OPINIONS.

Of the great number of opinions prepared by the department a few are selected for publication as of importance or general interest.

Liquor Dealers are Required to Give a New Bond for each New License.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, January 23, 1891.

G. P. Rogers, County Clerk, Refugio, Texas.

DEAR SIR:—Replying to your favor of January 19, you are respectfully advised that it is made your duty to require a sufficient bond, as required by General Laws Twenty-first Legislature, pages 49 et seq., to be properly executed, approved and filed before you issue a new license to any retail liquor dealer under said act. The bond required is only intended to cover the time for which license was issued, and in each instance of the issuance of license a new bond should be required, which in every sense is a strict compliance with the law, and you are advised that it is your duty in this matter to see that the law is strictly complied with before you issue a new license.

Yours truly,

FRANK ANDREWS,
Office Assistant Attorney General.

A sheriff is liable for unpaid fine and costs if he willfully allows a convict to escape. A convict is not to be allowed credits for lying in jail until he has made the affidavit required in article 816, Code of Criminal Procedure.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, January 28, 1891.

G. A. Walters, Esq., County Attorney, San Saba, Texas.

DEAR SIR:—Your favor of the 16th inst. has been received by this office. In reply thereto you are advised: That when a defendant is convicted of a misdemeanor and a pecuniary fine only is assessed, and he is remanded to jail in default of payment of said fine and costs, he is not entitled to receive any credits for such time as he may lie in jail, unless he shall have first made the affidavit required in article 816 of the Code of Criminal Procedure, and the county authorities shall have failed to put said convict to work, as provided in said article 816, and as further provided in the General Laws of the Twenty-first Legislature, page 14, or shall have hired said convict out. Until said affidavit is made no credits can be allowed upon such fine and costs. (See 20 Texas Ct. App., 127. Ex parte Wm. M. Bogle.)

As for the liability of the sheriff for permitting the prisoner to go at large before the fine and costs have been legally discharged, you are advised that where any sheriff who has the legal custody of a convict willfully permits such convict to go at large, it would be an escape within the meaning of article 203 of the Penal Code of this State. (See Hiram Muckett v. The State, 14 Texas, 400; also Murfree on Sheriffs, secs. 1163, 1166.)

As to the civil liability of the sheriff for willfully permitting a prisoner to go at large before the fine and costs have been legally discharged, it is the opinion of this office that unless such sheriff should apprehend the convict so permitted to go at large and have his fine and costs legally discharged, the sheriff himself would be liable for the amounts so due and unpaid at the time of the escape or the willfully permitting such convict to go at large. Revised Statutes, art. 950. Mechem on Public Offices and Officers, section 759, treats of the common law liability of sheriffs for permitting prisoners to go at large who are detained for debt. And also Murfree on Sheriffs, section 193 et seq., treats of the same subject, and the analogy to civil liability of sheriffs generally in this State, we think, clearly makes the sheriff liable for willfully permitting a convict to go at large before his fine and costs have been fully discharged, and without any order of competent authority.

Very respectfully.

FRANK ANDREWS,
Office Assistant Attorney General.

Commissioner General Land Office has no authority to cancel sale of Agricultural school lands for non-settlement.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, January 28, 1891.

Hon. W. L. McGaughey, Commissioner General Land Office.

DEAR SIR:—Your letter of the 25th instant, in which you inquire whether, as Commissioner of the General Land Office, you have the "authority to cancel the sale of Agricultural school land sold under the act of 1883 requiring settlement, when the evidence shows that the proof of such settlement and occupancy is wholly insufficient in law," has been carefully considered. Whatever authority existed to cancel sales for failure to settle upon and occupy the land, under the act to which you refer, was vested in the Land Board, of which the Commissioner was a member.

It has been decided by the Commission of Appeals, with the approval of the Supreme Court, that under the act of 1883 the Land Board, within certain limitations, was justified in declaring forfeited the purchase of one not an actual settler. King v. James, 14 S. W. R., p. 571. But this decision does not determine the question propounded by you.

Alone and distinct from the Land Board the act of 1883 did not, either expressly or by necessary implication, authorize the Commissioner to cancel sales when the purchasers failed to settle upon the land as therein provided. The act of 1883 was superseded and the Land Board dissolved by the act approved April 1, 1887, and the act amendatory thereof approved April 8, 1889. Neither of these last enactments clothe the Commissioner with the power to cancel sales under the act of 1883, either expressly or by reference to that act, and a careful investigation fails to disclose any other provision of law from which such authority could spring. You are, therefore, respectfully advised that in the opinion of this Department, the Commissioner is not authorized to declare a sale made under the act of 1883 forfeited under the facts stated in your inquiry.

No opinion is here intended to be expressed on the authority of the Commissioner to declare a forfeiture for non-payment of interest under the act of 1883, nor of the authority of the Commissioner to cancel sales made under the acts of 1887 and 1889, above referred to, either for non-payment of interest or failure to reside upon and improve the land.

Very truly yours,

C. A. CULBERSON,
Attorney General.

Scrap lands in Fisher county are not subject to appropriation under the act of March 29, 1887.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, February 10, 1891.

Hon. W. L. McGaughey, Commissioner General Land Office.

DEAR SIR:—Your letter of the 6th instant and that of Judge Rector, to which you ask a reply from this Department, have been fully considered. The inquiry is "whether scrap lands in Fisher county are now subject to appropriation under the act of March 29, 1887."

The act of July 14, 1879, provides that all the "vacant and unappropriated land," situated in Fisher county and other unorganized counties named, is thereby "appropriated and set apart for sale, together with all the unappropriated lands situated and being within and included in the Pacific reservation, and *together with such separate tracts of unappropriated public lands, situated in organized counties of this State, as contain not more than 640 acres.*"

The amendatory act of March 11, 1881, is but a re-enactment of the law of 1879, correcting the name of certain counties and adding the county of Carson. By the act of January 22, 1883, "all the public lands heretofore authorized to be sold" under the acts of 1879 and 1881, mentioned above, were "expressly withdrawn from sale," and it was there declared that such withdrawal should continue "until the Legislature shall otherwise provide."

The act of March 29, 1887, to which your inquiry is specially directed, pro-

vides "that any person desiring to purchase any of such appropriated lands, situated in the organized counties of the State of Texas, as contain not more than 640 acres, appropriated by an act to provide for the sale of a portion of the unappropriated public lands of the State of Texas and the investment of the proceeds of such sale, approved July 14, 1879," may do so by complying with the subsequent provisions of the act. This last act was amended April 5, 1889, but upon the subject of your inquiry the amendment makes no change. From this statement it appears that by the act of 1879 three classes of land were appropriated and set apart for sale, namely: All the vacant and unappropriated lands in Fisher and the other unorganized counties named, all the unappropriated lands within the Pacific Reservation, and such tracts of unappropriated public lands, situated in organized counties, as contain not more than 640 acres. The act of 1883 withdrew all these lands from sale, and in effect directed that they should not be sold until the Legislature should otherwise provide.

In view of this specific and mandatory provision of law, and the declaration that as these lands were "being daily sold to the great detriment of the State," an imperative public necessity existed for the immediate passage of the act, giving the exact hour and minute of its enactment, that the evil might be promptly arrested; unless the Legislature has since clearly and unequivocally directed their sale these lands should not be placed on the market. It is not believed the Legislature has so provided. As heretofore stated, three classes of land were set apart for sale by the acts of 1879 and 1881, and all of these were withdrawn from sale by the act of 1883. The acts of 1887 and 1889 distinctly offer for sale "such appropriated public lands situated in organized counties of the State of Texas as contain not more than 640 acres, *appropriated by*" the act of 1879. No other lands are offered for sale except scrap lands in organized counties appropriated by the act of 1879. It is therefore believed to be the better construction of the acts of 1887 and 1889, taken in connection with the foregoing considerations, that it was not the intention of the Legislature to place on the market other than the scrap lands appropriated by the act of 1879, which are situated in counties then organized. That by the act of 1879 "all the vacant and unappropriated land" in Fisher and the other unorganized counties named was appropriated for sale, and that Fisher county was organized April 27, 1886, prior to the last acts, can not change this construction of these acts, for their purpose appears to be to set apart for sale only fractional tracts of land appropriated by the law of 1879, situated in counties at that time already organized.

While the subject is not altogether free from doubt, your inquiry is answered in the negative.

Very respectfully,

C. A. CULBERSON,
Attorney General.

County Treasurer is not entitled to five per cent commission, or in fact any commission, for receiving and canceling county scrip.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, February 18, 1891.

Hon. W. C. Carpenter, County Judge, Wharton, Texas.

DEAR SIR:—Your letter of February 16 is before this Department. In your letter you propound this query: "In settlement of the county treasurer with the Commissioners' Court, is the treasurer entitled to five per cent commission on scrip received by the collector of taxes in payment of county taxes, turned into the Commissioners' Court for cancellation?"

You are respectfully cited to article 2403, Sayles' Annotated Statutes. Said article reads: "The county treasurer shall receive commissions on the moneys received and paid out by him, said commissions to be fixed by order of the Commissioners' Court as follows: For receiving and paying out money belonging to the school fund, not exceeding one per cent; for receiving any other moneys of the county not exceeding two and one-half per cent, and not exceeding two and one-half per cent for paying out the same; *provided*, that in counties where the treasurer's fees under this article amount to less than four hundred dollars, the Commissioners' Court may increase the per cent to such a rate as will assure

the said county treasurer fees of not more than four hundred dollars per annum: *provided*, that such increased compensation shall be paid out of the general revenues of the county; and *provided further*, that this act shall apply only to counties in which the bond required of the treasurer shall be as much as twenty thousand dollars."

You will see that the county treasurer is entitled to not exceeding two and one half per cent for receiving all moneys, other than the school fund, and not exceeding two and one-half per cent for paying out the same. This Department takes it that paying out means paying out to a creditor of the county, and does not include the turning in of scrip for cancellation by the county treasurer to the Commissioners' Court. Therefore, it is thought that "paying out" was intended to be considered literally, and means *discharging an obligation due by the county*. Therefore it follows that under the construction we place on article 2403, the county treasurer would not be entitled to two and one-half per cent for turning over county scrip taken by the collector of taxes, to the Commissioners' Court for cancellation.

See Wharton County v. Ahldag, 84 Texas, 12.

McKinney v. Robinson, 14 S. W. Rep., 699.

Very truly,

R. L. HENRY,
Office Assistant Attorney General.

None but Males can be Confined in the House of Correction and Reformatory at Gatesville.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, March 10, 1891.

Major T. J. Goree, Superintendent Penitentiaries, Huntsville, Texas.

DEAR SIR:—Your letter of the 7th instant, with a copy of the judgment and sentence in the case of the State of Texas v. Emma Creel, has been duly considered. Under the act of 1889, section 11, which is applicable in this case, none but males can be confined in the House of Correction and Reformatory at Gatesville. As a consequence the judgment and sentence in this case should not have been entered directing imprisonment at that place. The judgment and sentence requiring confinement in the Reformatory, you are not authorized under them to confine this person in the Penitentiary. I therefore suggest that you write to the county attorney of Parker county, R. C. McConnell, Weatherford, Texas, calling his attention to the situation, for such action as it may demand.

Very respectfully,

C. A. CULBERSON,
Attorney General.

Islands of Texas.—Reserved from Location.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, March 13, 1891.

Hon. W. L. McGaughey, Commissioner General Land Office, Austin.

DEAR SIR:—Your letter of yesterday, inquiring whether the islands of Texas are now reserved from location, has been duly considered.

In the examination of the question this Department has had the benefit of a valuable brief prepared in the interest of persons who, it is presumed, are favorable to the appropriation of islands, and at whose instance you propound the inquiry. This brief concedes, and it is clearly the law, that prior to 1870 the policy of the government was to sever the islands from the mass of the public domain and reserve them from location.

1 Sayles' Real Estate Laws, Arts. 440–445.

Franklin v. Tiernan, 56 Texas, p. 624.

It is insisted, however, that because of the broad language used in the act of August 12, 1870, this policy was then changed. But this proposition is unsound.

In the case above cited the court says that full effect could be given to the act mentioned without reference to the islands, and as a consequence, in the opinion of the court, they were not included in the lands there made subject to location.

To remove all doubt on the subject the act of May 16, 1871, was passed expressly excepting islands from location, and by the act of August 19, 1876, the Legislature declined to validate island locations except such as were made between the passage of the acts of 1870 and 1871, above mentioned, thus emphasizing the policy of reservation. It is believed that under the rule announced in Franklin v. Tiernan, *supra*, effect can be given to all general laws passed since 1876 without reference to the islands, and that none of such laws indicate a purpose to depart from the recognized policy of the State. Conceding that until then, both by express law and public policy, islands were reserved from location, it is finally claimed that such reservation was abrogated and repealed by the adoption of the Revised Statutes in 1879. This contention is based upon section 5 of the final title to the Revised Statutes providing that "all civil statutes, of a general nature, in force when the Revised Statutes take effect, and which are not included herein, or which are not expressly continued in force, are hereby repealed."

It is not believed that this provision is applicable to the question under consideration, the islands of the State being expressly reserved from the operation of statutes of a general nature: but if pertinent it is controlled and qualified by section 13 of that title where it is provided "that no law in reference to land reservations * * * shall be affected or impaired by the repealing clause of this title, unless expressly altered or repealed in some of the preceding articles of the Revised Statutes."

From the foregoing it follows that, in the opinion of this Department, the islands are reserved from location.

Very respectfully,

C. A. CULBERSON,
Attorney General.

Legislative Committee—The Pay of a Committee created by the Legislature to sit during recess is a matter of Legislative Judgment and Discretion.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, March 28, 1891.

Hon. G. B. Gerald, House of Representatives.

DEAR SIR:—I have carefully considered your note of to-day, in which you ask: "Can a resolution creating a committee to sit during vacation provide that the pay should be $5 per day, or would it be $2? And would they be entitled to mileage?" If the Legislature, or either house thereof, think proper a committee may be created to sit during the recess.

Cooley on Const. Lim., 5th ed., 162.

The proceedings before such committee would not in strictness be legislative, and if the committee should be clothed with authority to investigate, take evidence, and report to the House or Legislature, its action would be merely in aid of legislation.

Belo v. Wren, 63 Texas, 723.

It is doubtful, therefore, whether the constitutional provision prescribing the compensation of members of the Legislature is applicable to the case put by you. The committee, in the view above suggested, though composed of members of the Legislature, would perform duties other than those imposed upon them as legislators.

For these extra legislative duties the Constitution has prescribed no compensation, and the subject is consequently remitted to the judgment of the Legislature. But conceding that the proceedings of the committee you name would be legislative in character, the same conclusion is reached. The Constitution (article 3, section 24) provides, in substance, that the members of the Legislature shall receive such compensation as may be provided by law, not exceeding five dollars per day for the first sixty days of each session, and after that not exceeding two dollars per day for the remainder of the session. In addition to this the members are allowed mileage in going to and returning from the seat of government at a rate not exceeding five dollars for every twenty-five miles. The

members of a committee such as you name will not be serving the first sixty days of a session of a Legislature, nor for the remainder of the session. The session will have closed entirely. The five-dollar provision can not be said to apply, for the first sixty days of the session will have expired: nor can the two-dollar clause be held controlling, for there will be no remainder of the session.

It is not believed, therefore, that the Constitution has prescribed the compensation of members of a committee organized for the purposes you mention, and it follows that, both as to per diem and mileage, it is a question of legislative judgment and discretion. This construction is in harmony with that acted upon heretofore by the State government, as will be seen from the joint resolution authorizing the investigation of land forgeries. General Laws 1879, pp. 194-195.

Very respectfully,

C. A. CULBERSON,
Attorney General.

Elections, Municipal.— The Election Law passed by the Twenty-second Legislature (1891) is Constitutional.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, April 3, 1891.

Col. D. A. Williams, County Attorney, Dallas, Texas.

DEAR SIR:—Your telegram of the 1st instant, asking for a written opinion of this Department "as to the constitutionality of the election law recently passed by the Legislature, known as the Kimbrough election law," was duly received, and presuming that you make the inquiry with a view to the enforcement of the valid laws of the State governing elections, the subject has been carefully considered.

So much of the law to which you refer as is necessary to be considered, provides that in any election—State, county or municipal—held in any city or town of 10,000 inhabitants or more, according to the last Federal census, when the right of an elector to vote is challenged, "the judges of election shall refuse to accept such vote unless, in addition to his own oath, he proves by the oath of one well known resident of the ward that he is a qualified voter at such election and in such ward."

It seems that the points upon which the validity of this law is assailed, and by reason of which it is presumed you were led to make this inquiry, are that it is local and not general in character, and that it imposes qualifications to vote other than those prescribed by the Constitution. With reference to the first of these objections, it is clear that the law is not local, in the sense of applying only to the city of Dallas, for it is well known that there are many other cities in Texas with more than 10,000 inhabitants, and in which the law is necessarily operative.

That it applies only to certain cities and is not in force throughout the entire State, does not give it the character of a local or special law within the meaning of the Constitution. It is applicable to all cities of 10,000 inhabitants or more, and to all persons within the limits of such cities. The question is settled by the Court of Appeals of this State, where it is said, following the rule which obtains throughout the United States, that "to make a statute a public law of general obligation it is not necessary that it should be equally applicable to all parts of the State; all that is required is that it shall apply equally to all persons within the territorial limits described in the act."

Cordova v. The State, 6 Ct. App., 221.

Cooley's Const. Lim., 5 ed., 482.

The principal objection to the law seems to be the claim that it adds to the constitutional qualifications of the electors. If it does, under all the authorities, it is void. The Constitution on this subject declares (art. 6, secs. 1, 2 and 3), that all male persons not minors, idiots or lunatics, paupers, convicted felons or soldiers, marines, and seamen in the army or navy of the United States, who shall have resided in this State one year next preceding an election, and the last six months within the district or county in which they offer to vote, including persons of foreign birth who have declared their intention to become citizens of the United States and resided within the State and county for the time above

mentioned, shall be deemed qualified electors. It also provides that qualified electors of the State, as therein described, who shall have resided for six months immediately preceding an election within the limits of any city or corporate town, shall have the right to vote for mayor and all other elective officers, and this provision is incorporated in section 5 of the present charter of the city of Dallas. The Constitution also provides that all electors shall vote in the election precinct of their residence, and the statute (article 1664) constitutes each ward of cities an election precinct. It must certainly be conceded that the law under consideration does not in terms prescribe any additional qualifications to those above enumerated, nor properly construed can it have such effect.

It distinctly provides that when challenged the vote shall be refused unless the voter shall, by his oath and that of one well known resident of his ward, prove that he is a "qualified voter." The act does not undertake to define who are qualified voters, and undoubtedly leaves that question to be ascertained from the Constitution and previous statutes. Its manifest purpose is, not to engraft upon the Constitution new qualifications to vote, but to provide the manner of discovering the existence of the qualifications there prescribed. In an analogous case the Supreme Court of Wisconsin said: "This act, therefore, instead of prescribing any qualifications for electors different from those provided for in the Constitution, contains only new provisions to enable the inspectors to ascertain whether the person offering to vote possessed the qualifications required by that instrument."

State v. Lean, 9 Wis., 283.

McCrary on Elections, 64.

That the Legislature is authorized to make necessary and reasonable rules for the orderly exercise of the right of suffrage will not be seriously questioned. Independently of an express grant in the organic law the authority would exist. The Constitution (article 6, section 4) not only confers the authority, but declares that the Legislature shall "make such other regulations as may be necessary to detect and punish fraud, and preserve the purity of the ballot box." The Legislature must determine the necessity for such laws, without interference from any other department of the government. When such regulations are not manifestly unreasonable, and when their scope and purpose are to protect the purity of the ballot box, and not deny or abridge the right of suffrage, they must be deemed valid. Except where there is no reasonable doubt the courts are not authorized to declare a law repugnant to the Constitution (Cooley's Const. Lim., 218), and it is doubtful if this extraordinary power of annulment of the legislative will can in any contingency devolve upon an executive officer. The law in question is practically that of the Revised Statutes except as to the requirement of the oath of a well known resident of the ward. The voter being required to cast his vote in the ward of his residence, if other proof than his own oath is thought necessary by the Legislature, it is reasonable to suppose that he could more easily establish the facts by his neighbors than otherwise. At all events such a requirement can not be said to be clearly and manifestly unreasonable. That a person voting illegally may be punished can not affect the validity of this law. The purpose of the enactment of our penal and restrictive statutes is expressly declared to be not only the punishment but the prevention of crime.

You are therefore respectfully advised that in the opinion of this Department the law is valid and constitutional.

Very respectfully,

C. A. CULBERSON,
Attorney General.

Public Printing.—All public printing and binding of whatever character, except proclamations and such printing as may be done at the Deaf and Dumb Asylum by the inmates under proper instruction, must be done by contract.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, April 27, 1891.

To Messrs. Geo. W. Smith and W. B. Wortham, of the Board of Public Printing.

GENTLEMEN:—The Legislature which has just adjourned appropriated $20,000 for public printing, and the law making the appropriation expressly provides that "the Printing Board shall, so far as it may be in their judgment to

the interest of the State, cause all printing and binding to be done under contract, and no printing shall be done at the Deaf and Dumb Asylum except such as is contemplated by the Constitution."

It is understood that the validity of the printing establishment at the Deaf and Dumb Asylum, so far as the same has been conducted by persons not pupils of that institution, has heretofore been frequently questioned; but, until the passage of the law above referred to, the Board of Public Printing, it seems, has not been required to take notice of and determine the controversy. This law, however, providing that "no printing shall be done at the Deaf and Dumb Asylum except such as is contemplated by the Constitution," imposes upon the Board the duty of determining what public printing and binding may be legally done at said Asylum. At your request, therefore, and as a member of the Board, I have given the subject careful consideration, and that the result of the examination may be clearly understood, a full statement of the case is necessary. The first law which authorized any character of printing at the Asylum was the act of March 13, 1875. It provided that the "Board on Public Printing be and is hereby authorized and required to purchase a suitable printing press, with type and all necessary fixtures and material, for the creation of a printing establishment at said institution for the deaf and dumb, and that said Board is further empowered and required to employ some competent person for such time or times as may be deemed necessary to give the pupils of said institution, or such of them as the Superintendent and Directors shall designate, proper instruction in the art of printing in all its necessary branches."

By the third section of that act it was provided that "the Public Printing Board of this State shall have the power to have any public printing executed at said institution at any time that they may see proper and expedient, *and when the same can be done by the pupils of said institution*." It was the clear purpose of this act, as declared in its title, to "provide for the instruction of the pupils of the institution for the deaf and dumb in the art of printing," and, if possible, to organize an efficient printing establishment by employing and utilizing the labor of the inmates. But the Board under that law was not authorized to employ any person as printer not a pupil there, except the instructor named, and was not empowered to have public printing executed at the Asylum, except "when the same can be done by the pupils of said institution." This was the only law in existence on the subject when the present Constitution was adopted in 1876.

It is well known that prior to 1876 the system of executing the State printing and binding through the agency of a public printer, which was then being pursued, produced widespread dissatisfaction. To remedy this supposed evil the present Constitution provides (art. 16, sec. 21) that, "all stationery and printing, except proclamations and such printing as may be done at the Deaf and Dumb Asylum, paper and fuel used in the Legislature and other departments of the government, except the judicial departments, shall be furnished, and the printing and binding of the laws, journals, and department reports, and all other printing and binding, and the repairing and furnishing the halls and rooms used for the meetings of the Legislature and its committees shall be performed under contract, to be given to the lowest responsible bidder, below such maximum price, and under such regulations, as shall be prescribed by law."

This provision, succintly and broadly stated, declares that all State printing and binding of whatever character, except proclamations and such as may be done at the Deaf and Dumb Asylum, shall be performed under contract, and that all paper and fuel used in the Legislature and other departments of the government, except such as is used in the judicial department, as well as the reparing and supplying the halls and rooms for the Legislature, shall be furnished under contract.

In construing this clause of the Constitution it is necessary to consider the purpose of its framers, and the condition of affairs at the time of its adoption, with reference to which it was incorporated in that instrument. It is evident that the intention of the people was to put an end to the public printer system then being pursued, and to adopt the contract plan, with the exceptions named. When the Constitution was prepared and ratified there was no law in existence which authorized public printing at the Asylum, except the act of March 13, 1875, heretofore cited; nor in fact had any other printing been done there beyond what was contemplated and provided for by that act. The inmates of the Asylum, under the instruction of an expert appointed by authority of the act, were the

only persons then engaged there in printing. It must, therefore, be presumed that when the Constitution excepts from the contract system which it established "such printing as may be done at the Deaf and Dumb Asylum," the exception was only designed to comprehend such printing as could be done at that institution under the most efficient organization of which the deaf mutes are susceptible. As members of the Board, however, we know that a contrary policy is now being pursued, and has obtained for years. Gradually and almost imperceptibly a thoroughly organized system of public printing has been established at the Asylum with which the inmates are in no manner concerned, and for which, it is believed, there is no express statutory law, and none from which such authority can fairly be implied. With exceptions scarcely worthy of mention, the deaf mutes do no part of the public printing. At this time, with an annual appropriation of only $20,000, the pay roll of the printers engaged at the Asylum, other than inmates, will average $2300 per month, which alone will more than absorb the entire sum appropriated. In this estimate the fact is not overlooked that a great deal of printing is done for the departments, for which there are separate appropriations, and the money thus obtained is placed in the treasury to the credit of the printing fund and thereafter used; but this practice is illegal, for when money once reaches the treasury it can not be lawfully withdrawn except in pursuance of specific appropriations made by law. Nor could the printer or the Board retain in their hands until disbursed the funds thus realized, for the treasury only is the legal depository of public moneys. It is plain, therefore, that in addition to the legal question involved, the Board is met at the outset with a clear and certain *deficit*, if the present policy is continued.

Upon the legal question you are respectfully advised that in the opinion of this Department all public printing and binding of whatever character, except proclamations and such printing as may be done at the Asylum by the inmates under proper instruction, must be done by contract, as provided for in the Constitution.

Very respectfully,

C. A. CULBERSON,
Attorney General.

District or County Attorney is to represent the State in all land litigation.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, May 6, 1891.

Messrs. Flood and Cobb, Wichita Falls, Texas.

GENTLEMEN:—It is the rule of this Department that attorneys interested in land litigation will not be authorized to represent the State in a suit affecting lands. If there is any good reason shown why the State should intervene in any suit, or prosecute an independent one to cancel a patent, the district or county attorney of the proper district or county will be requested to do so upon full information received at this office.

Very respectfully,

C. A. CULBERSON,
Attorney General.

Sheriffs can not collect mileage in misdemeanor cases.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, May 16, 1891.

Hon. Frank R. Graves, Helena, Texas.

DEAR SIR:—Your letter of May 9 is to hand. In it you state that at the request of your sheriff, who has previously written this Department on the subject, you write to make some inquiries for him. Substantially, you ask: Where a defendant is convicted in a misdemeanor case in an inferior court, is the sheriff, constable, or other peace officer entitled to have taxed against the defendant fees for mileage in executing a warrant of arrest, subpœnas, or other process? We are unable to find any express statute or decision allowing mileage to be taxed against the defendant in such cases. We do not undertake to say that the

absence of such a statute is a wise and just negative action on the part of the Legislature. We must be controlled in deciding this question by express statutes and authorities. I find nothing to govern me except articles 1042, 1094, and 1096, Code of Criminal Procedure, and the action of the Commissioners who codified the laws and acted on this subject. Article 1042 reads: "No item of costs in a criminal action or proceeding shall be taxed that is not expressly provided by law."

Article 1094 does not provide for mileage in the case stated, and 1096 is governed by 1094. The "Commissioners to Revise the Code" said in their report to the Governor, under title 15, chapter 4 (preceding the Code of Criminal Procedure in Willson's Texas Criminal Statutes), "Articles 1087 to 1095, inclusive, are supplied from the act of August 23, 1876, page 284 et seq. Articles 1096 to 1105, inclusive, are suggested as necessary additions. Also articles 1109 and 1110. The mileage fee for executing process is omitted from the costs in all cases, the Commission being of the opinion that it is the source of much extortion on the part of officers, and also operates unequally." Adopted, except article 1103 was stricken out.

The costs of officers are created by express statute, and when the statute is silent there is no cost. It is thus in this case. This seems to be a hardship on the officers in this instance. If the Legislature has not seen proper to create reasonable fees for these services, and indeed all services, we can not remedy the matter or question the propriety of legislative action or inaction. The query in the beginning of this letter is respectfully answered in the negative.

Very truly,

R. L. HENRY,
Office Assistant Attorney General.

Sunday Law.—Drug Stores and Restaurants can only Sell Drugs and Meals respectively on Sunday.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, May 26, 1891.

A. J. Gibson, Esq., County Attorney, Austin, Texas.

DEAR SIR:—We are in receipt of your letter, in which you inquire:

"1. Whether a drug store, as such, can sell on Sundays whisky and cigars, soda water, milk shakes, etc., as drugs?

"2. Whether restaurants on Sundays can furnish guests either spirituous, vinous or malt liquors with meals, or cigars or confectionery?"

Regardless of what construction would be placed upon the statute if the matter were now an original question in this office, you are respectfully advised that this Department, under a former administration, ruled in effect that in exempting keepers of drug stores and restaurants from the operation of the Sunday law the Legislature meant only to allow such persons to open their places of business and sell on Sunday respectively only drugs and medicines in the one case and only ordinary meals in the other. The various district and county officers throughout the State have doubtless acted on this construction. Two Legislatures have met and adjourned since this construction and made no change in the law as to what articles could be sold on Sunday by the keepers of drug stores and restaurants. It is therefore reasonable to suppose that the construction by this Department heretofore placed upon the Sunday law accorded with the intention of the Legislature. This Department now, in the light of these facts, feels authorized to adopt the same construction of the law.

Very respectfully,

W. J. J. SMITH,
Office Assistant Attorney General.

Penitentiaries, Superintendent of.— State Senator.— A State Senator appointed to a State office by the Governor, by and with the advice and consent of the Senate, is not an appointment in part by the Senate.— Such appointee is eligible under the Constitution.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, June 6, 1891.

Hon. L. A. Whatley, Huntsville, Texas.

DEAR SIR:— Acting upon your verbal request made, it is presumed, to govern your official action, the question of the legality of your appointment as Superintendent of Penitentiaries, has been carefully and thoroughly considered. The facts upon which the opinion is sought are, that you were elected State Senator in November, 1890, for four years, duly qualified as such, and served until the the 13th day of April last, and on that day you were appointed to the position named by the Governor with the advice and consent of the Senate.

The act of 1881 provides (2d Sayles' Statutes, art. 3521) that "the Governor shall appoint by and with the advice and consent of the Senate, a Superintendent of Penitentiaries, who shall hold his office for the term of two years and until the appointment and qualification of his successor." The only provision of the Constitution which can possibly bear upon the question is that portion of section 18, article 3, in which it is declared that, "no member of either House shall, during the term for which he is elected, be eligible to any office or place, the appointment to which may be made in whole, or in part, by either branch of the Legislature," and, thus considered, the single point is presented whether under the law the appointment to the office is made in part by the Senate.

In the consideration of this subject by this Department, a proper respect for the opinion of the Executive and the Senate would suggest the presumption that the former would not make, or the latter advise and consent to appointments unauthorized by the Constitution, and in all cases they should be deemed valid until the contrary clearly appears. Appointments to office, moreover, are in their nature intrinsically Executive acts, and unless expressly authorized by law neither the Legislature nor either branch thereof can ordinarily exercise the appointing power. This authority rests primarily with the people, which, under our system of government, they have generally delegated to the Executive.

Mechem Public Officers, secs. 103-106.

It must consequently be assumed that unless the Constitution or laws expressly confer the power of appointment in part upon the Senate, it does not possess it, and inasmuch as such authority is certainly not found in the Constitution, we must look alone to the statute.

There it is provided that "*the Governor shall appoint*, by and with the advice and consent of the Senate," etc. By appointment is meant the act of designation by the Executive of the person who is to exercise the functions of the office.

Mechem, sec. 102.

Thus understood and applied, the appointment is the sole act of the Governor. The Senate does not appoint in whole or in part, for the essential elements of choice and selection are confided exclusively to the Governor. It can not originate or suggest an appointment, nor inquire into the motive of the Executive in making it.

2 Story on the Const., sec. 1534.

Its power is wholly passive or preventive: its authority is confined to assenting to an appointment to be made by the Governor, or withholding such assent. It does not make or take part in making an appointment, but simply consents that the Governor may make it. Although before an act can be performed it becomes necessary to obtain the consent of another, the giving of such consent does not make that other a participant in the act.

It is true that unless the Senate consents the appointment can not be made, yet when such consent is obtained and the appointment is made it is unquestionably that of the Governor. So, also, it may be true that the Senate may prevent the Governor from making a certain appointment, but in that case "the most that can be said is that he had not his first choice."

2 Story on the Const., sec. 1531.

The views expressed above are fully sustained by the Supreme Court of the United States in the leading case on the subject (Marbury v. Madison, 1 Curtis, 368), in which the opinion was delivered by Chief Justice Marshall. Speaking of the nature of appointments under the Constitution of the United States, in

which it is provided that "the President shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors," etc., the Chief Justice said:

"The appointment. This is also *the act of the President*, and is also a voluntary act, though it can only be performed by and with the advice and consent of the Senate." At another point in the opinion he said:

"The appointment being *the sole act of the President*, must be completely evidenced when it is shown that he has done everything to be performed by him," and that "*the appointment is the sole act of the President;* the acceptance is the sole act of the officer." This construction accords with that given this provision by members of the convention. Attorneys General of the United States and commentators on the Constitution, it being generally held that the concurrence of the Senate was only intended as a check upon the President, and its action confined to a simple affirmation or rejection of the President's appointment.

3 Opinions Atty. Genl., 189.
4 Opinions Atty. Genl., 527.
The Federalist. No. 76.
2 Story on the Const., sec. 1531.
1 Bryce's Amer. Com., 57.

The language of the statute under consideration is substantially that of the Federal Constitution, and, if under the latter the appointment is the sole act of the President, it is necessarily the sole act of the Governor under the former, and consequently is not in part the act of the Senate.

There is another view of the question which leads to the same conclusion. The prohibition is leveled only at offices and places, the appointment to which may be made in whole or in part by either branch of the Legislature. It is well known that in the Convention which framed the Constitution a strong effort was made to declare members of the Legislature ineligible to many offices during the term for which they were elected, and to this end a distinguished delegate sought to amend the clause under consideration by substituting for all after the word eligible, the following: "To any other office in this State or the Government of the United States, elected by any part of the people of this State, or by the Legislature." Jour. Conv., 209. It will be observed that even the advocates of the broadest prohibitory policy did not seek to render members of the Legislature ineligible to offices which might be filled by the Governor, but the inhibition was limited to offices or places, the appointment or election to which were to be made by the Legislature or the people. This amendment, however, was rejected, and it is impossible not to attach significance to this action of the Convention. It positively declined to extend the prohibition beyond appointments made in whole or in part by either branch of the Legislature, and in view of this deliberate action it is believed that the intention was to limit the ineligibility to cases in which one branch of the Legislature was clearly and unequivocally invested with the power of appointment in whole or in part. The Constitution does not prohibit the Legislature from vesting the appointment of many offices already existing, and others which may be created, directly in the House or Senate, in whole or in part, and the disqualification was no doubt intended for such cases. Had the purpose been to disqualify legislators from holding offices, the appointment to which the Senate must consent to rather than take part in making, it is to be presumed such intention would have been clearly expressed. Matters of such importance, discriminating against one class of citizens and denying them equal privileges with the great body of the people, can not be given effect upon mere inference and construction. No purpose being shown in the Convention to declare legislators ineligible to offices appointed solely by the Governor, either by the advocates of the clause adopted or the broader one rejected, an interpretation which would extend the prohibition to appointments which all must admit are at least vested primarily in the Governor, though coupled with a condition, would both violate the fundamental rule that disqualifying provisions should be strictly construed, and be repugnant to the spirit of the Constitution and the evident intention of its framers.

It follows, therefore, that in the opinion of this Department your appointment was not in violation of the Constitution.

Very respectfully,

C. A. CULBERSON,
Attorney General.

Railroads.—Separate coach law.—Act of Twenty-second Legislature, p. 44, prohibits the riding of the white and colored races in the same coach, under any circumstances.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, June 19, 1891.

James K. P. Gillespie, Esq., District Attorney, Houston, Texas.

DEAR SIR:—Your favor of June 17, together with the enclosed letter of Captain A. Faulkner, General Passenger and Ticket Agent of the Houston and Texas Central Railway Company, has been received and duly considered by this Department. The question presented in the letter of Captain Faulkner is as follows: "We will have a coach for whites; also one for negroes; now we wish to accommodate smokers; we propose to place a coach between the coach for whites and the one for negroes and mark it "smoker:" can this coach be used by whites and negroes jointly who wish to occupy it temporarily for smoking? This smoking car is to be a sort of a free and easy and run empty unless some one occupies it at his own option."

The separate coach act, as passed by the Twenty-second Legislature, page 44, General Laws, sec. 1, provides "that every railroad company, etc., shall provide separate coaches for the accommodation of white and negro passengers, which separate coaches shall be equal in all points of comfort and convenience." We find no provision in the act authorizing or permitting the use of any coach on strictly passenger trains by the races jointly, as passengers, for any purpose except that which permits nurses to travel with their employers, and the plain and unmistakable language of the law is that separate coaches shall be provided, and that all coaches run on any passenger train shall be separate coaches, and the races shall not be allowed to ride together on any coach for any purpose except as above specified. Section 9 of the act provides adequate penalties against all conductors who refuse to enforce the provisions of the act and keep the races in separate coaches, where the same have been provided in accordance with the requirements of the law. The law was intended for the convenience, benefit and comfort of both races alike, and its unmistakable language means a complete separation of the two races when traveling upon the passenger trains in this State, and penalties are imposed upon all railroad companies, their officers and agents to secure a proper enforcement of its provisions. It therefore follows that, in the opinion of this Department, the running of such a coach as that above described would be in violation of the law, and you are respectfully requested to see that the law in this and in all other respects is properly enforced in your district. Section 3 of the act provides that: "Each compartment of a coach, divided by a good and substantial wooden partition with a door therein, shall be deemed a separate coach within the meaning of the act." We therefore suggest that the benefits of a smoker, which seems to be an essential element in the comfort of the traveling public, could easily be secured by placing in the middle coach above mentioned, "a good and substantial wooden partition with a door therein," the different compartments of which should be marked so as to designate the race for whose use it is intended, thus providing separate smoking coaches for the accommodation of both races, "equal in all points of comfort and convenience."

Very respectfully,

FRANK ANDREWS,
Office Assistant Attorney General.

Railroads.—Separate Coach Law.—Sheriff in charge of negro prisoner may guard him in the negro coach.—Where sheriff has white and negro prisoners in charge he must guard them in their respective coaches.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, June 27, 1891.

Mr. T. J. Epperson, Livingston, Texas.

DEAR SIR:—In your favor of June 21 you ask substantially: In regard to the separate coach law enacted by the Twenty-second Legislature, where a sheriff has in custody one or more negro prisoners and desires to transfer them on the railroad, what action should the sheriff or peace officers take in regard to the separation of the races?

You are respectfully advised that the sheriff should place a negro prisoner in the coach provided for negroes and guard the prisoner or have him guarded there. If a white prisoner is in custody he should be placed in the coach provided for the whites.

The Legislature did not intend to prohibit a sheriff from conveying and guarding a negro in the negro coach. It did not intend to make it a criminal offense for the sheriff in the discharge of his official duties to be in the negro coach with a negro prisoner.

There is another point suggested in your letter. Suppose the sheriff has a negro and white prisoner in custody at the same time, can he put them in the same coach and convey them together? You are advised that the sheriff can not convey the two races together. The law says they must be separated, and I take it that the Legislature intended exactly what it said, and the races should be separated except where the law makes exceptions. Provision must be made for conveying the two kinds of prisoners apart from each other.

Very respectfully,

R. L. HENRY,
Office Assistant Attorney General.

Notary Public.—Is an unmarried woman twenty-one years of age eligible to the office of Notary Public? Yes.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, June 30, 1891.

Mr. S. B. Scott, County Clerk, Dallas, Texas.

DEAR SIR:—Your letter of June 23 is to hand. You ask this Department for an opinion on the question as to the eligibility to the position of notary public of an unmarried woman twenty-one years of age.

If it is held that an unmarried woman is not eligible to such position, some very cogent and sensible reason should be given to support such a holding. All restrictions upon human liberty and freedom of human action, and all claims for special privileges by any class of citizens, should be regarded as having the presumption of law against them, and should not be sustained except by very clear expression or very clear implication of law. In considering the subject in hand this Department has no concern in regard to the *propriety* of a woman holding the position of notary public, or in regard to women holding any office; but we can only consider the question, do the Constitution, statutes, and the law confer the office of notary public upon men alone, to the exclusion of *femmes sole?* I find nothing in the Constitution of Texas excluding single women from this position, but the Constitution, by its very language, rather indicates that the Governor may include such persons in appointing notaries.

Here is the language of the Constitution, art. 4, sec. 26: "The Governor, by and with the advice and consent of two-thirds of the Senate, shall appoint a convenient number of notaries public for each county, who shall perform such duties as now are or may be prescribed by law." This is the only article of our Constitution that bears upon this subject, or that tends to exclude women from this position, or to include them as being eligible.

Has the Legislature excluded women from the position? Article 3362 is the only act of the Legislature in force, that I am aware of, that sheds any light on the subject: "There shall be appointed by the Governor, by and with the advice and consent of the Senate, a convenient number of notaries public for each county in this State, who shall hold their office for the term of two years," etc. This language most certainly can not be said to *exclude* women from its provisions, either by express words or implied meaning.

The act of Congress, 1825, reads: "The Postmaster General shall establish postoffices and appoint postmasters," and it has been held frequently under this language the Postmaster General has the authority to appoint both married and unmarried women to the office of postmistress. And the President has appointed and the Senate confirmed women to this office. Then, if the Constitution and statutes do not prohibit females from holding this position, we are remanded to the common law and the decisions of our own country for authority. Appealing to the last named source, I can not find one single authority saying that a single woman can not be a notary, but many authorities tend to the doctrine

that women are eligible to the place. The common law presents us this proposition descending through many ages and nearly all the decisions: "A woman may fill any local office of an administrative character, the duties attached to which are such that a woman is competent to perform them." 115 Mass., 602. "Offices wherein the duties are ministerial and not judicial may be granted to women." Judge Gresham, in the case of the United States v. Bixby, 10 Biss., 522, in holding that infants are eligible to the office of notary public, remarked: "The office of notary public is ministerial, and does not concern the administration of justice."

Lynch v. Livingston, 6 N. Y., 422.

National, etc., v. Conway, 1 Hughes, 37.

In the case mentioned Judge Gresham says: "Infants are capable of executing mere powers. In England they are allowed to hold the office of parkkeeper, forester, jailer, and mayor of a town; and in both England and this country they are capable of holding and discharging the duties of such mere ministerial offices as call for the exercise of skill and diligence only." Steven S. Mason was the acting Governor of the Territory of Michigan before he was twenty-one years of age, and his record as Governor displayed a vigor and wisdom that clearly showed the propriety of his appointment by Jackson.

It is a notorious fact that in many States women are acting as duly appointed and qualified notaries: They have been appointed and have acted in several instances in Texas. So the present case presented by you wherein Governor Hogg has appointed a single woman notary is not the first case. In the case of Huff v. Cook, 44 Iowa, 639, it is held that a woman may be a county superintendent of schools. A married woman of Chicago for three terms was appointed pension agent for the State of Illinois. Women have held and are now holding the office (as it is termed in many authorities) of attorney at law.

Matter of Hall, 47 Am. Rep., 625.

But there are authorities to the contrary.

Belva Lockwood's case, 9 Ct. Cl. Rep., 346.

And so a female has held the office of justice of the peace, 107 Mass., 604. She may be a commissioner of court, 47 Am. Rep., 625. And may be a member of a school committee, 115 Mass., 602. In the case of Findlay v. Thorn, 31 Albany Law Journal, 43 How. Pr. (N. S.), 76, the question was not directly decided, but the opinion tends strongly to the doctrine that a female may be a notary. There the verification to an answer was sworn to before Miss Jennie Turner, a notary public, and the court held that the verification was valid; that the appointment of a notary could not be attacked collaterally; and that her acts as a *de facto* officer were entitled to absolute verity. In England women have held many offices. Anne, Countess of Pembroke, held the office of sheriff of Westmoreland and exercised the duties thereof in person. At the assizes of Appleby she sat with the judges on the bench. Sheriffs at that time held court and exercised judicial functions. Eleanor was appointed lord keeper of England. It seems that she actually performed the duties of lord chancellor in person, and sat as a judge in *aula regia*. These are a few out of many cases where women, both married and unmarried, have held office, some very important. It is not pretended to discuss or decide in this communication whether a married woman can hold an office of any sort; but simply whether a single woman, twenty-one years of age, whose identity is not merged in that of another, as an independent and untrammeled individual, can hold this purely ministerial position, which men hold in connection with many other offices.

Until the Legislature interdicts such appointments, in these modern days of personal freedom and expanded and liberal equitable jurisprudence, it would not seem proper and sensible to curtail the inherent rights of an individual by a mere dictum. I can not think of one good, sensible reason why this office should not be filled by a *femme sole*, but I can think of many potent reasons and arguments why she could and should hold a position of this nature—an office purely local and ministerial.

It is true that the decisions and the law exclude—and rightly—women from a *great majority* of *offices*, but she has never been excluded from positions of this character as far as the law indicates. Here we have an office of less importance than many that women have held and are now holding, one that has been held by an infant, one that men hold when they at the same time hold another office that is more important, one that a woman may hold to the satisfaction of every one, and one that the Governor has filled by appointment and the Senate has

confirmed, thereby giving *Executive* and *legislative sanction*, one that is being conferred upon *femmes sole* in other States and this State — then why exclude her from this local and ministerial place? Where is the law? Where is the sensible reason? You are, therefore, respectfully advised that an unmarried woman, twenty-one years old, may hold the office of notary public, and when she has been appointed by the Governor and confirmed by the Senate and has duly qualified, her acts as a *de facto* officer are most certainly legal and binding until she is removed by a direct proceeding for that purpose.

In addition to authorities above see also:

25 Albany Law Journal, 104;
Wilson v. Newton, 24 Am. St. Rep., 173;
Shuehardt v. People, 39 Am. Rep., 34.

Very truly,

R. L. HENRY,
Office Assistant Attorney General.

Legislative committee has no power to punish for contempt.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, July 14, 1891.

Hon. H. M. Garwood, Bastrop, Texas.

DEAR SIR:—Your letter of the 9th instant, requesting, on behalf of the committee, an opinion touching the authority of the joint committee appointed by the last Legislature to investigate the receivership of the International and Great Northern Railroad Company, has been carefully considered. The precise question propounded by you is as follows:

"C. F. Bonner and H. M. Whittaker, witnesses duly subpœnaed to appear and testify in the proceedings, were each asked the question: 'Do you, either of your own knowledge or by information derived from any officer of the receivership, know of any fact not hitherto disclosed which is pertinent to this investigation?' To this each witness replied that he did and that such pertinent fact was disclosed to him by an officer of the receivership. When requested to state the fact each witness refused to testify. Can the committee, if the said witnesses refuse further to testify, if again summoned to appear and testify, be punished as for contempt by the committee?"

It is assumed that by the last sentence you intend to inquire whether the witnesses named, if again summoned and again decline to testify, may be punished as for contempt by the joint committee. Whatever may be the power of the Legislature or either branch thereof to punish as for contempt, the law seems clear that neither joint committees nor committees of either House can exercise this authority. The Constitution of this State (art. 3, sec. 15) invests each House and not the committees with this power, and the general and thoroughly accepted rule is that "a refusal to appear or to testify before such committee or to produce books or papers, would be a contempt of the House; but the committee can not punish for contempt: it can only report the conduct of the offending party to the House for its action."

Cooley Const. Lim., 5th Ed., 162–163;
Rapalje on Contempts, Sec. 60;
Burnham v. Morrissey, 14 Gray, 240.

The practice indicated above has been uniformly pursued in this character of cases.

Kilbourn v. Thompson, 103 U. S., 168;
In Re Falvey, 7 Wisconsin, 630;
People v. Keeler, 29 Alb. Law Jour., 511;
Cushing's Legislative Assemblies, secs. 662, 667, 1902;
Rapalje on Contempts, secs. 60, 68.

Very respectfully,

C. A. CULBERSON,
Attorney General.

It is Unlawful for any Person to Retail Medicine without first Complying with the Requirements of the Law Regulating the Practice of Pharmacy in this State.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, August 10, 1891.

Dr. W. H. Robert, Jr., Denison, Texas.

DEAR SIR:—In reply to your favor of August 1 you are respectfully advised that this Department has no authority to give opinions to any persons except certain State, district and county officers, and you are respectfully referred to your county attorney. However, as the matter is one of some importance, you are unofficially advised that under section 12 of the pharmacy act of the Twenty-first Legislature, page 12, no person not a qualified pharmacist under the law may compound prescriptions or retail medicines. The selling of laudanum, paragoric, oil, salts and various other medicines, together with a lot of patent medicines, is certainly a retailing of medicines within the meaning of section 12 and prohibited by law.

The object of the law was first to protect the public against the incompetency and unskillfulness of pretended druggists and compounders of prescriptions, and also to protect pharmacists who have prepared and qualified themselves for the business at an expense of time, labor and money, from the injurious competition of those who are not qualified.

All persons who "retail medicines" of any kind are subject to the conditions of the pharmacy law and liable to prosecution for retailing medicine, unless the party so selling has first complied with the regulations of the law, and this is applicable in all towns where the law is operative, whether such sales are made out of a store of merchandise, from a huckster shop, from a tent or from a wagon. To permit people to engage in other business and "retail medicine" as an incident to that business without being qualified pharmacists, would afford no protection to the regular and qualified pharmacists and none to the public, and would render the law in that far nugatory and void. The legitimate competition of the druggist is desired, but the law seeks to exclude for public safety all incompetent and unskilled persons from compounding drugs and retailing medicines, and to require proper preparation for the business or prevent it being followed.

Very respectfully,

FRANK ANDREWS,
Office Assistant Attorney General.

State Superintendent of Public Instruction should not refuse a teacher's certificate to a lady on the ground that she is a nun or Sister of Charity.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, August 14, 1891.

Hon. H. C. Pritchett, State Superintendent Public Instruction.

DEAR SIR:—We have your favor of August 11, wherein you inquire whether the State Superintendent of Public Instruction should refuse a teacher's certificate to a lady on the ground that she is a nun or sister of charity. We have given this matter careful attention, and in reply thereto you are respectfully advised that the only qualifications required by law for a teacher in the public schools of this State, as the law now exists, are to be found in chapter 116, page 183, *et seq.*, Acts Twenty-second Legislature. Section 2a of said act provides that any one desiring to teach a public school shall present a certificate from three good citizens known to the county superintendent or *ex-officio* superintendent that the applicant is of good moral character and exemplary habits. The county superintendent or *ex-officio* superintendent shall thereupon, *unless satisfied that some good cause exists for refusing the certificate* hereinafter mentioned, recommend him to the Board of Examiners for examination. Section 3f provides that after such application and recommendation has been made the Board of Examiners shall examine such applicant as to his competency to teach the branches named in the preceding clauses in the English language, and shall make a report on oath to the county superintendent or *ex-officio* superintendent, which report shall state who of the Board were present at such examination,

that the applicant was examined in all the branches of study embraced in the grade of certificate recommended, and that such applicant is competent to teach and qualified to teach all such branches, and the county superintendent shall, if such report be favorable, issue a certificate of competency to the applicant, according to the grade recommended by the Board of Examiners, authorizing his employment by the trustees of any school district in the county in which the same is issued. These seem to be the only qualifications prescribed for teachers. The only question, therefore, is raised in the accompanying correspondence, submitted with your letter, as to whether or not a nun or sister of charity, otherwise qualified, would be prohibited from teaching in the public schools of this State on sectarian grounds. The Constitution, art. 7, sec. 5, provides that no part of the permanent or available school fund of this State shall ever be appropriated to or used for the support of any sectarian school. Article 5705, Sayles' Civil Statutes, provides that no part of the public school fund shall be appropriated to or used for the support of any sectarian school.

The question resolves itself into that of whether or not the employment of a nun or sister of charity in a public free school, to which the public free school money of this State has been apportioned and appropriated, would be an appropriation of any part of the school fund of this State for the support of a sectarian school. By the general law the trustees of the public schools of this State are given control and management of said schools under the direction of the county superintendent and under the general direction of the State Superintendent of Public Instruction, and it is the duty of these officers to see that the laws under which they act are properly enforced. If the trustees of any of the public schools of this State see fit to employ a nun or sister of charity to teach in such schools, and no religious teachings of any nature whatever are permitted during school hours nor in the school building, nor on the school premises either before or after school hours, I can not see that the person so employed would be disqualified under the Constitution and laws of this State. If, however, any nun or sister of charity, or any other person who should be employed by the trustees of any public school in this State to teach in said school, should in any manner whatever give any religious instruction of any nature whatever, or in anywise teach or attempt to teach in any form, method or manner the religion of any denomination, sect or creed, such teacher could not be paid out of the public school fund of this State, as it would be in violation of the Constitution to appropriate any part of the school fund to the support of any sectarian school or school where any kind of religion was taught. You are, therefore, respectfully advised that in the opinion of this Department you have no authority to withhold a certificate authorizing her to teach in the public schools of this State from a nun or sister of charity, upon the exclusive ground that she is a member of a religious order or maintains or upholds a particular religious faith. The spirit of our institutions is that religious faith or want of religious faith should not prevent the citizens of this country from exercising and enjoying all the rights, immunities and privileges granted under the Constitution and laws of this State; and it is only when the Constitution and laws prohibiting religious instruction in our public free schools are infringed that you would be authorized to withhold payment of teachers' vouchers. The employment of a nun or sister of charity is a matter peculiarly under the supervision of the trustees of each public school and superintendent or county judge, as the case may be, of each county, and if the proper officer should be satisfied that some good cause existed for refusing a certificate to a nun or sister of charity, he would be authorized to refuse to issue the same as in any other case, but it is not believed that he could legally refuse to grant the certificate upon the exclusive ground that the applicant was a nun or sister of charity; but he would be authorized to refuse payment of any voucher where any sort of religion was taught in any public school in his county as above indicated. Our Bill of Rights also provides, article 1, section 4, that "no religious test shall ever be required as a qualification to any office of public trust in this State." Section 6 of the same article provides that: "No human authority ought, in any case whatever, to control or interfere with the rights of conscience in matters of religion, and no preference shall ever be given by law to any religious society or mode of worship."

It is therefore concluded, as above indicated, that you can make no distinction against any person on the account of any religious belief he may have or any

religious order to which he may belong or maintain: provided always, that no religious teaching of any nature by any person is permitted in the public schools of this State.

Very respectfully,

FRANK ANDREWS,
Office Assistant Attorney General.

One State has no Power to Create a Corporation with Authority to do Business in Another.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, August 15, 1891.

Hon. George W. Smith, Secretary of State.

DEAR SIR:—The charter of the Chickasaw Compress Company, together with the letter of Messrs. Head and Dillard, which were referred to me by you, have been carefully considered. This subject has heretofore undergone very careful consideration by this Department, and the conclusion reached that one State had no power to create a corporation with authority to do business in another. After a careful examination of the question I see no reason to change the opinion then formed. The general rule on the subject is thus stated: "It is a fundamental principle that the laws of a State can have no binding force *proprio vigore* outside of the territorial limits and jurisdiction of the State enacting them. Hence it follows that a State can not grant to any person the right to exercise a franchise in a foreign State or country, for a franchise is the result of a law authorizing particular individuals to do acts or enjoy immunities which are not allowed to the community at large."

2 Morawetz on Corporations, sec. 959.

Angell and Ames on Corporations. sec. 104, and notes.

Empire Mills v. Alston Grocery Company, 15 S. W. Reporter (Texas), 505, and authorities cited.

The question presented to you is not, I think, as seems to be believed by Messrs. Head and Dillard, one of comity, but is purely a question of the power of this State expressly to create a corporation which is intended to do business exclusively beyond its limits.

In Middle Bridge Corporation v. Marks, 26 Me., 326, it was held that the Legislature of one State can not create a corporation so as to authorize it to build a bridge extending within the limits of another State and so as to empower such corporation to collect toll of one who passes only upon that part of the bridge within the limits of the other State.

In Hill v. Beach, 1 Beasley. 31, it was held that a corporation organized under the laws of New York for the sole purpose of doing business in New Jersey could not be treated as a corporation by the laws of the latter State, but merely as a partnership.

In the case of Empire Mills v. Alston Grocery Company, cited above, it is said by the Court of Appeals that: "A corporation can not incorporate in one State for the purpose of carrying on all of its corporate business in another." 15 S. W. Rep., 509.

From what has been said it follows that I concur with you in the opinion that this charter is not entitled to be filed. The charter and letter are herewith returned.

Very respectfully,

C. A. CULBERSON,
Attorney General.

Organized counties are not bound to pay for scalps taken in the attached unorganized counties.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, August 25, 1891.

Judge G. W. Walthall, Big Springs, Texas.

DEAR SIR:—Your letter inquiring whether, under the Scalp Law, Howard county is lawfull bound to pay for scalps taken in the attached counties of Dawson and Glasscock, is received. The first section of the act provides that persons

who shall kill any of the animals named, "shall be paid in the county in which he kills such animal or animals," and section 2 provides that the Commissioners' Court of each county shall order to be paid to the person or persons having killed any of said animals "in their respective counties as fixed in section 1 of this act." These provisions, it seems to me, considered in connection with the entire act, clearly contemplate that no county can be required to pay for scalps taken in any other county. The act makes no provision for payment where the animals are killed in unorganized counties. An express law requiring organized counties to pay a bounty for acts beneficial to unorganized counties attached to them for judicial purposes only, making no provision for future compensation, would obviously be unjust, and this act can not by mere construction be held to have such operation.

In my judgment, therefore, Howard county is neither required nor authorized to pay for the killing of animals named in the act in the counties attached thereto.

Very respectfully,

C. A. CULBERSON,
Attorney General.

District and County Attorneys, when present and representing the State in any felony case before an Examining Court, are entitled to the fee of five dollars whether testimony be taken or not.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, August 26, 1891.

Judge E. W. Terhune, Greenville, Texas.

DEAR SIR:—Your letter of the 18th instant, asking for a construction of section 4 of the act approved March 3, 1883, relating to the fees of county and district attorneys, has been fully considered, and I am constrained to differ with you.

The section provides that "district and county attorneys, for attending and prosecuting any felony case before an Examining Court, shall be entitled to a fee of five dollars, to be paid by the State, for each case prosecuted by him before such court," and the question presented by you is whether, should the defendant waive examination and no evidence be taken by the State, under article 317 of the Code of Criminal Procedure, such attorneys are entitled to the fee provided for by the act.

To prosecute under this statute means to proceed against the defendant judicially. It is usual when a crime has been committed for the district or county attorney to confer with the witnesses, prepare the accusation, cause the accused to be apprehended and brought before the Examining Court, and be present for such further action on his part, as the representative of the State, as in his judgment may be proper or necessary. This is certainly a judicial proceeding against the defendant. Whether testimony is taken on the trial depends upon whether the accused waives examination and, if so, whether in the judgment of the prosecuting attorney or magistrate the best interest of the State requires it. But in either case, whether testimony be taken or not, the attorney has prosecuted the defendant in that court and proceeded against him judicially. It is true that it sometimes occurs that prosecuting attorneys are not present when crimes are committed and the complaints prepared, but in those cases they are present at the trial, frequently traveling long distances at their own expense, examine the complaint and if necessary amend it, confer with the witnesses and hold themselves in readiness to take testimony if not waived by the accused or if deemed proper by them.

No argument against this view can be drawn from the fee allowed. It would be considered small for the preparation of the complaint and conference with the witnesses, and in some cases for the mere attendance upon a distant court; and it is not reasonable to suppose that the Legislature intend to withhold it except in those cases in which testimony was taken, because in those cases it is especially inadequate compensation. The more reasonable conclusion is that the Legislature believed that, while small, the fee allowed would be a fair average in all the cases, in some of which time and labor are necessary, and in others a mere formal and less laborious representation occurs. The fee is too small to

be considered as having been offered by the Legislature either as compensation or as a stimulus for taking testimony at the trial.

That some prosecuting attorneys may neglect their duty and fail to perpetuate the testimony in cases clearly demanding such a course can not control the operation of the general rule applicable to all and enacted upon the presumption that this duty will be performed.

It is believed, therefore, that when the district or county attorney is present at the trial and represents the State in the case, he is entitled to the fee whether testimony be taken or not.

Very respectfully,

C. A. CULBERSON,
Attorney General.

Corporation.—Charter.—Secretary of State not authorized to file charter of land company to do business in Texas.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, September 10, 1891.

Hon. George W. Smith, Secretary of State.

DEAR SIR:—We have your favor of September 9, with the inclosed proposed charter of the Guarantee Abstract Land Company, of Brazoria county, Texas, requesting the opinion of this Department as to whether or not such proposed charter should be filed. After a careful examination of the law of private corporations, as amended by the Twenty-second Legislature, we are of the opinion that the proposed charter is not in conformity to and in harmony with the intention and spirit of section 39 of said act, under which it is proposed to be filed. The language used in section 39 clearly imports the idea that such companies as may be incorporated under said section shall have the right only to buy, own, sell and convey real estate in States other than Texas, and in foreign countries. The prohibition in the second clause of said section is that such company shall only own such real estate in this State as may be necessary for its office. The proposed charter empowers the corporation which it intends to form to buy and sell real estate in the State of Texas, and it seems to be a legal impossibility for a person to buy and sell real estate unless such person shall own the same for some period of time, unless the buying and selling was strictly as agents or on commission, in which event we find no provision for incorporation. You are, therefore, respectfully advised that in the opinion of this Department you should decline to accept and file the proposed charter of the Guarantee Abstract Land Company, of Brazoria county. The charter is herewith returned.

Very respectfully,

FRANK ANDREWS,
Office Assistant Attorney General.

Elections.—When a vacancy occurs in either House of the Legislature it is the duty of the Governor to order an election to fill such vacancy, and if he fails to do so within twenty days, then it is the duty of the returning officers of said district to order such election.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, November 10, 1891.

Judge E. G. Bower, County Judge, Dallas, Texas.

DEAR SIR:—In answer to your letter of the 7th instant, asking this Department to refer you to the law authorizing you to order an election to fill the vacancy in the Legislature caused by the resignation of J. W. Crayton, flotorial Representative of the Thirty-fifth Representative District, you are respectfully advised that by article 13, Revised Statutes, the counties of Dallas, Tarrant and Rockwall are erected into the Thirty-fifth Representative District. By article 14, Revised Statutes, the county judge of Dallas county is made the returning officer for said Thirty-fifth Representative District. Section 13 of article 3 of the State Constitution provides: "When vacancies occur in either House, the

Governor or person exercising the power of Governor, shall issue writs of election to fill such vacancies: and should the Governor fail to issue a writ of election to fill any such vacancy within twenty days after it occurs, the returning officer of the district in which such vacancy may have happened shall be authorized to order an election for that purpose."

If the Governor failed to order an election to fill said vacancy within twenty days after it occurred, authority to order the same has been by the Constitution vested in you, as the returning officer of the district.

Very respectfully,

W. J. J. SMITH,
Office Assistant Attorney General.

Cities and towns.—Bridges.—Bridges built by a county and afterwards brought into the city limits are under the control of the city, and the city is liable for the repairs thereof.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, November 12, 1891.

Messrs. John N. Brown, W. N. McElroy, Chas. A. Newning, County Commissioners, Austin, Texas.

DEAR SIRS:—In your letter of October 6 you state in substance, that while the south boundary line of the city of Austin extended south only to the center of the channel of the Colorado river a private corporation obtained a charter to build and built and maintained a toll bridge over said river at the foot of Congress avenue. That subsequently the county of Travis, through its Commissioners' Court, purchased from said private corporation said bridge, its approaches, the roadway leading up to it on the south for the distance of 900 feet, which was owned in fee by the private corporation, together with all franchises, etc., and issued negotiable bonds in payment, and withdrew the tolls, making the highway and bridge public and free. That subsequent to said purchase the Twenty-second Legislature granted to Austin an amended charter, extending its corporate limits so as to entirely include said bridge, its approaches and the right of way, 900 feet in length above referred to; and that you wished to be advised by this Department upon the following points:

First. Does the county of Travis lose its title to the bridge, roadway, approaches, etc., because they are now in the limits? If yea, can the citizens of the country outside of the city be taxed to complete the payment due by the county for the purchase of said bridge?

You are respectfully advised that the county has not been divested of its title to said roadway and bridge, but that it is held by it in trust for the public who have by dedication an easement of travel over the road and bridge. If the bonds of the county issued in payment for said bridge were legally issued, they must of course be paid by the taxpayers of the whole county.

Second. You also inquire: "Who has the right to regulate and control said bridge, roadway, approaches, etc., the city or county?" The act of the Twenty-second Legislature incorporating the city of Austin contains, among others, the following provisions, which it is necessary here to notice: Section 35 as to taxes and bonds: section 50, "That the city council shall have *exclusive* control and regulation of *all* streets, alleys, sidewalks and highways within the corporate limits of the city. * * *"

"Section 51. That the city council shall fix and determine the nature and extent of all sidewalks and streets, etc., and shall have power * * * to construct, regulate and keep in repair all necessary sidewalks, footways and streets and to regulate the use of the same."

"Section 53. That it shall be their (board of street and sewer commissioners) duty to prepare and recommend to the city council comprehensive plans for sidewalks, streets." * * * "Section 57, subdivision 23. The city council shall have power by ordinance to regulate and license all ferries and toll bridges within the limits of the city" except above a certain point on the river; and subdivision 41, "To prohibit and regulate the driving of cattle or other animals through the streets of the city." Also subdivision 47 of the same section. "Section 98. That the (street) superintendent, in the absence of direction from the board of street commissioners or from the council or city engineer,

shall, with the advice of the mayor, have general supervision of all work on the streets and bridges of the city within such limit of expense as the council may provide." Also section 106. "Section 113. That the inhabitants of the city of Austin are hereby exempted from working on public roads beyond the limits of the city." "Section 120. That the jurisdiction and powers conferred on the city of Austin by this act shall supersede the authority of each and all other municipal corporations heretofore exercising any authority over any part of the territory included within the boundaries of the city of Austin as prescribed by this act."

Our Constitution, section 1, article 11, recognizes the several counties as municipal corporations and legal subdivisions of the State.

From the sections cited above it is clear that the Legislature intended to vest in the city of Austin the exclusive control of all public highways and bridges, which would properly be said to form a part or section of any public street of the city. As the corporate limits of the city include the Colorado river and a narrow strip of land on either side thereof for a distance of more than twenty-one miles above the bridge in question, it is not intended that the conclusion herein reached shall apply to any other bridge than the one at the intersection of Congress avenue and the Colorado river. This bridge is wholly within the city, and is built across a stream at its intersection with a principal street so as to form a continuation thereof. It is a part of the street or highway.

Jones v. Heith, 37 Texas, 394.
City of Eudora v. Miller, 30 Kansas, 494.
Elliott on Roads and Streets, pp. 22 and 23.
Chicago v. Powers, 42 Ill., 169.
89 Am. Dec., 418.

The city of Austin, being empowered to control and regulate its streets and highways, and having power to raise money to keep them in repair, is obliged to repair them in their entirety, including bridges thereon. Its corporate responsibility is commensurate with its corporate obligation. That the Congress avenue bridge was originally bought by the county does not shift the responsibility.

Phelps v. City of Mankato, 25 Minn., 276.
City of Eudora v. Miller, 30 Kansas, 494.
City of Goshen v. Myers, 119 Ind., 196.

The erection of the municipal corporation of Austin, and the grant to it of exclusive jurisdiction over its thoroughfares by the Legislature *ipso facto* ousted the jurisdiction of Travis county over the highways recognized by the city and included within the city limits. Upon this subject our Supreme Court has said: "The county court does, it is true, possess a general jurisdiction, co-extensive with the limits of the county, to lay out and establish public roads and highways, but as that jurisdiction is conferred by a general law which is applicable to every county in the State, it is at all times subject to be changed or modified by special laws acting upon the same subject in particular counties, or special localities, though such change will not affect the operation of the general law, except in these particular localities which are intended to be taken out of the rule. Now, the act incorporating the town of Goliad, and giving to its council authority to lay out and improve the public highways within the incorporation, is a special law upon the same subject, co-extensive in its operation with the limits of the town, and if acted upon by the council its effect must be to modify and repeal the general law upon the subject, within those limits, and to take from the county court its jurisdiction over roads and highways therein."

State v. Jones, 18 Texas, 880.
Charter, sec. 98.
Elliott on Roads and Streets, p. 13.

That the tax payers of the county at large must pay the purchase price of said bridge can make no difference. The city of Austin is under obligation by virtue of its exclusive jurisdiction to maintain its highways, including bridges, in a safe condition for travel, and when that duty is performed, it will inure to the benefit of every person interested in its performance. The county of Travis bought the bridge by virtue of powers granted to it as a governmental agency, and as such continued to exercise its jurisdiction over it until the Legislature, by the charter of the city of Austin gave to the city sole jurisdiction and control to the exclusion of other governmental instrumentalities. And by reason of the city's exclusive control over the public highways, and the power under

its charter to raise money to keep them in repair, and its acquiescence in the use of them by the public, it becomes bound to keep them in a safe condition.

Commissioners of Shawnee Co. v. Topeka, 39 Kan., 197.

Mechanicsburg v. Powers, 54 Ill., 845.

Third. In answer to your third and fourth questions, as to whether the county can surrender and donate the property to the city, you are respectfully advised that the jurisdiction and status of the bridge being fixed by law, no act of surrender by the county could change it; except that if the city expressly adopt the bridge, it will be an additional reason that it should preserve it in repair. Your court would be unauthorized to convey the fee to the city, because the county holds it in trust for the people of the county who have a right to its use as a public free bridge.

Your fifth question, asking whether the city or county is responsible for keeping the bridge in repair is answered under the third question above.

State v. Jones, 18 Texas, 874.

City of Sherman v. Nairy, 17 Texas, 291.

Klein v. City of Dallas, 71 Texas, 280.

City of Galveston v. Posnainsky, 62 Texas, 118.

Barnes v. District of Columbia, 91 U. S., 566.

City of Austin v. Ritz, 72 Texas, 403.

It may be that the county having bought the bridge has a right as an incident of ownership to see that the property is preserved, and in the event of the failure of the city to maintain it in a proper state, or its failure to exercise its jurisdiction over it, the county has a right to make such voluntary repairs as are necessary to carry out the object of its purchase. In the case of the State v. Jones, 18 Texas, 880, it is said: "Until the town council acts under the authority conferred by its charter, the general authority of the county court over the subject matter continues to exist, and may be exercised. It is only when both bodies attempt to act in opposition to and in conflict with each other that the power and authority of one must cease and yield to that of the other, and in such a state of things I am of the opinion that the authority of the county court must yield to that of the town council."

Very respectfully,

W. J. J. SMITH,
Office Assistant Attorney General.

Texas Confederate Home.—Inmates of are entitled to vote.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, December 1, 1891.

Messrs. John M. Lewis, Martin Glover and Others.

GENTLEMEN:—Your note of the 24th inst., handed me by Colonel George B. Zimpleman, in which you inquire whether you are entitled to vote in the coming city election, has been duly considered.

The Constitution (art. 6, sec. 2) in effect provides that all male persons, including foreigners who have declared their purpose to become citizens, twenty-one years of age, and not idiots, lunatics, paupers supported by the county, convicted felons, soldiers, marines or seamen employed in the army or navy of the United States, and who shall have resided in the State one year next preceding an election and the last six months within the district or county in which he offers to vote, shall be deemed qualified electors. Section 3 of the same article provides that all qualified electors of the State, as above prescribed, who shall have resided for six months immediately preceding an election within the limits of any city or corporate town, shall have the right to vote for mayor and all other elective officers; but in all elections to determine the expenditure of money or assumption of debt only those shall be qualified to vote who pay taxes on property in said city or incorporated town.

From this statement of the law governing the subject it seems clear that if you possess the qualifications mentioned, and are *bona fide* residents of the city of Austin, making it your fixed and permanent place of residence, the fact that through the misfortunes and calamities of war you are inmates of the home provided for disabled Confederate soldiers is not a disqualification to vote. In view of the constitutional provision quoted the Legislature, if so disposed, would not

be authorized in the establishment of the Home to add to the qualifications of the electors; and certainly the mere acceptance of its generosity can not be held to withdraw this important right of citizenship from veterans entitled to the gratitude of the State.

With great respect, very truly yours,

C. A. CULBERSON,
Attorney General.

County Judge may accept the resignation of County Commissioner and fill the Vacancy.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, January 19, 1892.

Judge C. O. Ellis, Cotulla, Texas.

DEAR SIR:—I answered your telegram this morning to the effect that, as county judge, you were authorized to accept the resignation of the county commissioner and fill the vacancy, and I write to confirm the message. Article 1513, Revised Statutes, authorizes the county judge to fill a vacancy in the office of county commissioner. No statute, so far as I am advised, provides for the presentation of the resignation of a commissioner to any particular officer or court, and the rule is that, in the absence of such provision, the resignation should be made to the officer or body which is by law authorized to act upon it, by appointing a successor or calling an election to fill the vacancy. Under that rule, as you are authorized to fill the vacancy, you are the proper person to accept the resignation.

Mechem Public Officers, section 413.
Edwards v. United States, 103 U. S., 471.

Very respectfully,

C. A. CULBERSON,
Attorney General.

Public Land.—Land certificate.—Article VII, section 2 of the Constitution construed, without deciding whether the Legislature has the power under the Constitution to donate the land certificate to Governor P. H. Bell, held that such a donation certificate can not be located upon any of the undisposed of public domain, when the act granting the certificate does not provide for the survey and location of an equal amount of land for the public free schools, and when there is no other law in existence under which the free school can obtain a like amount of land.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, January 27, 1892.

Hon. W. L. McGaughey, Commissioner General Land Office.

DEAR SIR:—In your letter of January 15 you inquire whether the certificate for 1280 acres of land provided for Governor P. H. Bell, by chapter 6 of the special laws of the Twenty-second Legislature, can be "located upon either of the three classes of lands appropriated by the act of July 14, 1877, and the amendatory act of 1881."

Besides granting to Governor Bell an annual pension of $150, the special act of 1891 further provides:

"And to Governor P. H. Bell there is hereby granted a certificate for 1280 acres of land, which may be located upon any of the heretofore reserved public lands, now reserved for the payment of the public debt."

Under the act of July 14, 1879, as amended by the act of March 11, 1881, none of the lands therein appropriated and set apart for sale, could be disposed of, except in one of the following three ways and for the following purposes:

1st. The 3,050,000 acres theretofore appropriated for the building of a State Capitol had a preference right of location in such of the counties reserved for that purpose by the act of February 20, 1879, as were included within the bounds of the reservation made by the act of July 14, 1879.

Constitution, art. 16, sec. 57.
Act of February 20, 1879, sec. 1.
Act of July 14, 1879, secs. 1 and 10.

Act of March 11, 1881.

2d. Under pre-emption and homestead applications.

Act of July 14, 1879, sec. 1.

Constitution, art. 14, sec. 4.

3d. By sale at fifty cents per acre in tracts of not more than 640 acres each, the net proceeds to be set apart, one-half for the benefit of the public free schools and one-half for the payment of the bonded debt of the State.

Act of July 14, 1879.

Act of March 11, 1881.

Constitution, art. 7, sec. 2.

By the act of January 22, 1883, all the public lands authorized to be sold under the said acts of 1879 and 1881 were withdrawn from sale and reserved for the purposes for which the lands were originally set apart by the said acts, until otherwise provided by the Legislature.

By the act of April 10, 1883, the Legislature provided that, after payment of the amounts due from the State to the common free school fund out of the funds arising from the sale of lands under the said acts of 1879 and 1881, and set apart for the payment of the bonded debt of the State, and after payment directed to be made by the act of February 23, 1883, the remainder of the land, not to exceed 2,000,000 acres, contained in the counties and territory mentioned in the said acts of 1879 and 1881, or the proceeds thereof, reserved for the payment of the public debt, should be equally divided between the University and the permanent free school fund. By the act of March 29, 1887, and the amendment of April 5, 1889, such of the lands as contain not more than 640 acres reserved by the act of 1879, situated in organized counties were again opened to homestead acquisition and were put upon the market for sale, the proceeds to be equally divided between the permanent free school fund and the public debt fund. After the Legislature had provided for the survey and disposition of such lands as by the Constitution it had a right to dispose of for specified purposes, without making division with the school fund, the one-half of the balance of the land or the proceeds of the sale thereof, embraced within the boundaries of such reservation, was bound by the Constitution to go to the permanent free school fund.

Constitution, art. 7, sec. 2.

G. H. & S. A. Ry. Co. v. State, 77 Texas, 368.

If, therefore, the certificate of Governor Bell be located upon any of the undisposed of portion of such reserved lands, the school fund will not get its constitutional portion of the public domain. In other words, as there has been no segregation of the lands reserved for the purpose of paying the public debt from that reserved for the school fund, and as the act of the Twenty-second Legislature provides that the Bell certificate shall be located upon "any of the heretofore reserved public lands now reserved for the payment of the public debt," it is impossible to locate the certificate so as to charge the whole 1280 acres to the portion of the land destined to the payment of the public debt. On the contrary, if the certificate is located on any of the land reserved by the said acts of 1879 and 1881, the school fund would suffer the loss of 640 acres of land, a portion of its interest in the public domain given to it by the Constitution. From the language "now reserved for the payment of the public debt," used at the end of section 1 of the special act of the Twenty-second Legislature, it was evidently the intention of the Legislature that this certificate should be charged up to the interest of the public debt fund in the lands reserved. But as there is no land reserved solely for the payment of the public debt, that language can refer only to the land reserved for that purpose in connection with others. In all such reservations it is found that the constitutional right and interest of the school fund are recognized and provided for by a division of the proceeds of the sales made. None of the acts of reservation provide for any partition of the land between the public debt fund and the school fund, but only for an equal division of the proceeds of sales. How then can the Bell certificate be located exclusively on the land "now reserved for the payment of the public debt?" If the act for the relief of Governor Bell had provided a method of partition of that portion of the public domain to be affected, so as to give the school fund its rights, or if there were any other law in existence with which the said special act could be construed so as to effect such partition, a different question would be presented. But as the matter stands, there is positively no way without additional legislation to locate the certificate on any of the land reserved by said

acts, without depriving the school fund of some of its rights under the acts of reservation and under the Constitution.

Const., art. 7, sec. 2.

G. H. & S. A. Ry. Co. v. State, 77 Texas, 385.

The question being thus disposed of, it becomes unnecessary to consider whether under art. 14, sec. 4, and art. 16, sec. 55 of the Constitution, the Legislature is authorized to donate the land certificate, however meritorious the beneficiary, and however laudable the legislative purpose.

Bacon et al. v. Russell, 57 Texas, 409.

Very respectfully,

W. J. J. SMITH,
Office Assistant Attorney General.

County Judge is not entitled to commissions for selling school lands of his county.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, February 18, 1892.

George R. Page, County Clerk, Laredo, Texas.

DEAR SIR:—Your letter of February 11 is to hand. You state that the county judge sold the school lands belonging to Webb county to the highest bidder for the sum of $6974.10, and that the county judge now claims compensation for making the sale of the school lands of the county. You further state that the State Superintendent of Public Instruction has ruled that no part of this sum could be taken to pay the county judge commissions for selling this land. This ruling is correct. You further state that the State Superintendent has ruled that the county judge would be entitled to commissions out of the general revenue of the county to compensate him for said sale. This ruling is incorrect. The county judge would not be entitled to any commission whatever for making such sale. Article 4036, Revised Statutes, provides that each county may sell or dispose of the lands granted to it for educational purposes in such manner as may be provided by the Commissioners' Court of such county. See also article 7, section 6 of the Constitution. Article 661, Revised Statutes, provides that the County Commissioners' Court may by an order to be entered in the minutes of said court appoint a commissioner to sell and dispose of any real estate of the county at public auction. The insertion of this article in the Revised Statutes means to take the authority, if any such authority ever existed, away from the county judge and to give some other officer or agent power to sell the real estate of the county. Article 1134, Revised Statutes, provides that the county judge shall take the constitutional oath and the same oath that is prescribed for the Commissioners' Court. Article 1512, Revised Statutes, provides substantially that the commissioners shall subscribe to the following oath: That they will not be directly or indirectly interested in any contract with or claim against the county in which they reside except such warrants as may issue to them as fees of office, which oath shall be in writing and taken before some officer authorized to administer oaths. There is no fee provided for the county judge for selling these lands, and this oath expressly prohibits the judge from being interested in any contract with the county except where such power is given by a plain statute. The county judge would have no more right to contract with the county to sell its school lands than he would have to contract with the county to build its bridges and court houses and jails. Therefore, you are respectfully advised that the county judge would not be entitled to receive any compensation for making this sale, and that the Commissioners' Court would not be authorized to appropriate any fund, school fund or any fund, arising by taxation to pay such commissions, and that the Commissioners' Court should disallow the claim presented.

Very respectfully,

R. L. HENRY,
Office Assistant Attorney General.

Under the act of the Twenty-second Legislature a corporation can not be created for the purpose of buying and selling real estate in other States and foreign countries as broker or agent.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, March 3, 1892.

Hon. Geo. W. Smith, Secretary of State, Austin, Texas.

DEAR SIR:—At your request I have examined the proposed charter of the "Texas Land Investment Company." The purpose of the charter is to create a private corporation for the "establishment of a land company to buy, own, sell and convey real estate in any State or foreign country, and to charge reasonable compensation therefor." It will be observed that with the exception of the last six words the purpose of the corporation is stated in the exact language of the first paragraph of subdivision 39 of the act relating to private corporations passed by the Twenty-second Legislature.

Laws 1891, p. 163.

Reading the stated purpose in its entirety, however, it seems to me the evident design is to create a corporation to act as broker or agent in the purchase and sale of real estate in States other than Texas and in foreign countries, because it is provided that compensation for the work authorized may be charged for. If the purpose were to buy and sell real estate for the company itself the provision for compensation would be absurd.

The purpose being to create a corporation to act merely as broker or agent, the question is whether it may lawfully be created.

The first paragraph of subdivision 39 authorizes the formation of companies to "buy, own, sell and convey real estate in any State or foreign country," and the last paragraph provides that such companies "shall only own such real estate in this State as may be necessary for its office." As the first paragraph confers the power to own land in any State or foreign country in unlimited quantity and the last paragraph, which specifically applies to this State, limits the ownership to such as may be necessary for the office of the company, it is clear that the purpose of the law is to authorize the incorporation of companies for the purchase and sale of real estate as an investment exclusively in States other than Texas and in foreign countries. The provision does not authorize incorporation for the purpose of buying and selling real estate in other States and in other countries as a broker or agent, as contradistinguished from purchase or ownership by the corporation itself, and, in my judgment, the charter should not be filed.

The more important question, whether the Legislature is authorized to provide for the creation of companies to buy, own, sell and convey lands beyond the limits of this State, need not be considered.

Very respectfully,

C. A. CULBERSON,
Attorney General.

Insurance Companies and Benefit Societies.—An organization which purports to be promoted as a fraternal society organized purely for benevolence, but which in fact provides for the issuance, upon a moneyed consideration, of certificates of death benefits, accident benefits, endowment benefits and guarantee benefits, is, in contemplation of law, a life, health, accident, endowment and guarantee insurance company, and can not be incorporated under title 20, Revised Statutes, and, if incorporated thereunder, would be subject to ouster upon quo warranto brought for that purpose.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, March 5, 1892.

Hon. John E. Hollingsworth, Commissioner Insurance.

DEAR SIR:—You have transmitted to this Department a copy of the proposed "charter" and the "constitution and laws" of the Order of the Inca, and request the opinion of this Department upon the right of said association to incorporate under title 20, Revised Statutes of Texas, and to do business as a mutual relief or benevolent order under said title without being subject to the requirements, taxes and fees of companies carrying on the business of life insur-

ance for profit. The charter of the proposed Order of Inca contains, among others, the following provisions:

The incorporators declare: "We have formed ourselves, our associates and successors into an association purely benevolent in its nature, under the name of the Order of the Inca, for the purpose and object of providing and paying to members in good standing, under the constitution and laws of the order, benefits in case of death, benefits in case of total and permanent disability, benefits in case of sickness, funeral benefits, endowment benefits, and guarantee benefits, and propose conducting its business on the lodge system as a fraternal society. It shall have existence until dissolved by a majority vote of its members."

"This association shall have power to make its own constitution and laws and the constitution and laws for the subordinate branches of the order, and to change the same, to decide all matters pertaining to the order, to grant and revoke charters and to exercise all the powers and rights properly belonging to the governing body of an association of this or a similar character."

"The objects of this association shall be to unite in the bonds of fraternity all persons of *sound bodily health*, good character and reputable calling, to improve the condition of its members, and to render assistance in times of trouble or financial distress and to establish benefit funds for the purposes above set forth."

"The business of this association shall be conducted by the following officers, all of whom must be elected at the election session of the Supreme Council: A Copac Inca, a Cacique, a Secretary, a Treasurer, a Medical Examiner, who shall severally perform the duties prescribed for them in the constitution and laws of this order."

"This association shall have power to levy such per capita taxes upon the subordinate branches of the order as may be necessary to meet the legitimate expenses of conducting its business, but no per capita tax shall exceed $1 per capita each year. Assessments for the purpose of paying benefits shall be levied by the proper officers, as provided by the constitution and laws."

"This association shall have power to sue and be sued, to acquire, hold and convey such property, real, personal or mixed, as may be necessary to carry out its purposes and objects."

The first set of officers are then named. A few of the salient points in the constitution and laws are the following:

(1) The Supreme Council is the governing body, and the powers given it are as various and as plenary as could be desired by the directory of a regulary incorporated insurance company. It has power to make its own constitution and laws and the constitution and laws of its subordinate bodies; to grant charters, and for many causes, including the refusal to make returns or remit assessments for the benefit funds or the per capita taxes or other sums due the Supreme Council, to deprive any State or tribe of its charter, to cancel certificates and strike the names of members from the roll-book for various causes, including that of knowingly making false statements to the Medical Examiner or in the application for membership, violating the rules of the order, immoral conduct, offenses against the laws of the land, etc.

During the recess of the Supreme Council the Executive Committee, which is composed of the Copac Inca, the Cacique and the Secretary, shall exercise the rights, duties and powers of that body, subject to its approval.

The organization of the order contemplates that the Supreme Council shall be composed of one representative for each district or State and one representative for each full 2000 members in said district or State; that it shall meet annually, and that five members shall constitute a quorum.

The order is divided into three degrees. Applicants for membership must be between the ages of fifteen and fifty years.

The three degrees provided for are: First, or beneficial degree, which is subdivided into classes A, B and C; second, or social degree; third, or guaranty degree. Applicants for the first degree must accompany their petition for membership with a membership fee of $3 and certificate fee of $2, and upon initiation pay first quarter's dues and one advance assessment in the class in which he is admitted. The rates of assessment in classes A, B and C do not appear yet to be fixed, but are to be graduated by the ages of members. Members in class A, first degree, are to receive a certificate for not less than $500 and for not more than $5000, entitling them in the event of a total or permanent disability from accident, disease or other cause to a sum not to exceed one-half of the amount

stated in the benefit certificate, the other half to be paid to the heirs of the beneficiary at his death: provided, that the member retains standing in the order and pays assessments on the full amount of the original certificate.

Members in class B, first degree, are to receive certificates entitling holders under certain conditions to $10 per week for each week's sickness after the first, and not to exceed twenty-six weeks, and to a funeral benefit of $40 on the death of their spouse or one of their children. Members in class C, first degree, are to receive certificates entitling them to the sum of $100 in cash at the expiration of six years from the date of said certificate.

Applicants for the second degree must accompany their petition with a membership fee of $5, and pay certain dues. One dollar is to be forwarded with each application to the Supreme Council. This degree seems to have been formulated for the purposes of revenue and extending the order by affording amusements to the members, and is attended with no pecuniary benefits to the members.

Membership in the third degree is a guaranty of good faith, honesty and integrity, and the member is guaranteed to his employers or principals in the sum of $2000 as long as such member retains his standing as a third degree member of the order. The admission fee to this degree is $100, and certain dues and assessments.

It appears that the rates of assessments in the different degrees have not yet been fixed, but from the language of the constitution and laws it is clearly the intention to graduate the same upon the ages of the members, except probably the third or guaranty degree.

The officers of the Supreme Council are to be elected quadrennially.

The Copac Inca, who is made the executive head of the order, is given extraordinary powers, and is required to give bond in the sum of $5000. Other officers are required to give bond in the following sums to wit: The Cacique, $2000; the Secretary, $5000; the Treasurer, $5000.

The Medical Examiner is required, among other things, to recommend for appointment all subordinate medical examiners for each tribe, and to recommend for suspension or removal all subordinate medical examiners who, by carelessness or neglect, fail to properly perform the duties of their offices, and to hold himself in readiness to supply the Copac Inca and the Cacique with such information as they desire relative to the healthfulness of any particular section of the supreme jurisdiction. For such services he is allowed a compensation yet to be fixed for each application passed upon.

The Executive Committee, among other powers, is authorized "to make all investments, examine and audit all claims, *fix compensation not otherwise provided for*, and to increase or restrict the *number of employes* of any department." The revenue of the Supreme Council is to be derived from the per capita tax ($1 per capita per annum for each member of the order), the sale of supplies, badges, jewels, seals, certificate fees ($1 for each certificate of membership), dispensations etc., (see sec. 43), and all membership fees paid by the charter members of tribes. By paying one dollar any member may change the beneficiary upon application to the Supreme Secretary. Members are required to pay their assessments when due. A failure to do so, *ipso facto*, works a suspension. If the suspension lasts over thirty days the person in default must, to be reinstated, file a new application, reundergo medical examination and pass through the same formality as a new member, except the process of initiation. A tribe is likewise liable to like suspension by failure to remit its aggregate assessment when called: and if the suspension lasts thirty days a forfeiture of the tribe's charter is wrought. The above is the scope of the order as far as it can be realized from the charter and constitution and laws, which are in many respects incomplete and indefinite, and in a few instances conflicting and contradictory.

As there is nothing in the charter, constitution and laws to negative the paying of salaries to officers and employes, and as four of the officers are required to give heavy bond, and as power is vested in the executive committee to "fix compensations not otherwise provided for," and to "increase or restrict the number of employes in any department," and as "organized deputies" and "solicitors" are to be employed to extend the order, it is to be presumed that salaries adequate to their responsibility and duties will be provided for the bonded officers, and the "organizing deputies" and other "employes."

Article 2971a, Sayles' Statutes, which was added to title 53, Revised Statutes, governing insurance companies, provides: "Nothing in this title shall be con-

strued to affect or in any way apply to mutual relief associations, organized and chartered under title 20 of the Revised Statutes, or which are organized under the laws of any other State, which have no capital stock and whose relief funds are created and sustained by assessments made upon the members of the said association, in accordance with their several by-laws and regulations," provided, that the principal of every such *benevolent* organization not conducted by lodges shall be required to make an annual statement under oath to the Department of Insurance, showing certain facts, and among others, the salary paid each officer, the sources and the gross amount of the annual receipts, the amount paid to policy holders, and for all other purposes. It is further provided that if such report be not made the organization shall be deemed an insurance company, conducted for profit of its officers and amenable to the laws governing such companies.

Can such an association as the Order of the Inca be incorporated under title 20, Revised Statutes, as it stands amended, so as to be exempt under article 2971a, *supra*, from the burdens and requirements of an insurance company conducted for profit?

Title 20, article 564, Revised Statutes, defines corporations to be of three kinds: 1st. Religious; 2d. Corporations for charity or benevolence; and 3d. Corporations for profit. Such an association as the one under consideration is manifestly not religious. It is not charitable, for it dispenses no benefit without a consideration. It is either for benevolence or for profit. If its object is for profit, it could not be chartered under title 20, because it does not come within the scope of any of the thirty-nine subdivisions of the purposes for which a private corporation may be formed under article 566 of said title, but would in that event have to be incorporated under and subject to title 53, regulating the incorporation and supervision of insurance companies. If such a body as the one under consideration is "purely benevolent" in nature, as is declared in the proposed charter of the Order of the Inca, it could be organized and chartered under subdivision 2 of article 566, title 20, as amended by the act of the Twenty-second Legislature, General Laws, 1891, chap. 101. Is such an order as the Order of the Inca a benevolent institution? That its charter declares it to be purely benevolent, does not make it so in reality. If the main object of the institution is to do an insurance business for profit to the officers and employes, it is not a benevolent institution within the meaning of article 566, *supra*, notwithstanding it may gratuitously dispense a few incidental benefits or even charity. The object of the Order of the Inca, as shown by the quotations from its proposed charter, constitution and laws, is to carry on an insurance business, and the fraternal features are mere appendages unavailing to change its main object.

In consideration of initiatory and periodical contributions it engages to pay the member or his designated beneficiary a benefit upon the happening of a specified contingency. This is to be the chief and procuring inducement to join the order. It is a life, health, accident, endowment and guaranty insurance company, ineffectually disguised with fraternal features. That it was conceived, promoted and intended to be organized and extended for the purpose of profit, mainly, and benevolence, incidentally, is apparent from almost every section of the proposed charter, constitution and laws. It can not, therefore, be legally chartered under title 20, Revised Statutes, as amended, and therefore would not, if incorporated under that title, be entitled to the exemption, contained in article 2971a, Sayles' Statutes, from the provisions of title 53 regulating insurance companies.

What has been herein said may be applied generally to other similar organizations doing or proposing to do business under title 20, Revised Statutes, in this State, and is supported by the following authorities:

Bacon on Benefit Societies and Life Insurance, secs. 51, 52, 53 and cases there cited.
Article 4665, Sayles' Addendum.
Articles 2955 and 2971a, Sayles' Statutes.
Titles 20 and 53 generally, as amended, Revised Statutes.
Article 8, section 2, Constitution.
Chapter 112, General Laws, 1891.
Farmer v. State, 69 Texas, 561, and authorities cited in the opinion.
Commonwealth v. Wetherbee, 105 Mass., 149.
State v. Farmers' Benevolent Association, 18 Neb., 281.

In the case of Farmer v. State, *supra*, in considering a similar organization in a proceeding by information in the nature of *quo warranto*, instituted for the purpose of ousting the association from certain corporate franchises which it was claiming to exercise by virtue of incorporation under title 20, Revised Statutes, our Supreme Court said: "The benefits received are not gratuitous. They are due to the member on account of the money he pays into the society. It takes the risk of his continued existence and good health. If it be benevolence to pay out money under such circumstances, then every mutual life insurance company is acting in a benevolent manner toward the family of an insured member when it pays the policy it had issued them for a moneyed consideration. It matters not what name the association may assume; the law looks to the real objects of the body, and not to the name indicative of benevolence which it may have assumed."

As supporting its view the Court then cited the following authorities:

May on Insurance, sec. 550.
State v. Citizens' Assn., 6 Mo. App., 163.
State v. Merchants' Assn., 72 Mo., 146.
People v. Wilson, 46 N. Y., 477.
State v. Standard Life Assn., 38 Ohio, 281.

Very respectfully,

W. J. J. SMITH,
Office Assistant Attorney General.

According to the weight of authority, the Legislature is without power to provide for the formation of corporations to buy, own, sell and convey real estate in any other State or foreign country, but the question not being free from doubt, it is the duty of an executive officer to obey the plain commands of the statute.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, March 11, 1892.

Hon. Geo. W. Smith, Secretary of State.

DEAR SIR:—At your request I have examined the proposed charter of the "Texas Land Investment Company." The purpose of the charter now sought to be filed is to create a private corporation for the "establishment of a land company to buy, own, sell and convey real estate in any State or foreign country." It will be observed that the purpose of the corporation is stated in the exact language of the first paragraph of subdivision 39 of the act relating to private corporations passed by the Twenty-second Legislature (Laws 1891, page 163), and the question submitted is whether the charter should be filed and whether the Legislature is authorized to provide for the creation of corporations to buy, own, sell and convey real estate situated beyond the limits of this State. The general rule on the subject is thus stated: "It is a fundamental principle that the laws of a State can have no binding force *proprio vigore* outside of the territorial limits and jurisdiction of the State enacting them. Hence it follows that a State can not grant to any person the right to exercise a franchise in a foreign State or country, for a franchise is the result of a law authorizing particular individuals to do acts or enjoy immunities which are not allowed to the community at large."

2 Mor., Corporations, 959.
Angell & Ames, Corporations, 104.
Cooley Const. Lim. (6th ed.), 150–161.
Empire Mills v. Alston Grocery Co., 15 S. W. Reporter (Texas), 505.
1 Waterman, Corporations, p. 105.
Field on Corporations, sec. 25.
Middle Bridge Co. v. Marks, 26 Me., 326.
Meyers v. Bank, 20 Ohio, 294, 295.
Hill v. Beach, 1 Beasley, 32.
Carroll v. East St. Louis, 67 Ill., 568.
Insurance Co. v. Commonwealth, 5 Bush, 68 S. C.
96 Am. Dec., 331.

In the case above cited from this State, the Court of Appeals said: "A corporation can not incorporate in one State for the purpose of carrying on all of its corporate business in another."

15 S. W. Reporter, 509.

Whatever authority a corporation, created by another State of the Union or by a foreign country, may have to do business in this State springs, not from the act of incorporation by such State or foreign government, but from the laws of this State or the comity of nations.

Paul v. Virginia, 8 Wall., 168.

Cooley Const. Lim. (6th ed.), 150.

The law of such State or country can not of its own force operate here. It is only by the consent of the State expressed or implied, by affirmative law or acquiescence, such foreign corporation may do business here. The converse of the proposition necessarily follows. The force of our laws is spent at the State line.

Cooley Const. Lim. (6th ed.), 149.

By virtue of our statutes alone no corporation created in this State can operate elsewhere. To do so it must have the consent and comply with the law of the State in which it seeks to carry on its business. This doctrine is particularly applicable to the purchase and ownership of real property, which is always under the exclusive control of the State in which it is situated.

Cooley Const. Lim. (6th ed.), 151.

In addition to this it may be noted that our laws generally do not authorize the purchase and ownership of lands by private corporations except as may be necessary for the conduct of their business. Under the law of 1879 (Revised Statutes, art. 566, subdivision 7) corporations could be created for the purchase of lands in Texas. This law, however, was limited by the act of 1885 (Laws 1885, p. 59), and repealed by the act of 1887 (Laws 1887, p. 40), thus clearly outlining the policy of the State upon this subject. It has even been intimated by our Supreme Court that, to permit private corporations to purchase and hold lands as an investment and beyond the necessities of its business, would be in violation of the Bill of Rights against perpetuities and monopolies.

Campbell v. Blanchard, Austin, Term 1885, per Watts, Comm'r.

If, therefore, it is against positive law and public policy to create private corporations with authority to buy and own lands in unlimited quantities and without regard to the use to which it might be devoted, within this State, by what right can the Legislature of the State create corporations and authorize them to pursue such a policy in another State?

I am, therefore, of the opinion that according to the weight of authority the Legislature is without power to provide for the formation of corporations for the purposes specified in said subdivision. But the question is not entirely free from doubt (Christian Union v. Yount, 101 U. S., 359; Cowell v. Springs Co., 100 U. S., 59), and for this reason I do not feel authorized to advise you to decline to file the charter. Under any circumstances it is a serious and delicate matter for an executive officer to ignore a plain command of the Legislature, and if he is in any case authorized to do so it is only when the Legislature has, beyond any reasonable doubt, exceeded its constitutional powers.

You will readily observe the distinction between this charter and others you have been advised not to file. In the latter it was sought to give the corporation extra-territorial powers solely by virtue of the charter, without affirmative legislative authority, and it was held incompetent to do so, both because of the principle heretofore referred to, and because, except by clear and express enactment, laws will not be construed as intended to have operation beyond the State enacting them.

In the present case the plain and manifest intention of the Legislature is to authorize the creation of corporations to do business beyond the limits of this State, and in other States and foreign countries.

Very respectfully,

C. A. CULBERSON,
Attorney General.

School fund.—Perpetual.—Permanent.—What is.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, March 19, 1892.

Messrs. Hamblen and Jester, House of Representatives.

GENTLEMEN:—Your letter of the 16th instant, inquiring "what constitutes the State's permanent school fund?", has been carefully considered. It is under-

stood that your inquiry goes chiefly to the question whether the lands set apart to the public school fund by the Constitution which remain unsold are to be computed in determining the total value of the permanent school fund, one per cent annually of which the Legislature is authorized, by the amendment recently adopted, to add to the available school fund.

By section 2, article 7 of the Constitution it is declared that: "all funds, lands and other property heretofore set apart and appropriated for the support of public schools: all the alternate sections of land reserved by the State out of grants heretofore made or that may hereafter be made to railroads, or other corporations, of any nature whatsoever; one-half of the public domain of the State, and all sums of money that may come to the State from the sale of any portion of the same, shall constitute a perpetual public school fund."

So much of the amendment to section 5, article 7, adopted September 22, 1891, that is applicable to the question is as follows: "The principal of all bonds and other funds, and the principal arising from the sale of the lands heretofore set apart to said school fund, shall be the permanent school fund; and all the interest derivable therefrom, and the taxes herein authorized and levied, shall be the available school fund, to which the Legislature may add not exceeding one per cent annually of the total value of the permanent school fund; such value to be ascertained by the Board of Education until otherwise provided by law; and the available school fund shall be applied annually to the support of the public free schools."

From these provisions it will be seen that the Constitution divides the public school fund into three classes, viz.: Perpetual, permanent and available. The first, created by section 2, is composed of all funds, lands and other property theretofore set apart: all alternate sections of land granted to railroads or other corporations: one-half of the public domain, and all sums of money realized from the sales of lands thus set apart. The second, defined by section 5, consists of the principal of all bonds: the principal of other funds, and the principal arising from the sale of lands hereinbefore set apart to the school fund. And all the interest derivable from the permanent school fund, and taxes authorized to be levied constitute the available fund, to which may be added annually one per cent of the total value of the permanent fund. This division of the fund into the three classes named seems to have been deliberately made, and if such be the case no authority exists to disregard it. Ordinarily it may be conceded that the terms perpetual and permanent have the same practical significance, but in this instance the Constitution itself defines the meaning of the terms by an enumeration of the parts composing each, and these parts are essentially different in the two cases. The items which make up the perpetual fund are more numerous and include a greater variety of subjects than those comprising the permanent fund. The former includes all property which the people deemed expedient to dedicate perpetually to the public schools, but the permanent fund is far more restricted, and only includes such parts of the perpetual fund as may from time to time become interest bearing. This construction, it is believed, necessarily follows from the use of the term principal in the description of each of the items composing the permanent fund. The only item in section 5, which by any possible construction can include unsold lands, is the "other funds." This, however, can not be held to have reference to these lands, both because the use of the term principal in connection with that item obviously precludes such construction, and because the use of the terms "lands" and "funds" in section 2, where the entire fund is broadly enumerated, clearly indicates that the latter was not intended to embrace the former.

As further illustrating the correctness of this construction, it may be observed that it is evident from section 5 that the intention of the framers of the Constitution, when drafting that section, was drawn to the lands forming part of the school fund and they failed to include them, by name at least, in the permanent fund. Had the purpose been to embrace them in that fund, it is probable that such intention would have been clearly expressed. Having by name placed only the principal arising from the sale of said lands in the permanent fund, the inference is fair and reasonable that it was intended to exclude the unsold lands. This construction is borne out by the further fact that there are other interest bearing securities belonging to the permanent fund besides bonds and land notes arising from the sale of lands set apart by the Constitution, and there can be but little doubt that to these, and others which may be lawfully created, the term "other funds" in section 5 refers.

For these reasons I think the unsold lands belonging to the perpetual school fund are not a part of the permanent fund and should not be computed in estimating the total value of the permanent fund, not exceeding one per cent of which the Legislature may add to the available fund.

Very respectfully,

C. A. CULBERSON,
Attorney General.

Railroads.—Forfeiture of charter.—Obligation of parties succeeding to property to operate railroad.—When a railroad is constructed and put in operation, it is charged with a public trust, which is, that it shall be continuously thereafter maintained and operated as a public highway; and this trust remains with and rests upon the property as well after as before the dissolution of the corporation. Those who succeed to the property rights of the corporation, after the State has forfeited its charter, are bound to maintain and operate the railroad.

The State of Texas v. East Line and Red River Railway Company. In the District Court of Travis County. On application of Receiver to purchase rolling stock and steel rails.

As the representative of the State, and at the request of the court, my views of the application are given:

(1.) The charter of defendant company was forfeited by reason, among other things, of its failure to keep its road in such repair as was demanded by the law and public safety. Acting upon the decision of the Supreme Court, this court appointed a receiver, who is now operating the road. The franchise and charter rights of the old company having been reclaimed, there is no person or corporation to whom the property can now be delivered authorized to operate it as a railway. The court must, therefore, operate the road, through the receiver, until such time as it may lawfully deliver it to some other corporation. In my judgment, no court should undertake the operation of a railway by the agency of a receiver or otherwise, except in the clearest and most urgent cases; and then, only to preserve the railway and accomplish the public purpose of its construction, and, when undertaken, the operation by the court should cease at the very earliest time consistent with the proper performance of these duties. The original appointment in this case is, of course, thoroughly justified by the decision of the Supreme Court. The granting of this application, and the further operation of the road under the direction of the court, if the facts justify it, upon which, not having heard the testimony, no opinion is expressed, depends upon whether there is existing law under which a delivery of the property can be made within a reasonable time after a sale thereof, and, if so, whether the public exigency demanding its seizure still exists.

(2) Whether a new corporation can be formed with authority to operate the road, to which the property can be delivered after sale, must be determined by the construction of article 4260 of the Revised Statutes, and the act approved March 29, 1889. It seems to me clear that under the former of these laws the authority does not exist for the reason that it is only applicable where the "entire roadbed, track, franchise and chartered right of a railroad company" are sold, and in this case the franchise and chartered right can not be sold, for it has been forfeited and annulled. A railway can not be operated without a charter, and the evident purpose of this law was to permit the purchaser of the charter and the entire property to operate the road in the same manner that the original company could have done but for the sale.

In this case, in the event of sale, the purchaser would not take the franchise and chartered right; and together with the defunct company whose powers and rights were purchased would be without a charter, and consequently without the authority to operate and maintain the road.

It is believed, however, that in the event of a sale of the property in this case under the act of 1889 referred to, the purchasers thereof would be authorized to form a corporation for the purpose of acquiring and operating the road.

This act provides that: "In case of any such sale heretofore or hereafter made of the roadbed, track, franchise or chartered right or any part thereof," the purchasers and their associates shall be entitled to form a corporation for the purpose of owning and maintaining the road.

There are considerations indicating that probably this character of sale was not foreseen by the Legislature in framing this law, such, as that the chapter of which it is an amendment is intended to provide for the collection of debts from railroad corporations in ordinary cases of debt before dissolution, and not a sale after forfeiture for the purpose of closing out its affairs, but the language employed seems broad enough to permit purchasers in this case to incorporate.

(3) It being conceded, therefore, that should the court cause the railway to be sold at an early day the purchasers could at once incorporate and receive the property, is the court authorized to retain possession longer than is reasonably necessary to this end? And if possession may be longer retained, may the court lawfully encumber the property with a debt superior to the mortgage sufficient to put it in that condition which the public safety requires? In considering these questions it should be remembered that the charter of the defendant company was withdrawn in consequence of the fact, among others, that it had permitted its property to become so worn and impaired that it was unsafe and dangerous to operate it as a railway.

East Line Ry. Co. v. State, 75 Texas, 445, 449.

If, since then, it has been repaired and improved and is now in condition in which it can be operated with reasonable safety, I think it should be sold and delivered to the purchasers as early as practicable. If, on the other hand, it is now in the same condition substantially as when the charter was forfeited, and is in fact unsafe and dangerous, in my judgment the court is authorized and the duty devolves upon it to repair the property to an extent necessary to render it safe as a public highway. "This reason is grounded in that rule of public economy, which requires the public highways to be kept in repair. The public is entitled to protection in the continued use of the railway as a King's Highway."

Beach, Receivers, sec. 381.

In opposition to this view of the case, counsel for the defunct company, and the bondholders and mortgagees insist that as the charter has been forfeited, the parties interested in the *res*, "who are not in possession and operating the road, owe no duty to the public, and none they directly or indirectly can be compelled to perform," and, consequently, that the property thus situated is not pledged to the performance of any public trust. It appears to me that this position is radically unsound, and that the view taken in this paper is the true rule, for the following reasons, stated without elaboration, namely:

1st. The rules governing the winding up of ordinary trading and commercial corporations which owe no duty to the public do no apply here. The primary purpose of such corporations is private gain. Their property is shifting and perishable, constantly being merged and lost in the mass of general property in the State. It is charged with no public duty or liability, and may be sold without the consent of the State, or totally abandoned by its owner. With such corporations the chief and primary office of property in proceedings after dissolution is to pay debts. Railway and other corporations charged with public duties, and clothed with some of the attributes of sovereignty, are essentially unlike private corporations organized solely for gain.

25 American Law Review (July-August, 1891), 581.

Colman v. R. R. Co., 10 Bevan, 13.

Gates v. R. R. Co., 53 Conn., 342.

The character of the property is different. Keeping in view the fact that upon construction, a railway is, by the Constitution, made a public highway, the law contemplates that it shall always remain such, and that, except with the consent of the State, it cannot be abandoned or devoted to other purposes. In the very nature of things, by proper repair and improvement, railway property is intended to be imperishable and indestructible. Acting upon the faith of the continuous use of the property and powers of the company, cities, towns and villages, and enormous private and public enterprises grow up along the line, and to countenance the doctrine contended for in this case by the bondholders that the property is charged with no public trust, and that they are at liberty to tear up the road and destroy the highway, would be utterly destructive of the supervisory power of the State over public corporations created by it, and disastrous to private property and the industrial interests of the State.

Gates v. R. R. Co., 53 Conn., 343.

2d. The interest of the public in railway property and its operation is above that of the company or the bondholders or stockholders. The primary obliga-

tion resting upon the company and the property is the performance of the public trust. In the matter of the Long Branch and Sea Shore Railroad Company, reported in 24 N. J. Equity, 398, in which a receiver was appointed by reason of the failure of the company to operate its road, application was made to restore the property to the company. The chancellor denied the application, stating that the receiver was appointed to "relieve the public from the effects and consequences of the apparent dereliction of duty on the part of the owners of the road," and that "the public necessity is paramount." In 2 Beach on Corporations, p. 1240, it is said that "in case of *quasi*-public corporations, when such franchises as the right of eminent domain, or the right to maintain and operate a railway, are transferred by virtue of foreclosure proceedings, the purchasers take them subject to the obligations to the public which their possession imposes." In Talcott v. Township of Pine Grove, 1 Flippin, 145, affirmed in 19 Wall., 666, it is said that "every farthing of its tolls is first to be devoted to paying the public tax, *and to the continuance of the road*, its ample equipment and regular operation as the interests of the community—not those of shareholders—demand." In Gates v. R. R. Co., 53 Conn., 343, quoting many authorities, the rule is thus stated: "Upon principle it would seem plain that railroad property, once devoted and essential to public use, must remain pledged to that use so as to carry to full completion the purpose of its creation; and that this public right existing by reason of public exigency demanded by the occasion and created by the exercise by private persons of the powers of the State, is superior to the property rights of corporations, stockholders and bondholders."

3d. A public corporation, charged with the performance of certain services of a public nature, can not be dissolved or abandon its business without the consent of the State.

2 Beach on Corps., p. 1219, and authorities cited.

4th. Neither before nor after dissolution can the owners of railway property destroy or abandon it as a public highway. It remains always charged with the public trust. "That a railroad can not be abandoned after it has become one of the thoroughfares of the country, and that the company will, by proceedings in behalf of the State, be forced to continue its road and perform all its duties to the public, is beyond question."

Talcott v. Township, etc., 1 Flippin, 145.

"The large sovereign powers given by the State to railroad corporations are granted and exercised only upon the theory that these public rights are to be used to promote the general welfare. Having exercised these powers, the corporation has no right, against the will of the State, to abandon the enterprise, tear up its track, and sells its rolling stock and other property and divide the proceeds among the stockholders."

Gates v. R. R. Co., 53 Conn., 343.

2 Beach on Corporations, p. 1240.

Railway property, being in its nature indestructible and perpetually devoted to the public use, it necessarily follows that the loss of the franchise will not render it less so. But our statute does not leave this question in doubt. The act of March 29, 1889 (Gen. Laws 1889, p. 20), providing for the sale of the road and franchise, and under which the purchasers of this property must incorporate, if at all, clearly and unmistakably pledges the property of railway corporations, whether before or subsequent to the loss of the franchise, perpetually to the performance of the public trust to which it was originally dedicated by declaring "nor shall the main track of any railroad once constructed and operated be abandoned or removed."

5th. This court having lawfully taken possession of the property may retain it until the cause therefor is removed, subject to the statute.

In matter of R. R. Co., 24 N. J. Eq., 401.

High, Receivers, sec. 371.

Beach, Receivers, sec. 798.

6th. The property on hand may be made to bear the burden necessary to make repairs, and a lien may be fixed thereon superior to that of the mortgagees and bondholders. "It is apparent that the bondholders loaned the money and took their bonds with the security with full notice that the security for the loan was first pledged to the performance of the public trust. The necessary conclusion is that the State has the right to enforce the continuous exercise of the corporate powers and franchise for the public use to the exhaustion of the value

of such property and franchise; and this is true no matter what private right may embrace the title of the property."

Gates v. R. R. Co., 53 Conn., 344.

2 Beach, Corps., secs. 746. 747.

Beach, Receivers, secs. 380, 381, 382, 386, 387, 390.

Wait on Insolvent Corps., sec. 279.

Meyer v. Johnson, 53 Ala., 257.

7th. If, as a matter of fact, the railway is in substantially the same condition as when the charter was recalled by reason thereof, the only certain and adequate means by which it can be repaired and improved and the rights of the public enforced is through the instrumentality of the receiver appointed by this court.

It is understood that the present owners of the securities of the company were parties to the suit in the Federal Court in Kansas, in which a receiver operated the road for several years; and if it be a fact that no sufficient repairs were made, it is not unreasonable to suppose that a like course towards the property will be pursued when they purchase it, as they most probably will, directly or indirectly.

The record shows that they are non-residents of the State, against whom a mandamus can not be successfully prosecuted.

Nor after sale can the court positively know that through any other remedy it may be able to accomplish the desired end. The act of 1889, before referred to, relating to the formation of a corporation by the purchasers, is not mandatory, but permissive, and mandamus will not lie to compel the purchasers to incorporate.

High Ex. Legal Remedies, sec. 316.

In any view of the case it seems to me that mandamus would be an inadequate remedy. This writ acts upon the person only, and for disobedience the court could only proceed by attachment for contempt, which, under the limited penalty authorized to be inflicted for such an offense in this State, would be wholly ineffectual.

High Ex. Legal Remedies, sec. 565.

The result is, that if the court is not authorized to cause the property to be repaired by a receiver, the forfeiture of charters for neglect to do so is a useless and barren proceeding. The State would successively forfeit charters for the dereliction of public duty, and in the end the railway might be in the same, or even worse, condition than at the inception.

See the decision of the court upon this application.

48 Am. & Eng. R. R. Cases, 656.

Respectfully submitted,

C. A. CULBERSON,
Attorney General.

National Banks.—Each share of stock in a National Bank is taxable against its holder at its actual cash value, less its proportionate interest in the real estate of the Bank.—Such Shareholder is not entitled to have his share of stock diminished for the purpose of taxation by its due proportion of interest in the United States Bonds and other non-taxable securities belonging to the Bank, notwithstanding the fact that such United States Bonds, Treasury Notes and other non-taxable securities are exempt from taxation in the hands of an individual or firm of private Bankers.—"Other Moneyed Capital," used in our Statutes and the Revised Statutes of the United States, refers to and includes other moneyed capital which is subject to taxation.

ATTORNEY GENERAL'S OFFICE.
AUSTIN, February 17, 1892.

Messrs. West and McGown, Austin, Texas.

DEAR SIRS:—Your opinion and the authorities therein cited, in relation to the taxation of the shares of stock in the Gibbs National Bank of Huntsville, have been carefully examined. Article 4668c, Sayles' Statutes, provides that each share in a National bank shall be taxed, against its holder, at the difference between its actual cash value and the proportionate amount per share at which its real estate is assessed, and that nothing therein shall be so construed as to tax National or State banks or the shareholders thereof at a greater rate than is

assessed against other moneyed capital in the hands of individuals. I understand your position to be that, because a private banker would not be required under article 4684 to list his United States treasury notes and United States bonds, nor to pay taxes upon the same, that there should be deducted from every share of stock in a National bank its *pro rata* interest in the United States treasury notes and United States bonds, which belong to such bank, to the end that such shares may not be taxed at a greater rate than is assessed against other moneyed capital in the hands of individuals. The question is whether "moneyed capital," as used in the statute (following article 5219, R. S. U. S.), includes investments in United States bonds or other non-taxable securities when held by a private banker. Our statutes tax all the property of a private banker employed in his business. That in such a case it exempts from taxation the United States bonds and the treasury notes held by such private banker is not a reason for deducting for purposes of taxation from each share of stock in a National bank its aliquot part of the interest all the stock has in United States bonds, treasury notes and other non-taxable personal property of the bank. If the United States bonds held by the private banker in such a case were included within the meaning of the words "other moneyed capital," United States bonds in the hands of an individual engaged in no business whatever, whose entire fortune is invested in United States bonds, would likewise be included in the meaning of the statute, and it would result that the very act by which Congress permitted the States to tax the shares of National bank stock would, since such securities are exempt in the hands of an individual, operate a defeat of itself, in that the shares of stock in a National bank could not be taxed at a greater *rate* than individual investment in United States bonds. A private banker, who has a portion of his effects invested in United States bonds and a portion embarked in the business of private banking, can not be taxed upon his United States bonds any more than an individual whose whole effects consist of United States bonds can be taxed upon the like securities. A firm of private bankers can likewise claim exemption of the United States bonds held by them. When Congress authorized the taxation by the States of shares in National banks under the limitation that "the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individuals within the State," it intended the limitation only to prevent unfriendly and injurious discrimination against National banks, such as would drive capital from such investments. To say that shares in National banks are entitled to a deduction of a due proportion of the United States bonds held by the bank because United States bonds in the hands of individuals or firms engaged in private banking are exempt from taxation, is not to bring the case within the reason of the act of Congress nor to show an invidious discrimination. In People v. Commissioners, 4 Wallace, 244, it was said: "The meaning and intent of the lawmakers was that the rate of taxation on the shares should be the same, or not greater than upon the moneyed capital of the individual citizen *which is subject to taxation*." The investment which a private banking firm may have in United States bonds is, in the nature of things, separate and distinct from the capital employed in the ordinary business of banking, and can not in any way be made the basis of rivalry with National banks. It would, therefore, not result that the system of taxation in this State is an unfriendly discrimination against National banks.

The shares of stock in a national bank, under our statute, are to be assessed against the respective owners thereof at a rate not greater than is assessed against other moneyed capital which is subject to taxation in the hands of individuals. Without discussing the subject at length, you are respectfully referred to the following authorities, which, in my judgment, support both the validity of our statute and the construction thereof adopted by this Department:

Talbot v. Silver Bow County, 139 U. S., 438.
Palmer v. McMahon, 133 U. S., 660.
Mercantile Bank v. New York, 121 U. S., 138.
Engelke v. Schlenker, 75 Texas, 559.
Rosenberg v. Weeks, 67 Texas, 582.
Harrison v. Vines, 46 Texas, 15.
Griffin v. Heard et al., 78 Texas, 607.
National Bank v. Rogers, 51 Texas, 608.
Van Allen v. Assessors, 3 Wall., 573.
People v. Commissioners, 4 Wall., 256, and notes.
Exchange National Bank v. Miller, 19 Fed. Rep., 373,

Commonwealth v. Bank, 96 Am. Dec., 290, and notes.

As I understand that the county officers of Walker county are awaiting the the advice of this Department before proceeding to collect the taxes levied against the shareholders of the Gibbs National Bank at Huntsville, a copy of this letter will be furnished to Judge Smither.

Very respectfully, W. J. J. SMITH,
Office Assistant Attorney General.

Commissioners' Court can not issue interest bearing scrip.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, February 19, 1892.

S. P. Britt, County Attorney, Childress, Texas.

DEAR SIR:—Your letter of the eleventh instant is received. You enclose a copy of a piece of scrip issued July 5, 1887, by Childress county, to Geo. D. Barnard & Co., for stationery (which is part of the current expenses of the county), payable out of the general county fund, or third class, which by an express order of the Commissioners' Court endorsed thereon, draws ten per cent from October 4, 1887, and ask if the said court was authorized to obligate the county to pay such interest. The ruling of this Department is, in substance and effect, that in issuing scrip in the usual manner, and for the current expenses of the county, the Commissioners' Courts are not authorized to provide for the payment of interest. This rule is based upon the wholesome principle that these courts are of limited jurisdiction; that their powers and duties are specifically defined by law, and that they may not lawfully exercise such as are not so defined. A stringent construction should be given the implied power of counties.

Robertson v. Breedlove, 61 Texas, 324.

Our statutes upon this subject nowhere delegate to these courts the authority exercised in the case submitted by you, and the Legislature has emphatically declined to enact that such warrants shall bear interest, by defeating a bill introduced by Mr. Browning.

House Journal, 1887, pp. 53, 145, 373, 390.

Senate Journal, 1887, pp. 403, 558.

Under such circumstances, remembering also that such authority would be both dangerous and fruitful of debt and taxation, unless the Supreme Court has expressly and unequivocally so held, the authority should be denied. Rare and exceptional cases determined by that court should not be made the general rule. As heretofore stated, the statutes do not confer the power exercised in the case presented by you, nor has the Supreme Court decided the precise case or, in my judgment, laid down any general rule necessarily decisive of the question. In support of the contrary view, two cases are cited by you from the 58 Texas Reports. The first (San Patricio Co. v. McClane, 58 Texas, 243) is sufficiently explained by the letter of Attorney General Hogg heretofore referred to. The latter is Davis v. Burney, 58 Texas, 364. It will be observed, however, that in this case the Commissioners' Court practically undertook to call in and identify by registration all scrip issued prior to April 18, 1876, when the present Constitution took effect, and when a different rate of taxation was authorized (Const., art. 8, sec. 9) and the court contracted for the "postponement of this indebtedness by agreeing to pay interest as a consideration for the delay." This case, moreover, is a peculiar one. The facts are not fully reported, and it is not clear what was the character of the indebtedness or upon what ground the decision was put by the court. This being true, it should not be extended beyond the point actually decided, and especially when to do so would, it is believed, violate the spirit of our laws relating to this subject. In all cases in which county debts are evidenced by scrip or warrants, our statutes governing county finances contemplate either that money is in the treasury to discharge the obligation, or that the holder will await payment through the prescribed methods of taxation.

Rev. Stats., arts. 961 *et seq.*

Chapman v. Douglas Co., 107 U. S., 364.

The Commissioners' Courts are not authorized to act upon any other presumption or basis, and persons dealing with the courts must take notice of the

law. The Commissioners' Courts can not promise to pay at a specified time, because the law provides that payment shall be made in the order of registration.

Rev. Stats., art. 966.

Stewart v. Otee Co., 2 Neb., 177.

Chapman v. Douglas Co., 107 U. S., 353.

If there is no money in the treasury with which to satisfy the scrip, the statutes on county finances and taxation clearly show that the holder must abide the collection of taxes and other moneys which are set apart for the payment of such indebtedness. The Commissioners' Courts are not empowered to make contracts of this character, except with reference to this prescribed system of payment. It must, therefore, be held that whatever delay may occur in the payment of such debts springs, not from any act of the parties, but from the law. As a consequence these courts can not lawfully promise to pay interest for such delay as there may be in liquidating this kind of indebtedness according to the mode provided, for that would overcome the statute. Under the law these claims become due when there is money in the treasury to pay them, collected in the manner prescribed, and the courts are powerless to contract that they shall fall due at an earlier time, and obligate the counties to pay interest "for the use, forbearance or detention" thereof. Postponement of payment which results, not from consent or by contract, but by operation of law, can not furnish a basis for a promise to pay interest, and consequently such an obligation by a county would not only be without authority of law but without consideration also.

Bishop, Contracts, enlarged edition, sec. 48.

Very respectfully,

C. A. CULBERSON,
Attorney General.

Manner and time of Making Reports by Commissioners' Courts.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, March 25, 1892.

Hon. M. J. Hickey County Judge, Richmond, Texas.

DEAR SIR:—After careful investigation of your letter of the 9th instant, you are respectfully advised that the act therein inquired about is susceptible of two constructions, but the following is believed to be correct, viz.: (1) It is the duty of the Commissioners' Court under Article 259, P. C., as amended by the act of the Twenty-second Legislature, to make a quarterly statement at each regular term of court, specifying therein the names of creditors, the items of indebtedness, with their respective dates of accrual, and also the names of persons to whom moneys have been paid, with the amount paid each during the quarter. (2) This report should include the three months from January 1 to March 31, inclusive, and so on for each quarter. (3) At the first regular term in each year it is the duty of the court, *in addition to the report mentioned in Paragraph (1) of this letter*, to make or cause to be made an exhibit for the fiscal year ending on the second Monday in February, showing the aggregate receipts and disbursements for each fund for each quarter of the fiscal year, and this exhibit must be published as required by the act. (4) At the third regular meeting the court should make a report as mentioned in Paragraph (1) of this letter, and in addition thereto make an exhibit showing the aggregate receipts and disbursements of each fund for each quarter, and this should be posted as required by the act. (5) The purpose of the law being to inform the taxpayers of the financial condition of the county, all the reports herein mentioned, although not so required by the act, should be recorded in the minutes of the said courts for preservation.

I regret the delay in answering your letter, but this office has been very busily engaged in the preparation and trial of several important cases, in consequence of which earlier attention was not possible.

Very respectfully,

R. L. HENRY,
Office Assistant Attorney General.

Article 2791, Revised Statutes, is intended to exempt, not Insurance companies organized under the laws of another state from our insurance laws, but only benevolent organizations whose relief fund is created and sustained by assessments made upon its members.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, April 11, 1892.

Hon. John E. Hollingsworth, Commissioner of Insurance, Austin, Texas.

DEAR SIR:—In your letter of March 25 you request the opinion of this Department upon the right of the "People's Mutual Life Insurance Company," of Nashville, to do business in this State, as exempt under Article 2971a, Sayles' Statutes, from the burdens, taxes and requirements of life insurance companies. This order is incorporated under the laws of Tennessee. Its governing body is a Grand Council, composed of ten members who hold their positions not less than three years and are elected by general triennial sessions composed of the members of the Grand Council and one person from each subordinate council. The Grand Council is invested practically with the absolute direction and management of the order, having power to elect the grand officers, establish and charter subordinate councils, establish by-laws and make all rules and regulations deemed expedient for the management of the order; to create, as the business of the order may require, additional offices, and make appointments thereto and fix the compensation of the officers. The plan is to issue to each member of the order a certificate for either $1000 or $2000. These certificates, unless sooner matured by death, mature within a certain number of years, according to a tabulated statement, the time of maturity being graduated upon the age of the members. The death of a member will mature his certificate. The holder of a $1000 certificate is designated a half rate member. To become a member the applicant must be between the ages of fifteen and fifty years and pass satisfactorily an exhaustive medical examination, make a written application stating he is in sound bodily health, which becomes a part of the contract, pay a half rate membership fee of $8.00 or a full rate membership fee of $10.00, and thereafter, semi-annually, dues at the rate of $4.00 and $5.00 annually for half or full rate membership respectively, and also pay all assessments made by the Grand Council, according to a table graduated upon age, to meet certificates maturing by death or lapse of endowment period. The application contains nearly a hundred questions to be answered by the applicant, relating to the physical condition and health of the applicant, his ancestors and their collateral kindred. The applicant warrants his answers to be true, although some of them relate to besetting sins. The application and medical examination are made the basis of the agreement. The certificates are made assignable, and become forfeited by failure to pay assessments. When a certificate has matured by expiration of the life expectancy, the member can take out another certificate. The Grand Council is authorized to set aside and invest as much as 25 per cent of the annual dues and assessments until a protection fund of $500,000 (to be drawn to "equalize the assessments") has been created. Compensation is provided for the President, Secretary and Treasurer and Organizer of each local council, the Medical Examiner and the Grand Secretary and other officers of the order. There are many other features of the order which negative the claim that the order is purely benevolent.

The features above described are sufficient to show that the order is a mutual life and endowment insurance company, and that its certificates are cold-blooded insurance contracts made upon a moneyed consideration. Its only benevolent feature is that a limited relief fund is provided for, out of which are paid the assessments of members unable to meet the same on account of personal sickness. This feature does not change the main object of the corporation. The fraternal and lodge features seem to have been appended for the double purpose of evading the laws regulating life insurance and of providing a drag net by which its recruits can be taken in schools instead of singly and alone. The main object is to do an insurance business. It is not an organization whose primary objects are fraternity and benevolence, to which a feature of mutual insurance is added for the benefit of the dependents of such of its members as desire to avail themselves of it, but the plan is to insure every member, and the "organizers are directed to impress the insurance feature as the main object, and to lay little stress upon the fraternal feature." The Grand Secretary is au-

thorized to receipt any member for a full year's insurance at the rate of one double assessment per month in advance with annual dues added, and such member is not for that year subject to further assessments or dues. What is this but a contract of insurance upon a premium paid in advance? Suppose every member of the order should adopt the plan? You would then have a company operating under the exemption of article 2971a, whose relief funds are not created and sustained by assessments within the meaning of that statute. The main inducement to join is that it may be a good investment, and the member may reap some profit for himself upon the maturity of his policy. This is the boasted and distinctive feature of the order. You are therefore respectfully advised that the said order is not such a mutual relief association as is entitled to the exemption contained in article 2971a, Sayles' Statutes.

Bacon on Benefit Societies and Life Insurance, sections 51, 52, 53, 54, 55 and 56 and cases there cited.

Constitution, article 8, sec. 2.
Article 4666, Sayles' Addendum.
Articles 2955 and 2971a, Sayles' Statutes.
Farmer v. State, 69 Texas, 561.
Commonwealth v. Weatherby, 105 Mass., 149.
State v. Farmers' Benevolent Assn., 16 Neb., 261.
State v. Citizens' Assn., 6 Mo. App., 163.
State v. Merchants' Assn., 72 Mo., 146.
State v. Standard Life Assn., 38 Ohio, 281.
Larmour v. Supreme Council, 16 S. W. Rep.

Very respectfully,

W. J. J. SMITH,
Office Assistant Attorney General.

Commissioner of the General Land Office is not authorized, under the Act of April 12, 1883, to declare land forfeited for failure of purchaser to pay interest.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, July 6, 1892.

Hon. W. L. McGaughey, Commissioner General Land Office.

DEAR SIR:—Your letter of yesterday is received, asking whether, under the act of April 12, 1883, you are authorized to declare land forfeited for failure of purchasers to pay interest.

Under the act referred to, the Commissioner of the General Land Office had no authority except as a member of the Land Board.

This subject was discussed in a letter to you, dated January 28, 1891. Independently of this view, the Commissioner, under that act, did not possess the authority inquired about. By section 16 of the act and amendment of February 16, 1885, the failure to pay interest *ipso facto*, worked a forfeiture, and this was evidenced by the endorsement of the Treasurer, the custodian of the obligation. In this connection, no authority was conferred upon the Commissioner or the Board.

Your attention is called to the act of February 23, 1885, (Laws, 1885, p. 18) by which it is provided that failure to make the payments prior to the 1st day of August after maturity of the obligations, shall not cause a forfeiture of the rights of holders of the University, Free School and Asylum lands.

Very respectfully,

C. A. CULBERSON,
Attorney General.

Until the boundary lines of a newly organized County have been marked, as provided by the act of the Sixteenth Legislature, page 137, General Laws, such County should not be recognized by the Land Office as a separate Land District. The District and not the County Surveyor has jurisdiction for surveying purposes in such County.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, July 9, 1892.

Hon. W. L. McGaughey, Commissioner General Land Office.

DEAR SIR:—Your favor of June 18 has been duly considered by this Department. The question propounded is, substantially, whether or not your office should recognize the work of a county surveyor, who has been elected by the county and qualified in a newly organized county when such county has not by act of the Legislature been made a separate land district, and when the lines thereof have not been marked and identified by the Commissioners' Court of such county as required by law.

The act of the Sixteenth Legislature, page 137, General Laws, bearing upon this point reads: "Before any county in this State, not already recognized as a separate land district under existing laws, shall be recognized as such, the County Court (evidently meaning the County Commissioners' Court) shall cause the boundary lines of the county to be surveyed and marked and the field notes and a copy of such survey duly recorded and returned to the General Land Office, as provided in this act. "The only statute in apparent conflict with this act is the latter clause of article 3849, Revised Statutes, passed by the Seventh Legislature, page 66. The language therein used is as follows: "Whenever any county may elect a county surveyor who shall have qualified and given bond, and who shall have procured the maps and records required by law, the district surveyor, within whose district such county may have been or may be at the time, and his deputy shall cease to exercise any official acts within the same." Articles 3854, 3855 and 3856 also impose certain duties upon the county surveyors precedent to such surveyors doing any work within their respective counties after organization. It must be held that the act of the Sixteenth Legislature, above quoted, is at present the law applicable to the case, it being the latest act bearing directly upon this question. While the other articles referred to impose certain duties upon county surveyors, and article 3849 provides that after the law has been complied with the district surveyor shall do no more work in such county or have any further authority within it, yet it was entirely competent for the Legislature to prescribe such precedent condition as it considered proper before the county surveyor should be qualified and before the district surveyor should cease his official functions in such county. The Legislature having prescribed the precedent condition, which is that the Commissioners' Court shall have the lines of the county properly marked before the same shall be recognized as a separate land district, it necessarily follows that the district and not the county surveyor is the proper officer to do the work in such counties until all the conditions prescribed in the statutes have been complied with.

You are therefore advised that until the boundary lines of the county have been marked, as provided in the act of the Sixteenth Legislature above referred to, such county should not be recognized by the Land Office as a separate land district, and that the district and not the county surveyor has jurisdiction for surveying purposes in such county.

Very respectfully,

FRANK ANDREWS,
Office Assistant Attorney General.

The islands of Texas are reserved from location.—The certificate granted to William A. Wallace can not be located upon the islands of this State.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, July 12, 1892.

Hon. W. L. McGaughey, Commissioner General Land Office.

DEAR SIR:—Your letter of yesterday is received, asking if the land certificate issued to William A. A. Wallace, under the special act approved March 20, 1889, may be located on islands of the State.

The act under which the certificate was issued, provides that it "may be located upon any of the vacant public lands of the State, either within or without the several reservations heretofore created by law."

Special Laws, 1889, p. 170.

For the reasons given in the opinion rendered you on March 13, 1891, it is believed that the islands are not subject to location under the general laws of the State. Nor does this special law show an undoubted and clearly expressed intention of the Legislature to depart from this policy, and, until such intention is announced unequivocally, the long established rule and cherished purpose of the State can not be disregarded. Laws of this character, usually passed hurriedly, and without that careful consideration given to general laws, should be closely scrutinized and strictly construed.

Suth. Stat. Constr., sec. 378.

It is a matter of history that since the joint resolution of December 10, 1836, the islands of the State have been "reserved for the Government use." Even when it was determined to dispose of lands thereon, in a public exigency, they were not made subjects of location, but were sold at auction.

Hart. Digest, art. 1829.

Since then, the policy of preserving the islands free from location and for the use of the State has been steadily pursued.

It is also well known that the reservation of public lands, as that term is employed in our statutes, is intended to set apart and segregate from the public domain, subject under the General Laws to the location of certificates, a portion thereof for certain specific purposes, such as the University, free schools and works of internal improvement. Islands were held, not for any specific purpose, but for the general use of the State. They were never a part of the public domain, subject to location, and, consequently, were never included in any reservation thereof, as contemplated by the special act under which the Wallace certificate was issued.

Franklin v. Tiernan, 56 Texas, 624.

Very respectfully,

C. A. CULBERSON,
Attorney General.

In occupation tax cases, where the defendant pays the tax and the costs and the case is dismissed, a trial fee should not be taxed against the defendant.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, July 23, 1891.

S. B. Scott, Esq., County Clerk, Dallas, Texas.

DEAR SIR:—In reply to your favor of July 6, you are advised that the trial fee of five dollars should not be taxed as a part of the costs in prosecutions in cases where the parties have been indicted for failing to pay their occupation taxes and after indictment and prior to trial pay such tax and costs and have the cases dismissed. The trial fee provided for by article 1101, Code of Criminal Procedure, is intended to be taxed to in part bear the expenses of trials where actual trials have taken place. In case of dismissal by paying the tax and costs in occupation tax cases, the expenses of a trial being obviated, it is held by this Department that this trial fee of five dollars should not be taxed.

Very respectfully,

FRANK ANDREWS,
Office Assistant Attorney General.

The Commissioners' Court is without authority to appropriate any part of the county's road and bridge fund for the repair of the streets of an incorporated city, having and exercising exclusive jurisdiction over its highways.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, September 7, 1892.

Judge William Von Rosenberg, County Judge, Austin, Texas.

DEAR SIR:—In your leter of August 16, you inquire whether the Commissioners' Court of Travis county can lawfully appropriate any part of the road

and bridge fund belonging to said county to the repair and maintenance of the Congress avenue bridge or any of its approaches situated within the incorporated limits of the city of Austin. In addition to the facts stated in your letter of November 11, 1891, relating to said bridge, it now further appears, that since that date the city of Austin has expressly adopted said bridge and its approaches as a part of one of its public highways, by passing an ordinance on the 9th day of June, 1892, regulating travel and traffic thereon and by appointing and providing an officer to "police and supervise" the same. Before the city had expressly adopted the bridge and begun to exercise exclusive jurisdiction thereover, conferred by the charter, it would seem that the county, under the authority of Jones v. State, 18th Texas, might lawfully have continued its jurisdiction and made the necessary repairs, if the city declined to act. This point was not ruled upon in our former letter of November 11, 1891, but was expressly left open, because no opinion was requested on that subject. Whatever doubt there may be as to this, it is clear that after such express adoption of the highway by the city, the power and obligation to keep the street in repair rests now solely on the city. What was before the extension of the corporate limits a county road, to be kept by the county in repair, has become by the charter and express adoption a street of the city to be by it maintained. The Commissioners' Court would not, therefore, have any more authority under the present facts to expend any of the county's road and bridge funds in repairs upon said bridge than it would to appropriate any of such fund to repair any other portion of Congress avenue. Under its charter the city has power, which you state has not been exhausted, to levy and collect taxes for such purposes. The charter gives the city exclusive jurisdiction over its highways and empowers it to raise money by taxation for their maintenance. This necessarily ousts the county's control. The authorities cited in the former opinion support this view of the question. In addition to these, you are respectfully referred to the case of Harwood v. Gonzales Co., 79 Texas, 218, and authorities there cited.

If the county has no jurisdiction over the highway it is under no obligation to repair it, and if it is under no obligation to maintain the highway because it has no jurisdiction over it, the Commissioners' Court is without power to appropriate any of the county road and bridge fund for that purpose unless specially authorized by statute. There is no statute expressly or impliedly authoizing that tribunal to use any part of said fund for such a purpose. That the Legislature expressly authorized the Commissioners' Court to assume control of and cause to be repaired the streets of any incorporated city having no *de facto* municipal government (article 4359a, Sayles' Statutes) and made no provision for its participating in such improvements in any other case, is strong evidence of a legislative intent to grant the power in one case and to withhold it in all others not there or elsewhere mentioned, See article 1520a, Sayles' Statutes, and sections of charters cited in former letter, and also articles 375 and 376, Revised Statutes, and Clark v. Town of Epworth, 56 Iowa, 462.

The above are my views of the subject in the light of the statutes and decisions. The decisions of other States, being based upon dissimilar statutes, shed little light upon the subject except in the general principles announced. It is believed the weight of authority supports the conclusion herein reached, but a few well considered cases, holding that the county may assist the city under a similar state of facts, prevents the question from being entirely free from doubt. The strongest of the last named decisions are the following:

State v. Supervisors, 41 Wis., 46.
Barrett v. Brooks, 21 Iowa, 145.
Bell v. Foutch, 21 Iowa, 119.
But see McCullom v. Black Hawk Co., 21 Iowa, 409.

Very respectfully,

W. J. J. SMITH,
Office Assistant Attorney General.

Incorporated Clubs organized for social and other purposes, which sell liquors to their members only, without regard to profit, are liable to the payment of the occupation tax as retail liquor dealers under the laws of this State.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, September 22, 1892.

Hon. R. S. Harrison, State Revenue Agent, Austin, Texas.

DEAR SIR:—Your favor of September 8 has been received and duly considered by this Department. You therein state that you desire to be advised "whether clubs or associations, incorporated under the laws of this State for social and other purposes, that purchase spirituous, vinous or malt liquors and sell the same by retail to their respective members and stockholders, and for which each member and stockholder pays according to the quantity he calls for and consumes, are liable to the occupation tax imposed by law on retail liquor dealers?"

So far as I have been able to ascertain, the question propounded by you has not been adjudicated by the courts of last resort in this State. The act of April 4, 1881, imposes a tax on all persons engaged or engaging in the business of selling spirituous, vinous or malt liquors or medicated bitters, and under the common rules of construction by the courts of last resort a corporation for the purposes of this act must be held and considered to be a person within the meaning of the same. The importance of the subject, its wide and extended scope, and its material effect upon the revenue of the State will be sufficient authority for the somewhat lengthy discussion of the subject and citation of authorities bearing upon the same.

In the case of People v. Andrews, 115 N. Y., 427, the defendant was indicted and tried for violating the excise laws of that State. The testimony showed that the drinks sold by the defendant were to members of the club, and were not the property of the defendant, but the property of the club or the persons who drank the same. They were not bought in the name of the defendant, but were bought in the name of the Valley Association Club, and bills were rendered to that organization for them. The court in this case held that the action of this club was not an evasion of the law but a violation of it, and held that the defendant was liable to be prosecuted and convicted for failing to pay tax as a retail liquor dealer.

In the case of Commonwealth v. Jacobs, 152 Mass., 279, and Commonwealth v. Baker, 152 Mass., 337, the court sustains practically the same view enunciated by the New York Court, and holds that clubs organized for social or other purposes, and an incident of such organization is to buy liquors in quantities, and through an agent or steward of the club to dispense the same to members, would be liable to pay an occupation tax as a retail liquor dealer.

In the case of State v. Tindall, 40 Mo. App., 271, it was shown that the make-up of the club room was, in all respects, similar to that of an ordinary dram shop, and the dram-seeker was required to sign the articles of association, which clothed him with the privileges of membership, and entitled him to buy and drink at the same place whatsoever was carried in stock by purchasing a requisition ticket, paying therefor. It was held that this transaction was a sale, regardless of the purchaser's relation to the association, whether he was a member or a stranger; and the court say: "Considering the offense here in the most charitable light for the defense, these drinks disposed of to the members of the association were sales. The whisky, beer, etc., changed ownership in consideration of money then and there paid by the consumers. Call the club association a corporation, or a co-partnership, or a mere voluntary society, and the character of the transaction remains the same. The party seeking to purchase the liquor signs as a member, and pays 25 cents into the funds of the society for the privilege of buying its goods and being admitted as a member, having paid the 'gate money,' and entered with the right to become a purchaser, he proceeds to buy of the 'club,' of which he is a member. The transaction, too, is a sale, regardless of his relations to the association, whether a member or a stranger."

A recent and well considered case on the subject is the People v. Soule, 74 Mich., 250. In that case all the authorities bearing upon the subject are extensively discussed, and the court hold: "That a club properly organized for social purposes, and in good faith, under the laws of that State, can not distribute liquor among its members, receiving pay therefor, by the glass, which goes

into the club treasury, to be used in purchasing other liquors, or in paying expenses, without being liable under the laws of that State to pay a retail tax for selling liquor." The court say: "The element of bad faith in the organization of this club, which has been made to play an important part in the disposition of the main question involved here by some courts, seems to be eliminated from this record. The question is plainly raised, whether a club, properly organized, and in good faith, under number 22, Laws of 1883, can distribute liquors among its members, receiving pay for such liquors, as they are distributed, by the glass, the proceeds to go into the treasury of the club, to be used in purchasing other liquors, or in paying expenses, without being liable under the laws of the State of Michigan to pay a retail tax for selling such liquors;" and the agent of such club, so selling liquors without license, is held to be liable for prosecution and conviction for the offense of retailing intoxicating liquors without license.

It has been held by the United States Courts that clubs organized as above indicated and selling liquor to its members alone or to its members and other persons are liable to pay internal revenue license to the United States as liquor dealers.

In the case of the United States v. Wittig, 2 Lowell, 466, it was shown that the club in question bought beer at wholesale and the members of the club and no others were permitted to take beer at the rooms of the club, upon giving as many checks as they received glasses of beer. The court said: "There seems to me to be no doubt that the club sells beer to its members. Every element of a sale is present—the delivery of the beer on the one part and the payment on the other. It was argued that at common law a man can not buy of himself and others. This is a mistake. The common law recognizes such a sale, though if the contract is executory the common law has no method of enforcing it. The true question is whether such sales make the association a dealer under the statute," and the court held that a club or association of persons coming together to promote social or literary objects, which delivers beer to its members, receiving checks in exchange for glasses of beer, having sold the checks originally to members of the club, is a dealer under the statute and liable to be taxed.

In the case of Rickhart v. People, 79 Ill., 85, an association was formed for the avowed purpose of promoting temperance, friendship, etc. They claimed to have bought the dramshop of one of their members, who was elected their treasurer, and who continued in possession of the dramshop, having no license to sell intoxicating liquors. Each member was required to pay one dollar, for which he received a ticket with numbers from one to twenty upon it, and upon presenting the ticket at the bar the member received liquors or cigars as he wished and paid for the same by having numbers punched out of his ticket. Any person could become a member by paying one dollar. Held by the court, that if the liquor really belonged to the association and the treasurer acted for them, all the members would be guilty of unlawful sale, as the liquor would be partnership stock and the company would have no more right to sell to the individual members or partners than a stranger would.

In Martin v. State, 59 Ala., 35, the defendant was indicted for retailing liquor without license. He was employed as an agent of the Standard Club, which was organized in the city of Montgomery and incorporated under the laws of the State for social and literary purposes. It was governed by its constitution and by-laws, and according to its laws only members or persons invited by members could enter the premises of the club or be present at its meetings. In the second story of the buildings one of its rooms was used as a bar, in which spirituous liquors that had been purchased with the funds of the club were sold to members of the club only. The money paid for the liquors went to the common fund of the club. In the discussion of the case the court say: "A sale may be defined to be a transfer of ownership from one person to another upon a valuable consideration paid or promised." In Benjamin on Sales it is said: "To constitute a sale there must be a concurrence of the following elements, viz.:

1st. Parties competent to contract.

2d. Mutual consent.

3d. A thing, the absolute or general property in which is transferred from the seller to the buyer.

4th. A price in money paid or promised. Whenever the ownership is changed this essential of the contract is complied with.

In the present case there can be no question that the ownership was changed.

The spirituous or vinous liquors were the property of the corporation. By the sale they became the property of the individual for a valuable consideration paid by the individual member to the corporation aggregate."

To the same effect is the case of Marmont v. State, 48 Ind., 21, the chief difference being in the last named case a partnership or association and not a corporation. A number of persons associated themselves together as a club for social purposes and employed a steward, who purchased on each Saturday a keg of beer and on Sundays disposed of the same to members, who paid therefor the price of five cents a glass, the proceeds to go to the common fund of the club and without profit to the same, the price paid being intended merely to replenish the stock and bear the expenses of the club. The court held that the steward so employed was an agent of the corporation, and was guilty of a violation of the law in the sales so made.

The case of State v. Mercer, 32 Iowa, 405, sustains this view, and holds that such sales by clubs without license are unlawful.

A recent and well considered case on this subject is the State v. Lockyear, 95 N. C., 633. It was shown in that case that a number of persons in the city of Raleigh, in 1885, organized a club for social and literary purposes and were duly incorporated under the laws of that State. Incidental to the main purposes of the organization the members, but no other persons, were permitted to purchase from the defendant, as its steward, meals, cigars and liquors, which were furnished by the club at a price fixed by its officers sufficient to cover the cost, but not for the purpose of profit. In 1886 an election was held in Raleigh township under the local option act, in which a majority of the votes cast were for prohibition. The court held that furnishing liquors to members of the club under these circumstances was a sale, and the club, as a liquor dealer, guilty of a violation of the local option law in force in that township.

In the case of the Kentucky Club and University Club v. City of Louisville, 17 S. W. Rep., 743, it was admitted that each of complainants, who were respectively created by law corporations, regularly purchased by wholesale or in large quantities spirituous, vinous and malt liquors, which were taken to and kept in its club house and disposed of by retail to its respective members and stockholders, for which each paid according to the quantity called for and consumed by him, and it was contended that the process devised for accomplishing the end of exchanging the money of the drinker for the liquor of the owner and keeper of the club house did not amount to a sale by retail. It is made to appear by the statement of facts that each club is composed of members who each pay an admission fee of twenty-five dollars and besides pay three dollars monthly, and it was organized for the social pleasure of its members and for furnishing them with the convenience of a place of amusement, conversation or rest, and facilities for reading, writing, eating, drinking, smoking, etc., and that the club is a *bona fide* social organization and not organized for the purpose of evading the license law. The court hold: "The decisive fact exists that in each case the corporation purchases by wholesale and distinctly owns the liquor, and no member is permitted to drink or consume any of it without paying directly out of his individual means to the corporation the price per drink or bottle fixed and charged therefor. To say that under such circumstances the defendant in each of such cases, the corporation and owner of the liquor, has not violated the law by selling without license would be an abuse of terms, for the privilege of selling by retail is essentially exercised by each corporation, how much profit is made makes no difference," and the conviction against each of the defendants was sustained.

In the case of the State v. Essex Club, 20th, Atlantic Reporter, 769, the defendant was a duly incorporated social club, which out of its common fund purchased liquors in the name of the club and kept the same for the benefit of all of its members. Any member of the club in the club house could give an order to a servant or to the steward and liquor so ordered was served to him. He then paid for the same or signed a memorandum check which was presented to him at the end of the month. No one but a member could pay for such liquors so ordered. This disposition of the liquor was not for the purpose of making a profit out of the liquors or for the purpose of evading the law. It was held that this constituted a sale of liquor by the club and that the club was liable to the penalty provided for selling liquor at retail without license.

In the cases of the State v. Easton Club and Club of St. Michaels, 20 Atlantic Reporter, 783, it was shown that the club was conducted for the use of the mem-

bers only to provide for their rational entertainment and amusement. It transacted no business whatever for the purpose of making any profit directly or indirectly for itself or its members, and that the income derived from the various sources was applied solely to defraying the expenses of the corporation; that the sources of income were as follows: 1st. An entrance fee of three dollars for each new comer. 2d. Such monthly dues as shall be assessed by the board of governors each month. 3d. Money paid by members for the refreshments, liquors, cigars, etc., which they obtained for their personal use at the club house. 4th. Such additional assessments, fines, penalties, etc., as may be imposed from time to time upon its members. The liquors were bought by the corporation and kept in the club house under the charge of the manager (an employe of the club) under the supervision and control of the board of governors. The members of the club and no other person could get liquors by calling for them upon the steward and paying the price fixed by the regulations of the corporation, and the price was fixed and paid, not for the purpose of making any profit, either directly or indirectly, but merely for the purpose of covering the outlay in the purchase thereof by the corporation, and the same constituted the common fund to supply and replenish the stock of liquors so kept as aforesaid for the use of the members, and the expenses attendant upon the keeping and serving thereof at the club and the other expenses of the club. The court held that "the facts admitted clearly show habitual and constant violation of the law by these corporations by the sale of liquors at their club house to members of the club, and the fact that the sales were made without actual profit to the corporation is wholly immaterial and affords no ground of defense to these proceedings."

I have quoted at this length from the decisions on the subject in order that you might fully understand the position taken by the different courts of this country with reference to the subject matter.

You are therefore advised that in the opinion of this Department the doctrine of the authorites cited and referred to clearly sustains the position that incorporated clubs or associations organized for social and other purposes, which sell liquor to their members only, without regard to profit, are nevertheless liable to payment of occupation taxes as retail liquor dealers under the laws of this State.

Very respectfully,

FRANK ANDREWS,
Office Assistant Attorney General.

Tickets for Presidential Electors must contain the names of the candidates for State, County and Precinct offices.—Any candidate who has ballots printed must have them printed according to law.—Election officers can have ballots printed and the expenses thereof paid by the Commissioners' Court out of the general revenue fund of the county.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, September 24, 1892.

Judge W. H. Jenkins, County Judge, Waco, Texas.

DEAR SIR:—Your letter of the 21st inst. is at hand. In answer to your first inquiry you are respectfully advised:

Section 24 of the registration act provides: "All ballots used by voters at said election shall be furnished by the officers conducting said election, upon which shall be printed the names of all candidates for State, county, precinct or city offices upon one ticket and arranged according to the respective parties to which the candidates may belong." Nothing is said expressly in the law about the candidates for presidential electors, but if all the ballots voted at the general election must contain the names of the candidates for State, county and precinct offices, it necessarily follows that the tickets for presidential electors must contain the names of the candidates for State, county and precinct offices. Or, stated reversely, the general ballot may contain the names of the candidates for presidential electors arranged according to their respective parties, as the names of other candidates are thereon arranged.

In answer to your second inquiry, you are respectfully advised, that if, under section 25 of said act, any candidate should have ballots printed, he must have them printed in accordance with the requirements of section 24, and furnish them to the presiding officer of the election at least one day before the day of holding the election.

In answer to your third inquiry you are respectfully advised that, in my judgment, the word "furnish" in the clause, "All ballots used by the voters at said elections shall be furnished by the officers conducting said elections," (sec. 24) implies the physical act of supplying each voter with a ballot at the polls when he comes to vote. This is clear from the context in which the word appears and from the 25th section in which it is provided that any candidate may have ballots printed and handed the presiding officer, *i. e.*, furnish the ballots in the sense of providing them. But, while this is true, it does not follow that the election officers may not provide the necessary ballots for the election.

The act, while providing for the payment of other expenses of the election, is silent as to the expenses of printing and providing the ballots. The candidates, it is true, may arrange and provide a ballot in accordance with law. But suppose they do not do it. The express duties devolved by the act upon the officers of the election can not be carried out without the obtaining in some way of the prescribed ballots. As heavy penalties are denounced against election officers, who willfully disregard any of the provisions of the act, such officers ought, in the nature of things, be accorded the right to say what ballots are prepared as the law directs, and if an abundant supply of legal ballots are not furnished to them in ample time before the election, they ought to have, and, in my judgment, have the power to cause the same to be prepared, and the expenses thereof in all State and county elections should be paid by the Commissioners' Court out of the general revenue fund of the county. This implied power is necessary to the exercise of the express duties and powers and results as well from the nature and necessity of the case.

In answer to your fourth inquiry you are respectfully advised, that the last sentence of section 23 repeals 1693a, Sayles' Statutes, so far as the latter article conflicts with the said section. See section 31 of the registration act.

Very respectfully,

W. J. J. SMITH,
Office Assistant Attorney General.

Election tickets must be numbered.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, October 5, 1892.

Judge W. D. Harris, Fort Worth, Texas.

DEAR SIR:—Your letter of September 27 is received.

It is not believed that the provisions of section 28 of the Registration Act, approved April 12, 1892, that "any elector, or any one who shall, contrary to the provisions of this act, place any mark upon or do anything to his ballot by which it may afterwards be identified as the one voted by any particular individual," shall be guilty of a misdemeanor, repeals that portion of article 1694, Revised Statutes, requiring ballots to be numbered.

The marking of the ballot, it will be observed, which is denounced by the statute, is such only as is "contrary to the provisions of this act." There is no express repeal of the article requiring the ballots to be numbered, and the presumption is not permissible that the Legislature would by implication repeal a provision of the law, the enactment of which is positively commanded by the Constitution, by declaring that the "Legislature shall provide for the numbering of tickets."

Constitution 1876, art. 6, secs. 4, 5.

General Laws, 1891, pp. 194, 195.

You are therefore advised that in my judgment the requirement that the tickets be numbered is operative throughout the State.

Very respectfully,

C. A. CULBERSON,
Attorney General.

Under Registration Act, approved April 12, 1892, only bona fide citizens of a city can register.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, October 5, 1892.

J. M. Cook, Esq., Registrar, Denison, Texas.

DEAR SIR:—Your letter of September 23, inquiring whether persons residing beyond the limits of the city of Denison can be registered by you under the Registration Act, approved April 12, 1892, is received. The sections of the act directly applicable to the question are as follows:

"Sec. 2. Each qualified elector of such city, under the Constitution and laws of this State, shall be entitled to register; but no elector of such city who fails to register under the provisions of this act shall vote at any State, county or city election for which registration is had under the provisions of this act."

"Sec. 5. It shall be the duty of the registrar, provided for in the preceding section, to register all the qualified electors of such city as hereinafter provided, and to do and perform all other duties required of him by the provisions of this act."

"Sec. 21. Every male person who shall have become of the age of twenty-one years by the day of election, and shall be otherwise a qualified elector, or shall have become a qualified voter of the city by the day of the election for which the registration is made, and is a *bona fide* citizen of the city in which he offers to register, shall be entitled to register as a qualified voter of the city, provided he shall establish the same as herein provided."

Sections 12, 13 and 14 are in harmony with the foregoing, making reference to "voters of the city," and from all of them it clearly appears that you have no authority to register any except *bona fide* citizens of the city.

Not being inquired about, other questions which your letter suggests have not been considered.

Very respectfully,

C. A. CULBERSON,
Attorney General.

Election.—The name of a candidate for an office can not be placed on a ballot more than once.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, October 14, 1892.

Hon. W. D. Harris, County Judge, Fort Worth, Texas.

DEAR SIR:—Your letter of October 2 is received. You ask whether, under the registration law recently enacted, it is legal to place the name of any one candidate on the ticket more than once. This Department has carefully considered every article and section of the registration law and the Revised Statutes, and has concluded that it is not legal to place the name of any one candidate for office on the ballot more than once.

Article 1694, Revised Statutes, in regard to ballots, reads: "All ballots shall be written or printed on plain white paper, without any picture, sign, vignette, device or stamp mark, except the writing or printing in black ink or black pencil, of the names of the candidates, and the several offices to be filled, and, except the name of the political party whose candidates are on the ticket; *provided*, such ballots may be written or printed on plain white foolscap, legal cap, or letter paper."

Thus it is apparent that the Legislature has provided that only the names of the candidates, and the parties to which they may belong, can be placed upon the ballot. The Legislature, considering the context of this article, intended to restrict the printing on the tickets to the names of the candidates and their parties.

Section 24, page 17, of the act of the called session of the Twenty-second Legislature, approved April 12, 1892, reads: "All ballots used by the voters at said election shall be furnished by the officers conducting said election, upon which shall be printed the names of all candidates for State, county or precinct officers (offices) upon one ticket and arranged according to the respective parties to

which the candidates may belong, and whenever a voter has been furnished with a ballot by any officer conducting the election, the presiding officer shall stamp with a rubber stamp provided for this purpose the words 'official ballot,' and no ballot cast without said words stamped upon it by the said presiding officer shall be counted at said election."

By this article the names of *all* the candidates should be placed on one ticket and their names must be arranged according to the party to which they belong.

See article 1697, which reads: "No ballot which is not numbered as provided in article 1694, shall be counted, nor shall either of two or more ballots be counted, and where the names of two or more persons are upon a ballot for the same office, when but one person is to be elected to that office, such ballot shall not be counted for either of such persons."

Construing these statutes together, I am fully convinced that the Legislature intended to permit each candidate to have his name placed upon the official ballot once where the names of all candidates of all parties must be arranged according to their political faith. This method permits every voter to cast his ballot for the candidate of his choice, and no matter to what party that candidate may belong, or where his name may be found, the voter can vote for him as conveniently where he finds such candidate's name on the ticket as if he found it there a number of times.

In order to express his choice, it is only necessary for the voter to mark out the names of those candidates not his choice, and he thereby leaves the candidate of his choice on the ticket to be counted, no matter where the name is found thereon.

See also McCreary on Elections, secs. 399, 405.

Paine on Elections, secs. 552, 554.

Very respectfully,

R. L. HENRY,
Assistant Attorney General.

Election.—In Cities affected by the Registration Act the names of Candidates for Presidential Electors and Candidates for Congress should be placed on the Ballots.—The name of a Candidate for an office can be placed on a Ballot only once, and must be arranged under the name of the Party to which he belongs.—Any method by which a Voter marks off objectionable Candidates and leaves on the Candidates of his choice would be a sufficient designation.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, October 14, 1892.

Judge E. G. Bower, Dallas, Texas.

DEAR SIR:—Your letter of a recent date is received. You propound three questions in regard to the registration law recently enacted by the called session of the Twenty-second Legislature.

1st. You desire to be advised whether in cities affected by the act the candidates for presidential electors and the candidates for Congress should be placed upon the ballots. You are respectfully advised that such names should be placed upon the ballots. A copy of a letter to Judge W. H. Jenkins, of Waco, fully discussing said question, is here inclosed.

2d. You submit a form of a ballot and ask if it meets the requirements of the law. The letter to Judge Jenkins bears upon the question. It is further stated that this Department has just ruled that the name of a candidate for office can be placed upon a ballot only once, and must be arranged under the name of the party to which he belongs. This appears to be the proper construction of section 24 of the registration act.

3d. You ask in what manner the voter should designate the candidates for whom he votes. Should he mark out the names of those not his choice or should he place a mark by the names of those for whom he votes, leaving the names of all other candidates on the ticket? The law in regard to registration of voters in certain cities and in regard to casting ballots in such cities left in force many provisions of former laws in regard to elections. Article 1697, Revised Statutes, is still in force, and reads as follows: "No ballot which is not numbered as provided in article 1694 shall be counted, nor shall either of two or more ballots

folded together be counted, and where the names of two or more persons are upon a ballot for the same office, when but one person is to be elected to that office, such ballot shall not be counted for either of such persons."

In this provision it is seen that if the names of two or more candidates for the same office are left upon the ticket the ballot shall not be counted for either candidate for that office. If the voter simply places a mark by the name of the candidate for whom he votes he thereby leaves the names of all candidates upon the ballot, which is not in accordance with the article of the Revised Statutes quoted. The safe action for the voter to take in marking his ballot would be to mark out with pen or pencil the names of all candidates on the ticket not his choice. Any method by which the voter marks off objectionable candidates and leaves on the candidates of his choice would be sufficient, but the voter should prepare his ballot so as to clearly leave upon it the names only of the candidates of his choice, with the names of candidates not his choice plainly marked out. See

State v. Millican, 63 Texas, 390.
Owens v. State, 64 Texas, 500.
Paine on Elections, secs. 552, 554, 562.
Adams v. Wilson, C. & H., 373.
McCreary on Elections, sec. 411.

Very truly,

R. L. HENRY,
Assistant Attorney General.

NOTE.—On January 3, 1893, the Supreme Court of Oregon construed a similar statute, in regard to a candidate's name appearing on the same ticket twice, in accordance with this ruling.

A qualified elector is one who has an actual, bona fide residence in a voting precinct in this State which entitles him to vote for State officers if he has resided in the State twelve months and possesses the other qualifications prescribed in the Constitution; for district officers (congressional, judicial and legislative) when he possesses the foregoing qualifications and has resided in the district six months; for county officers, when he possesses the foregoing qualifications and has resided in the county six months.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, October 26, 1892.

R. E. Taylor, Esq., County Attorney, Archer City, Texas.

DEAR SIR:—We have your favor of October 22, making inquiry as to the qualifications of voters under certain conditions in this State, and as the various questions frequently arise, it is thought proper to answer you fully upon these questions.

The Constitution of this State, article VI, section 2, provides: "Every male person subject to none of the foregoing disqualifications, who shall have attained the age of twenty-one years, and who shall be a citizen of the United States, and who shall have resided in this State one year next preceding an election and the last six months in the county or district in which he offers to vote, shall be deemed a qualified elector * * * and all electors shall vote in the election precinct of their residence."

In this connection Attorney General Templeton rendered an opinion on October 21, 1884, as follows:

"I. For State officers a residence of twelve months in the State is required, and a *bona fide* residence in the election precinct where the applicant desires to vote. It makes no difference how short the residence in the election precinct may have been, provided, only, that it is actual and *bona fide*. From the above it will be perceived that mere transients will have no right to vote in any county if they have a residence elsewhere, even if they have been citizens of the State for twelve months.

II. For district officers (congressional, judicial or legislative), a residence of twelve months in the State is required, and a *bona fide* residence of, no matter how short the duration, in the election precinct where the applicant desires to

vote, and in addition thereto, a residence of six months in the district. Thus, a former resident of Taylor county may have moved from said county into Jones county, only a few days or weeks preceding the election, and have the right to vote in Jones county for State and district officers. (See Constitution, article VI, section 3, and U. S. v. Slater, 4th Woods U. S. Circuit Court Reports, 356.) I will add that this was also the construction of my immediate predecessor in this office.

III. For county and precinct officers, a residence of twelve months in the State, and six months in the county, is required. In this case, also, the voter must vote only in the election precinct where he actually resides.

In regard to the right of transient cowboys, who have been in the State for twelve months, and in Jones county for six months, to vote in Jones county for county and precinct officers, I have to say that that they can clearly vote there for all officers—Presidential, State, district, county and precinct—if they have no other place they claim as their home.

I will add that I wish it distinctly understood, that the impression prevailing in many places, that this office has heretofore advised, either before or since I became Attorney General, that a residence of twelve months in the State, under the Constitution, would entitle a citizen to vote for State officers, wherever he might happen to be on election day, is wholly incorrect and unsupported by the official records of this office; and, at the risk of being tautological, I again expressly say, that neither State, district, county or precinct officers can be voted for except in the election precinct wherein the proposed elector has his actual *bona fide* residence." A later case upon this subject, in harmony with this view, is Little v. State, 75 Texas, 616.

This opinion is in harmony with that of Attorney General McLeary, which is as far back as we have any records of the opinions of this Department, the others having been destroyed in the burning of the old Capitol, and is in harmony with the views of the present Attorney General upon the subject.

In addition to this, upon the question of temporary absence, you are respectfully advised that a residence is not lost by a temporary absence, for the purpose of business or pleasure, with an intention to return. The county into which an elector removes with his family, intending to make it his place of residence, is the county in which he should vote, so long as his family remains there, although he may be absent himself, engaged in business or work elsewhere. The domicile, or residence, in a legal sense, is determined by the intention of the party. He can not have two homes at once, and when he acquires the new one, he loses the old one; but, to effect this change, there must be both the act and the intent, and the test of domicile is the intent as established by all the facts of the case and the surrounding circumstances, and not merely by a declaration of intention, but also by the attendant circumstances and conditions. The question of domicile is a question of fact, and the intention is the evidence of the fact, but not always conclusive, for to constitute a domicile, both fact and intent must concur.

Henderson v. Ford, 46 Texas, 647.
Paine on Elections, sec. 47.
State v. Judge, 13 Alabama, 806.
Lincoln v. Hapgood, 11 Mass., 350.
People v. Holden, 28 Cal., 124.

You are, therefore, respectfully advised that no merely transient person can vote. He must have an actual *bona fide* residence in some voting precinct in the State. Having this, he may vote:

1st. For State officers, if he possesses the other qualification prescribed in the Constitution, and has resided in the State twelve months.

2d. For district officers (congressional, judicial and legislative), when he possesses the foregoing qualifications, and has resided in the district where he offers to vote for six months.

3d. For county officers, when he possesses the foregoing qualifications, and has resided in the county where he offers to vote for six months.

Very respectfully,

FRANK ANDREWS,
Office Assistant Attorney General.

The act of April 3, 1879, under which cities acquire exclusive control of their schools and rest their management in a board of trustees to be elected by the people, is not repealed by the act of April 14, 1883, and the latter act was not intended to empower city councils to take the management of schools out of the hands of trustees elected by the people and place it in the hands of a board of trustees elected by the city council.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, November 25, 1892.

George D. Green, Esq., Cleburne, Texas.

DEAR SIR:—This Department has given careful consideration to the statement of facts contained in your several communications, in connection with the letter of Judge F. E. Adams, of Cleburne, requesting us to sign an information in the nature of a *quo warranto*, to inquire and determine the right of the school trustees of the city of Cleburne to exercise the functions of the offices of trustees. The facts seem to be agreed upon by both parties to the controversy, and are as follows, to wit:

The city of Cleburne, some time prior to July, 1879, was incorporated under the general law. At an election held August 29, 1879, under the act of April 3, 1879, the city of Cleburne acquired the exclusive control of the public free schools within its limits, and at the same election it was decided that the said schools should be under the control of a *board of trustees to be elected by the people* in accordance with the said act of April 3, 1879; that subsequent thereto, to-wit, on the 15th day of September, 1879, an election was held and trustees elected to manage and control said schools; that the people continued to elect a board of trustees, in whom was vested the management and control of the schools, until December 11, 1883; that upon that day the city council appointed a board of trustees, and have continued since that time until now to appoint trustees for said schools, and that the present board of trustees was elected by the city council and not by the people.

The single issue in the case is, whether the city council, under the facts stated, is empowered to elect a board of trustees for said schools, or whether the power to elect is vested in the people.

To determine this question it will be necessary to examine several acts of the Legislature. The act of April 3, 1879, under which the city of Cleburne acquired the exclusive control of its schools and vested their management in a board of trustees to be elected by the people, contains the following provision: The election shall be held "to decide by a majority of the votes cast by the qualified voters of such city or town at such election, whether such city or town shall acquire the exclusive control of any or all of the public free schools or institutions of learning within its limits, and whether the same shall be under the control of the board of trustees as hereinafter mentioned, or of the city council or board of aldermen of such city or town."

It is then provided that if it shall have been decided that the schools shall be under the management of a board of trustees, an election shall be held to elect six trustees to take charge of and manage the schools, and that the board of trustees so elected shall have the same exclusive powers, control and management of the schools as are conferred upon the city council when it is invested with control of such public free schools.

By another act of the Legislature, approved April 14, 1883, it is provided in section 1 as follows: "That the city council of every city or town of one thousand inhabitants or more, incorporated under the general law, that has or shall assume control of its public free schools, may appoint six persons of good moral character, and qualified voters of such city or town, as a board of trustees for such schools, of which board the mayor shall be ex-officio chairman."

The legal question presented is whether this last act of 1883 divests the people of the power formerly exercised to elect their trustees. Does it invest the city councils of cities, situated like Cleburne was at that time, with the power to elect a board of trustees, when the people of the city had previously determined by an election that the city should acquire exclusive control of its schools, and their management should be vested in a board of trustees to be elected by them? The act of April 14, 1883, contains no repealing clause. If the act of 1879 is in any way affected, modified or repealed by the act of 1883, it is by implication merely. Repeals by implication are not favored. The acts must be clearly in-

consistent before it will be held that the latter repeals the former act. The two acts referred to are, in my judgment, harmonious and can be construed so that both may stand and be operative.

Under the act of 1879 the people could have vested the control and management of their schools in the city council, and it is possible that many cities in Texas did so. It seems to me that the act of 1883 was passed for the purpose of empowering such city councils as had been invested with the management of schools to devolve that duty upon a board of trustees to be elected by the city councils, and that it was not intended to empower the councils to take the management of the schools out of the hands of the board of trustees elected by the people under the act of 1879 and place it in the hands of a board of trustees elected by the council. This view, if adopted, will render the two acts harmonious, and it is favored by the rule of construction which requires both acts to stand if possible, and it is supported by the language used in the fifth section of the act of 1883, which is as follows: "The public free schools of such city or town shall be under the control and supervision of such board of trustees, and the said board, when appointed, shall have the same power to control, manage and govern said schools that the *city council or board of aldermen now have.*"

It is apparent from this language that the act was intended only to operate upon such city councils as then had or might thereafter acquire the management of the schools of the city, and this view of the question is also supported by, what seems to me, a legislative construction of the two acts in its favor, which is as follows: The act of March 27, 1889, Twenty-first Legislature, page 128, provides in substance, that in all cities and towns in this State which have assumed or may assume the exclusive control and management of the public free schools within their limits shall be in a board of trustees, and organized under the act of the Sixteenth Legislature, approved April 3, 1879, the title to all property of the free schools shall be vested in the board of trustees, in trust, for the use of the schools. This latter act applies only to cities organized under special charters, but it nevertheless shows that the Legislature construed the act of 1883 as merely amendatory of the act of 1879, the latter being considered as still in force, so as to allow the city council the power to appoint a board of trustees when such council itself was invested with the control of the schools, and that it was competent for the people, after having so determined at an election held for that purpose, to elect trustees of their schools under the act of 1879.

From this construction of the two acts of the Legislature it follows, that as the city council of the city of Cleburne was not invested with the control and management of the Cleburne schools at the date of the act of 1883, and has never been by the people invested with such control and management, it was not authorized to proceed under the act of 1883 to elect a board of trustees. That right was vested solely in the citizens of the town of Cleburne. The present board of trustees of the school is, therefore, in my judgment, acting under an illegal appointment.

It may be, however, that upon further consideration these offices will be properly filled, and consequently no official action will be taken for the present.

Very truly,

C. A. CULBERSON,
Attorney General.

Where the County Judge-elect dies before he qualifies, such a vacancy exists in the office of County Judge as shall be filled by the Commissioners' Court.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, November 28, 1892.

J. D. Childs, Esq., Fairfield, Texas.

DEAR SIR:—Replying to your favor of 21 instant, in which you state that County Judge-elect Henderson died before he qualified as county judge and that you have been asked for a ruling as to whether there is a vacancy, or whether the present incumbent holds over until the next general election, and that you had construed articles 1133 and 1135, Sayles' Civil Statutes, and given it as your opinion that no vacancy existed, and ask this Department for an opinion on the question indicated, will say there is highly respectable authority to support

your views, as this question has undergone exhaustive consideration at the hands of many courts of last resort outside of this State, and the conclusion almost uniformly reached that in such a case no vacancy existed.

It would seem, however, that this rule does not prevail in this State. The language, "shall hold his office for two years and until his successor is elected and qualified," as provided in our Constitution, has been construed as follows by our courts: "The primary object of this provision, that the incumbent is entitled to hold the office until his successor is elected and qualified, is simply to prevent, on grounds of public necessity, a vacancy in fact in office until the newly elected or appointed officer can have a reasonable time within which to qualify. The right of the officer who thus holds over is by sufferance rather than from any intrinsic title to the office."

State v. Cocke, 54 Texas, 482.

Flatan v. State, 56 Texas, 93.

By comparing article V, section 15, and article VIII, section 14, of the Constitution, it will be observed that the terms of the county judge and assessor are fixed at the same period and in the same identical language, *i. e.*: "Shall hold office for two years and until his successor is elected and qualified." If, then, the failure to qualify by the assessor-elect and an appointment of a successor to an incumbent terminated the term of the incumbent under a former election, as was held in the case of State v. Cocke above quoted, we see no reason why the same rule should not apply to the case under consideration.

Applying the rule announced in the case above quoted, it is not believed that article 1133, Revised Statutes, would extend the term of your county judge until the next general election. It is true, under the facts stated, no absolute vacancy exists, but a constructive vacancy does. "A vacancy may be said to be constructive when the incumbent has no legal claim to continue in office, but can legally be replaced by another functionary." Mechem on Public Offices and Officers, section 127.

Such, then, in the opinion of this Department, is the status of the office of county judge in your county.

"Vacancies in the office of county judge * * * shall be filled by the Commissioners' Court until the next general election for such office." Section 28, article V, of the Constitution of Texas.

You are, therefore, respectfully advised that, in the opinion of this Department, such a vacancy exists in the office of county judge as should be filled by the Commissioners' Court.

Very respectfully,

M. TRICE,
Office Assistant Attorney General.

A justice of the peace has no legal authority to organize a posse and raid a gambling den for the purpose of making an arrest.

ATTORNEY GENERAL'S OFFICE.
AUSTIN, December 5, 1892.

R. J. Haywood, Justice of the Peace, Texarkana, Texas.

DEAR SIR:—Your letter of December 1 is received. It indicates a degree of regard for the law as unusual as it is gratifying.

The Department, however, doubts your authority, as a justice of the peace, to organize a posse and raid a gambling house.

The law evidently contemplates that ordinarily an offender shall be arrested by a peace officer upon a warrant duly issued by a magistrate. Article 25, Penal Code, provides, however, that "If any justice of the peace * * * shall willfully neglect to return, arrest or prosecute any person committing a breach of the peace or other crime or misdemeanor which has been committed within his view or knowledge * * * shall be guilty of a misdemeanor * * *."

This clause in the Penal Code providing the punishment for not arresting when the act was committed in his presence, by implication, recognizes a more liberal rule with reference to arrests than is indicated by any other part of the law.

Article 112, C. C. P., is "Whenever any number of persons are assembled together in such a manner as to constitute a riot according to the penal laws of the State, it is the duty of every magistrate or peace officer to cause such persons to disperse. This may either be done by commanding them to disperse, or by arresting the persons engaged, if necessary, either with or without warrant." Here the magistrate is given the authority to arrest.

Article 226, C. C. P.: "A peace officer or any other person may, without warrant, arrest an offender when the offense is committed in his presence or within his view, if the offense is one classed as a felony or an offense against the public peace."

Under the clause "any other person" a magistrate has, under the circumstances mentioned, the right to arrest.

Article 88, C. C. P.: "Whenever, in the presence or within the observation of a magistrate, an attempt is made by one person to inflict an injury upon the person or property of another, it is his duty to use all lawful means to prevent the injury. This may be done either by verbal order to a peace officer to interfere and prevent the injury, or by the issuance of an order of arrest against the offender, or by arresting the offender; for which purpose he may call upon all persons present to assist in making the arrest."

Article 89, C. C. P., provides: "If, within the hearing of a magistrate, one person shall threaten to take the life of another, he shall issue a warrant for the arrest of the person making the threat, or, in case of emergency, he may immediately arrest such person." I can find no other instances in which the authority is directly conferred.

The law apparently does not favor arrests, except upon warrants and by peace officers. Article 901, C. C. P., provides that the justice may issue his warrant for arrest whenever the offense is committed in his presence, and the trial thereof is within his jurisdiction.

Article 87, C. C. P., makes it his duty, when he has heard that a threat has been made by one person against another, to notify a peace officer. The peace officer is to prevent the injury; this duty does not devolve upon the magistrate. Article 89, above quoted, mentions a case in which a serious misdemeanor is committed in the presence of the magistrate, but he is given authority to arrest only in case of emergency.

With reference to the summoning of a posse, article 88, above quoted, gives a magistrate authority to call upon all persons to assist him in the case mentioned. Article 109, C. C. P., gives authority to any officer authorized to execute process, or, when he has sufficient reason to believe that he will meet with resistance in executing process, he may call citizens to his aid. This article appears to give authority only when the sheriff's action is based upon process. Article 46, C. C. P., provides that when a peace officer meets with resistance in discharging any duty imposed upon him by law, he shall summon citizens to overcome the resistance. This article would confer no power upon a justice of the peace, who is classed as a "magistrate," and not as a "peace officer."

A justice has, perhaps, no authority, except such as is conferred by statute. But, even at common law, he could arrest without warrant only "any person committing a felony or breach of the peace in his presence." The broadest powers that he may now be supposed to have, arise from implication in a construction of article 253, Penal Code, which would seem to indicate that he should arrest in any criminal case where the offense is committed in his presence. This would appear to be limited by the article of the Code of Criminal Procedure, above set forth. At all events, he can not arrest, except when the crime is committed in his presence. Under the broadest construction, if you should see persons in the act of violating the gaming law you could arrest; under no other circumstances. I find nothing which would authorize you to summon a posse.

It appears to me, however, that your efforts to suppress gaming ought not to be futile. If the sheriff and other peace officers fail to do their duties, there is nothing to prevent you from prosecuting them under article 252 and article 369, Penal Code. If difficulty is experienced in securing arrests by the officers, you could depute, under article 245, C. C. P., some suitable person to arrest them and the other violators of the law.

Very respectfully,

R. L. BATTS,
Office Assistant Attorney General.