OPINIONS.

AS BEING OF GENERAL IMPORTANCE OR INTEREST, THE FOLLOWING OPINIONS HAVE BEEN SELECTED FOR PUBLICATION FROM THE LARGE NUMBER RENDERED.

QUARANTINE.

Duty of the commissioners court, when threatened with any contagious or infectious disease, to declare and maintain quarantine at the county's expense. In case of the failure or refusal of the county authorities to declare and maintain quarantine, the city authorities have power to declare and maintain the needed quarantine within the city limits.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, January 24, 1899.

Hon. Joseph D. Sayers, Governor of Texas, Austin, Texas.

DEAR SIR: The letter of Dr. W. F. Blunt, State Health Officer, addressed to you, of date January 21st, together with accompanying letters and documents, all relating to the smallpox situation in Bell county, Texas, referred by you to this department, to hand.

The legal question involved seems to be, upon whom is the legal duty cast, county or city authorities, to establish and maintain quarantine under the circumstances set forth.

Art. 1339 of the Revised Statutes makes it the duty of every county judge, after each general election, to appoint a county physician, whose duty it shall be to establish, maintain and enforce quarantine for his county, whenever declared by proclamation of commissioners court; to furnish supplies, select medical assistants, guards, and perform all other duties coincident to a reasonable, economic and consistent quarantine. This section also requires the county physicians, in making rules, etc., to make them in harmony with the rules prescribed by the State Health Officer, and to obey and respect his instructions, and to make written reports to him when required.

Art. 4340, Revised Statutes, provides that whenever the commissioners court has reason to believe that they are threatened at any point or place within or without the county limits, with the introduction or dissemination of a dangerous, contagious or infectious disease, that can and shall be guarded against by quarantine, they *may* direct their county physician to declare and maintain said quarantine against any and all such dangerous diseases; to establish, maintain and supply stations or camps for those held in quarantine; to provide hospitals, tents or pest houses, etc.; to furnish provisions, medicines and all other things absolutely essential for the comfort of the well and convalescence of the sick. This section also requires the county to assume and pay all these expenses, as

other claims against the county are paid. It also reads, "Chartered cities and towns are embraced within the purview of this article, and the mere fact of incorporation does not exclude them from the prohibition against epidemic diseases given by the commissioners court to other ports of their respective counties. The medical officers of chartered cities and towns can perform the duties granted or commanded in their respective charters, but must (if the county physician is not, as is frequently the case, the city physician also) be amenable and obedient to rules prescribed by the State Health Officer. This article, however, must not be construed as prohibiting any incorporated town or city from declaring, maintaining and paying for a local quarantine."

It will be observed that Art. 4339, in stating the duty of the county judge as to the appointment of a county physician, uses the words: "He shall appoint," etc., while Article 4340, Revised Statutes, uses the words "May direct their county physician to declare and maintain said quarantine," etc., when the commissioners court has reason to believe that they are threatened with the named diseases, etc.

Notwithstanding the use of the word "shall" in one section and "may" in the other, as above stated, I am of the opinion that the Legislature intended to impose the absolute duty upon the county authorities to establish and maintain an effective quarantine, both in and outside of the cities, when the exigencies exist which make it necessary. Endlich, in his work on the interpretation of statutes, in Section 312, in speaking of the word "may," in a statute, says: "The result seems to be, that, when a public benefit is conferred in enabling terms, a duty is impliedly imposed to exercise it whenever the occasion arises. These terms are, then, in effect, invariably invested with compulsory force; and when a judicial discretion is found to be involved in the exercise of the power of authorization only, and not of command, but, because, according to the circumstances of the act, it is intended by the Legislature that the power shall be exercised only when some fact is found to exist which can, from its nature, be ascertained only by the judicial discretion. Since, therefore, a discretion contained in a statute, though couched in merely permissive language, will not be construed as leaving compliance optional, where the good sense of the entire enactment requires its provisions to be deemed compulsory, it is evident that the question is, in any case, one of intention. And the intent is to be judged of by the purposes of the statute. Where these purposes are to provide for the doing of something for the sake of justice, *something which concerns the public rights or interests*, and for the doing of which the public has a claim *de jure;* and, of course, when the thing to be done concerns and subserve rights, both of the public and of individuals—in all these cases, an intent is to be inferred, that in using a permissive power, the Legislature really meant to enjoin an imperative duty."

While the commissioners court are invested with the discretion to determine whether their county, or any part of the same, is threatened with the introduction or dissemination of dangerous, contagious or infectious diseases, yet when they believe such to be the case, notwithstanding the use of the word "may" in the statute, it is their imperative duty, enjoined upon them by law, to cause their physician to establish and maintain the necessary quarantine, etc. The city authorities are

given merely a permissive right to maintain quarantine in the city limits, and in the event of the failure or refusal of the commissioners court to discharge its duty as to the quarantine, then it becomes the duty of the city authorities to establish and maintain the necessary quarantine within the city limits. The law also contemplates and provides for co-operation between the county and city authorities. In the present instance, it appears, that by reason of a dispute existing between the city of Temple and the commissioners court of Bell county, as to upon whom the duty is placed by law of maintaining and paying the expenses of quarantine, that the quarantine heretofore maintained is about to be abolished altogether. In such case, if both the county and city authorities persist in refusing to discharge their duty, the county, primarily, and the city, secondarily, fortunately, the people in the vicinity of the infected locality, and the people of the State at large, are not altogether without protection against such infected place. I refer to Art. 4321, Revised Statutes, and subsequent articles, which confer ample authority upon the Governor to place the infected city in a state of quarantine, and thus isolate it from the balance of the State.

I trust you will pardon the length of this opinion, as I considered it would be more satisfactory to give the reasons for my conclusions as to the law, instead of simply stating such conclusions. I am,

Very respectfully,

R. H. WARD,
Office Assistant Attorney General.

INTEREST ON PUBLIC LANDS.

Interest on public lands must be paid up to the first day of November of each year, regardless of the date of the act under which the purchase was made, to prevent forfeiture.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, February 11, 1899.

Hon. John W. Robbins, State Treasurer, Austin, Texas.

DEAR SIR: Your communication of this date, to this department, as follows: "To what date should interest be paid to prevent forfeiture of accounts on sales made under Acts approved April 1, 1887, and acts amendatory thereto, approved April 8, 1889, and April 28, 1891," duly to hand. In reply I have to say that Chapter 37, of the Acts of 1897, page 39, it being an act entitled "An Act to authorize the Commissioner of the General Land Office to forfeit all lands heretofore sold by the State under any of the various acts of the Legislature, for failure to pay any portion of the interest theron," approved March 25, 1897, requires the Commissioner of the General Land Office, that if on the first day of November of any year, any portion of the interest due by any person to the State of Texas for lands heretofore sold by the State, to forfeit the purchase, etc., and to make the proper endorsement, etc. A proviso in the act, where the purchaser dies, gives his heirs or legal representatives one year in which to make the payment after the first day of November next after such death. This law in express terms is made applicable to

all purchases heretofore made under any and all of the various acts of the Legislature under which land may have been sold by the State. That the act is constitutional, there can be no doubt, as the Supreme Court of this State has so held in the case of Fristoe vs. Blum, 45 S. W. Rep., 996.

In conclusion, I have to state that in order to prevent a forfeiture interest must be paid up to the first day of November of each year, regardless of the date of the act under which the purchase was made, as the Act of 1897, above quoted, applies to purchases made under all of the previous acts of the Legislature.

Very truly yours,

R. H. WARD,
Office Assistant Attorney General.

FEES IN DELINQUENT TAX SUITS.

ATTORNEY GENERAL'S OFFICE,
STATE OF TEXAS,
AUSTIN, February 17, 1899.

Mr. J. H. Galbreath, County Clerk, Corsicana, Texas.

DEAR SIR: I have your favor of the 13th inst., in which you ask this department for an opinion concerning the fees allowed you for services under the law known as the Colquitt Act, providing for the collection of delinquent taxes, etc. For several weeks this office has been flooded with inquiries of this nature from officers entitled to costs under said act.

In order to avoid so many inquiries of the same nature, I have prepared the following statement, showing the fees to which an officer is entitled under the law as construed by this department.

THE COUNTY ATTORNEY.

The county attorney shall have $3.00 for the first tract in one suit and $1.00 for each additional tract; provided, that if the taxes, etc., are paid during the pendency of the suit he shall have only $2.00 for the first tract and $1.00 for each additional tract; provided further, where two or more unimproved city or town lots belonging to the same person, and situated in the same city or town, are involved in the same suit, shall be treated as one tract in taxing costs.

THE DISTRICT CLERK.

The district clerk is allowed $1.50 for each case, without regard to the number of tracts or lots involved, and when the taxes, etc., are paid during the pendency of the suit he is allowed only $1.00. This covers all the cost he may charge in one case.

THE COUNTY CLERK.

The county clerk, for making out and recording the data of each delinquent assessment, and for certifying the same to the commissioners court for correction, and for noting the same in the minutes of the commissioners court, and for certifying the same, with the corrections, to the Comptroller, and for noting the same in the delinquent tax record, shall receive $1.00, without regard to the number of tracts included in the same assessment. The clerk is not required to record, etc., the delinquent lists prepared for the current year since 1897, and, therefore, his fees are limited to his work on the tax rolls prepared from 1897 back. For filing and keeping in his office the delinquent lists made by the tax collector for the current years he is entitled to nothing. For recording deed, when the State is the purchaser, the county clerk is entitled to $1.00 and no more.

THE TAX COLLECTOR.

The tax collector, for preparing the delinquent lists, and separating the property previously sold to the State, from that reported to be sold as delinquent, and certifying the same to the commissioners court, shall be entitled to a fee of $1.00 for each correct assessment of the land to be sold, and no more, without regard to the number of tracts in each assessment.

THE SHERIFF.

The sheriff shall be entitled to a fee of $1.00 for selling and making deed thereto to the purchaser of land that he sells under judgment for taxes, and it is the duty of the sheriff to pay for the acknowledgment when the same is made. This is the only provision in the Colquitt Act concerning sheriff's fees, in cases that are prosecuted to final judgment, and refers to the one item of cost only, towit: the selling and making of the deed to the purchaser. The rest of the sheriff's fees will be regulated by the general fee bill, and he may charge such costs for his services in these tax suits as he would charge in any other civil case; provided, that he shall charge no commissions on sales made under this act; and provided further, that if the taxes, etc., are paid during the pendency of the suit he is allowed only $1.00 for the whole case.

All the fees provided for under this act are to be charged as costs in the case against the land, and will not be paid except out of the proceeds of the land—the State and county being liable for nothing in any event.

The act under which these suits are prosecuted definitely fixes the fees of the county attorney, the district clerk, the county clerk, and the tax collector for all the services to be performed by them in the whole case, but when it reached the sheriff it changed only the one item in the fees to be charged by him in case the suit is prosecuted to final judgment; reducing it, however, to $1.00 in case the taxes, etc., are paid before final judgment.

Where the State is the purchaser, the costs will be paid when the land is redeemed by the true owner, and not until then.

In making reports of fees in counties where officers are required to make reports, the sheriff, as a matter of course, will not charge himself

with costs as having been collected in these land tax suits where the State is the purchaser, until he makes such collections.

Section 15, page 11, Acts of the Special Session of the Twenty-fifth Legislature, 1897, provides that "the fees allowed by law to the county and district clerks, county attorneys and tax collectors in suits to collect taxes shall be in addition to the maximum salary fixed by this act."

The officers entitled to these fees contend that they are inadequate for the amount of work required of them, etc. This contention may be true, but it is not for this department to make laws regulating fees. We must construe them according to the intention of the Legislature, and according to what the laws within themselves say. It is evident to my mind that the Legislature intended that these land tax suits should be prosecuted and the taxes collected with less cost than is ordinarily incurred in civil cases.

Trusting this will be satisfactory, I am,

Yours truly,

N. B. MORRIS,
Office Assistant Attorney General.

TAXATION OF PERSONAL PROPERTY.

The State has no prior lien on personal property to secure the payment of taxes due thereon, with certain exceptions stated.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, February 24, 1899.

Mr. V. B. Harris, County Attorney, Quitman, Texas.

DEAR SIR: Your favor of the 10th inst., duly received, but an answer thereto has been unavoidably delayed until now.

In your letter you ask this department to give you an official opinion as to whether or not the State has a lien on personal property for taxes, and whether or not such lien is superior to a chattel mortgage duly registered, etc.

Replying to this, I beg to call your attention to Article 8, Section 15, of the Constitution of this State, which reads as follows: "The annual asesssment made upon landed property shall be a special lien thereon, and all property, both real and personal, belonging to any delinquent tax-payer shall be liable to seizure and sale for the payment of all taxes and penalties due by said delinquent; and such property may be sold for the payment of the taxes and penalties due by such delinquent, under such regulations as the Legislature may provide."

Following this provision of the Constitution, the Legislature, in Art. 5086, Revised Statutes of 1895, provided that "All taxes upon real property shall be a lien upon such property till the same shall be paid. And should the assessor fail to assess any real estate for any one or more years, the lien shall be good for every year that he should fail to assess for, and he may, in listing property for taxes any year thereafter, assess all the back taxes due thereon, according to the provisions of this title."

Concerning liens for real estate, you will observe that ample pro-

visions are made by the Constitution and the laws, but we find no provision in the Constitution, nor in the statutes, creating any lien upon personal property for taxes, except that contained in Art. 5175a, Revised Statutes, which provides that "In all cases where a tax-payer makes an assignment of his property for the payment of his debts, or where his property is levied upon by creditors, by writs of attachment or otherwise, or where the estate of a decedent is or becomes insolvent and the taxes assessed against such person or party, or against any of his estate, remains unpaid in part or in whole, the amount of such unpaid taxes shall be a first lien upon all such property; provided, that when taxes are due by an estate of a deceased person, the lien herein provided for shall be subject to the allowances to widows and minors, funeral expenses and expenses of last sickness; and such unpaid taxes shall be paid by the assignee, when said property has been assigned, by the sheriff out of the proceeds of sale in case such property has been seized under attachment or other writ, or by the administrator or other legal representative of decedents, and if said taxes shall not be paid, all said property may be levied on by the tax collector and sold for such taxes in whomsoever's hands it may be found."

Art. 5176 provides that "All real or personal property held or owned by any person in this State shall be liable for all State and county taxes due by the owner thereof, including taxes on real estate, personal property and poll tax; and the collector of taxes shall levy on any personal or real property to be found in his county to satisfy all delinquent taxes, any law to the contrary notwithstanding."

It may be contended that under Art. 5176, the latter part of which says: "And the collector of taxes shall levy on any personal or real property to be found in his county to satisfy all delinquent taxes, any law to the contrary notwithstanding," that this provision contravenes the chattel mortgage act, etc., but such is not a fair construction of said article, and when tested by the authorities it cannot stand. As stated above, tax liens are not created merely by implication, and this provision is simply intended to deny the right of the delinquent to claim exemptions under the Constitution and laws of this State. It makes all the delinquent's property liable for all his taxes, but as a matter of course in doing so, it only makes liable such property as he really owns, and when the collector levies on and sells property, he cannot sell any greater interest in the property than owned by the person against whom he is making such levy and sale.

If it should be contended that the State has a lien on personal property for delinquent taxes, then I ask, when does such lien commence, and upon what property does it exist? In the article above quoted, with reference to assignment, attachment, etc., the lien is created on the property, and begins as above indicated. In the matter of real estate the lien is created by the Constitution and is never waived until all the taxes on the particular land are paid.

Finding no provision in our Constitution, nor in the statutes of the State creating a lien generally upon personal property, I conclude that the State has no such lien by law, and, therefore, a mortgage duly executed and registered according to law, creates a lien upon the property, and if, while said mortgage is on record and unsatisfied, the tax collector

levies on said property, which he may do, and sells the same, he sells it subject to such mortgage lien. The tax lien begins when the collector makes the levy, and not until then, except, of course, in cases of assignment, attachment, death, etc.

It will not be contended for one moment that in the statute or Constitution there is any other provision as to liens except those here quoted. If the Legislature had understood or believed that the State had a lien generally on personal property to secure the payment of taxes, it would not have been necessary to have adopted Article 5175a, above quoted; but realizing that no such lien existed, and in order to make sure of the collection of the taxes in such cases as are enumerated in this article, the Legislature expressly created a lien and provided a mode of collecting the taxes. The lien mentioned in said Art. 5175a arises immediately upon the happening of the contingencies there stated, and ceases upon the payment of the taxes, and has reference to personal property, as well as real estate. The enactment of this particular statute excludes the idea that any other lien exists on personal property for a delinquent's taxes.

The doctrine of tax liens, as stated by Desty on Taxation, Vol. 2, Section 128, is as follows: "A lien for taxes is of statutory creation and attaches on the property of the tax-payer at the time prescribed by the statute conferring it. When it attaches, it continues till the tax is paid. It attaches on real estate from the time specified in the statute, but it does not attach on the personal property until the levy, and is lost by the neglect to levy." The same author says that "Tax liens must be strictly construed," and "there is a wide difference between liens created by law and one created by levy." And further, "the tax is not a lien unless it is expressly made so by the law or ordinance which imposes it."

In the case of Binkert vs. The Wabash Railway Company, 98 Illinois Reports, page 216, in discussing a question similar to this one, the court said: "If it had not been the intention of the Legislature to create a specific charge upon every article of personal property to the extent of the taxes assessed on its valuation, as it has on each tract of land, some provision certainly would have been made by which the extent of the charge could be definitely ascertained so as to prevent hardships and fraud upon innocent purchasers. And since this has not been done, in the absence of any express provision to that effect, we must hold that it was not the intention of the Legislature to create any such charge." The same authority holds that "While the right to raise revenue by taxation is necessarily inherent in every government, yet, in a constitutional government like ours this right is regulated by law, and can only be exercised in the manner and for the purposes specified in the Constitution and in the statutes of the State."

The State has no general lien on personal property, but, nevertheless, the tax collector may levy on any property found in the possession of a delinquent and sell the same, according to law, for the taxes and costs due by such delinquent, subject, of course, to all prior valid liens, as well as other rightful claims of ownership.

Tax collectors are not compelled to levy on mortgaged property, but they may do so if they see proper, considering all the facts in each par-

ticular case, and should do so, if there is a reasonable chance to make the taxes, without involving himself in fruitless litigation.

Of course, you know, that any form or manner of conveyance made for the purpose of hindering, delaying or defrauding tax collectors or other creditors would be absolutely null and void, and should not be regarded at all by tax collectors in performing their duties.

Trusting this will be satisfactory, I remain,

Very truly yours,

N. B. MORRIS,
Office Assistant Attorney General.

REVIVAL OF CORPORATE EXISTENCE.

S. H. B. No. 125, providing that corporations which have expired within twelve months before the passage of this act may renew or revive their corporate existence by resolution adopted by a majority of three-fourths of the stockholders, is unconstitutional.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, March 4, 1899.

To His Excellency, Gov. Joseph D. Sayers, Executive Office.

DEAR SIR: I herewith return to you S. H. B. No. 125. You ask me if this bill is constitutional?

I have given this subject extensive consideration and have considered it after an examination and in the light of many authorities, and I respectfully submit to you that it is my opinion that the bill is unconstitutional.

I think that feature of the bill which provides that corporations which have expired within twelve months before the passage of this act may renew or revive their corporate existence, by resolution adopted by a majority vote of three-fourths of the stockholders, renders the bill unconstitutional.

When corporations are formed the law, as it existed at the time, becomes a part of the contract and subscribers take stock and pay for it with the knowledge of the law and upon the presumption of the stability of the law under which they entered into the corporation. It is true that by the act of the Legislature passed April 24, 1874, which is in the Revised Statutes, Art. 650, the right is reserved to the Legislature to alter, reform or amend all charters or amendments to charters under the provisions of the general law; but, is an act which provides for the recreation of a defunct corporation, after it must have passed, by virtue of law, into process of liquidation, an alteration, reformation or amendment of the charter?

I call your attention to Title XXI, Chapter 5, of the Revised Statutes, and especially to Art. 680, which is as follows: "A corporation is dissolved: First, by the expiration of the time limited in its charter; second, by a judgment of dissolution rendered by a court of competent jurisdiction."

The one method of dissolution is as effective as the other. In said Chapter 5 the law provides that the president and directors or managers

of the affairs of the corporation at the time of its dissolution shall be trustees of the creditors and stockholders of such corporation, with full power to settle the affairs, collect the outstanding debts, *and divide the moneys and other property among the stockholders,* after paying the debts due and owing by such corporation at the time of its dissolution. The rights of the stockholders to a division of the money and other property vests in them immediately upon the dissolution of the corporation, subject, of course, to the rights of creditors to have their debts first paid. Now, with this vested right in the stockholders, can the Legislature pass a law taking their money and property held in trust for them by their last president and board of directors, and provide a method whereby three-fourths of the stockholders can pass *all* of the assets into the re-created corporation, over the protest of the dissenting stockholders? Such a law would, in my opinion, be retroactive and impair the obligation of a contract and violative of the Constitution, Art. 1, Sec. 16. See also Southerland on Statutory Construction, Section 474.

This feature of the bill does not prolong the life of an existing corporation, neither does it provide for a new corporation, but it provides that a stated majority can condemn the private property of a dissenting minority, revive the franchise which was once a part and parcel of their property and renew the corporate life that expired when the property rights vested in the trustees to be held in trust for distribution among the stockholders. If a portion of the money or assets of the corporation had been distributed, will it be contended that this law could recall it from the stockholders, rehabilitate the trustees, and pass it into a new corporation, revived over the dissent of a minority of the stockholders; I think not. Then the right of distribution, once vested, is as inviolate as the act in process of distribution.

Under the law at it exists now, upon the dissolution of a corporation, the stockholders have a peaceful right of distribution and division of the assets belonging to them, and under this proposed law, the above right is taken from them, their property is taken from them, and they are driven, if agreement on valuation cannot be had, into litigation to determine the value of their property, which they are forced to sell over their protest and against their will. See Black on Constitutional Prohibitions, Secs. 18 and 19; Cooley's Constitutional Limitations, Sixth Edition, page 344.

I recognize that after a corporation has been dissolved or lost its franchise to continue its operation, it may be reorganized or revived pursuant to authority newly conferred by the statute. But it is clear that this can be done only with the consent of all the stockholders; for although the Legislature may at any time confer franchises or privileges, it cannot arbitrarily compel any one to accept them or use them. Morawetz on Private Corporations, Vol. 2, Sec. 1038; Beach on Private Corporations, Vol. 1, p. 19.

Where the charter of a corporation or the general law under which it is organized fixes the existence of the corporation, it will, upon the expiration of the time become *ipso facto* dissolved and the assets must be distributed if any one of the stockholders insists upon it. Cook on the Law of Stock and Stockholders, Secs. 636 and 638; Beach on Private Corporations, Vol. 2, Sec. 780. And the right of distribution upon dissolution is expressly given in the Revised Statutes, Art. 682.

If it be said that the method of distribution of assets provided in our statute is merely a remedy, and does not come within the constitutional inhibition: I say that it is more than a remedy, it provides a stockholder an easy, safe, inexpensive and expeditious mode of repossessing his property, and on this right, I quote from the opinion of Mr. Justice Clifford in the case of Edwards vs. Kearzey, 96 U. S., 608, as follows:

"I concur in the judgment of this case upon the ground that the State law, passed subsequent to the time when the debt in question was contracted, so changed the nature and extent of the remedy for enforcing the payment of the same as it existed at the time as materially to impair the rights and interests which the complaining party acquired by virtue of the contract merged in the judgment.

"When an appropriate remedy exists for the enforcement of the contract at the time it was made, the State Legislature cannot deprive the party of such a remedy, nor can the Legislature append to the right such restrictions or conditions as to render its exercise ineffectual or unavailing. State legislatures may change existing remedies and substitute others in their place; and, if the new remedy is not unreasonable, and will enable the party to enforce his rights without new and burdensome restrictions, the party is bound to pursue the new remedy, the rule being that a State Legislature may regulate at pleasure the mode of proceeding in relation to past contracts as well as those made subsequent to the new regulation."

In the same case, Mr. Justice Swayne, delivering the opinion of the court, says: "The obligation of a contract includes everything within its obligatory scope. Among these elements nothing is more important than the means of enforcement. This is the breath of its vital existence. Without it, the contract, as such, in the view of the law, ceased to be, and falls into the class of those 'imperfect obligations,' as they are termed, which depend for their fulfillment upon the will and conscience of those upon whom they rest. The ideas of right and remedy are inseparable. 'Want of right and want of remedy are the same thing.' These propositions seem to us too clear to require discussion. It is also the settled doctrine of this court, that the laws which subsist at the time and place of making a contract enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This rule embraces alike those which affect its validity, construction, discharge and enforcement. Von Hoffman vs. City of Quincy, *supra;* McCracken vs. Hayward, 2 How., 508."

In Green vs. Biddle (8 Wheat., 1) the court said, touching the point here under discussion: "It is no answer that the acts of Kentucky, now in question, are regulations of the remedy and not of the right to the lands. If these acts so change the nature and extent of existing remedies as materially to impair the rights and interests of the owners, they are just as much a violation of the compact as if they overturned his rights and interests."

I submit that the case of Loan Association vs. Hardy, 86 Texas, 610, is in line with the opinion herein, and respectfully refer you to it.

Yours truly,

T. S. SMITH,
Attorney General.

SALE OF LAND FOR TAXES.

In the sale of land for taxes, under the Colquitt Act, the county attorney should bid enough to cover the full amount due under the judgment, regardless of other bidders.

ATTORNEY GENERAL'S OFFICE.
AUSTIN, March 22, 1899.

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

DEAR SIR: I have just received your favor of this date, which I attach as a part of my answer thereto.

Replying to the same, I beg to state that it is true that this department on January 28, 1899, wrote to Mr. W. W. Gatewood, advising him in substance that if there should be no bidder at the sale of land for taxes under the Colquitt Act, that the county attorney had the right to bid, etc., but if any person should make a bid the county attorney would not have the right to bid. This construction of the law may be literally correct, but upon a more extensive examination, we conclude that such a course should not be pursued by the county attorneys in these matters. In other words, you are authorized to advise county attorneys in such matters to bid enough to cover the full amount due under the judgment, regardless of other bidders. This is the only course that will save the State and it must be followed. As to whether or not the State will get a valid title to the land in this manner, it is not necessary for us to decide. We simply suggest this course as the only one by which the State, and officers entitled to costs, may expect and have perfect protection.

Yours truly,

N. B. MORRIS,
Office Assistant Attorney General.

TAX COLLECTOR.

Tax collector is entitled to a fee of one dollar for each correct assessment made under the provisions of Sec. 10, Chap. 103, Laws 1897.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, July 29, 1899.

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

DEAR SIR: Your favor of the 20th inst. has been received. Attached to your letter I find a letter from the tax collector of Hunt county, in which he states that he desires to know what compensation shall be allowed tax collectors for preparing the delinquent record under the Colquitt Act. In your letter you state that your department has uniformly held that the compensation of the collector for preparing the delinquent list for back years, being fixed and paid by the commissioners court, such compensation should not be prorated and charged as costs in redemption of property appearing on said record, and that said fee of one dollar provided in Section 9 must be charged as costs against the land appearing on his delinquent list (for each current year), prepared under the

provisions of Section 10, Chapter 103, and collected in redemption. You state, however, that in view of the decision of the Court of Civil Appeals in the case of The State vs. Wolfe, you desire to know if the collector is authorized to tax a fee of one dollar on each correct assessment appearing on his delinquent tax record for back years, and to collect the same in redemption.

Replying to this, I beg to call your attention to the fact that the case of The State vs. Wolfe, which you will find in the 51st S. W. Rep., p. 657, was decided in the Court of Appeals on an agreed statement. This agreed statement was not full enough to present squarely before the court the direct question that you ask, and the court did not decide this direct question. By referring to Section 3, page 132, Acts of the Twenty-fifth Legislature, you will find that it is made the duty of the commissioners court of each county within this State immediately upon the taking effect of said act to cause to be prepared by the tax collector, *at the expense of the county* (the compensation for making out the delinquent tax record to be fixed by the commissioners court), a list of all the lands, lots or parts of lots sold to the State for taxes since the first day of January, 1885. It plainly appears that for this work the tax collector is to be paid a bulk sum by the county, under contract between him and the commissioners court. This is the only compensation allowed by law for the tax collector for preparing this work, and certainly there is no law that allows the collector, in addition to this compensation, to charge anything against the owner of the land. Quite a different question arises, however, when you reach the delinquent tax record which the law requires the collector to make, beginning on the 31st of March of each year for the preceding year only. In this case, the law requires the collector to do it, and Section 9 of said act provides a proper compensation for the collector which is one dollar for each correct assessment. In other words, the group of years from 1885 up to the time the Act of 1897 went into effect, must be made by the tax collector and must be paid for by the county, the compensation to be fixed by the court, and this is the only pay to the collector for said work, while the delinquent tax record for the current year must be made by the tax collector for which he is allowed a fee as above stated.

Therefore, you are advised to adhere to your former rulings.

Very truly yours,

N. B. MORRIS,
Office Assistant Attorney General.

WATERS-PIERCE OIL CO.

Permit to do business in Texas should not be issued to the Waters-Pierce Oil Company, incorporated May 7, 1878, by the Secretary of State.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, September 5, 1899.

Hon. D. H. Hardy, Secretary of State, Austin, Texas.

DEAR SIR: I have received your favor of the 5th inst., regarding the

application of the Waters-Pierce Oil Company for a new permit to do business in the State of Texas.

Since receiving the same I have inspected the record in the case of the State of Texas vs. The Waters-Pierce Oil Company, which was filed in the District Court of Travis county for the 26th Judicial District, and from a judgment in said court in favor of the State an appeal was prosecuted to the Court of Civil Appeals at Austin, wherein the judgment of the district court in favor of the State was affirmed, from which judgment in the Court of Civil Appeals a writ of error was applied for to the Supreme Court of our State, and by it denied, and from the judgment of the Court of Civil Appeals a writ of error was sued out to the Supreme Court of the United States, where the case is now pending.

I quote to you a part of the judgment of the district court, as follows:

"It is, therefore, ordered, adjudged and decreed by the court that the defendant, the Waters-Pierce Oil Company, be and is hereby denied the right and prohibited from doing any business within this State, and that its permit to do business within this State, heretofore issued on July 6, 1889, by the Secretary of State of this State, be and the same is hereby canceled and held for naught, and the said defendant, the Waters-Pierce Oil Company, its managers, superintendents, agents, servants and attorneys be and are hereby perpetually enjoined and restrained from doing business within this State."

It will be proper to say in this connection that the Waters-Pierce Oil Company, in addition to the appeal bond which it executed in appealing from said case, also executed a supersedeas bond.

In replying to your first proposition in your letter, you are respectfully advised that while the above judgment is suspended by virtue of the appeal, that I do not believe the Waters-Pierce Oil Company has any right to obtain a new permit to do business in this State and that the above suit is sufficient authority for you to decline to issue to it a new permit, at least until its case is adjudicated.

I note also your propositions in regard to the fraud which it practiced against the State when it applied for its permit to do business on July 6, 1889, wherein it stated that its capital stock was $100,000. I notice in the transcript in the above case, in the brief filed by the attorneys for the Waters-Pierce Oil Company, that Mr. H. C. Pierce testified that he was president of the Waters-Pierce Oil Company and that its capital stock was $400,000. He also declined to state how much of the capital stock was owned by the Standard Oil Company, and did not state that the Standard Oil Trust was one of its incorporators, and said nothing about the Chess-Carley Company being one of the incorporators and the owner of its capital stock.

I do not think, however, in answer to your letter that it is necessary to go fully into the other of your propositions, but I mention these facts so that you may see that it could not have been an oversight in stating that its capital stock was $100,000 when in truth it was $400,000.

I do not think there is any question but that the Waters-Pierce Oil Company owes the State the difference between the tax it would have owed if it had correctly stated its capital stock at $400,000, and what it did pay by stating it at $100,000. I would not, however, advise you to

collect any tax since the forfeiture of its franchise by the State by its judgment aforesaid which was dated June 16, 1897.

I will say, however, that as I have heretofore stated to you, both in writing and verbally, that it is my opinion that where the charter, as this one does, shows upon its face that it is largely, or entirely, made up of another or other corporations, that this would be without authority or provision of law and contrary to the laws of this State, and the proposed charter would, therefore, show upon its face that it was void and should not be filed.

I wish to say further that if the judgment against the Waters-Pierce Oil Company is affirmed it relates back to June 16, 1897, and it would be very unwise for the State to collect any tax since that time, and as said judgment outlaws said corporation, and finds it to be a trust, it has no standing in this State and should not be granted a permit and should not pay any tax since the date of said judgment.

I herewith return the copy of the articles of incorporation enclosed in your letter.

Yours truly,

T. S. SMITH,
Attorney General.

WATERS-PIERCE OIL CO.

The judgment against the old Waters-Pierce Oil Co. is not binding on the new Waters-Pierce Oil Co., incorporated May 29, 1900, and the Secretary of State has no discretion to refuse to file certified copy of articles of incorporation and issue permit to do business in the State of Texas to said new company.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, July 20, 1900.

Hon. D. H. Hardy, Secretary of State, Austin, Texas.

DEAR SIR: I have received your favor of the 19th inst., which is as follows:

"With reference to issuance of permit to the new Waters-Pierce Oil Company, I beg to submit that I have been asked for a copy of your opinion on the matter in pursuance of which permit was issued.

"In view of this fact, and of the further fact that the public have been misadvised by some newspapers as to the facts in the matter, and the law applicable to the same; and of the further fact, that your opinion was given to me orally, in accordance with a custom prevailing between us in many cases, I suggest that it would be but justice to yourself, as well as to me, that you restate to me, in writing, for filing in this department, your opinion to the effect that the new permit should be issued."

Complying with your request, I will state the facts as gone over with you heretofore, together with my opinion advising you that you had no discretion and could not in law decline to file the certified copy of the charter, with the other papers accompanying, and to issue the permit to do business in Texas to the said oil company, which was incorporated May 29, 1900, in the State of Missouri.

On the 6th day of July, 1889, the Waters-Pierce Oil Company filed

a certified copy of its charter, together with a certificate that its capital stock had been increased, but did not show who owned this increased capital stock (this feature seems to have been overlooked at the time as no certified copy of the proceedings of this increase was filed), and I find on file a copy of said permit issued to said company on the 6th day of July, 1889, stating that it has an authorized capital stock of $100,000. This permit was issued to said company to cover a period of ten years from the said 6th day of July, 1889. In September, 1899, the attorney for the Waters-Pierce Oil Company came to Austin with certified copy of its original charter, together with certified copy of the increase of capital stock, showing who the additional incorporators were, and he asked for a permit to do business in Texas. At that time I advised you verbally that you could not issue a new permit to said company, and among the reasons assigned by me then was that the proceeding was still pending in the Supreme Court of the United States to cancel the said permit and enjoin it from doing business in Texas. I retained a copy at that time of said charter; together with the certificate of increase of capital stock, showing who the additional shareholders were. On the 13th day of June, 1882, in Missouri, the amendment, referred to above, was filed to the charter of the Waters-Pierce Oil Company, which shows that it increased its capital stock from $100,000 to $400,000, and that said $300,000 additional is shown by said charter to have been subscribed and paid in as follows:

Chess-Carley Company.....	600 shares—	$ 60,000
Wm. H. Waters.....	1200 shares—	120,000
Trustees Standard Oil Trust.....	1200 shares—	120,000
	3000 shares	$300,000

Chess-Carley Company, I have been reliably informed, was a corporation co-operating with the Standard Oil Trust in other States, and the above facts show that the Standard Oil Trust paid in $120,000 of the increased capital stock, and the Chess-Carley Company $60,000, making $180,000, owned by a corporation and by a trust in the increased capital stock of the Waters-Pierce Oil Company. These facts had never been shown by the files in your office, because, as I have stated, when the company filed its application for the original permit this evidence was not amongst the papers. When the company applied to you on the 31st day of May, 1900, for its permit, it filed a certificate from the Secretary of State of Missouri, which shows that the said Waters-Pierce Oil Company dissolved according to the laws of Missouri on the 28th day of May, 1900. This fact certified to by the Secretary of State of Missouri on the 29th day of May, 1900. It also filed certified copy of another charter granted by the State of Missouri on May 29, 1900, which shows, also, that the incorporators of the new company were Henry C. Pierce, Andrew M. Finlay, John P. Grust, Chas. M. Adams and John D. Johnson, all of St. Louis, Missouri. You will observe that only one of these persons was one of the incorporators of the old company; and that the Chess-Carley Company and the Standard Oil Company were left out entirely in the new corporation. Mr. Pierce stated that he had actually and in good faith purchased and was the owner of the stock held by the Standard

Oil Co. and the Chess-Carley Company in the old company, and that said companies owning said stock had now no connection whatever with the new Waters-Pierce Oil Co., and also filed the anti-trust affidavits as provided by the Act of 1899, page 249, in which he states, among other things, that said new corporation is not a member of or a party to any pool, trust, agreement, combination, confederation or understanding with any other corporation, partnership, individual or other person or association of persons to regulate or fix the price of any article of manufacture, etc. With these facts, the question was then presented, should you issue a permit to the new corporation?

This question was carefully considered by me and my assistants in the office quite a while. The question to be decided was, did the judgment against the old company bind the new one? Was the new corporation in fact and in law a new corporation? Could the State, with the above facts, which, as I understand it, were all of the facts in the case, successfully maintain that the judgment against the old company could be visited upon the new corporation, to the extent that it be excluded from the State and not permitted to do business?

The proposition of law to be decided, among others stated, was, did the charter filed with you on May 31, 1900, show the formation of a new and distinct company, or was it a continuation of the original corporation.

The facts in this case show that there was not a mere change of membership, but a change in the corporation itself, with only one of the former incorporators in the new corporation. It is true that the new corporation took the name that the old corporation had, but nowhere do I find any prohibition that a new corporation can assume the name once held by a former corporation which had been dissolved.

The law of Missouri provides that "No certificate of its incorporation or certificate of its change of corporate name shall be issued by the Secretary of State to any company or association: First, under the same corporate name and style as that already assumed by another corporation; nor, second, when the corporate name and style assumed is the name of a person or a firm, unless there be joined thereto some word designating the business to be carried on, followed by the word 'company' or 'corporation.'"

In the case of Island City Savings Bank vs. Sachleben, 67 Texas, 424, in the opinion by Judge Gaines, in discussing the rights of creditors in a corporation which had not taken out a new charter, but had merely reorganized, this language is used:

"Now it is contended, on behalf of the appellees, that the reorganization which took place in February or March, 1885, resulted in the formation of a new and distinct company, and was not a continuation of the old corporation. We do not doubt that when the bank became unable to pay its debts it was competent to transfer its assets to a new corporation who may continue a similar business, without incurring any liability for the debts of the insolvent corporation, and it would make no difference in this respect if the new company consisted in part of the stockholders of the original corporation, and transacted its business through one or more of its officers."

But in said case there was no formation of a new and distinct corpo-

ration, because at that time the laws of this State did not permit the incorporation of any company with banking privileges, but in the case referred to, the court held that it was simply a reorganization of the old company under the same charter, and that the reorganized company assumed to pay the debts of the old company, and, therefore, it was liable for its debts. But in said opinion the position is strongly stated that if it had been a new corporation, even with some of the stockholders of the old corporation, it would not have been liable for the debts of the old corporation. And the rights of creditors are much more carefully guarded by our courts than the question as to whether or not a penalty assessed against an old corporation could be visited upon a new and distinct corporation, even if formed with some of the stockholders of the old corporation.

In the case of Marshall vs. Western North Carolina Ry. Co., 92 N. C. Reports, 322, it is shown that under the above name a corporation was being operated in North Carolina in which the State owned three-fourths of the stock; that the State sold its stock to certain parties, and that said parties took out another charter under the same name as that used by the former corporation. In discussing this question the court said: "The reorganization of the old company as a new corporation at once had the effect to disorganize and dissolve the old one." Page 322. "The mere fact that the new corporation was allowed to retain the same name of the old one—however much this might tend to mislead uninformed people—cannot be allowed to disappoint the intention of the Legislature so clearly expressed. It was properly conceded on the argument * * * that if the defendant is a new corporation, such as we have indicated it is, the plaintiff cannot recover in this case. It is sometimes difficult to determine whether or not a corporation is in fact a new and independent one, or the old one with new and superadded powers and privileges, but when it is settled that it is a new one, it follows, in the absence of any provision in the statute creating it to that effect, it is not liable for the debts of the old." Page 331, Id. Angell & Ames on Corporations, Sec. 780. Morowetz on Private Corporations, 566.

I wish to call your attention to the fact, however, that in considering the question as to whether or not you should file the charter, there was no question as to the rights of creditors.

Article 745 of the Revised Statutes provides that any corporation for pecuniary profit, etc., organized or created under the laws of any other State or Territory of the United States, desiring to transact business in this State, shall be and are hereby required to file with the Secretary of State a duly certified copy of its articles of incorporation and thereupon the Secretary of State shall issue to such corporation a permit to transact business in this State.

In the case of Beattie et al. vs. Hardy, 53 S. W. Rep., 685, where a charter was offered to you for filing, under the advice of this department you concluded, not in the exercise of discretion, but that the paper showed upon its face that you were not empowered to record the same. In passing upon this question, after discussing the whole case, and after using the following language in concluding, our own Supreme Court in said opinion said: "The charter complies with the law in form specifying the purposes for which the corporation is organized. * * * It

is therefore ordered that the peremptory writ of mandamus issue to the Secretary of State, commanding him to file and record the charter presented by the plaintiffs, and to issue the certificate required by law."

I therefore concluded, and so advised you, that you had no discretion to decline to file the charter presented by the Waters-Pierce Oil Co., and to issue the permit required by law, basing this opinion upon the facts which I have stated above. And I remember to have used this expression to you, that you had no more discretion to decline to file this charter and issue the permit, than I believed I had the power and discretion to permit the old company to continue business under its charter with the judgment against it.

If you had declined to issue the permit, there is no question in my mind but that the Supreme Court would have compelled you to do so by mandamus, and, so believing, I advised you as above indicated, basing my opinion upon what I believed and still believe to be the law.

Yours very truly,

T. S. SMITH,
Attorney General.

ASSESSING OF FRANCHISE TAX.

Franchise tax should be assessed in the county in which is located the principal office of the company or corporation. No law prorating it among the counties. Assessor is entitled to full amount of fees for assessing.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, November 10, 1899.

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

DEAR SIR: I have received your favor of recent date, asking if you are authorized to pay commissions to tax assessors for assessing the entire value of the franchises in this State owned by corporations and persons, where such assessment has been made in the county in which the principal office and place of business of such corporation is located.

After having investigated this question in the light of all the authorities accessible, I conclude that, while the law authorizes the assessing of said property, it has made no provision for the distribution of the same throughout the counties, where said corporation transacts its business; as in the case of the assessment of the rolling stock of railway companies, and the apportionment thereof between the counties where it operates, that, therefore, it is proper that the franchises of a corporation should be assessed in the county in which is located the principal office or place of business of the corporation in this State; and if the franchise is owned by a person, then in the county where such person resides. You are, therefore, respectfully advised that you are authorized to draw warrant for fees or commissions of tax assessors, where the assessment is made in the county wherein is located the principal office of said corporation, or if the franchise of a person, then to the assessor of the county of the residence of such person.

I appreciate the necessity for legislation providing suitable and equitable methods for the distribution of such assessments among the coun-

ties in which the tangible personal property, or real property, is located, or through which the franchise is operated, and which contributes to the value thereof; but in the absence of such legislation, I believe the franchises are subject to assessment as hereinbefore suggested.

Yours truly,

T. S. SMITH.
Attorney General.

VACCINATION OF PUPILS.

Board of trustees have power to refuse admittance into the public schools pupils who fail or refuse to be vaccinated.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, November 17, 1899.

Hon. J. S. Kendall, State Supt. of Public Instruction, Austin, Texas.

DEAR SIR: Your favor of the 14th inst., to this department, together with a letter from Mr. E. F. Comegys, Superintendent, Gainesville, Texas, and also a copy of a resolution passed by the board of trustees of the public free schools of Gainesville, referred by you to this department, has been received. That portion of the resolution to which Mr. Comegys' letter refers, is as follows:

"Whereas, There exists in the State a widespread prevalence of smallpox and the school board believes it to be their duty to use all possible precautionary means in their power to prevent the further spread of this loathsome disease; therefore, be it

"Resolved 1st, That every child attending the public schools, who has not been successfully vaccinated, shall have it done within a reasonable time and that the family physician shall be the sole judge as to the efficacy of previous vaccination.

"Resolved 2nd, That a failure or refusal to submit to the process of vaccination shall be deemed a sufficient cause for exclusion from the schools until the vaccination is performed.

"Resolved 3rd, That the superintendent of schools is hereby empowered and instructed to enforce these resolutions to their full extent and meaning."

Mr. Comegys in his letter states that a "few persistently and positively refuse to be vaccinated," and his inquiry is as to the legal right to exclude from the schools those who so refuse to be vaccinated.

Our statutes do not in specific terms confer upon school trustees the power to exclude from the schools children who refuse to be vaccinated when such is required by the board, nor do I find that the Texas courts have passed upon this question. Neither do I find that the Constitution gives the school trustees such authority, nor that the exercise of such authority would be in violation of any constitutional provision. It is then under these conditions that the authority of the school board must be determined.

In considering this question, it is well at the very beginning to relieve the matter of all confusion as between compulsory vaccination and the right to exclude from the schools pupils who refuse to be vaccinated.

In the former there must be express authority from the Legislature, as no such power will ever arise by implication. Adams vs. Burdge, 95 Wis., 390, 37 L. R. A., 157; Potts vs. Breen, 167 Ill., 67, 39 L. R. A., 152. It should be borne in mind that there is here no effort to compel vaccination. They claim only the right to exclude from the schools those who do not comply with the regulations of the board as has been thought necessary to preserve the public health. Duffield vs. Williamsport School District, 162 Pa., 476, 25 L. R. A., 152.

I understand the city of Gainesville to be incorporated for municipal purposes, having assumed control of the public schools within its limits, and that the board of trustees were appointed by the city council under Art. 4018, Revised Statutes, 1895. While I think it immaterial, it might be well to here note that in the act passed by the last Legislature, approved May 30, 1899, there is an exception in favor of the "cities as provided for in Art. 4018." Such board of trustees may adopt such rules, regulations and by-laws for their own government as they may deem proper, and the public free school of such city or town is placed under their control and supervision, and such board has the exclusive power to control, manage and govern the schools. Art. 4021.

The question then presented is, has the board of trustees, under the authority granted in said article, the power to pass the resolution hereinbefore quoted, and enforce the same?

I will say here that in considering this question, I have not overlooked nor failed to give due consideration to Art. 3905, which provides that "all children, without regard to color, over eight years of age and under seventeen years of age, at the beginning of any scholastic year, shall be entitled to the benefit of the public school fund for that year," but this right is not absolute, but is one to be enjoyed by all on reasonable conditions. Sherman vs. Charleston, 8 Cush., 160.

Has the board of trustees power to prescribe such regulations?

I submit as a proposition that the school board, in its discretion, under their power to control, manage and govern the schools, may prescribe all reasonable regulations looking to the best interests of the schools. And even where the authority of the school board is not defined by statute, they, nevertheless, have power to expel or suspend the pupils from school for sufficient cause. 21 A. & E. Enc. of Law, 771, and cases there cited, Note 5. It may be well to here note briefly a few such regulations which have been held reasonable, and which school boards, vested with similar authority to that of the Gainesville board, have been permitted to enforce. First, however, as to a general rule announced by the Supreme Court of Massachusetts. In Spear vs. Cummings, 34 Am. Dec., 54, the court said: "The law provides, that every town shall choose a committee, who shall have general charge and superintendence of all the public schools in such town. The general charge and superintendence, in the absence of express legal provisions, includes the power of determining what pupils shall be received and what pupils rejected. The committee may, for good cause, determine that some shall not be received, as, for instance, if infected with any contagious disease, or if the pupil or parent shall refuse to comply with regulations necessary to the discipline and good management of the school." Pupils have been excluded on account of licentious and immoral conduct, though not main-

ifested by any acts within the school. In this case there was no prescribed rule on the subject, either of requirement or penalty. Sherman vs. Charleston, 8 Cush., 160. Children have been excluded from school for absence contrary to rule, and held valid, although such absence was pursuant to the command of their Roman Catholic parents and their priest, and for the purpose of attending religious service on a holiday of the church. Ferritor vs. Tyler, 21 Am. Rep., 133. For failing to write compositions. Guernsey vs. Pilkin, 32 Vt., 224. For misconduct. On appeal to the superintendent this pupil was to be permitted to return to the school on conditions of promise as to future conduct, with a confession that she had done wrong. She refused to comply with the conditions. The court said: "It is undoubtedly true that trustees have the power, and it is their duty, to dismiss or exclude a pupil from their school, when in their judgment it is necessary for the good order and proper government of the school so to do." Stephenson vs. Hall, 14 Bard., 222. In the case of Spiller vs. Woburn, 12 Allen, 127, a girl, by direction of her father, refused to bow her head during prayer at the opening of the school. The court held that it was lawful to expel her for disobedience to the rule. All of the foregoing have been held to be reasonable regulations and enforcible. Many others could be cited. Without reference to authorities, I cannot believe that it would be contended for a moment that a pupil could not be excluded for uncleanliness, indecency of person, and many other things which could be mentioned. But finally and directly in point, I think the case of Duffield vs. Williamsport School District, 162 Pa., 476, 25 L. R. A., 152, is clearly decisive of the question. In this case it is held (1) a school board has the power to adopt reasonable health regulations for the benefit of the pupils and the general public, and (2) a school board has the right to exclude from the schools those who do not comply with a regulation of the city authorities and the school board requiring a certificate of vaccination as a condition of attendance. A careful reading of this case is suggested. If there should be further doubt as to such regulations being reasonable, reference is made to the many cases sustaining compulsory vaccination, among which is specially cited Morris vs. City of Columbus, 42 L. A. R., 175.

It will not do to say that the individual objection, or disbelief in the efficacy of vaccination shall exempt one from the rule. The great preponderance of medical authorities is in favor of its efficacy, and the school board has availed itself of such medical authority, and in its discretion it has determined this to be a necessary regulation. The pupil is not compelled to submit to vaccination. One who prefers not to submit to the rule may remain out of school. Even in regard to compulsory vaccination is has been righteously said: "When one remembers the terrible scourges suffered from smallpox in the past, and thinks of the moderation and control of them by a general vaccination of the people, no one would hesitate to answer all philosophical objections to compulsory vaccination by an appeal to the legal maxim, the safety of the people is the supreme law." Teidman's Lim. Police Power, Sec. 15.

I am of the opinion that the Gainesville school board had the authority to pass said resolution; that the regulation is a reasonable one, and that

children refusing to comply therewith may be legally excluded from the schools.

While this opinion is directed to the particular Gainesville board of trustees, yet the authority given all school trustees in this State are so similar in their character, I am of the opinion that the conclusion reached is applicable to Texas school boards generally.

Yours very truly,

T. S. JOHNSON,
Office Assistant Attorney General.

MILITARY RESERVATION.

United States troops stationed at Fort Ringgold, a military reservation ceded by the State of Texas to the United States, who, from said reservation, shoot and wound or kill citizens of Texas, violate the laws of this State and are subject to the jurisdiction of its courts.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, December 14, 1899.

Hon. Joseph D. Sayers, Governor of Texas, Austin, Texas.

DEAR SIR: I have duly considered the two telegrams of date November 21 and December 12, 1899, respectively, addressed to you by General McKibben, Commanding General United States forces in Texas, relative to the recent occurrences at Fort Ringgold, Texas, and also the conversation had in reference thereto. I assume that Fort Ringgold has been ceded by the State of Texas to the United States government for a military reservation in accordance with the laws of the State of Texas. See Title XVI, Revised Statutes of Texas, and particularly Arts. 374 and 375. The latter article provides that "No cession of jurisdiction shall ever be made except upon the express condition that the State of Texas shall retain concurrent jurisdiction with the United States over the lands so ceded, and every portion thereof, so far, that all process, civil or criminal, issuing under the authority of this State, or any of the courts or judicial officers thereof, may be executed by the proper officers of this State upon any person amenable to the same within the limits of the land so ceded in like manner and with like effect as if no such cession had taken place; and such condition shall always be inserted in any instrument of cession under the provisions of this title." This law was passed in 1849. It will be observed that the only reservation made in this cession is the right to execute process, civil and criminal, in the same manner and to the same extent as if no such cession had been made. This reservation does not give the State concurrent jurisdiction with the United States over the territory ceded, but only the right to execute process in the ceded territory. I am of the opinion that the process of the State can be executed upon the ceded territory upon any one found thereon, but its criminal process cannot be executed thereon for an offense actually committed in this ceded territory. See Mitchell vs. Tibbetts, 17 Pick., 301; U. S. vs. Cornell, 2 Mason C. C., 63; Sec. 159 Bishop's New Criminal Law.

I am of the opinion that the United States government has exclusive jurisdiction over all crimes and offenses committed on any military reservation ceded by the State in accordance with law. That the State court has no jurisdiction to try any person for an offense thus committed upon the ceded territory. Article 1, Sec. 8, Constitution of the United States, provides, "That Congress shall have power to exercise exclusive legislation over all places, purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock yards and other needful buildings." As far back as April 30, 1790, Congress passed laws for the punishment of criminal acts committed in the above places. See Revised Statutes of the United States, Sec. 5339 *et seq*. That the jurisdiction of the United States is exclusive of that of the State over such places has been established by the decisions of both the national and State courts.

See Vol. I, Bishop's New Criminal Law, Sec. 159; United States vs. Cornell, 1 Mason, 63; Mitchell vs. Tibbetts, 17 Pick., 298; Benson vs. United States, 146 U. S., 330; Fort Leavenworth R. R. Co. vs. Lowe, 114 U. S., 526; Chicago, R. I. & P. Ry. Co. vs. McGlinn, 114 U. S., 542.

I have been informed that soldiers or persons, while actually upon the land or territory known as Fort Ringgold (and which, as above stated, was ceded by this State to the United States government for the purposes of a fort), fired upon and wounded citizens of Texas, who were then not upon the military reservation or fort,—the shots being fired from the fort. If this be true, then the question arises, was the criminal act committed upon the reservation, or was the same committed in the State of Texas, and consequently within the jurisdiction of Texas. If the criminal act, in contemplation of law, was committed upon the reservation, the United States and not the State has jurisdiction. If on the other hand, in contemplation of law, the criminal act was committed in Texas, the State court has jurisdiction and not the United States court.

In Sec. 53, Vol. I, Bishop's Crim. Pro., it is said: "The law deems that a crime is committed in the place where the criminal act takes effect. Hence, in many circumstances, one becomes liable to punishment in a particular jurisdiction while his personal presence is elsewhere. Even in this way he may commit an offense against a State or country upon whose soil he never set foot.

If a man stands upon shore within a county and by discharging firearms kills another upon the high seas, without the county, he is triable for the murder by the admiralty, which has jurisdiction over the locality where the ball took effect, and not over the place where he stood to perpetrate the crime. And one who poisons another by the help of an innocent agent is guilty of murder in the county where the poisoning took place." In Sec. 110, Vol. I, Bishop's New Criminal Law, it is said: "If one, personally out of the county, puts in motion a force which takes effect in it, he is answerable where the evil is done, though his presence was elsewhere."

In the case of People vs. Adams, 45 Am. Dec., 468, it was held "personal presence at the place where a crime is perpetrated is not indispensable to make one a principal offender in its commission. Thus, where a gun is fired from the land which kills a man at sea, the offense must be tried by the admiralty, and not by the common law courts, for

the crime is committed where the death occurs, and not at the place from where the cause of death proceeds. And on the same principle, an offense committed by firing a shot from one county which takes effect in another must be tried in the latter, for there the crime was committed. 1 Chit. Cr. Law, 155-191; United States vs. Davis, 2 Sumner, 485."

To the same effect is the well considered case of Com. vs. Macloon, 101 Mass., 1, reported also in 100 Am. Dec., 89. This case collects and discusses all the common law authorities, and reaches the conclusion announced in the above case.

Tyler vs. People, 8 Mich., 333, is to the same effect.

The following cases by the United States courts hold that to constitute murder upon the high seas, both the mortal stroke and the death must have happened upon the high seas.

United States vs. McGill, 4 Dall., 427; S. C., 1 Wash. C. C., 463; U. S. vs. Armstrong, 2 Curtis, 446. In the case of the United States vs. Davis, 2 Sumner, 482, it was upon the following facts, towit: A gun was fired from an American ship lying in the harbor of Raiatea, one of the Society isles and a foreign government, by which a person on board a schooner belonging to the natives and lying in the same harbor, was killed, held, "That the act was, in contemplation of law, done on board the foreign schooner where the shot took effect, and that jurisdiction of it belonged to the foreign government, and not to the courts of the United States under the Crimes Act of 1790."

I am of the opinion, from a consideration of the authorities, that if the soldiers, under such circumstances as to make the act criminal, stood upon the reservation and fired and wounded persons outside of the reservation in the State of Texas, that such criminal act was committed in the State, and in violation of the laws of the State, and that such acts are triable in the courts of the State.

In the above telegram of date December 12, from General McKibben, occurs the following: "Am informed that State court intends to issue warrants for the arrest of Lieutenant Rubottom and all the non-commissioned officers at Fort Ringgold for the occurrences which took place on reservation. This the military authorities cannot permit, as it would destroy all control over troops at post."

The position of General McKibben is absolutely untenable, and results in making the civil authorities subordinate to the military, when the reverse of this has always been one of the most cherished ideas of the framers of our form of government, not only reflected in our Constitution and laws, and the decisions of the highest courts both Federal and State, but set forth in the Articles of War by which the military are specially governed.

In the case of Dow vs. Johnson, 100 U. S., 169, the Supreme Court of the United States say: "We fully agree with the presiding justice of the Circuit Court in the doctrine that the military should always be kept in subjection to the laws of the country to which it belongs, and that he is no friend to the republic who advocates the contrary. The established principle of every free people is that the law should alone govern; and to it the military must always yield." And in same case, on page 187, it was further said, "Reported cases, in great number and of high authority, support the proposition that a military officer, except when war is

flagrant or when courts are silent by the exigencies of military rule or martial law, is subject to judicial process for the abuse of his authority or for wrongful acts done outside of his military jurisdiction. Mertyns vs. Tobrigas, 1 Cowp., 161-175." And same case, page 189, "When and where the civil power is suspended, the President has a right to govern by the military forces, but in all other cases the civil power excludes martial law and government by the war power. A soldier cannot justify on the ground that he was obeying the orders of his superior officer if such orders were illegal and not justified by the rules and usages of war, etc." See also Coleman vs. Tennessee, 97 U. S., 514.

In 15 Am. & Eng. Enc. Law, p. 428, it is said: "When a person becomes enrolled as an officer or soldier in the army he is not relieved of his civil obligations, but still continues subject to the civil courts for violations of local laws, as well as for liabilities incurred towards individuals."

"Under the Revised Statutes of the United States, Sec. 1237, enlisted men are exempt from arrest on civil process except for certain debts contracted prior to enlistment. There is no statutory enactment which extends such exemption to officers; but like all other persons in the public service, they are exempted as a matter of public policy from arrest upon civil process while engaged in the active performance of their duties. Neither the statutory provision as to enlisted men nor the rule of public policy as to officers extends to arrest on criminal process." The text is supported by the following authorities, holding that the "soldier is still a citizen, and as such always amenable to the civil authorities." State vs. Sparks, 27 Texas, 627; Ex parte McRoberts, 16 Iowa, 600; Dow vs. Johnson, 100 U. S., 158; Ex parte Harlan, 39 Ala., 563; United States vs. Kirby, 7 Wall., 482; U. S. vs. Harvey, 8 L. Rep., 77; Coxson vs. Doland, 2 Daly (N. Y.), 66. In Vol. 15, Am. & Eng. Enc. Law, p. 441, it is further said, "An officer or soldier who commits a criminal offense in any portion of a State or Territory not within the exclusive jurisdiction of the United States is amenable to the courts of such State or Territory for his offense. It is the policy of the United States, as shown by the fifty-ninth Article of War, to aid the civil authorities in the administration of justice on officers and soldiers who have committed crimes.

"Where both civil and military courts have jurisdiction of a crime or misdemeanor committed by a soldier or an officer, the court in which proceedings are first begun is entitled to proceed. It is the duty of the civil authorities to immediately apply for the accused, as provided by the fifty-ninth article; but if such application is not made, the military authorities should then proceed to exercise their jurisdiction." The above is taken from and supported by the case of Ex parte Mason, 105 U. S., 696, and also the case of Ex parte McRoberts, 16 Iowa, 600, and also Coleman vs. Tennessee, 97 U. S., 509. The fifty-ninth Article of War reads as follows:

"When any officer or soldier is accused of a capital crime, or of any offense against the person or property of any citizen of any of the United States which is punishable by the laws of the land, the commanding officer, and the officers of the regiment, troop, battery, company or detachment to which the person so accused belongs are required, except in time of war, upon application duly made by or in behalf of the party injured

to use their utmost endeavors to deliver him over to the civil magistrate, and to aid the officers of justice in apprehending and securing him in order to bring him to trial. If, upon such application, any officer refuses or wilfully neglects, except in time of war, to deliver over such accused person to the civil magistrates, or to aid the officers of justice in apprehending him, he shall be dismissed from the service." The Articles of War were enacted by Congress, and have all the binding force of laws. By the above Article of War, the officer in charge has no discretion; whenever an application is made by the proper civil authority upon such officer for the delivery of an accused officer or soldier, it becomes his imperative duty, enjoined upon him by an act of Congress, to deliver such accused officer or soldier to the proper civil magistrate for trial, upon the pain of dismissal from the service if he refuses or wilfully neglects so to do. The commanding officer has no discretion or power to investigate the guilt or innocence of the accused soldier, and act in accordance with his determination of the question, for that would be a denial to the State court of the right or power to try the offender, and would make the jurisdiction of the State court depend upon the will of a military officer, thus completely subordinating the civil judicial power of a State to a military officer. If the officer or soldier is not guilty of the alleged offense, or is wrongfully accused, those are matters he must interpose in the State court. To hold otherwise would not only nullify the plain language of the fifty-ninth article of war, but would have the effect of abrogating all State laws as to offenses committed by officers and soldiers in the State, and make their amenability to State laws and State courts absolutely dependent upon the discretion or will of a military commander, however high or low his rank may be.

A question similar to the one under consideration was submitted to the Attorney General of the United States by Hon. Jefferson Davis while Secretary of War. A surgeon in the United States army, while stationed at Fort Graham, Texas, shot and killed an officer in the army, a major. This surgeon was indicted in the State court, and the question was submitted by the Secretary of War as to the right or power of the State court to try the case, and as to the duty of the commanding officer to surrender the accused to the State authorities. The opinion, an able and exhaustive one, was rendered by Attorney General Cushing, who, after an elaborate discussion, concludes his opinion as follows:

"From the general doctrines of law here stated, sundry corallaries plainly flow, applicable to the present inquiry.

"1. It is the duty of General Smith (the commanding officer) to aid the political authority of the State of Texas in bringing Surgeon ——— to trial for murder as a citizen on the pending indictment, and to that end to co-operate with any civil magistrates, or, if need be, to act in spite of any particular magistrate in order to prevent his escape.

"2. If, in the meantime, Surgeon ——— escapes from civil custody, or is released on bail, it is the right and duty of General Smith to hold him in effective custody until he be remanded for actual imprisonment on *mesne* process, or for trial by the civil authority of Texas.

"3. So long as ——— is not in the actual custody of the civil authorities, he is amenable to the military authorities, and may be tried by them, either for the crime of mutiny or for that of desertion, or for that of breach of arrest, neither of which is triable by the civil magistrate.

"4. Although not necessary in the actual case, yet in deference to the spirit of our institutions and to the civil authority, it may be expedient for the military authorities to suspend the trial of the military relations of the act of killing Brevet Major Arnold, until the civil relations of that act shall have been tried by the civil magistrate.

"7. As it is the duty of General Smith, and will, of course, be his pleasure, to do everything in his power to assist the political authorities in the arrest, custody, trial and punishment of ————, civiliter, there can be no collusion or conflict of jurisdiction between the military and civil authorities, etc., etc." See Vol. 6, p. 427, Opinions Attorney General United States.

That opinion has always been accepted by the Federal authorities, and is cited with approval by the Supreme Court of the United States in the case of Coleman vs. Tennessee, 97 U. S., 540.

In conclusion, I beg to say, that I am of the opinion that regardless of the question of guilt or innocence of the officers and soldiers for participation in the recent unfortunate events at Fort Ringgold, that should they be indicted by the State authorities, that it is the plain duty of the officer commanding to surrender the accused persons, upon proper application, to the civil authorities of Texas for trial in the State court, where their guilt or innocence will be determined in accordance with the law and the facts.

Very truly yours,

R. H. WARD,
Office Assistant Attorney General.

FRANCHISE TAX PAYABLE BY FOREIGN CORPORATIONS.

Franchise tax paid by a foreign corporation at the time its permit is issued pays said tax *only* to May first following thereafter.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, January 16, 1900.

Hon. D. H. Hardy, Secretary of State, Capitol.

DEAR SIR: In reply to your favor of the 5th inst., to this department, referred to me for attention. You state a case as follows: "A foreign corporation files its articles of incorporation and application, and permit is issued to it on June 1, 1899. Under the statute it pays on June 1, 1899, as well as its permit fees also the franchise taxes for one year from said June 1st." After quoting the statutes bearing upon the question, you say: "In view of these statutes my inquiry is propounded, does this foreign corporation to whom permit is issued on June 1, 1899, and who pays its franchise taxes for one year in advance on June 1, 1899, does or does it not have to pay its next year's franchise tax on or before May 1, 1900?"

This question might simply be answered in the affirmative, but in view of your statement above that the corporation pays its "franchise taxes for one year from said June 1," and also "who pays its franchise taxes for one year in advance on June 1, 1899," such an answer would be mis-

leading, and would not altogether reflect my views on the matter presented by your letter.

I find no precedent upon which to base a construction of the statute in regard to payment of franchise tax by foreign corporations "hereafter" authorized to do business in this State, and, consequently, will have to resort to the general rule that in all interpretations one shall look diligently for the intention of the Legislature, keeping in view at all times, the old law, the evil and the remedy.

Referring again to your statement that the said corporation pays its franchise tax for one year in advance on June 1, 1899 (at the time it was authorized to do business in this State), and also remembering our short conversation on yesterday in regard to this matter, you will pardon me for writing at length, in order to make myself fully understood, and also to give full expression to my opinion not only upon the particular question which you ask, but upon other kindred ones suggested by your letter, and the conversation above referred to.

Article 5243i, Revised Statutes, 1895, as amended by the Twenty-fifth Legislature, Chap. 120, Laws 1897, contains the present law relative to the payment of franchise taxes by foreign corporations. We will trace the history of this law, noting each subsequent change therein, and thus endeavor to arrive at the intention of the Legislature in its enactment. This article as now contained in the Revised Statutes, 1895, is Sec. 5 of an act passed by the Twenty-third Legislature, Chap. 102, Laws 1893, and reads as follows:

"Sec. 5. That each and every private domestic corporation heretofore chartered or that may be hereafter chartered under the laws of this State, and each and every foreign corporation that has received or may hereafter receive a permit to do business under the laws of this State, in this State, shall pay to the Secretary of State, annually, on or before the first day of May, a franchise tax of ten dollars. Any such corporation which shall fail to pay the tax provided for in this section shall, because of such failure, forfeit their charter."

The caption of this act is "An Act to fix the rate of taxation on insurance companies, telephone companies, sleeping and dining car companies, and other corporations; to prescribe the time and manner of collecting such taxes; to provide penalties for the violation of the provisions of this act, and to repeal all laws and parts of laws in conflict therewith."

I call attention here to the object expressed "to prescribe the time and manner of collecting such taxes," and I take it that this object extends throughout the amendments hereafter noted.

This entire act was brought forward in the Revised Statutes, 1895, as Arts. 5243e, f, g, h, i, j and k.

The Twenty-fifth Legislature, Chap. 104, Laws 1897, approved April 30, 1897, amended Arts. 5243e, 5243i, 5243j and 5243k. Article 5243i, as here amended contains the following:

"And every such (foreign) corporation which shall hereafter receive such permit shall also pay to the Secretary of State an annual franchise tax of fifty dollars, the tax for the first year to be paid at the time such permit is issued....., and each succeeding tax shall be paid on or before the first day of May of each year thereafter. (Provides for

one dollar additional for every ten thousand dollars capital stock over one hundred thousand.) And any corporation which shall fail to pay the tax provided for in this article, at the time specified herein, shall, because of such failure, forfeit its right to do business in this State," etc.

It will be noted that this amendment provides for an *annual* franchise tax, and that the tax for the *first year* should be paid at the time the permit was issued.

But it seems that the Legislature was not yet satisfied with this law, and by an act passed at the same session, approved May 15, 1897, Chap. 120, Laws 1897, Arts. 5243i, 5243j and 5243k were again amended. Article 5243i, as here amended, contains the following, which is the present law on the question in hand:

"Each and every foreign corporation heretofore authorized to do business in this State under the laws of this State shall, on or before the first day of May of each year, and each and every such corporation, which shall hereafter be so authorized to do business in this State, shall, at the time so authorized, and on or before the first day of May of each year thereafter, pay to the Secretary of State the following franchise tax. (Here follows the amount to be paid according to the authorized capital stock.) Any corporation, either domestic or foreign, which shall fail to pay the tax provided for in this article at the time specified herein, shall, because of such failure, forfeit its right to do business in this State," etc.

You will notice that as here amended there is no reference to an annual franchise tax as is mentioned in connection with the first payment in the Act approved April 30th, nor is it provided that the tax for the *first year* is to be paid at the time such permit is to be issued. The present law provides, supplying the words understood, that each and every such corporation which shall hereafter be authorized to do business in this State, shall at the time so authorized, pay to the Secretary of State the following franchise tax; and each and every such corporation..... shall, on or before the first day of May of each year thereafter, pay to the Secretary of State the following franchise tax. It is true that "the following franchise tax" is recited as an annual franchise tax, but it is the change with reference to the original or first payment, to which I call attention.

Now, if by this last amendment, the present law, it was intended that the payment made at the time the permit was issued was to be for *one year in advance*, why this change? Why were the words "the tax for the first year to be paid at the time such permit is issued" omitted? Certainly such a change in the law must have carried with it some intention. Was it that the first payment was not for one year in advance?

Recurring now again to the case cited by you. A corporation receives its permit June 1, 1899, and pays its franchise tax on that date for "one year in advance," or until June 1, 1900. Then it becomes the duty of the Secretary of State, on or before the first day of the following March to notify the corporation, as provided in Art. 5243j, that its tax will be due on June 1, 1900, and that it must be paid on or before the first day of May, 1900. If the tax is not so paid then the permit becomes forfeited thirty days before the expiration of the time for which it has been paid. But this would not be so bad as other cases which might arise.

Suppose the corporation receives its permit, say, on the first day of December, 1899, and pays its franchise tax on said date for "one year in advance," or until December 1, 1900. It is still the duty of the Secretary of State, on or before the first day of March, 1900, to notify the corporation that its tax will be due December 1, 1900, and must be paid on or before the first day of May, 1900. Failing to do so, its permit becomes forfeited seven months before the expiration of the time for which it has "paid in advance." Suppose, further, that this corporation should desire to wind up its business, to quit doing business in this State on December 1, 1900. In order to do so, having access to the courts, etc., it would hape to pay on May 1, 1900, thus paying one year's tax after quitting business in the State.

Then again. Suppose the permit was issued on the first day of February, 1900. The same condition would exist, except as to the length of time. Or, if the law should be construed to mean that the Secretary of State should not give the notice until on or before the first day of March one year following, then he would have to notify the corporation that its tax *was* due the first day of February last, and must be paid on or before the first day of May next. Hence, if not paid before May first, we would have the corporation doing business in Texas from February first to May first with its franchise tax unpaid, and this would be the case each year as long as the corporation continued to do business in this State.

Under the original act, and under the amendment of April 30, 1897, this confused condition of affairs could not be averted. Was this not one of the evils of the old law? Is it not cured by the last amendment, by omitting all provision that the tax for the *first year* should be paid at the time the permit is issued, and simply providing such corporations "shall, at the time so authorized, *and* on or before the first day of May of each year thereafter pay to the Secretary of State," the taxes named?

To my mind it is clear that the tax paid by the corporation, "at the time so authorized" is not for one year in advance, but is payment only until the first day of May following, and must then be again paid, which payment *is* for one year in advance, or until the first day of the next May. The present law, as I construe it, "prescribes the time and manner of collecting such taxes," free from the irregular and confused manner under the old laws, and brings about a uniform system evidently sought by the Legislature.

It will not contravert the conclusion reached by saying that a corporation receiving a permit on the first of December would receive less benefits, or pay more in proportion to time, than one receiving its permit on June first before. The Legislature had the authority to make such provision, and there is nothing to compel a corporation to begin business in the State other than on the first day of May of any year. Yet should it conclude to come in at any other time, it voluntarily assumes the tax thus imposed upon it. There is no question in it as to the tax being equal and uniform. It is equal and uniform on all coming in on the first day of June. It is equal and uniform on all coming in on the first day of December. It is equal and uniform in that all corporations coming in at any time before the first day of May of any year are subject to and pay the same tax.

In conclusion, I will add that after full conference, the Attorney General and all the members of this department concur in this opinion.

Yours very truly,

T. S. JOHNSON,
Office Assistant Attorney General.

FRANCHISE TAX PAYABLE BY CORPORATIONS.

Both foreign and domestic corporations are required to pay their franchise tax on or before the first day of the following May of each year, regardless of the time of year at which they may take out their permit.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, February 1, 1900.

Hon. D. H. Hardy, Secretary of State, Capitol.

DEAR SIR: Your two favors of the 17th ult., in regard to the franchise tax of domestic and foreign corporations, came duly to hand. I regret this delay in replying thereto, thus causing your further favor of the 29th ult., but in the press of business in this department, prompt reply has necessarily been deferred.

First, I note one of your inquiries as follows: "I beg to inquire what would be my procedure to collect the franchise tax due on the first day of May, by a foreign corporation, who had filed its articles and paid the first franchise tax after March 1st; for illustration, say March 10th, it being noted that all notices of franchise tax must be sent out on or before the first day of March of each year?"

Although here confirming my former opinion in regard to the payment of franchise tax by foreign corporations, I can but say that your question clearly evidences the confused condition of many of our statutes to be contended with when we come to their construction.

Under my former opinion I held that such foreign corporation would have to pay its first franchise tax at the time its permit was issued—that is, in the case you propose, on March 10th, and again pay such tax on or before May first following. This, of course, presents a case wherein the Secretary of State could not possibly give the notice on or before March first. It is not entirely clear to my mind that the forfeiture for the failure to pay the tax is dependent upon the giving of the notice. Article 5243i provides: "Any corporation, either domestic or foreign, which shall fail to pay the tax provided for in this article, at the time specified herein, shall, because of such failure, forfeit its right to do business in this State, which forfeiture shall be consummated without judicial ascertainment, by the Secretary of State entering on the margin of the ledger kept in his office relating to such corporations, the word 'Forfeited,' giving the date of such forfeiture, and any corporation whose right to do business may be thus forfeited shall be denied the right to sue or defend in any of the courts of this State, and in any suit against such corporation on a cause of action arising before such forfeiture, no affirmative relief may be granted to such defendant corporation, unless its right to do business is revived as provided in Art. 5243j." It is

impossible for me to conceive of a more complete provision of law than the above. The forfeiture is absolutely predicated upon the failure to pay the tax. No reference whatever is made to the notice provided for in the succeeding article. Reference is simply made to the manner of revival as provided in Art. 5213j. Neither does Art. 5213j indicate by any word that the giving of the notice is a condition precedent to forfeiture. It is not even required that the Secretary of State shall notify the corporation that the tax must be paid on or before the first day of May, or its permit will become forfeited. Upon this question I do not deem it necessary to express an opinion. The courts might hold that the giving of the notice is necessary before forfeiture. If so held, it would indicate to my mind an hiatus in the law in that no method of giving the notice is provided in such case as proposed by you. I am of the opinion, however, that at the time the permit is issued, or before May first following, the Secretary of State should give the notice, and upon the failure by the corporation to pay the tax within the time specified, he should proceed as directed in the law hereinbefore quoted, in regard to the forfeiture. I will add that in view of what follows here below, I am also of the opinion that the foregoing applies to domestic as well as foreign corporations.

In the matter of domestic corporations. Your questions are as follows:

"1. Articles of incorporation of a domestic corporation are filed by me on June 1, 1899, with a capital stock of $10,000. At the same time I am paid a filing fee of $25.00, as well as a franchise tax of $10.00, the corporation being one for profit and subject to franchise taxes. My question is, for what period of time does this $10.00 pay the franchise tax of such corporation, and when does this corporation, under the statute, have to pay its second franchise tax, and for what period does this second payment of franchise tax hold good?

"2. Articles of incorporation of a domestic corporation are filed by me on February 1, 1900, the same being a corporation for profit and, like the one named in subdivision 1 of this letter, subject to franchise taxes, and having a capital stock of $10,000 pays me a franchise tax of $10.00, as well as a filing fee of $25.00, at the time the articles are filed. Query. —For what period of time does this $10.00 franchise tax pay and when does this corporation pay its second franchise tax, and for what period of time does the second payment hold good?"

In reply to both questions, I am of the opinion that the first payment by each corporation made pays up to the first day of May, 1900; that the second payment must be made on or before the first day of May, 1900, and that this last payment holds good until the first day of May, 1901, on or before which time the third payment must be made. In other words, as to the time of payment of franchise taxes, and the time for which such payments hold good, my opinion to you of the 16th inst., in regard to foreign corporations is also applicable to domestic corporations.

In view, however, of the fact that said former opinion was solely with reference to foreign corporations, I deem it necessary to give you my reasons for arriving at the same conclusion in regard to domestic corpo-

rations. My opinion in regard to foreign corporations was based in part on the change as made in the Act of May 15, 1897, from the terms of the Act of April 30, 1897. Such reason does not obtain as to domestic corporations, for the two acts, so far as the time and manner of payment by domestic corporations, contain identically the same provisions. I do not think, however, that the reasons here given conflict with my former opinion, but in fact render it stronger.

Article 5243i contains the following: "And such corporation which shall be hereafter chartered under the laws of this State, shall also pay to the Secretary of State an annual franchise tax of ten dollars, the tax for the first year to be paid at the time such charter is filed, and the Secretary of State shall not be required to file such charter until such tax is paid, and each succeeding tax shall be paid on or before the first day of May of each year thereafter." The difficulty in the construction of this statute is because of the use of the terms "an annual franchise tax," "the tax for the first year" and "each succeeding tax to be paid on or before the first day of May of each year thereafter." Can these provisions be harmonized with each other, and with my answer to your questions as hereinbefore given?

It has been suggested to me that the words "an annual franchise tax" precludes altogether the construction I place upon this statute. I do not think so. Those words must be construed in connection with the others. In fact, I think the proper construction is to be arrived at by ascertaining the meaning of the provision, "the tax for the first year to be paid at the time such charter is filed." This involves more particularly than any other, the meaning of the word "year," as here used. A year, unless from the context or otherwise a different intent is gathered, is generally construed to mean a calendar year, twelve months, beginning with the first day of January, or some other given day. The meaning of the term, however, must be determined from the connection in which it is used. Knode vs. Baldrige, 73 Ind., 54; Thorton vs. Boyd, 25 Miss., 598. And where applied to matters of revenue there is a presumption in favor of referring the word year to the fiscal year. Glasgon vs. Rouse, 43 Mo., 479. In the Mississippi case, above cited, the court, quoting Pavis vs. Hiram, 12 Mass., R. 262, said: "We are all of the opinion that the term 'one whole year,' used in the statute, must be understood to be a political or, rather, a municipal year, viz.: from the time the officer is chosen until a new choice takes place at the annual meeting for the choice of town officers, which may sometimes exceed, and sometimes fall short of, a calendar year." Then does the context, the connection in which the word is used, indicate a fiscal year? Undoubtedly it is here applied to a matter of revenue, and when the statute declares that "each succeeding tax shall be paid on or before the first day of May of each year thereafter," and when it further provides that such corporations "which shall fail to pay the tax, at the time specified,"—that is, May first each year, the conclusion is irresistible that the statutes establish a fiscal year as pertaining to the payment of the franchise tax. Each and every payment, except the first, must be made on the first day of May, and, as we have concluded, pays to the first day of the following May. We have seen that "one whole year" does not necessarily mean twelve calendar months, but may sometimes exceed and sometimes fall short of a cal-

endar year. Then, to carry out the evident intent of the law to establish a fiscal year, and bring about a uniformity in the payment of these taxes, may not the term "the tax for the first year" be construed to mean the tax for the first fiscal year ending May first following. There is, seemingly, if not in fact, a repugnancy between the provisions "the tax for the first year to be paid at the time such charter is filed," and that "each succeeding tax shall be paid on or before the first day of May of each year thereafter," and the subsequent provisions as to forfeiture at that time if not paid, but I think if this be so, the rule of interpretation long recognized, that, in case of repugnancy between two provisions of the statute which cannot be reconciled, the latter in position should control, as being the last expression of legislative will (Overstreet vs. Manning, 67 Texas, 657), will be applicable.

Referring again to the word "annual." In McInry vs. City of Galveston, 58 Texas, 340, the court said: "In Russell vs. Farquhar, 55 Texas, 359, Chief Justice More said: 'While it is for the Legislature to make the law, it is the duty of the courts to "try out the right intendment" of statutes upon which they are called to pass, and by their proper construction to ascertain and enforce them according to their true intent. For it is this intent which constitutes and is in fact the law, and not the mere verbiage used by inadvertance or otherwise by the Legislature to express its intent, and to follow which would prevent that intent.'

"The language under consideration is that of a single clause in a long act, the purpose of which was to create and put into operation a city government for the most important city in the State. The intent of the Legislature was to so arrange it, that, like an extensive and complicated machine, it would be perfect in all its parts. It would be doing violence to the most elementary rules of construction to take an isolated provision of such an act, and, without regard to the context or the purposes of the act, give it an independent and literal construction according to the language used.

"That provision had reference to the financial system provided for in the act, and which is a part of the machinery of the city government, and should be construed with a view to the harmonious working of the whole system in all its parts.

"The financial and municipal year was the same. The budget, as it had reference to the compensation of officers, was required to be made up and established by the council prior to the commencement of the municipal year. It was intended that the compensation thus established should be confined to the municipal year. This system requires that accounts be kept and reports to be made at the end of the fiscal year, including appropriations, receipts and expenditures.

"The construction, as contended for by appellant, would materially affect the harmonious working of the system, and lead to confusion in the accounts and reports of those expenditures, by thrusting the policies of one administration into that of its successor."

I think this reasoning highly applicable to the case in hand.

Yours very truly,

T. S. JOHNSON,
Office Assistant Attorney General.

EXCESS OF COUNTY OFFICERS' FEES.

Excess of county officers' fees collected under the "Fee Bill" should go to the general fund and may be disposed of as provided by Section 3, of Article 857.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, January 24, 1900.

Hon. R. B. Allen, County Attorney, Dallas, Texas.

DEAR SIR: Your favor of the 17th inst. to this department has been received.

You state that quite a large amount of money, of excess fees, collected by the officers of Dallas county, under the provisions of the "Fee Bill," have been turned over to the county treasurer. Your question is as to in what fund this money should go, and whether or not the treasurer should allow the commissioners court to apportion this fund to such accounts as they see fit.

The fee bill simply provides that this excess "shall be paid to the county treasurer of the county where the excess accrued." You correctly state the proposition that the feel bill within itself does not provide as to what fund this money shall go in. I take it, however, that it must be construed in connection with other articles of the statutes.

Article 857 is as follows:

"The funds received by the county treasurer shall be classed as follows:

"1. All jury fees, all money received from the sale of estrays, and all occupation taxes; and this class of funds shall be appropriated to the payment of all claims registered in class first, described in Art. 852.

"2. All money received under any of the provisions of the road and bridge law, including the penalties recovered from railroads for failing to repair crossings, prescribed in Art. 4435, and all fines and forfeitures; and this fund shall be appropriated to the payment of all claims registered in class second.

"3. All money received, not otherwise appropriated herein or by the commissioners court; and the funds of this class shall be appropriated to the payment of all claims registered in class third."

It will be noted that under section 3 above, that all moneys received, not otherwise appropriated herein or by the commissioners court, go into what might be termed the general fund, and disposed of as provided in said section 3; provided, it had not previously been appropriated by the commissioners court. Articles 858 gives the power to the commissioners court to create other classes of funds and Art. 859 gives them authority to transfer one class of fund to another, with the exception therein named.

I am of the opinion, that with reference to the moneys inquired about, that the commissioners court has the authority to dispose of it by proper orders, and that the county treasurer will be authorized to pay it out on proper warrants in accordance with the order.

Yours truly,

T. S. JOHNSON,
Office Assistant Attorney General.

PUBLIC LANDS—FORFEITURE.

Additional lands purchased from an original purchaser before the three requisite years of occupancy has been completed is forfeited to the State if the vendee does not himself complete said three years occupancy required.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, January 30, 1900.

Hon. Chas. Rogan, Commissioner General Land Office, Austin, Texas.

DEAR SIR: This department is in receipt of your favor of 22nd inst., with request for an opinion as to whether your department has the power to forfeit the sale of additional lands under the facts stated. The facts stated are, that one Pearce, on November 11, 1895, purchased for the purpose of a home the west half of Section 90, in Motley county, and at the same time purchased Sections 56, 60 and 64 as additional lands. That on July 6, 1897, said Pearce sold all three of said additional sections to one Wm. M. Reid, as appears from certified copy of deed on file in your office. This deed recites that Pearce is to continue the occupancy of his home section, and pay all interest until three years occupancy is complete, and to make proof of occupancy. That such proof of occupancy was made November 21, 1898, and filed in the Land Office November 25, 1898. That all interest due on all four sections has been promptly paid. It will be observed that the home section was purchased on November 11, 1895, as well as the additional lands, but that the additional lands were sold to Reid, a non-resident, on July 6, 1897, just one year, seven months and twenty-five days from the date of the original purchase by Pearce. You further state that Reid has never occupied this land, and is a non-resident of the county where the lands are situated. The original purchase was made under the Act of 1895, and the inquiry presented requires a construction of that act. The questions presented are two:

First. The additional lands having been sold by the original purchaser prior to expiration of three years occupancy to a purchaser who does not occupy or settle on the same, is this sale valid; and,

Second. If the sale was invalid, have you the power to declare the sale forfeited for the above reasons, and to cancel the sale of said additional lands?

Your letter further states the fact that Reid has never filed in the Land Office any application to purchase said lands, or his obligation to the State, or his transfer to said land, and hence has never obligated himself to become an actual settler upon said land. Without undertaking to quote extensively from the Act of 1895, I will undertake to give you my conclusions only, though I have most carefully studied the law.

I am of the opinion that the purpose of the law was to permit the purchase of the school lands by actual settlers: that it permitted the actual settler to purchase not exceeding four sections; that three sections could be purchased by virtue of actual occupancy and settlement upon the fourth; that in such case he was an actual settler within the meaning of the law upon all the sections: that his purchase should be treated as if the several tracts of land constituted one tract. In the case of Watts

& Walker vs. Wheeler, 10 Civil Appeals, 118, the Court of Civil Appeals held: "We conclude that a settler proposing to purchase four sections of pasture land * * * would not be required to settle upon and improve more than one of these. In other words, a proper construction of this article would not require a settlement upon or actual improvement of each of the sections constituting the proposed purchase and more than an actual improvement of each acre of the 160 would be required to give the actual settler upon county school land the prior right guaranteed him by the Constitution to acquire that amount. Perkins vs. Miller, 60 Tex., 63.

"For the same reason, we conclude that a *bona fide* settler who, previous to the passage of Art. 4045 (Act of April 28, 1891), had purchased and improved an agricultural or watered section would not be required to remove therefrom and settle upon one or more of the three additional pasture sections he was therein authorized to acquire, it seems to us clear from the language of this article that the intention of the Legislature was to authorize the sale of this land to actual settlers in bodies not exceeding four sections each, and that upon actual settlement upon any one of these is all that should be required."

It is true that the above decision was not a construction of the Act of 1895, but the principles therein announced are applicable to that act. The principle being that actual occupancy or settlement of one of the tracts is an occupancy or settlement of all, that all the sections comprise one body so that occupancy of one is occupancy of all. When a part of this body of land is sold, it becomes severed from the remainder, so that the occupancy of a part no longer constitutes occupancy of the part sold, and unless the purchaser settles upon or occupies this part so purchased, it becomes unoccupied, because the original purchaser, by deed of conveyance, has parted with both his title and possession, and if the purchaser does not settle upon it, it results that this land has no settlement upon it at all, and has been vacant and unoccupied land since the first purchaser sold the same. It is clear to my mind that the law only contemplates and authorizes the sale of the public land to an actual settler. That when the actual settler sells his land, or part of the same, before the three years occupancy is complete, in order to constitute a valid sale, such purchaser must become an actual settler upon the land purchased by him. Section 9 of the Act of 1895, p. 65, reads: "The Commissioner of the General Land Office shall prescribe suitable regulations whereby *all* purchasers shall be required to reside upon as a home the land purchased by them for three consecutive years * * *. If, however, any purchaser has sold his purchase, *or any part thereof, his vendee shall be permitted to complete the time of the occupancy of his vendor* as a part of his own occupancy * * *." This section most clearly indicates that the purchaser from the first purchaser, whether he purchase the whole or any part of the land from the first purchaser, must occupy the lands so purchased.

Section 10 of the Act, see Acts 1895, p. 66, also reads: "Purchasers may also sell their lands, or a part of the same, in quantities of forty acres (or multiples thereof, at any time after the sale is effected under this act, and in such cases the vendee, or any subsequent vendee, or his heirs or legatees, shall file his own obligation with the Commissioner,

of the General Land Office, together with the duly authenticated conveyance or transfer from the original purchaser and the intermediate vendee's conveyance or transfer, if any there be, duly recorded in the county where the land lies * * *, together with his affidavit, in case three years' residence has not already been had upon said land and proof made of that fact, stating that he desires to purchase the land for a home, and that he has in good faith settled thereon, and that he has not acted in collusion with others for the purpose of buying the land for any other person or corporation, and that no other person or corporation is interested in the purchase save himself, and thereupon the original obligation shall be surrendered or canceled or properly credited, as the case may be, and the vendee shall become the purchaser direct from the State, and be subject to all the obligations and penalties prescribed by this act, and the original purchaser shall be absolved in whole or in part, as the case may be, from further liability thereon."

The language of this section, as of many others, all unmistakably convey the idea, that it was meant by the Legislature, that subsequent purchasers, as well as original purchasers, must be actual settlers upon the lands purchased by them. Consequently, in answer to the first question submitted, I beg leave to state, that the purchase of Reid, for the want of an actual settlement upon the lands so bought by him from Pearce, became invalid, and that said lands were by reason thereof forfeited to the State.

Now, as to the second question.

Section 11 of the Act of 1895, p. 67, reads as follows: "If upon the first day of November of any year the interest due on any obligation remains unpaid, the Commissioner of the General Land Office shall endorse on such obligation 'Land Forfeited,' and shall cause an entry to that effect to be made on the account kept with the purchaser, and thereupon said land shall thereby be forfeited to the State without the necessity of re-entry or judicial ascertainment, and shall revert to the particular fund to which it originally belonged, and be resold under the provisions of this act or any future law; provided, if any purchaser shall die, his heirs or legal representatives shall have one year in which to make payment after the first day of November next after such death, and shall be absolved and exempt from the requirement of settlement and residence thereon.

And if any purchaser shall fail to reside upon and improve in good faith the land purchased by him, he shall forfeit said land and all payments made thereon to the State, in the same manner as for non-payment of interest, and such land shall be again for sale as if no such sale and forfeiture had occurred * * *."

The above section plainly provides, in substance, that a failure to reside upon the land and improve the same in good faith, shall work a forfeiture of the sale as well as all payments made on the land, and upon the endorsement of the words "Land Forfeited," by the Commissioner, the forfeiture occurs, without the necessity of re-entry or judicial ascertainment, and in such case the land reverts to the particular fund to which it belonged, and shall be sold as other lands. In the case of G., H. & S. A. Ry. Co. vs. The State, 81 Texas, 595, the Supreme Court say: "When apt words are used to express the intention that the for-

feiture shall take place upon the happening of a contingency without the necessity of a judicial declaration, then the court will give effect to that intention whenever the question is presented in a judicial inquiry." In the case of Waggoner vs. Flack, 92 Texas, 634, the Supreme Court say, in speaking of the forfeiture law of 1897: "That said law did not repeal the 11th section of the general law of 1895 upon the same subject." In the case of Fristo vs. Blum, 92 Texas, 84, a case which upholds the validity of the forfeiture clauses in the various laws, our Supreme Court says: "These authorities show that a remedy may be given although none before existed. Neither the right of the State as a vendor nor the remedy by recession of the sale was given by the statute of 1897; both existed at common law. The Legislature might have rescinded the contract by an act passed for that purpose, or it had the right, as it did, to empower some officer to put in force its remedy." The law made the fact of settlement in good faith as much a condition precedent to the acquisition of the legal title to the land as the payment of interest, and a failure to comply with either condition operated as a forfeiture of the land, and it was competent for the Legislature to empower the Commissioner, in either case, to declare the forfeiture, or, to speak more accurately, to rescind the sale on the ground of the failure of the purchaser to comply with the conditions upon which the sale of the land was made.

In conclusion, I beg to state, that I am of the opinion that you have the power, under Sec. 11 of the Act of 1895, to cancel the sale to Reid, and resell the lands as provided by law.

Very truly yours,

R. H. WARD,
Office Assistant Attorney General.

CONSTITUTIONAL LIMITATION ON TERM OF OFFICE.

I. The Constitution limits the term of office of all officers not otherwise provided in the Constitution to two years.

II. The reasoning in and the opinion of our Supreme Court in the case of Kimbrough vs. Barnett applies to the laws fixing the term of office of the Board of Regents of the University and the Board of Directors of the Agricultural and Mechanical College for a longer period than two years; and such legislation fixing the term of office of said officers at longer periods than two years is unconstitutional.

III. Such officers, however, are *de facto* officers and their acts are valid, and cannot be collaterally attacked or questioned.

ATTORNEY GENERAL'S OFFICE.
AUSTIN, February 6, 1900.

Hon. Joseph D. Sayers, Governor of Texas.

DEAR SIR: Your request has been received, in which you ask for my opinion upon the following questions:

"1. The effect of the opinion of the Supreme Court in the case of W. H. Kimbrough vs. W. W. Barnett, upon the Board of Regents of the University of Texas and the Board of Directors of the Agricultural and Mechanical College.

"2. Whether in view of such decision, and the language of the statutes, creating such boards, it is necessary that legislation should be immediately had in order to bring the terms of the members of said boards within the opinion expressed by the court in that case."

I have just read very carefully the opinion of our Supreme Court in the case above mentioned, decided yesterday.

Examining the legislation with reference to the Board of Regents of the University of Texas, I find in the Act of 1881, on page 79, that the University was established; that in Sec. 6 of said act the term and tenure of office was fixed, as shown in said Sec. 6, which is as follows:

"The Board of Regents shall be divided into classes, numbered one, two, three and four, as determined by the board at their first meeting; shall hold their office two, four, six and eight years, respectively, from the time of their appointment. From and after the 1st of January, 1883, two members shall be appointed at each session of the Legislature to supply the vacancies made by the provisions of this section, and in the manner provided for in the preceding section, who shall hold their offices for eight years respectively."

Said Section 6 was brought into the Revised Statutes of 1895, and became Article 3844 thereof.

It will be observed that in referring to the Board of Regents, it is stated that they shall hold their offices two, four, six and eight years, respectively, from the time of their appointment.

In the case of Kimbrough vs. Barnett, Associate Justice Brown, delivering the opinion for the court, quoting from Mechem's Public Officers, says: "Public office is a right, authority and duty created and conferred by law by which, for a given period either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public." Then the court says: "The correctness of this definition is nowhere questioned, so far as we know, and it is useless to add supporting authorities."

The court then enumerates the powers and authority of the school trustees in independent school districts, which powers and authorities of said school trustees is not less, if as much, as the power and authority of the Board of Regents of the University,—and then states that "every essential element of an office is embraced in the powers conferred; indeed, the authority conferred is broad in its scope, ample in its adaptation to the performance of the duties enjoined, and largely independent of the control of others." No salary or compensation is given but that is not necessary to make the employment an office.

Regarding the Agricultural and Mechanical College, Art. 3863, of the Revised Statutes of 1895, is as follows:

"The directors provided for in the preceding article shall be appointed by the Governor, to be selected from the different sections of the State, and shall hold office for six years or during good behavior, and until their successors are qualified."

This is a reproduction of the amendment passed in 1881, by act approved March 30, 1881, as shown in said act as Art. 3685, which is an amendment also of the said article in the Revised Statutes of 1879, but,

in Art. 3685, of the Revised Statutes of 1879, the term of office was fixed at two years.

It must be observed that in all of the legislation regarding both the Board of Regents and the Board of Directors, they are spoken of as officers, or rather, the positions are spoken of as offices, and it is stated with reference to this legislation, regarding the Board of Directors, that they shall hold their offices for six years. By act approved March 9, 1899, the Legislature amended the above Art. 3863 of the Revised Statutes of 1895, which article, as amended, is as follows:

"The Board of Directors shall be divided into classes, numbered one, two, three and four, as determined by the Governor, shall hold their office two, four, six and eight years, respectively, from the date of their appointment, and until their successors are appointed and qualified. Two members shall be appointed at each session of the Legislature to supply the vacancies made by the provisions of this article, and in the manner provided for in the preceding article, who shall hold their office for eight years, respectively."

I believe, in view of the opinion of our Supreme Court in holding the act unconstitutional, which provides for a term of office for school trustees, because the term of office is fixed at a longer time than two years, that these articles as brought forward, and as they have been amended, which provides for a longer term of office than two years for the Regents of the University and the Directors of the Agricultural and Mechanical College, are unconstitutional, for the same reasons as stated by the Supreme Court in the case under consideration.

I do not believe, however, for the reasons I have stated, that the history of the legislation authorizing the appointment of the Board of Regents of the University and the Directors of the Agricultural and Mechanical College, are not so interwoven with the whole of legislation upon the subject of the University and Agricultural and Mechanical College, is not so dependent upon and connected with the articles providing for the appointment of the boards, as to declare the entire legislation, regarding the University and regarding the Agricultural and Mechanical College, unconstitutional. In the case under consideration by our Supreme Court, it says: "The provisions of the act giving four years' term to the trustees, and those providing for alternate elections, are the heart of the act in question: all their parts are so dependent upon and connected with those, that to declare the former void renders the act ineffectual for the accomplishment of the purposes which induced its enactment. The Legislature evidently would not have passed the law without the void provisions, and we must hold the law void as a whole."

As I have just remarked, I do not believe that the various sections of the Revised Statutes, even as amended, providing for the term of office for the Board of Regents of the University and Board of Directors for the Agricultural and Mechanical College, are so dependent upon the balance of the legislation on said subjects as to declare the whole of it unconstitutional, but only those sections which fix the term of office at a longer time than two years to be unconstitutional.

To state the question in another form, guided by the opinion of the Supreme Court, I only believe that Art. 3863, both as it is amended by the Act of 1899, page 21, and as it appears in the Revised Statutes of

1895, and the various legislation thereon, is unconstitutional, because fixing the term of office for a longer time than two years, and that the legislation, and these sections only with reference to the University which fix the term of office of the Regents at a longer period than two years, is unconstitutional, and that this unconstitutionality of these sections, regarding both sets of said officers, does not render the other legislation with reference to said institutions unconstitutional and therefore void.

Answering your second question as to the necessity of immediate legislation to conform the tenure of office of these officers to the Constitution—as to whether or not this legislation should be in advance of the next regular session of the Legislature—I cannot see any pressing necessity, other than the tenure of office, and the title thereto, of the Board of Regents and the Directors of the Agricultural and Mechanical College, should be legal and fixed. Unless some person should sue for some of these offices, who has, or could have, a legal title to it, the present management could not be disturbed, unless, on the other hand, the State should question their tenure by information in the nature of a quo warranto. So far as I am concerned, I do not believe it to be the policy of my department, if there should not be immediate legislation, to disturb the conditions, or to interfere with the even management and government of either institution, but it occurs to me, that in view of the fact that both of these bodies do so many acts and transact so much business, that there should be legislation upon it, and that the sooner the legislation is had the better for the State. The Board of Regents now, in addition to their many other duties, have control both in the leasing and selling of all of the public lands that belong to the University, and unless there is some remedy they might be embarrassed in the control and sale of their lands.

I should say further, that the acts of the Board of Regents and the Board of Directors are the acts of *de facto* officers. I do not believe there is any question but what both the Regents and Directors are *de facto* officers, and, therefore, their acts could not be collaterally attacked, and would, therefore, be valid.

Yours truly,

T. S. SMITH,
Attorney General.

SPECIAL DISTRICT JUDGE.

The Constitution confers the right upon the parties to a cause to agree upon or select a special judge in case of the disqualification of the regular judge, and the Comptroller is authorized to draw his warrant on the Treasurer for the payment of such special judge.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, February 16, 1900.

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

DEAR SIR: This department is in receipt of a letter from you of recent date, to the following effect: "I enclose herewith a letter from

Hon. R. W. Stayton, of Corpus Christi, wherein you will observe he raises a constitutional question as to the absolute and primary right of parties litigant to agree upon a special judge without regard to the requirements of Arts. 1069 and 1070, Revised Statutes, as amended by the Twenty-fifth Legislature in 1897.

"Without regard, however, to the question of such primary right claimed by virtue of the constitutional provision cited by Mr. Stayton, the material inquiry on the part of this office is whether the Comptroller would be authorized to issue warrant upon the State treasury in payment for services rendered as a special judge under and by virtue of said constitutional provision, and without observance of the requirements of said Arts. 1069 and 1070. I will thank you to advise this department in the premises."

From the papers submitted, it appears that the judge of the District Court of Cameron county, Texas, was disqualified in several criminal cases pending in his court, and that, therefore, without any attempt to comply with the provisions of Arts. 1069 and 1070, Revised Statutes as amended by the Act of 1897 (see Acts 1897), the State, acting by the district attorney, and the defendants by their respective counsel, agreed upon and selected R. W. Stayton as special judge to try said cases. Said Stayton qualified under the agreement selecting him, and as special judge presided at the trial of said cases. For this service he presented to you his account sworn to and certified by the district clerk. Not having been selected such special judge in the manner as required by the said Act of 1897 amending Arts. 1069 and 1070, Revised Statutes, you desire to know if you should issue a warrant on the Treasurer for the amount due for such services.

Under Art. 1069, of the Revised Statutes, prior to said amendment, when the regular judge was disqualified, the parties to a cause were given the right in the first instance to agree upon a special judge for the trial of a cause, but if the parties failed to agree, then the judge certified his disqualification to the Governor who in that event appointed a special judge to try such case.

The Act of 1897 (see Acts 1897, p. 39) amended said Art. 1069, by providing in the first instance that the disqualified judge should certify his disqualification to the Governor, whereupon the Governor was required to cause an exchange of the judges for the trial of such cases as the judge of the district was disqualified in, and the parties to a cause were only given the right to select or agree upon a special judge when the exchanging judges failed to attend the court, etc.

It will be observed that under the old law the parties had a right to agree upon a special judge in the first instance, while under the amendment such right was made to depend upon the failure of the regular judges to exchange districts as directed by the Governor.

Section 11, Art. 5, of the Constitution reads: "When a judge of the district court is disqualified * * * the parties may, by consent, appoint a proper person to try said causes; or, upon their failure to do so, a competent person may be appointed to try the same in the county where it is pending, in such manner as may be prescribed by law. And the district judges may exchange districts, or hold courts for each other when they may deem it expedient, and shall do so when required by law."

Section 16, of Art. 5, of the Constitution reads as follows: "* * * When the judge of the county court is disqualified in any case pending in the county court the parties interested may by consent appoint a proper person to try said case, or, upon their failing to do so, a competent person may be appointed to try the same in the county where it is pending in such manner as may be prescribed by law."

In the case of Parker County vs. Jackson, 5 Civil Appeals, 31, the above provisions of the Constitution were construed. In that case a special judge was appointed in a case in the county court, after the constitutional provision as to the county court was adopted, it being an amendment, but before there was any legislation as to the same. It was held: "We see no necessity for legislation to put in force that part of the Constitution above quoted, which authorizes the parties in such cases to appoint a judge by consent, and we, therefore, hold the proceeding in the court below in this respect regular."

I am clearly of the opinion that the Constitution confers the right upon the parties to a cause, in the first instance, in case of the disqualification of the regular judge, the right to agree upon or select a special judge. That the Hon. R. W. Stayton was selected, as such special judge, and that his acts as such were lawful and as binding as those of the regular judge. He was selected in accordance with the Constitution.

In the general appropriation bill passed by the Twenty-sixth Legislature, p. 277, we find the following appropriation: "For salary of special judges, $1500" for each year. This appropriation is for pay of special judges without words of qualification or limitation. As Judge Stayton was constitutionally selected, and acted, as a special judge, he certainly comes within the above appropriation. There being nothing in the appropriation bill to exclude him he must certainly come within it. If the Legislature intended to confine the appropriation to any particular special judges it should have said so, and not used such broad and comprehensive terms, without qualification or limitation. I am confirmed in this view of the law by the fact that the Twenty-sixth Legislature, in 1899, notwithstanding the amendatory act of 1897, made an appropriation to pay special judges who had been selected by the parties in disregard of said amendment of the law. In the deficiency appropriation made by the last Legislature we find the following:

"Pay of Special Judges.

"Under Arts. 4841 and 4842, Revised Statutes of 1895, commissioned by the Governor, *and also for special judges elected by the bar, or agreed upon by the parties or their attorneys*, and pay of special judges of the Courts of Civil Appeals for the two years ending February 28, 1899, $15,000—$15,000." See Acts of 1899, p. 31.

The Legislature in 1897 made no appropriation for special judges, yet, in 1899, the Legislature paid special judges appointed as was Judge Stayton, for services rendered after the amendatory act of 1897 was passed. I am of the opinion that Judge Stayton is entitled to be paid, and that you are authorized to draw the proper warrant on the Treasurer for that purpose. I return herewith the correspondence enclosed by you.

Yours very truly,

R. H. WARD.
Office Assistant Attorney General.

CONTEST OF LOCAL OPTION ELECTION.

Violation of law to sell intoxicating liquors during the pendency of a contest of a local option election, duly and properly declared, by the commissioners court, voted to prohibit the sale of intoxicating liquors.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, March 20, 1900.

Mr. R. H. Zane, County Attorney, Midland, Texas.

DEAR SIR: Your letter of recent date, addressed to the Attorney General, has been duly received. On account of the great number of cases before the Court of Criminal Appeals, in which the State was being represented by Mr. R. A. John, Assistant Attorney General, he returned the inquiry to this department for consideration and answer. You state that in a recent election, on the question of local option, Midland county, according to the result as duly and properly declared by the commissioners court, voted to forbid the sale of intoxicating liquors; that within the time prescribed by Art. 3397, Revised Statutes 1895, a contest was filed to judicially try and determine the result of said election. It further appears that the proper notice for four successive weeks was published in a newspaper of the county, giving the order of the court declaring the result and prohibiting the sale of intoxicating liquors. You wish to know if pending the contest of the election it is a violation of law to sell intoxicating liquors.

It appears that the question has never been judicially determined in this State, nor am I able to find a decision of any other State directly in point.

Article 3396, Revised Statutes, is as follows:

"When any such election has been held and has resulted in favor of prohibition, and the aforesaid court has made the order declaring the result, and the order of prohibition, and has caused the same to be published as aforesaid, any person who shall thereafter, within the prescribed bounds of prohibition, sell, exchange or give away, with the purpose of evading the provisions of this title, any intoxicating liquors whatsoever, or in any way violate any of the provisions of this title, shall be subject to prosecution, by information or indictment, and shall be punished as prescribed in the Penal Code."

This article and the one following, which latter provides for the contest of the election, have been on the statute book together since 1887. When the commissioners court has counted the vote, declared the result as in favor of prohibition, and made an order according to Art. 3390, and such order has been duly published, every prerequisite to the going into operation of the law has been complied with. Now, "any person who shall *thereafter*" is the language used to express the time when one may be guilty of violating the law: not *thereafter* unless a contest is filed, but absolutely. The order entered is of binding force until the proper judicial tribunal declares otherwise, or "until such time as the qualified voters therein may at a legal election, held for that purpose, by a majority vote, decide otherwise." The intention of the law is to allow, as far as possible, the exercise of local self-government. Whenever the major-

ity of the voters has declared its will for a certain condition of affairs, that will should be allowed to prevail. As has been declared by our Supreme Court in a recent decision: "The object of a popular election is that the will of the greater number of the voters may prevail. * * * Hence the important matter in every election is that the will of the voters should be fairly expressed, correctly declared, and legally enforced. Compared to this, the question as to the manner and time of ordering the election is of trivial moment." 53 S. W. Rep., 574. This being the true doctrine, that condition of police regulation should be legally enforced which evidences the fairly expressed will of a majority of the voters. "The burden of proof is always upon the contestant or the party attacking the official returns or certificate. The presumption is that the officers of the law, charged with the duty of ascertaining and declaring the result, have discharged that duty faithfully." Section 306, McCrary on Elections. This is but another way of expressing the doctrine that a public officer is always presumed to have done his duty. I do not think the language of the dissenting judge in the case of McDaniel vs. State, 32 Tex. Cr. Rep., 21-22, should be a guide for our decision of the question propounded. It is not to be presumed that the Legislature intended to make two classes of cases under Art. 3397, viz.: one class where the contest is filed before completion of the time of publication, four successive weeks or twenty-eight days; the other class where the contest is filed after the time for publication has expired, but before the expiration of the time within which the contest may be filed, viz.: within thirty days. In the first class of cases, according to the opinion of the dissenting judge, the filing of the contest *ipso facto* suspends the operation of the law, "for the publication not being completed, the law cannot be enforced." In the latter class of cases, the law having taken effect at the expiration of twenty-eight days after the first publication is in full force and effect, notwithstanding a contest is pending, filed according to law. If local-option is in force at the time of the election and the result of the election shows, by the order of the commissioners court, that a majority of the voters still favor prohibition, the previous condition of local option continues as a result of the first election, regardless of the four weeks publication of the result of the last election. If this second election results against prohibition, the previous condition of local option continues until the commissioners court have met, counted the vote, entered the order declaring the result and setting aside the previous order enforcing prohibition. If local option was not in force at the time of the election, and the result of the election shows a majority of the voters is in favor of prohibition, the law goes into effect after the commissioners court has entered an order declaring the result and prohibiting the sale of intoxicating liquors and said order has been duly published twenty-eight full days, notwithstanding the filing of a contest. Suppose one who up to the time of the election has been engaged in the sale of intoxicating liquors, desires to continue such sale, notwithstanding the order of the commissioners court prohibiting such sale. He does so and is indicted. He may in his defense show the validity of the election and consequently that the law is not, as a matter of fact, in operation. Every one is bound to observe the penal law of his country until it is properly declared unconstitutional, or decide that it was not in fact

operative at any time, otherwise he acts at his peril. Suppose that pending a contest one pursues the business of selling intoxicating liquors upon the principle that pending a contest the law is inoperative. The contest is not decided, for instance, till the end of twelve months. The district court, as also the Court of Civil Appeals, holds with the commissioners court and declares that prohibition carried. Now, when does the law go into operation? From the time of the decision of the court, or does it relate back to the end of the twenty-eighth day after the first publication? The people were entitled to that condition of affairs which exists in a local option territory, but they have been deprived of this right by the opposition of one man in the form of a contest proceeding. If local option prevail at the time of and prior to the election, and the result, as declared by the commissioners court, is against prohibition, this makes out a prima facie case sufficient to justify one in pursuing the business of selling intoxicating liquors, notwithstanding some one in favor of prohibition should file a contest. I do not think he would, in the meantime, have violated the law by such selling, although, upon a full judicial investigation, the result showed that prohibition carried. There must be some definite point of time fixed upon at which penal laws become operative. We know of no better rule than to let the declaration of the commissioners court make out the prima facie case which fixes the status as to the sale of liquors within the prescribed territory. This reasoning follows the analogy of a contest for an office. The person who holds the certificate of election is prima facie the true and proper office holder, entitled to the privileges thereof, until it is otherwise determined upon a proper judicial inquiry. In most States injustice to the properly elected officer is prevented by requiring a sufficient bond on the part of the contestee. The fact that no provision has been made by the Legislature to prevent financial loss to one deprived of business during pendency of the election contest, where it is finally determined that prohibition did not carry, and hence persons were entitled to sell intoxicating liquors, does not alter the question. Selling such liquor is not an inherent right of any one. It is a matter of police regulation and very strict regulations as to both the person and property of the citizen have been upheld on this ground. Some inconvenience necessarily follows upon the enactment of such laws as the foregoing. But we are not able to say that pending a contest the inconvenience and financial loss to a few persons should outweigh the more serious considerations of good order and morality of the community which are necessarily involved in such a determination.

You are, therefore, advised that until it is otherwise judicially determined, it is the opinion of this department, that pending a contest of a local option election, the result, as declared by the commissioners court, should prevail.

Yours very truly,

D. E. SIMMONS,
Office Assistant Attorney General.

MUTUAL FIRE INSURANCE COMPANIES.

Mutual fire insurance companies have no authority to issue standard policies limiting the liability of policy holders.
Difference between mutual insurance and old line insurance discussed.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, April 27, 1900.

Hon. Jefferson Johnson, Commissioner, etc., Austin, Texas.

DEAR SIR: I have your communication of recent date, stating to this department that since our opinion to you of February 2, 1900, several companies who hold charters granted under the Acts of 1897, Subdivision 50, on page 192, are writing and delivering standard fire insurance policies, whereby they promise to pay a stipulated sum for a level premium; said policy being in all things what we understand and know as a standard fire insurance policy, with the addition that they contain a clause or have a printed by-law upon it substantially stating that the insured, by accepting the policy, becomes a member of the company, and as such shall be governed by the by-laws of the company and be entitled to the privileges and benefits therein provided for. You ask whether such companies have authority to write policies such as that which has been exhibited to us and referred to in your communication.

Upon inspection, I find that policies issued by several companies which hold charters under the act above referred to of 1897 are substantially old line fire insurance policies, such as are issued by stock companies, or what we understand in insurance parlance as old line fire insurance companies.

A proper consideration of the question which you submit, and the question that I shall pass upon, involves a construction of said Act of 1897, Subdivision 50, as found on page 192, Acts of 1897. This is all the legislation in this State on the subject of mutual fire insurance companies.

In order to understand what the Legislature means and intends by a regular fire insurance company, or rather by a company which is not a mutual fire insurance company we may and should look to Title 58 of the Revised Statutes of 1895, from pages 583 to 603, inclusive. Therefore, there is no difficulty in determining whether a fire insurance company which pretends to be incorporated under the said last cited law is doing business as provided by law; but I confess that the question is more difficult of solution when it is presented as to whether or not a company incorporated under the above Act of 1897, as a mutual company, is doing business according to law.

A mutual insurance company is one in which the members mutually contribute to the payment of losses and expenses where the benefit to accrue or indemnity is conditioned in any manner upon the persons holding similar contracts; such companies differ essentially from stock insurance companies. The former need many by-laws and conditions that are not required in stock companies, and each person who insures therein becomes a member of the association. Joyce on Insurance, Vol. I, Sec. 340; Baxter vs. Chelsea Mutual Fire Insurance Company, 1 Allen (Mass.), 294.

You are respectfully advised that in my opinion a company organized as a mutual fire insurance company cannot issue a policy to its members limiting their liability for such policy to a fixed or stated or level premium for a specified length of time; that is, that it cannot issue a standard fire insurance policy for a stipulated premium, and either in its by-laws or otherwise limit the liability of the policy holder to a specified sum of money for a stated time. This involves the distinctive feature between a stock company and a mutual company.

In Vol. 16, American and English Enc. of Law, p. 19, it is said:

"Notwithstanding their ancient origin, the idea of co-operative insurance had not become a matter of considerable and general importance until within the last twenty-five years, and as a subject of litigation in the courts such contracts had attracted but little attention until within ten years."

I find in discussing this question with the gentlemen who are operating some of the mutual companies in Texas that great reliance is had upon the case of the Union Insurance Company vs. Hogue, 21 Howard, p. 35. Some of the text-books refer to this authority for the position that policy holders may execute a note for a stated amount in consideration for a policy issued by a mutual company for a certain sum for a stated time. The parties who are operating, or propose to operate, mutual companies in Texas also rely upon this authority to sustain the above proposition. But upon an examination of said case it is found that the general act of New York conferring the power upon the companies organized under it to make contracts of insurance against fire and issue policies, provides for a certain amount of capital stock ($100,000) secured by premium notes upon engagements of insurance entered into by the companies as a condition to the right of commencing the business of insurance. This capital stock thus obtained is essential to a complete organization under the act; for, without it, the corporation is forbidden to enter upon the business of insurance. This preliminary engagement and the giving of premium notes is designed as an immediate security to those who, confiding in the responsibility of the company, should make application for insurance on its going into operation. The notes thus constituting capital are to be made payable at or within a year from their date, and they may be made payable, therefore, within the terms of the act, on demand, or at any other period; and they are made negotiable and collectible for the payment of any losses which may occur in the business of insurance or otherwise. These premium notes required by the act of New York were expected and intended to take the place and to act as capital of the company, therefore the contention is made that although a company is doing a mutual business it may take cash payments for the policies for a specified sum for a stated time, but this is especially required by the said act of New York which provides for the organization of mutual insurance companies.

The law of this State above cited provides that the members of said mutual fire insurance companies applying for such charter shall be resident citizens of the State of Texas; and it further provides that such companies shall be without an authorized capital stock. I wish to call especial attention to the fact that the act of Texas provides for incorporation of the *members* of said mutual fire insurance companies.

In May on Insurance, Vol. 2, Sec. 548, it is said:

"The principle which lies at the foundation of mutual insurance and gives it its name, is mutuality; in other words, the intervention of each person insured in the management of the affairs of the company and the participation of each member in the profits and losses of the business in proportion to his interest. Each person insured becomes a member of the body corporate, clothed with the rights and subject to the liabilities of a stockholder. He is at once insurer and insured."

In the same authority in Sec. 146, it is stated:

"Mutual insurance, it is truly observed, is essentially different from stock insurance, and most of the litigation which had grown out of this species of insurance has been owing to the inattention to this difference. Its original design was to provide cheap insurance by means of local assessments, the members of which should insure each other. Such associations are in their nature adapted only to local business. They need many by-laws and conditions that are not required in stock companies, and it is necessary and equitable to each person who gets insured in them should become subject to the same obligations towards his associates that he requires from them towards himself. If the officers have discretionary power as to the terms of the contract, or even as to its form, it is obvious that different parties may become members upon different terms and conditions, and thus the principle of mutuality will be completely abrogated."

In discussing the necessity that there should exist mutuality, in the case of Mutual Benefit Company vs. Jarvis, 22 Conn., 133, 145, the court says:

"This makes between all the members that mutuality in regard to profits and losses which was contemplated by the charter and the organization of the company; and if the company can collect such notes as it pleases without making an equal assessment on all, it is clear that there is an end to everything like mutuality."

It is well to bear in mind that the companies doing business in Texas provided in the policies that if the premiums collected for a certain year exceeded the losses that the excess shall be returned to the members paying it *pro rata;* but no provision is made in any of the policies or the by-laws of these companies doing business in Texas that if the losses exceed the premiums collected that then the members shall contribute *pro rata* to pay the losses. On the contrary, some of the policies have printed upon them this clause in the by-laws: "No member or members shall be personally or individually liable for losses or expenses or any indebtedness of the company to an amount except to the extent of one year's premium on the policy or policies held by him, less the cash payment made by him on the same. A member whose premium has been fully paid in cash shall have no liability whatever."

In discussing a company organized on this plan I desire to quote from the Supreme Court of Ohio somewhat at length in the case of the State ex rel. vs. Monitor Fire Insurance Association, which is reported in the

42 Ohio, p. 555. After reviewing the facts and stating the case fully, it is said:

"The 'annual deposit' required is but another name for annual premiums. If these annual deposits exceed the necessary expenses and losses during a given year, they are treated as 'savings' out of which dividends are made to those who may then be members. As a consequence, if the annual deposits exceed the expenses and losses, there is a net profit to be divided or carried forward each year, derived from those who may not be members the next year, but if expenses and losses exceed the receipts from such source for a given year, the deficit becomes a burden upon succeeding members equally with those who were members when the loss occurred, and so continued. Those who were members when the loss occurred, and ceased to be such before the deficit was ascertained, were free from this burden. * * *

"Something has been said in argument in favor of the comparative merits of the system of insurance based upon this plan for annual deposits in advance. We are not called upon to consider or determine the comparative merits of the various plans upon which companies are organized for insurance. The assessment plan authorized by the statutes under review has been thought by the law-making power to be worthy of adoption in this State. It, doubtless, has its merits, and is entitled to equal regard before us with any other plan sanctioned by law. While it may be wise, prudent and within the scope of its authority to require prepayment of a premium or annual deposit by members, to be covered by specific assessments to pay expenses and losses which occur while they are members, yet the scheme before us which requires such annual deposit from those who are then members to accumulate a fund to pay losses after they have ceased to be such, or before they become members, is not insurance upon the assessment plan, but upon the general plan of stock companies."

I have considered these questions, and have discussed them very fully with some of the gentlemen who are operating and managing what they believe to be mutual fire insurance companies, but in none of these policies, and in none of the by-laws of the various companies do I see that *mutuality* which is necessary in order to constitute them *mutual* insurance companies, as intended by our law. I have not seen any policy yet, or any proposed policy by any of the so-called mutual companies which I believe to be legal, or a valid policy which is authorized by the laws of this State, and by the articles of incoporation under which said companies are chartered.

I believe it is due to those who are engaged in the incorporation and management of these companies in Texas to say that I find nothing to impeach their integrity and good faith, yet I am compelled to hold that they have misinterpreted the provisions of the law providing for insurance on the mutual plan as authorized by the act of Texas above referred to, and that they have been doing business upon a plan unauthorized by the laws of this State.

Yours very truly,

T. S. SMITH,
Attorney General.

The Commissioner of the General Land Office, under Chapter 11, Acts Special Session Twenty-sixth Legislature, has no authority to have surveyed, or to accept surveys made by others under this act, of tracts of land containing more than 2560 acres not situated in either of the seventeen counties named in Section 3 thereof.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, June 10, 1900.

Hon. Chas. Rogan, Commissioner General Land Office, Austin, Texas.

DEAR SIR: This department is in receipt of a letter from you of date June 7, 1900, asking the advice and opinion of this department as to the construction of certain provisions of the act of the Special Session of the Twenty-sixth Legislature, approved February 23, 1900, being Chap. XI, acts of said special session, the purpose of which, as declared by Sec. 1 of the act, was to adjust and settle finally the controversy between the permanent school fund and the State of Texas growing out of division of the public domain.

The act sets apart and grants to the school fund four million, four hundred and forty-four thousand one hundred and ninety-five acres, or all of the unappropriated public domain, and provides for the sale thereof.

You ask to be advised by this department as to your authority to have surveyed, or to accept surveys made by others under this act, of tracts of land containing more than 2560 acres not situated in either of the seventeen counties named in Sec. 3 of the act.

Sec. 3 of said act is as follows:

"Sec. 3. All lands set apart and appropriated by this act shall immediately become a part of the permanent school fund, and when surveyed or sectionized, as herein provided, and classified and valued by the Commissioner of the General Land Office, shall be subject to sale in the manner now provided by law for sale of surveyed school lands, except where otherwise provided by this act. Tracts of unsurveyed land, containing more than twenty-five hundred and sixty acres shall be surveyed and sectionized under the direction of the General Land Office before being placed upon the market for sale in the following named counties, towit: Andrews, Crane, Ector, El Paso, Gaines, Loving, Reeves, Ward, Winkler, Cochran, Hansford, Hartley, Hockley, Kent, Lynn, Sherman and Terry; provided, said land may be leased without being sectionized, classified and surveyed; and provided further, that said land when leased or sold shall be leased and sold on the same terms, conditions and limitations as now provided by law for the sale and lease of other school land."

This section is susceptible of but one construction; that is, that the lands referred to in Sec. 1 shall be subject to sale, after having been surveyed and sectionized in the manner provided in the act, and that tracts of over 2560 acres in the counties named shall be surveyed and sectionized under the direction of the Commissioner of the General Land Office.

To carry out this special provision as to surveying and sectionizing tracts of over 2560 acres in said counties, Sec. 4 authorizes the Commissioner of the General Land Office to employ such number of surveyors as he shall deem necessary to survey, sectionize and return field notes to the General Land Office of such lands.

The authority of the surveyors which the Land Commissioner is here authorized to employ is confined to the work of surveying and sectionizing tracts of over 2560 acres in the seventeen counties named in Sec. 3. They would have no authority, by virtue of the employment here provided for to survey and sectionize any other of the lands referred to in the act.

Sec. 6 provides for the surveying and sectionizing of tracts of 2560 acres or *less* of any of said land wherever located, such surveying to be done by the surveyor of the county or district, as applications to purchase are made, under the direction of the Commissioner of the General Land Office, and at the expense of the person making the application to purchase. Evidently this provision in Sec. 6 does not apply to or provide for the surveying or sectionizing of tracts of over 2560 acres.

These are the only two provisions of this act which provide for the surveying and sectionizing of the land referred to in the act. One embraces tracts of over 2560 acres in the seventeen counties mentioned in Sec. 3, and the other embraces all tracts of 2560 acres or less wherever located. Neither embraces tracts of over 2560 acres elsewhere than in said seventeen counties.

The latter part of Sec. 1, after providing for the employment of surveyors by the Commissioner of the General Land Office to survey and sectionize tracts of over 2560 acres in the counties mentioned in Sec. 3, and in immediate connection therewith, has this provision:

"For the purpose of surveying and sectionizing *any* unsurveyed land there is appropriated the sum of ten thousand dollars, or so much thereof as may be necessary, out of any moneys not otherwise appropriated, to be expended by the Commissioner of the General Land Office."

If it be granted that by the words "*any* unsurveyed lands," the Legislature intended to embrace not only tracts of over 2560 acres in the counties mentioned in Sec. 3, but also such tracts wherever located would such construction, by implication or inference, carry with it authority to the Commissioner of the General Land Office to have surveyed and sectionized tracts of over 2560 acres located elsewhere than in said counties. We think not. If such survey was elsewhere provided for, these words in this connection would probably authorize the expenditure of the appropriation provided in paying therefor, but by no sort of construction can this provision making the appropriation be held to provide for the surveying and sectionizing of tracts of over 2560 acres outside of the counties named, or authorize the Commissioner of the General Land Office to have such work done.

We can find, outside of this act, no provision in the general statutes with reference to the public domain, or the public school lands, and the duties and powers of the Commissioner of the General Land Office in connection therewith that would authorize or empower him to have lands referred to in this act surveyed and sectionized, or which provides the machinery therefor. Even if there was a provision in the general statutes which would authorize the Commissioner of the General Land Office to have these tracts surveyed and sectionized, would it be a compliance with the conditions in Sec. 3 that the lands shall be surveyed and sectionized as "*provided herein*" to have them surveyed and sectionized under such provision of the general statutes? We think not.

It is true that the act provides specifically that these lands shall be "surveyed and sectionized as herein provided" as a condition precedent to their being "subject to sale," and it may be that the result of the conclusions at which we have arrived in the construction of this act will be to prevent the sale of lands out of tracts of over 2560 acres outside of the counties named in Sec. 3 until the Legislature shall provide for the surveying and sectionizing of such tracts. Yet such result seems to us to be rendered unavoidable by a proper construction of the act in question. You say in your letter:

"The intent of the framers of the bill, as well as the intent of the Senate and House committees having the bill in charge, was, as I understood it at the time, that all of the unsurveyed land should be surveyed and put on the market for sale under certain limitations under this act, and without the necessity of future legislation."

This is doubtless true, and it is unfortunate that (by oversight or otherwise) this intention was not carried into effect in the particular matter which is the subject of your inquiry and of this opinion.

Should you undertake to have these tracts of over 2560 acres, in any counties except those named in Sec. 3, surveyed and sectionized, either by the surveyors of the county or district or surveyors employed by you, as in case of such tracts in said counties, or by accepting and adopting surveys made by persons desiring to purchase, there would be always a serious doubt whether this would be a compliance with the provision that these lands should be surveyed and sectionized, "as provided in this act," before becoming "subject to sale," as provided in Sec. 3. Titles of purchasers under such circumstances would be in doubt, contests would inevitably arise between such purchasers and those making application to purchase after the Legislature should have, by amendment or further legislation, cured the defect in the law, and probably between such purchasers and persons at present holding the lands under lease.

These evils, we think, can only be avoided by adhering to the law "as it is written," and keeping within its plain provisions until such time as the law-making power shall provide for surveying and sectionizing these tracts.

We, therefore, in response to your inquiry, advise you that, in the opinion of this department, you have no authority to have surveyed, or to accept surveys made by others under this act, of tracts of land containing more than 2560 acres not situated in either of the counties named in Sec. 3 of the act.

Since writing the foregoing opinion we have seen a published circular issued by you entitled "New Land Law.—Effective May 23rd, 1900. Instructions," in which occurs the following:

"No body or tract of land containing *over* 2560 acres in any county other than those named in this paragraph (being the seventeen counties named in Sec. 3 of the act), can be surveyed or sold until authorized by future legislation, because under my construction of the law the Commissioner has no power to make a sale out of such a tract; therefore, no application, or a survey based thereon, will be filed or accepted in the Land Office, but if received will be returned."

This construction placed by you on this act is in accordance with the conclusions at which we had arrived, as embodied in the foregoing opinion.

Very truly yours,

T. S. REESE,
Office Assistant Attorney General.

The county named as "Hutchins county" in the Act of July 14, 1879 (Chapter 52, p. 48, S. S.), and amendment thereof of March 11, 1881, is to be taken as meant for "Hutchinson county."

ATTORNEY GENERAL'S OFFICE,
AUSTIN, June 12, 1900.

Hon. Chas. Rogan, Commissioner, Austin, Texas.

DEAR SIR: This department is in receipt of yours of the 9th inst., which is as follows:

"After the passage of the Act of July 14, 1879, Chap. 52, p. 48, special session, and the amendments thereto passed March 11, 1881, Chap. 33, p. 24, there were many certificates located on public domain in Hutchison county. Some have been patented while others have not. I would thank you for your opinion as to the validity of said locations, and whether or not I should issue patents on the unpatented claims in said county where everything else is regular. In this connection I beg to call your attention to the spelling of that county in the printed Act of 1879 as being Hutchins and not Hutchinson. An inspection of the original and enrolled bills of the Act of 1879 has not been had, but an inspection of these bills of Act of 1881 reveals the fact that this county was spelled Hutchins, while the printed Act of 1881 spells it Hutchinson. There does not appear to be any other county of similar name. File No. 50,579, Bexar Scrip."

I have examined both of the enrolled bills to which you refer in the office of the Secretary of State; that is, the original Act of July 14, 1879, and the amendatory Act of March 11, 1881. In both of these enrolled bills the name of the county referred to is written "Hutchins." In the printed Act of 1879 the name of the county also appears as "Hutchins," while in the printed Act of 1881 it appears as "Hutchinson." There is no such county in Texas as "Hutchins." In case of variance between the published act and the enrolled bill, duly signed, approved and certified, the rule is that the enrolled bill is conclusive as to the terms of the act as passed, so it must be conceded that the name of the county appears as "Hutchins" in the Act of 1881, notwithstanding it is printed "Hutchinson" in the published act.

By reference to the map it will be seen that the territory covered by the provisions of this act includes every county (except Hutchinson) north of and including Andrews, Martin, Howard, Mitchell and Nolan, and west of and including Fisher, Stonewall, King, Cottle, Childress, Collingsworth, Wheeler, Hemphill and Lipscomb (with the exception also of Dallam in the extreme northwest corner of this territory, and of the State, which is left out of both bills). In the tier of counties named in the act which includes the county of Hutchinson, the counties are

named in the act as follows: Hemphill, Roberts, "Hutchins," Moore, Hartley. From the collocation of the counties in the act, in connection with their collocation on the map, it is perfectly clear that the county named as "Hutchins" is intended for Hutchinson county. And the name of "Hutchins" is a clerical error. Should this mistake be allowed to defeat the plain intention of the Legislature?

In view of the fact that there is no such county as "Hutchins" in the State; that in this act "Hutchins" is placed exactly where Hutchinson county would have been placed if by "Hutchins" the Legislature meant Hutchinson, and that in the published Act of 1881 the name is given as "Hutchinson," it is not possible that any one could have been misled as to the intention of the Legislature to include Hutchinson county in the provisions of this bill.

You say that the locations as to which you inquire were made after the passage of the amendatory Act of the 11th of March, 1881, which, in the published act gives the name of the county as "Hutchinson."

We think we are justified in treating the name of "Hutchins" (as the name of the county included in this act) as a clerical error,—clearly intended for "Hutchinson," and under this rule of construction Hutchinson county is included in the provisions of the act to which you refer.

Land in this county, then, not being subject to location of certificates at the time you say the certificates as to which you inquire were located, such locations were void and patents should not issue.

Yours very truly,

T. S. REESE,
Office Assistant Attorney General.

Under Article 1264, Revised Statutes, defendants in a delinquent tax suit cited by publication are allowed until appearance day of the term next succeeding that to which the citation is returnable to file answer.

The court is required to appoint an attorney to represent defendants cited by publication in tax suits in which no answer is filed, and tax the attorneys' fees as costs.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, July 3, 1900.

Hon. J. M. Smithers, Judge 12th Judicial District, Huntsville, Texas.

DEAR SIR: This department is in receipt of yours of the 23rd ult. wherein you request an opinion upon the following points:

1st. Whether in a suit for delinquent taxes by the State under the provisions of the Act of the Twenty-fifth Legislature, Chapter 103, where defendants are cited by publication, defendants are allowed until appearance day of the term next succeeding that to which such citation is returnable to file answer as provided in Art. 1264, Revised Statutes.

2nd. Whether the court in such case is required to appoint an attorney ad litem to represent such defendants, where no answer is filed, as provided in Art. 1346, Revised Statutes.

3rd. Whether in such cases the court can allow such attorney ad litem compensation to be taxed as costs.

Section 15, Chap. 103, Acts of the Twenty-fifth Legislature, after providing for service by publication, in a newspaper (or by posting), in suits for delinquent taxes where the owners of the property are non-residents of the State, or unknown, provides: "And such suit after publication shall be proceeded with as in other cases."

Under the last provision, above cited, it is the opinion of this department:

1st. That in such cases (as provided in Art. 1264, Revised Statutes) the defendants are allowed until apearance day of the term next succeeding that to which the citation is returnable to file answer.

2nd. That (as provided in Art. 1346, Revised Statutes) where no answer is filed by the defendants within the time prescribed, the court is required to appoint an attorney to defend the suit, and that a statement of the evidence, etc., should be filed as provided in said article.

3rd. That the court is authorized to allow such attorney reasonable compensation for his services, to be taxed as part of the costs.

Article 1212, of the Revised Statutes of 1879 (Act November 9, 1866), is as follows:

"Art. 1212. In all suits where the defendant is cited by publication, and no appearance is entered within the time allowed for pleading, the court shall appoint an attorney to defend in behalf of such defendant, and shall allow such attorney a reasonable compensation for his services, to be taxed as a part of the costs of the suit."

This article does not appear in the published code of 1895, nor is there in that code, as published, any provision authorizing the compensation of an attorney ad litem for defendants cited by publication.

Reference, however, to the enrolled bill, adopting the Revised Statutes of 1895, in the office of the Secretary of State, discloses the fact that Art. 1212, as above given, is a part of the Revised Statutes of 1895, as adopted by the Legislature, and that its omission in the published code is an error of the publishers. In the edition of Texas Civil Statutes by John Sayles, the article given above is omitted, and it is stated in a note to Art. 1211 that Art. 1212 is omitted by the codifiers. In Batts' edition of the Civil Statutes this Art. 1212 is inserted with a note to the same effect.

The article was not omitted by the codifiers, as shown by the enrolled bill, approved and signed, and filed with the Secretary of State; but by mistake was omitted in the publication of the code. This article is still the law, notwithstanding its omission from the published code of 1895, and its provisions apply to suits for delinquent taxes against defendants cited by publication.

Section 9 of the Act of 1897 (Chapter 103, Acts of the Twenty-fifth Legislature), above referred to, providing for certain costs in tax suits and fixing the amount thereof, is not intended, we think, to exclude all other costs except those items therein provided for (except as therein stated).

An opinion upon these points, to some extent differing from the views here expressed, was given by this department in 1899, but was predicated largely upon the conclusion that Art. 1212 of the Revised Statutes of

1879 had been repealed by its omission from the Revised Statutes of 1895. Further investigation, made in preparing this opinion, discloses this to be a mistake as herein explained, and requires a revision of the opinion herein referred to.

Very truly yours,

T. S. REESE,
Office Assistant Attorney General.

TERMINAL RAILWAY COMPANIES.

The Beaumont Wharf and Terminal Company, in the matter of issuing bonds, is subject to the supervision and control of the Railroad Commission, as provided in the stock and bond law.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, July 30, 1900.

Hon. J. H. Reagan, Chairman Railroad Commission, Austin, Texas.

DEAR SIR: This department is in receipt of your communication of the 20th inst., which is as follows:

"Under the charter of the 'Beaumont Wharf and Terminal Railway,' an application is being made to the Railroad Commission of Texas by said company for authority to issue stocks and bonds, as provided for in the act of the Legislature of April 8, 1893, commonly designated as the Stock and Bond Law.

"Subdivision 53, Art. 642, of the Revised Statutes of Texas, provides for:

"'The construction, maintenance and operation of terminal railway companies, said companies to have no right to charge other railroads for terminal facilities beyond what may be prescribed by the Railroad Commission.'

"Article 4562, of the Revised Statutes, makes it the duty of the Railroad Commission to 'adopt all necessary rates, charges and regulations to govern and regulate railroad freight and passenger tariffs.'

"The question we present, and upon which we ask your opinion, is: Does this article so control Subdivision 53, of Article 642, as to warrant this Commission in giving authority to said corporation to issue stock and bonds. Or do the following words in said subdivision, towit: 'Said companies to have no right to charge other railroads for terminal facilities beyond what may be prescribed by the Railroad Commission,' confer the only power of the Commission over such corporations, and leave them, like other private corporations, the power to issue stock and bonds independently of the Railroad Commission?

"We send you herewith the charter of this corporation, which please return with your answer."

Accompanying your communication is a copy of the charter of the Beaumont Wharf and Terminal Company.

We have had great difficulty in arriving at a conclusion as to the law involved in the question propounded by you, arising out of the seemingly inconsistent and confusing statutory provisions with regard to the crea-

tion of corporations generally and of "railroad corporations" particularly, rendering it a matter of some difficulty to determine whether the corporation referred to is a "railroad corporation," and its road a "railroad," within the meaning of those terms as used in the Act of April 8, 1895 (Chap. 50, Acts 1893; Chap. 14, Revised Statutes), known as the Stock and Bond Law.

The corporation in question was created under the provisions of Subdivision 53, of Art. 642, Revised Statutes. Chapter 2, Title 21, of which this article is a part, is intended to authorize and provide for the creation of private corporations, other than railroad corporations, the creation of which is provided for by a different statute, prescribing different conditions, which is Chap. 1, Title 94, Revised Statutes.

Article 4350, Revised Statutes, provides that "No *railroad corporation* shall be formed until stock to the amount of one thousand dollars for every mile of road so intended to be built shall be in good faith subscribed and five per cent. of the amount subscribed paid in to the directors of such company."

The charter of this company shows that this requirement of the statute was not complied with by this company, but, on the contrary, that the corporation complied with the requirements of the general incorporation law requiring the subscription of fifty per cent., and the payment of ten per cent., of the authorized capital stock. This company, according to the charter, has ten directors, while a railroad company cannot have more than nine.

There are various provisions of the "Railroad Corporation" law which tend to show that this company is not a "railroad corporation" within the meaning of that law, and that in fact neither of the railway companies referred to in Subdivisions 21, 53 and 54, Art. 642, Revised Statutes, are "railroad companies." The general act providing for the incorporation of "railroads" specially, and distinct from other private corporations is the Act of August 15, 1876, p. 141.

Article 4580, Revised Statutes, being Sec. 22 of the Act of 1891, p. 55, creating the Railroad Commission, contains a broader definition of railroads and railroad corporations, towit: "The terms 'road,' 'railroad,' 'railroad companies' and 'railroad corporations,' as used herein, shall be taken to mean and embrace all corporations * * * that may now or hereafter own, operate, manage or control any railroad or part of a railroad in this State." And to show that the term "railroad," as last above used, was not to be restricted to railroads chartered under the railroad corporation law, and referred to in Art. 4350, Revised Statutes, and succeeding articles of that chapter, Subdivision 1 of said Art. 4580 specially provides that this chapter shall not apply to "street railways, nor suburban or belt lines of railways in or near cities or towns," the creation of which is provided for in the general incorporation law as private corporations and not in the railroad corporation law as "railroads."

This last provision would have been unnecessary if the Legislature had used the term "railroads" in the restricted sense, as railroads operated by corporations created as "railroad corporations" under the statutes for the purpose above referred to, and leads to the conclusion that in the definition of "railroads," in Art. 4580, the Legislature intended to include as well those railroads or railways referred to in Subdivisions 53 and 54, Art. 642, specially excepting those referred to in Subdivision 21.

The Railroad Corporation Law and the Railroad Commission Law and the Stock and Bond Law all use the term "railroads," while the general incorporation law, in providing for the incorporation of terminal and local and suburban "railways," used the term "railways," but this we do not regard as significant as the terms railroads and railways are synonymous and are used interchangeably in the statutes and in railroad charters. See Millvale vs. Evergreen R. Co., 131 Pa., 1 (7 L. R. A., 369).

It will be noticed that the Railroad Stock and Bond Law (Chap. 14, Title 94, Revised Statutes) was passed in 1893, and was intended as an addition to the Railroad Commission Law passed in 1891. It is fairly to be presumed that the Legislature, in the use of the terms "railroad," "railroad corporation" and "railroad company," in that law, attached to them the meaning expressly given to them by Sec. 22 of the Railroad Commission Law (Art. 4580, Revised Statutes), which, as we have endeavored to show, would include a terminal railway incorporated under Subdivision 53 of Art. 642, Revised Statutes.

This conclusion is strengthened when we consider the purpose intended to be accomplished and the evil intended to be remedied by the Stock and Bond Law.

It may be considered settled law that while the Legislature has the right, either directly or through the agency of the Railroad Commission, to regulate railroad charges, such charges must be reasonable and subject to the supervision of the courts as to whether the rates so fixed are "reasonable." The question of whether such rates are reasonable or not depends largely, under the decisions of the courts, upon the amount of stock and bonds issued by a railroad company. The Railroad Commission is expressly given power to regulate the charges imposed by terminal railways upon other railroads for terminal facilities.

These charges enter, to a very small extent perhaps, but still to some extent, into all charges for carrying freight by other railroads, that is handled by this terminal company or carried over its tracks. Any rate for such service by this terminal company, to be fixed by the Railroad Commission, would have to be "reasonable," based to some extent on the amount of stock and bonds issued by the terminal company. This brings the issuance of stocks and bonds by such company within the general purpose of the Railroad Stock and Bond Law.

We do not think that the provision in Subdivision 53, of Art. 642, towit: "Said companies (terminal railways) to have no right to charge other railroads for terminal facilities beyond what may be prescribed by the Railroad Commission," is an exclusion of such companies from the operation of the Stock and Bond Law. Indeed, this express authority given to the Commission to fix such charges by terminal railways would seem to us an additional reason why such railways should be included in a law, sufficient in its general terms to include them, and intended to give to the Railroad Commission authority to limit the issuance of stocks and bonds which must be, to some extent, the basis for the regulation of such charges.

It may be said that the provision in Subdivision 53, of Art. 642, that terminal railways shall not charge others more for terminal facilities

than the Railroad Commission may prescribe, would have been unnecessary, if such railways were to be considered as "railroads" within the meaning of the Railroad Commission Law and in an interpretation of this statute this consideration is entitled to some weight and increases the difficulty of arriving at a satisfactory conclusion as to the interpretation of the term "railroad" and "railroad corporation," as used in the Stock and Bond Law, but we do not think it ought to be given the force of relieving terminal railways from the effect of that law in view of the other reason for including them herein set forth.

We will add that we have been unable to derive any assistance from any decided case, or from general principles laid down in text-books, in arriving at a correct interpretation of the statutes in question with reference to the particular inquiry submitted to this department. Nor do the constitutional provisions with reference to "railroads" assist us to determine whether this company is a "railroad" within the meaning of the Stock and Bond Law, which is really the question calling for solution.

Our conclusion is that the Beaumont Wharf and Terminal Company, in the matter of issuing bonds, is subject to the supervision and control of the Railroad Commission, as provided in the Stock and Bond Law.

Yours truly,

T. S. REESE,
Office Assistant Attorney General.

COMMISSIONERS COURT.

Commissioners court has power to compromise claims in favor of the county, as well as against it.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, August 21, 1900.

To the Commissioners Court of Travis County, Texas, Judge A. S. Walker, Presiding.

GENTLEMEN: Your communication of July 31 to the Attorney General has been duly received, and is given below in full as necessary to properly present the question involved:

"The county of Travis holds a judgment for over $9,000 against several sureties on the official bond of A. J. Jernigan, former county treasurer of Travis county.

"The defendants in the case—the parties against whom the judgment was rendered—have submitted to the commissioners court a proposition to compromise the judgment by paying a less amount than the face value of the judgment.

"It may be immaterial to this inquiry, but it may be further stated that in the suit wherein the above judgment was rendered the defendants impleaded the Austin National Bank, asserting that it was liable to pay the amount of any recovery by the county by reason of certain representations made by it as to the condition of the account of said Jernigan as treasurer with said bank. The judgment of the District Court released

the bank from liability, and that judgment was affirmed by the Court of Civil Appeals, but reversed and remanded by the Supreme Court as to the liability of the bank, leaving, however, the judgment of the county against the sureties as affirmed.

"The county commissioners court desires to be advised by your department, at as early a date as possible, whether or not it has the right under the law to compromise the judgment in the manner above stated. The court is advised that it is a matter of some doubt whether the face value of the judgment can be made out of the sureties on the bond, and the liability of the bank remains to be decided under the decision of the Supreme Court."

In order to properly consider the matter, it will be necessary to review some provisions of the Constitution, articles of the statutes and decisions.

Art. 5, Sec. 18, Constitution 1876, provides: "Each county shall in like manner be divided into commissioners precincts, in each of which there shall be elected by the qualified voters thereof one county commissioner, who shall hold his office for two years and until his successor shall be elected and qualified. The county commissioners so chosen, with the county judge as presiding officer, shall compose the county commissioners court, which shall exercise such powers and jurisdiction over all county business as is conferred by this Constitution and the laws of the State, or as may be hereafter prescribed."

In setting forth the powers and duties of the commissioners courts, Art. 1537, Subd. 8, of the Revised Statutes, 1895, is as follows: "The said courts shall have power and it shall be their duty (8) to audit and settle all accounts against the county and direct their payment." The Supreme Court of this State, in the case of Bland et al. vs. Orr, 90 Texas, 194 *et seq.*, construes the above statutory provision. The case is very similar to the one presented by your honorable body. The county treasurer, by reason of the failure of a bank in which he had deposited the county funds, became a defaulter to the county in the sum of about $2,800. The commissioners court of Jones county, by proper order, accepted two hundred acres of land from one of the sureties on the treasurer's official bond in satisfaction of $1,514.86 of the indebtedness to the county, and for the balance of such indebtedness took promissory notes due in one, two and three years, executed by the treasurer with good sureties. The Supreme Court says: "We are of the opinion that the commissioners court had not the power to compromise the debt and to discharge the liability upon the bond. * * * The eighth subdivision more nearly relates to the question under consideration than any other, and clearly that does not confer any authority over *debts due* the county. It refers exclusively to claims 'against the county' * * *. It is sometimes to the interest of a creditor to compound his claim, and counties are not exceptions to this rule. It would seem, therefore, that authority to receive in satisfaction of a debt due a county something other than the full amount in money ought to have been given to some of its officers or agents; but it is clear, we think, that the Legislature has not lodged the power with the commissioners court." If there were no further legislation upon the subject, we might be inclined to the opinion that the decision above would be conclusive of the question, notwithstanding the court in said opinion did not refer to Art. 845, Revised Statutes,

which, however, might not have been applicable to the facts of the Bland case.

The principle is well settled in the law that a commissioners court is a body which has limited jurisdiction and can exercise only such power as is delegated by law. Under the laws of nearly all of the States it is the corporate body which manages and controls the general affairs of the county government.

Constitution, 1876, Art. 16, Sec. 1: "The several counties of this State are hereby recognized as legal subdivisions of the State."

Art. 789, Revised Statutes: "Each county which now exists, or which may be hereafter established, shall be a body corporate and politic."

Art. 791: "In all suits instituted by or against any county, the inhabitants of the county so suing or being sued may be jurors or witnesses, if otherwise competent and qualified according to law."

Art. 1196: "All suits brought by or against any of the counties or incorporated cities, towns, or villages shall be by or against it in its corporate name."

The above articles of the statute show that the Legislature created counties as corporate bodies and provided how they should sue and be sued. To give the power to sue, which necessarily involves a discretion on the part of those who are the agents or officers of the corporate body, and then allow no discretion in compromising a suit, may be to avoid the result of years of long and fruitless litigation would be to construe the law too strictly. Powers which are reasonably necessary to the fulfillment of a duty imposed are implied and are incidental to those expressly granted. It would be perhaps too general to say that the commissioners court have the entire management of county affairs; but this is so nearly true that it scarcely needs any limitation.

It makes all divisions of the county for election, school, justice and commissioners precincts; it lays out, changes, repairs and discontinues all public roads; it provides for building, equipping, repairing and maintaining all county buildings as court houses, jails, poor houses, and builds and keeps in repair all bridges, levies all county taxes, declares and maintains local quarantine, and pays out the money for all of the above named purposes.

In speaking of the power of the commissioners court to bring suit, as against the right of others to bring such suits, the Supreme Court says: "Expensive and often unnecessary litigation would in many instances occur, inducing financial embarrassments and absolute loss to the county against which the official guardians of the county's interest in financial matters would be often rendered impotent to protect. The existence of such a right, in discord and conflict with the powers and duties of the commissioners court, would promote confusion, create uncertainty and doubt, and in the end might paralyze the power of that court to efficiently regulate the financial affairs of the county."

A county is a public municipal corporation, or, as it is more generally called, a *quasi* public corporation. Art. 639, Revised Statutes, is as follows: "A public corporation is one that has for its object a government of a portion of the State." In reference to the management of the financial affairs of the county, the commissioners court would be limited to the exercise of its power, the same as would the officers of a city or

town, viz.: by the power granted it by law and such power incidental thereto as may be determined by the decisions of the courts.

Beach on Public Corporations, Sec. 638 *et seq.*, says: "It is well settled that municipal corporations have the power to effect the compromise of claims in favor of or against them. This is a corollary to the right to sue and be sued. They may compromise doubtful controversies in which the corporation is a party either as plaintiff or defendant."

Under our law as it now stands, since the amendment of 1897, which I will quote later on, the power is the same to settle a claim for the county as it is to settle one against it. In the case of Agnew vs. Brall, 121 Ill., 312, where a city recovered judgment for the sum of $200, the question arose as to the power of the city to compromise for the sum of $100, and payment of costs by defendant, Brall. At the time of this settlement, the defendant had the right of appeal. The court says: "The city council have no power to sell or in any manner dispose of the property of the corporation without consideration, and, in our opinion, they have no right to discharge a debt without payment, which may be held against parties who are solvent and responsible where no controversy exists in regard to the validity and binding effect of the indebtedness. But a municipal corporation has power to settle disputed claims against it. * * * After the suit was instituted, and before the judgment, it is not denied that the city council might have settled the matter in controversy with Brall; and if an appeal had been taken while the case was pending in court, that right of settlement would have still existed. This being so, upon what principle can it be said that, while the right of appeal existed, the city council was powerless to interfere?" The judgment was affirmed allowing the compromise.

In the case of Collins vs. Welch, 58 Iowa, 72-3, which was a proceeding brought by plaintiff to test the power of the county supervisors to remit part of a judgment against a bank for taxes due, the court says:

"It has now become a claim to be enforced by execution, and in our opinion stands upon the footing of any other judgment. The question then arises as to whether the board of supervisors has power to compromise a judgment. In our opinion it has * * *.

"The board should have the power to accept a part in satisfaction of the whole if, in its judgment, the best interests of the county would thereby be promoted. All rules of business conduct by which a prudent person is governed are applicable to a county in the management of its affairs under similar circumstances."

In the case of St. Louis, Iron Mountain, etc., R. R. vs. Anthony, 73 Mo., 131, there was involved the power of the county to compromise a tax judgment, the Supreme Court says: "The power to sue implies the power to accept satisfaction of the demand sued for, whether the precise amount demanded or less. The taxes were levied for the benefit of the county. The beneficial interest was in the county, and it is for the public interest that she should have the right to settle, by compromise, questionable demands which she may assert. Must the county prosecute doubtful claims at all hazards, regardless of costs and expenses, and is it for the public good that the right to settle such demands by compromise be denied her?"

In the case of State vs. Davis (South Dakota), 75 N. W. Rep., 897, a judgment for $300 was taken upon a forfeiture in a criminal proceeding, and the board of county commissioners compromised the judgment for $100. When the settlement was reached steps were being taken to perfect an appeal. The question presented is, did the board of county commissioners have such power? Under the statutes of Dakota, as in this State, each organized county has the right "to sue and be sued, plead and be impleaded, * * * superintend the fiscal concerns of the county, and secure their management in the best manner." The court says: "Of course, where the debtor is solvent, the board cannot without fraud thus discharge an obligation concerning the validity of which there is no question; but where, as in this case, the claim is in doubtful litigation, and a compromise made by the board is fully sustained by the court before whom all proceedings were had, we would most reluctantly disturb such action on appeal."

In the case of Washburn County vs. Thompson et al., 75 N. W. Rep., 309 *et seq.*, is one which is very much in point. This was a case of a county treasurer defaulting for the sum of more than $14,000. Judgment was rendered against the treasurer and his bondsmen, one of whom was the president of the bank in which the county funds were deposited. The bank made an assignment, and in order for it to resume business the county board entered into an agreement with it by means of which the county was made secure by a bond signed by the bank as principal and by sureties. "The county owned a judgment against its treasurer and his bondsmen, each and all of whom were insolvent, and as collateral thereto a claim against an insolvent bank, no part of which was immediately collectible, and the ultimate value of which, and the time when such value would be realized by the county, was exceedingly uncertain. Under such circumstances was it competent for the county board to release one of the bondsmen, the president of the insolvent bank, and consent to a reassignment to the bank, so it could resume business with some prospect of ultimately paying its indebtedness, suspend further proceedings to collect such judgment and extend the time for the bank to pay the claim on condition of its giving a bond with sufficient sureties to make reasonably certain the payment thereof at the end of the extension period?" The court says: "It would seem to rest in sound reason and common sense, without judicial authority to support it, that the right to sue and be sued, in the conduct of corporate business, must necessarily carry with it the right to compromise and settle disputed or doubtful claims." Under the laws of Wisconsin, each county is a body corporate, with power to sue and be sued, to hold property for public uses, to make such contracts and do such other acts as shall be necessary and proper to the exercise of the powers and privileges granted, etc. (Art. 650, Revised Statutes.)

The powers of the county board as set forth in the Revised Statutes resemble very much the powers granted our county commissioners, especially as to power to examine, settle and allow all accounts, demands or causes of action against such county. There is no special provision for adjusting and settling claims *in favor* of the county. (Art. 669, Subd. 2, Revised Statutes of Wisconsin, 1878.) Subdivision 6 of said article is as follows: "To represent the county, and to have the care of the

county property, and the management of the business and concerns of the county in all cases where no other provision shall be made." The court, after citing cases and the articles of the statute which so closely resemble ours as to make the application of the law involved equally pertinent to the case presented by your honorable body, says: "So we reason easily up to the conclusion that the county board possessed express authority to take the bond of the Shell Lake Savings Bank, with the appellants as sureties thereto, if done in good faith and deemed necessary by the board in the performance of its duties to collect the debt due from its treasurer and his bondsmen by realizing on the collateral claim against the bank."

Having cited the above authorities from various States to show the enunciation of the law applicable to your inquiry, I now quote the amendment of 1897 to Art. 1537, Revised Statutes, Subd. 8, which was enacted by the Twenty-fifth Legislature, Chap. 145: "The said courts shall have power and it shall be their duty * * * (8) To audit, adjust and settle all accounts against the county and direct their payment, and to audit, adjust and settle all accounts and claims *in favor* of the county." This amendment gives express authority to the commissioners court to *settle claims* in favor of the county, and seems to have been enacted for the purpose of meeting the decision of the Supreme Court of this State as announced in the case of Bland vs. Orr (90 Texas), above cited.

Art. 845, Revised Statutes, is as follows:

"Whenever the principal and sureties upon any judgment, the proceeds of which revert to and belong to any county, are insolvent so that under any existing process of law said judgment, or any part thereof, cannot be collected, the commissioners court of said county are hereby constituted a board to dispose of such judgment, and are hereby empowered and authorized, by such advertising as they may deem necessary, to offer for sale, as they may deem to be to the best interests of the county, all the rights of the county to such judgment. And if by public sale, if the amount bid on the same should not be deemed sufficient they shall refuse to accept the same, and dispose of the same in any manner deemed by them most advantageous to the interest of the county, and upon sale shall make a proper assignment of said judgment to the purchaser."

Without such amendment, I think Art. 845, Revised Statutes, confers sufficient power upon the commissioners court to "dispose of the same in any manner deemed by them most advantageous to the interest of the county" a judgment which belongs to the county where the principal and sureties of such judgment are *insolvent*.

While the county treasurer of Jones county was unable to pay the amount due the county, "It does not appear whether the amount could have been made by execution off the sureties of his official bond or not." At least, no judgment had been obtained on the claim.

The judgment rendered against Jernigan and his bondsmen certainly belongs to Travis county. Now the principal on such bond being dead, the question of the insolvency of the sureties must be left to the determination of some agent, officer or official body of the county, which determination requires the exercise of discretion. If the sureties are insol-

vent so that under any existing process of law said judgment, or any part thereof, cannot be collected, the commissioners court of said county are hereby constituted a board to dispose of such judgment, and are hereby empowered and authorized * * * (to) dispose of the same in any manner deemed by them most advantageous to the interest of the county. * * *."

Looking to the reported opinion of this controversy as given in the case of Anderson et al. vs. Walker, 53 S. W. Rep., 821 *et seq.*, it does not seem to us to appear that Travis county made either the Austin National Bank or its president parties defendant. If either of said parties can yet be made parties defendant, or if they are such parties defendant, and litigation is yet to be had to determine their liability to the county, it would doubtless add strength to the question of solvency, but it would doubtless add uncertainty to the question of time when such indebtedness would become collectible. If execution is to be levied against the property of the sureties on the treasurer's official bond, and litigation is to be had as to the rights of property, the commissioners court in the exercise of sound discretion and good faith, looking to the best interest of the county financially, may compromise and settle the claim.

Yours very truly,

D. E. SIMMONS,
Office Assistant Attorney General.

LOTTERY.

Any distribution of prizes by chance prohibited by law.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, August 25, 1900.

Mr. W. A. Keeling, County Attorney, Groesbeeck, Texas.

DEAR SIR: Your letter of recent date to the Attorney General has been received. You desire some information in reference to prosecutions of certain schemes for giving away prizes, whether or not they come within the meaning and scope of the statutes against lotteries, banking games, etc.

Article 3, Sec. 47, of the Constitution is as follows: "The Legislature shall pass laws prohibiting the establishment of lotteries and gift enterprises in this State, as well as the sale of tickets in lotteries, gift enterprises or other evasions involving the lottery principle, established or existing in other States."

The above article of the Constitution is the paramount law of the land and is binding upon the action of the Legislature in forbidding the licensing of a lottery or gift enterprise. Each and every Constitution adopted by the people of Texas, in their sovereign capacity, has provided against the establishing of lotteries. The present Constitution (1876) has added to lotteries, gift enterprises. It was decided by the Supreme Court of Texas, in the case of Randle vs. State, 42 Texas, 583, *et seq.*, that the Legislature transcended its power in passing an occupation tax

law, licensing gift enterprises which involved the element of risk or chance.

Article 373, Penal Code, of the Revised Statutes of 1895, provides: "If any person shall establish a lottery or dispose of any estate, real or personal, by lottery, he shall be fined not less than one hundred nor more than one thousand dollars." This provision of the statute is directed against one who establishes and operates a lottery. I find no provision against one who may purchase from such individual operating a lottery or gift enterprise. The statute nowhere undertakes to give a precise definition of a lottery. It must be determined in each particular case, according to well recognized principles of the common law, as enunciated in the decisions of the courts.

There have been various announcements of the principle involved in the lottery. "A lottery embraces all schemes in which a valuable consideration of some kind is paid *directly* or *indirectly* for a chance to draw a prize." Yellowstone Kit vs. State, 88 Ala., 196.

Websters' Dictionary, "A disposition of prizes by lot or chance."

Worcester's Dictionary, "A distribution of prizes and blanks by chance; a game of hazard, in which small sums are ventured for the chance of obtaining a larger value either in money or other articles."

The shortest and most satisfactory definition, and one largely adopted by the courts, is that of Bouvier, "A scheme for the distribution of prizes by chance."

Lottery schemes and chance distributions of property present one of the most seductive phases of gambling, as evidenced by the great number of mechanical devices which are sold to merchants for the purpose of inciting among the people the very common desire of obtaining something for nothing or of getting more than you bargain for. Many people get their idea of lottery from such institutions as was the Louisiana Lottery; that is, you may draw either a prize or blank. But this is not the legal meaning. The fact that every one gets something of value who takes a ticket, or who puts a nickle in the slot, or who buys an article and for every ten cents purchase gets one roll at the wheel, does not take such method of dealing out of the statute against lotteries. The court in the Randle case met the argument of counsel contending for such a construction of the law, as follows: "The opinion of the two lottery experts, that this was not a lottery, can scarcely be expected to have any weight against the opinions of the most enlightened judges in the country, who have repeatedly held that the fact of each ticket holder being certain to receive something did not relieve it from the character of a lottery." We are unable to find where the law has been differently announced in this State. I do not propose to enter into a discussion of the difference between a bank or banking game or gaming device and a lottery. As was said by the court in the recent case of Prendergast vs. State, 57 S. W. Rep., 850, "The fact that this machine would be indictable as a gaming device is no reason why the keeper was not also indictable for establishing a lottery." See this case for a discussion of the *nickle in the slot* machine found in a great many saloons, in which machine there are five or six apertures marked, red, black, green, white and yellow, and the result of the venture may be a blank or nothing or a winning from five cents to a dollar. Whether the prize is money or goods makes no dif-

ference, if it is a distribution of prizes by chance. If you enter a store, knowing they have some kind of a scheme for returning the amount of your purchase money up to and not exceeding ten dollars, and buy goods expecting that you may be the lucky purchaser, the prize is the amount you have spent, which amount is determined before you know whether you are the one to get the prize. The twentieth or thirtieth purchaser is determined by a registering machine, and whether you get a prize does not depend on any skill in anything you may do, but purely on a question of *chance* as to when you strike the register. If you are the thirtieth person registered you take the prize. The other twenty-nine persons, many of whom were induced to trade with the view of being the *lucky* one, get nothing. It is the element of chance in it which makes it unlawful. If with each article of purchase, you draw a ticket with a certain number on it, and what you are to get as a prize or premium is determined by the number, it is a game of chance, a distribution of prizes which is prohibited. If with every purchase of a certain amount you receive a certain number of what are called premium stamps, and when you have accumulated a certain number of the stamps you are entitled to certain premiums, all of which you know as well as does the merchant from whom you buy, there is no uncertainty in the procedure, no element of chance or risk, and the same is a legitimate transaction.

I might give a number of illustrations, but an application of the principles hereinbefore enunciated to each case as it presents itself to the officer is all that is required.

It is true that, in some instances, the application may be hard to make, but this occurs in the enforcement of any criminal law. For a full discussion of the questions involved, I refer you below, to several well-considered cases.

Stearnes vs. State, 21 Texas, 693.
Randle vs. State, 41 Texas, 293; 42 Texas, 563.
Holman vs. State, 2 Ct. App., 610.
Prendergast vs. State, 57 S. W. Rep., 350.
62 Ala., 334.
88 Ala., 196.
89 N. C., 542.
137 Mass., 250.
74 Mich., 264.

Yours very truly,

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