OPINIONS.

As being of general importance or interest the following opinions have been selected for publication from the large number rendered:

Commissions of County Treasurer.—County treasurer is entitled to receive a commission of one-half of one per cent on money coming into his hands as permanent school fund of a county, and is also entitled to a like commission for disbursing this fund. County treasurer is also entitled to receive commissions on the proceeds of county bonds issued for the purpose of making improvements and turned over to the contractor.

ATTORNEY GENERAL'S OFFICE.
AUSTIN, December 10, 1892.

Alexander Coker, Esq., County Treasurer, Oakville, Texas.

DEAR SIR—Replying to your favor of December 8, I beg to state that the questions you ask have already been considered in reply to a letter from the county judge of your county. To reiterate, you are entitled to charge commissions of one-half of one per cent on money coming into your hands as permanent school fund of the county: you are also entitled to a like commission for disbursing this fund. A mere transfer of money from one fund to another, without paying it out, is not a disbursement. The commissions are not to be paid out of the permanent school fund, but must be paid out of the available school fund of the county.

General Laws Twenty-second Legislature, page 142.

In answer to your second question, it has been held that where county bonds issued for the purpose of making public improvements are sold and the proceeds turned over to the contractor, the county treasurer is entitled to receive a commission; in such case it may be that the treasurer does not actually handle the money, but he is held to be the proper custodian of county funds and should be permitted to handle the proceeds of the bonds, and is held, therefore, to be entitled to commissions on the amount.

Wall v. McConnell, 65 Texas, 401.

On the other hand, it is held that where county bonds are issued and are not sold, but are paid directly to the contractor, the county treasurer is not entitled to commissions. The Supreme Court makes the distinction between these two classes of transactions very clear, and it is of the opinion that county treasurers are no more entitled to receive commissions on bonds paid directly to the contractor than he would be to receive a commission on a promissory note or other evidence of pecuniary obligation issued by the county to the contractor.

McKinney v. Robinson, 19 S. W. Reporter, 899.

You are respectfully advised, therefore, that under the facts stated by you, you are not entitled to a commission on the bonds issued by the county and registered by you.

Very respectfully,

(Signed) R. L. BATTS,
Office Assistant Attorney General.

Sureties on Official Bonds.—It is against public policy for a county commissioner to become surety on the bond of any county officer.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, December 13, 1892.

C. L. Goodman, Esq., County Clerk, Orange, Texas.

DEAR SIR—Your favor of December 9 is received. You state that two commissioners of your county are sureties on the bond of the treasurer for the general fund of your county, and also upon the bond of the treasurer for the county school fund. You state that the commissioners court desire an opinion from this department as to whether said bond should be approved.

Article 1912, Sayles' Statutes, prescribes that before entering upon the duties of his office the county judge and each commissioner shall take the oath of office prescribed by the Constitution, and also take an oath that he shall not be, directly or indirectly, interested in any contract with or claim against the county in which he resides, except such warrants as may issue to him as fees of office. It is the duty of the commissioners court to approve the bond of the treasurer for the general fund.

Article 988, Revised Statutes.

It is the duty of the county judge to approve his bond for the school fund.

Article 989, Revised Statutes.

There is no statute which expressly prohibits a county commissioner from being a surety on the bond of any county officer, though it is believed that such action is in contravention of the obvious public policy of this State. All safeguards that can be are thrown around the commissioners, so that they may never be placed in any position where a commissioner would have as an individual any interest adverse to the commissioner as an officer, or in other words, any interest adverse to the constituency he represented. It has been held that the act of approving a bond by the commissioners court is a judicial act. Murfree on Official Bonds, section 51. Our Constitution and laws prohibit judges from sitting in any case in which they are interested, or to which they are a party, and prohibit various officers of the court from practicing law in the court, and prohibit district and county attorneys from representing any interest adverse to the State. The general public policy of this State is, that its officers who represent it shall represent no interest adverse to it, and the same rule would be applicable to counties. It can readily be seen where the interest of a commissioner who was surety for a treasurer would be in direct conflict with the interest of the county in case of a default by the treasurer, and we have a very high authority for saying that no one can serve two masters.

You are therefore advised that while not expressly prohibited by statute, it is not believed to be permitted under the public policy of this State and the interests involved for the county commissioners to become sureties of the treasurer's bond in and for the county for which they are the acting commissioners.

Very respectfully,

FRANK ANDREWS,
Office Assistant Attorney General.

Constitutional Law.—Articles marked 2589a and 2589b of the first section of chapter 10 of the General Laws of the Special Session of the Twenty-second Legislature (1892) are not unconstitutional as conflicting with section 40, article III, of the Constitution of 1876.

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

Hon. S. S. Hanscom, County Judge, Galveston, Texas:

DEAR SIR—Your letter of December 10 was duly received. The pressure of business that could not be postponed has been so great that it has been impossible to give it earlier attention.

The question you submit might be thus stated: Are articles marked 2589a and 2589b of the first section of "An act to amend article 2578," etc., published at chapter 10, General Laws Special Session Twenty-second Legislature, constitutional? To the subject of these articles no reference is made in the proclamation of the Governor. In his regular message to the Legislature upon the convening of that body he used the following language:

"*Sale of Estates*

"Under existing law real property under administration or guardianship can not be sold on longer time than twelve months under such conditions as to very much embarrass such estates. It would be well to permit real estate to be sold on a longer time with good security under suitable restrictions, so that vast estates now, or that may hereafter be, controlled by administrators and guardians will not be sacrificed."

The law passed in response to this portion of the message was entitled "An act

to amend article 2578 and article 2581 of chapter 10 of the Revised Statutes of the State of Texas, and to add thereto article 2589a, providing for a hypothecation of lands belonging to an estate in the hands of a guardian, and article 2589b providing for the novation of existing indebtedness of estates in guardianship." This title describes the conditions of the bill.

The entire law is valid unless it comes in conflict with the following provision of the Constitution: "When the Legislature shall be convened in special session, there shall be no legislation upon subjects other than those designated in the proclamation of the Governor calling such session, or presented to them by the Governor." Section 40, article III, Constitution 1876.

In Baldwin v. State, 21 Court of Appeals, 591, passing upon a similar case, the court says, "It is well worthy of serious consideration whether a court in this State can go behind a statute which is valid upon its face, and inquire into the particular authority by virtue of which it was enacted," and quotes authority to sustain the proposition that this would suggest. Such a rule would virtually abrogate all constitutional limitations on legislative actions. The citations do not go further than to question the right of the judiciary to determine the regularity of legislative proceedings; they do not undertake to limit the courts in an inquiry as to the primary authority of the Legislature. But the Court of Appeals has, since the promulgation of the opinion above cited, even held that the constitutional rules as to procedure are mandatory, and that if it should appear that these rules have not been observed in the passage of a bill, the law would be held unconstitutional.

Hunt v. State, 22 Court Appeals, 396.

The constitutionality of the law or any part of it can then be questioned, but in the determination of the matter here involved the following rules must be considered:

Nothing but a clear violation of the Constitution, a clear usurpation of power prohibited, will justify the judicial department in pronouncing an act of the legislative department unconstitutional and void.

Railroad Company v. Riblette, 66 Penn., 184.

Courts "never declare a statute void unless the nullity and invalidity of the act are placed, in their judgment, beyond a reasonable doubt. A reasonable doubt must be solved in favor of the legislative action, and the act sustained."

Cooley Constitutional Limitations.

Legislative power, except when the Constitution has imposed limits upon it, is practically absolute; and where limitations upon it are imposed, they are to be strictly construed, and are not to be given effect as against the general power of the Legislature, unless such limitations clearly inhibit the act in question.

Baldwin v. State, 21 Texas, 593.

The court should hesitate long and be convinced beyond a reasonable doubt before pronouncing an act of Congress invalid. The argument should amount almost to a demonstration. If doubt exists, the act should be sustained,—the presumption is in favor of its validity.

Sarony v. Burrow, 17 Fed. Rep., 591.

In view of these rules, the burden will be upon the party attempting to demonstrate the invalidity of the law. The matter of articles 2589a and 2589b will be considered within the "subject presented" to the Legislature, in the paragraph heretofore quoted, if it may be considered at all presented, inasmuch as there is no other subject in the proclamation or any message of the Governor remotely relating to the property of guardianship and administrations.

The Governor announces as the subject of the paragraph referred to "Sale of Estates." A mortgage was primarily at common law understood to be a sale of real estate which became inoperative or nugatory upon the happening of prescribed conditions. Though the conception of the nature and effect of a mortgage is somewhat changed, the form of instrument to which this idea gave rise is still retained, and under the rules above quoted it is not improbable that a court would hold, if necessary, that a mortgage is a sale.

Again, could it not be said that the subject of the paragraph was the disposition of real property of an estate, or the embarrassment that must result from a disposition of it under the present laws, or the handling or management of the real property of an estate?

Article 2572, Sayles' Statutes, provides for the sale of real estate to pay, among other things, the debts of the estate. When debts exist there arises a condition, when, as suggested in the Governor's message, it may become necessary to make

a sale which would, or might, under the old law, very much "embarrass the estate" or result in its "sacrifice." Under the law the debts of the estate and the sale of the estate occupied such relation that it might have been, in contemplation of the Governor and of the Legislature, impossible to pass a law that would obviate the defects in the articles providing for sales without also providing for borrowing money and of renewing and securing of debts of the estate. Indeed, it is not difficult to imagine a case in which articles 2578 and 2581, as amended, would be entirely useless and inoperative, or entirely unjust to the creditor of the estate in the absence of some such authority as is conferred in articles 2598a and 2598b.

When a sale is made upon the long time allowed by the statute, must a creditor wait until the notes executed become due before he can receive amounts already payable? Or, if a creditor must wait, shall he be barred by the statute of limitations because there is no authority in anyone to renew the evidence of indebtedness which he holds?

In view of these considerations, it appears that a court would not be without warrant in holding that a mortgage of property to pay or secure debts, or the novation of evidence of debts, is not excluded from the subjects presented to the Legislature in the paragraph headed "Sale of Estates."

The statute considered is certainly as much entitled to that construction as the one under consideration in Baldwin v. State, heretofore cited, in which it was held that the words "to redeem the taxes, both *ad valorem* and occupation, so far as it may be found consistent with the support of an efficient State government" was held to embrace the entire subject of taxation, and to warrant the passage of a law placing an occupation tax upon persons engaged in selling certain papers.

In the case of Devereux v. City of Brownsville, 29 Federal Reporter, 742, the question arose under a similar constitutional provision as to whether or not, under a call "to enable taxing districts to compromise their old debts," an act which repealed former grants of power to levy taxes to pay these debts, was constitutional. In the discussion of this case the court says: "It was not the intention to require the Governor to define with precision, as to details, the subjects of legislation, but only in a general way by his call to confine the business to particular subjects. Mitchell v. Turnpike Co., 3 Humph., 455. Too great latitude of construction might, undoubtedly, abrogate the restriction of the Constitution; but, on the other hand, a too rigid requirement in this regard would disastrously embarrass the Executive and the Legislature, since the former could never, with accuracy, foretell what the legislative mind would adopt as pertinent to the general subject, and therefore could not specifically define the provisions or even the special character of the forthcoming legislation, while the latter could not always, if ever, determine with accuracy what might or might not be of too remote affinity with the call. Besides, it would be conferring legislative powers never contemplated by the Constitution to permit him to restrict the Legislature as to the details or character of its enactments."

The Legislature has construed the paragraph under consideration: the Governor, by his approval of the bill, has at least acquiesced in that construction.

The correct rule of construction by the Legislature is that no law should be passed if there is a doubt of its constitutionality; the correct rule of construction by a court is that no law should be declared unconstitutional unless it is clearly so.

The question you present can not be put beyond doubt except by an adjudication of a court of last resort, but it appears to me that a liberal construction of a latitudinous rule would enable the court to hold that all of the law under consideration is constitutional.

Very respectfully,

(Signed) R. L. BATTS,
Office Assistant Attorney General.

Where an appeal is dismissed by the Court of Criminal Appeals because no notice of appeal appeared in the record, the sureties on the recognizance of defendant are liable.

ATTORNEY GENERAL'S OFFICE.
AUSTIN, December 30, 1892.

J. D. Varnell, Esq., County Attorney, Clarksville, Texas.

DEAR SIR—Replying to your favor of the 18th instant, in which you ask if the sureties on the recognizance of Tom Lowrance are liable, his appeal having been dismissed by the Court of Criminal Appeals because no notice of appeal appeared in the record, you are respectfully advised, that in the opinion of this department the sureties are liable. The fact that appellant failed to give and have entered of record the required notice of appeal to confer jurisdiction on the Court of Criminal Appeals, will in no manner lessen the liability of him and his sureties on his recognizance; he could not, thus, by his own laches and neglect, relieve himself of a valid judgment of your County Court. If the Court of Criminal Appeals had acquired jurisdiction and affirmed the case, and he then failed to appear in accordance with the conditions of his recognizance, then, under all the authorities, the sureties would be liable. In a case like this, when no affirmance is had, but the appeal is simply dismissed with the order that the appellant pay the costs of appeal, there is no statutory direction as to the procedure in such a case, nor is there any decision by our appellate court which indicates the rule.

Then, in view of the silence of the statute and the absence of judicial construction, it can not be said that the question presented is altogether free from doubt: it is not believed, however, that the mere silence of the statute in the precise question indicated will leave the State without remedy when the defendant fails to appear before the trial court "from day to day and term to term and not depart without leave of the court, in order to abide the judgment of the Court of Criminal Appeals." Where the defendant fails to appear, as in this case, his recognizance should be forfeited under article 440 et seq., Code of Criminal Procedure. In case this is done the sureties will no doubt contend that under article 875, Code of Criminal Procedure, the right to forfeit a recognizance on appeal is limited to cases of affirmance of the judgment of the trial court, and that in all cases other than an affirmance the bail bond is the obligation to proceed upon. This position seems to be supported by the case of Wells v. State, 21 Court of Appeals, 594. We think, however, a dismissal under the circumstances stated is tantamount to an affirmance.

"The dismissal of the appeal is an affirmation of the judgment below." State v. Biesman (Montana), 29 Pacific Reporter, 534. We therefore conclude that the doctrine announced in Wells v. State, *supra*, will not be held to extend to cases where there is a judgment of the Court of Appeals to be performed; the Wells case was reversed and no judgment of any kind was rendered against appellant. This case stands different: there is a judgment of the Court of Appeals to be performed, viz., payment of the cost of appeal. Then how shall that judgment be performed? Evidently the law does not contemplate that it can be performed in any other manner than that stipulated by the terms of his recognizance, i. e., appearance before the trial court and payment of the judgment. "All bonds and recognizances for appearance to answer the charge of the State are intended to secure the trial of the offender rather than to mulct the sureties." Jackson v. State, 13 Texas, 218.

In this case the offender has been tried and judgment rendered, but said judgment was suspended by entering into a recognizance, the conditions of which evidently intend an ultimate performance of the judgment unless it is reversed and unless the principal literally complies with all the conditions of the recognizance, both in manner and form as conditioned, the sureties are liable, and the only way to avoid liability is to bring the case within the exceptions enumerated in article 452, Code of Criminal Procedure.

Under the facts stated, we have no doubt but what the sureties will contest any judgment you may seek against them. We advise you, however, to proceed to forfeit the recognizance under articles 440, Code of Criminal Procedure, et seq., and we are confident that the judgment rendered against the sureties can be made final and sustained.

In answer to your second question, as to whether the arrest of the defendant

after his case had been dismissed by the Court of Appeals was legal, will say, it does not appear that his recognizance had been forfeited, or that the sureties had made the affidavit required by article 500, Code of Criminal Procedure. Unless one of these things had been done, we are of opinion that the sheriff has no right to arrest the defendant on the original charge. The recognizance stands for the appearance of the defendant, and until the same is forfeited or the necessary affidavit made under article 300 Code of Criminal Procedure, the sheriff has no right to arrest him. "When a surety desires to release himself from liability, the law provides the manner in which he may accomplish it, and the modes provided must be strictly complied with."

Roberts v. State, 4 Apps., 428.
Kiser v. State, 13 Apps., 201.

Very respectfully,

(Signed) MANN TRICE,
Office Assistant Attorney General.

Registration Law.— The fact that the registration law passed at the called session of the Twenty-second Legislature has been put in force in cities of more than ten thousand inhabitants, is not sufficient to make the law operative in all succeeding elections in said cities, but a petition of five hundred citizens must be presented, prior to each election, to the Commissioners' Court of the county, asking for registration for said city election.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, January 12, 1893.

James D. Farmer, Esq., Registrar, Fort Worth, Texas.

DEAR SIR—Replying to your favor of the 10th instant, in which you state that upon petition of five hundred citizens the registration law for cities over ten thousand inhabitants was put in force for the last general election in the city of Fort Worth, and ask whether that is sufficient to make the law operative in the coming municipal election, or whether another petition of five hundred citizens is necessary, you are respectfully advised that in order to put said law in force and make it govern in the coming municipal election it is necessary that a petition signed by five hundred citizens, asking for registration, be first presented to your commissioners' court. The fact that such petition was granted and the law put in force for the last general election is not sufficient to continue the law in force after such election. This conclusion follows from the language of the act providing for registration. So much of said act as is necessary to a decision of the questions presented by you reads as follows: "There shall, upon the petition of five hundred citizens of such city, be, prior to each general election, either State, county, or municipal, had a registration of all voters in said city." Section 1, p. 13, General Laws, first called session Twenty-second Legislature.

This language clearly indicates that such petition is necessary "prior to each general election." If the Legislature intended that the law should continue in operation after having been put in force, we apprehend that the above language would not appear in the act. Again, there is considerable expense incurred by the enforcement of the registration act. This expense is paid out of the general fund of the county in State and county elections, and out of the general fund of the city in city elections. Section 10, p. 14, General Laws first called session Twenty-first Legislature. It is not believed that a petition for registration in a general State and county election will put the registration act in motion and effect as to city elections, and thereby create a charge upon the revenue of the city for the expense of conducting registration in a municipal election; but it is the opinion of this department that when registration is desired in a municipal election, the proper petition therefor should be presented as required by section 1 above quoted. This it seems would be necessary in order to constitute a charge upon the general funds of the city for the payment of the expense of conducting registration. It is the evident purpose of the registration act to permit cities of ten thousand inhabitants to invoke its provisions when desired, but not to force them to accept same in all elections, whether State or municipal. You are, therefore, respectfully advised that unless five hundred citizens of your city

present a petition to the commissioners' court of Tarrant county, asking for registration in the coming municipal election, the registration law can not be enforced in such election.

Very respectfully,

(Signed) MANN TRICE,
Office Assistant Attorney General.

Sheriffs' Fees.—A sheriff cannot charge five cents for mileage actually traveled in posting two notices of sale at two public places other than the court house door in cases of sale of land by public execution.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, January 30, 1893.

Hon. John H. Rice, County Judge, Corsicana, Texas.

DEAR SIR—In reply to your favor of January 14, you are advised that a sheriff is not entitled to charge five cents for mileage actually traveled in posting two notices of sale at two public places other than the court house door in cases of sale of land by public execution.

Article 2693, Sayles' Statutes, provides that: "For traveling expenses in the service of any civil process sheriffs and constables shall receive five cents for each mile going and coming. If two or more persons are mentioned in the writ, he shall charge for the distance actually and necessarily traveled in the service of the same." The latter clause clearly indicates the nature of the process for which the sheriff is allowed to charge mileage. By mentioning that if two or more persons are mentioned in the writ, he shall charge only for the distance actually traveled in making the service. Another clause of article 2396 provides a fee of one dollar for posting the advertisement for sale under execution or any order of sale. You will observe that the plural is there used, and it evidently intends that the sheriff or constable shall receive only the one dollar therein provided, and that it is not such civil process as would entitle him to charge five cents per mile.

Very respectfully.

(Signed) FRANK ANDREWS,
Office Assistant Attorney General.

Recording of Official Bonds.—It is the duty of the County Clerk to record official bonds without compensation other than that provided for as ex-officio.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, January 2, 1893.

Hon. M. B. McKnight, County Judge, Mason, Texas.

DEAR SIR—In reply to your favor of December 28, referred by the Comptroller to this department for attention, you are advised that under the opinions of this department it is the duty of the county clerk to record official bonds without compensation other than that provided for him as ex-officio salary. The duty of recording these bonds devolves upon the county clerk; they are required as public records, and it is to the interest of the county and for its benefit that they should be recorded. No fee is prescribed for this service, and it is therefore held that this service should be performed by the county clerk without additional compensation other than is above indicated.

Very respectfully,

(Signed) FRANK ANDREWS,
Office Assistant Attorney General.

Salaries of Justices of Supreme Court.— The Constitution, article 5, section 2, as amended September 22, 1891, does not fix absolutely the salaries of the Justices of the Supreme Court and the Judges of the Court of Criminal Appeals at four thousand dollars per annum, but the Legislature has authority to change the salaries provided for under the Constitution, but until such change has been made by the Legislature the salaries remain at four thousand dollars.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, January 30, 1893.

Hon. Travis Henderson, Chairman Finance Committee, House Representatives.

DEAR SIR—In response to your verbal inquiry, I have made a careful investigation of the question as to whether or not the Constitution, article 5, section 2, as amended September 22, 1891, fixes absolutely the salaries of the justices of the Supreme Court of this State and the salaries of the judges of the Court of Criminal Appeals at four thousand dollars. Said section provides that the Chief Justice and the Associate Justices of the Supreme Court "shall each receive an annual salary of four thousand dollars, until otherwise provided by law." Section 4 of said amended article provides that the judges of the Court of Criminal Appeals shall have the same qualifications and receive the same salaries of the judges of the Supreme Court. The question, tersely stated, would be, whether this provision of the Constitution is self-executing and fixes the salaries of these officers by its own terms, or whether legislation is necessary in order to fix the same.

The Constitution of 1876, article 5, section 2, provided that the Chief Justice and Associate Justices shall each receive an annual salary of not more than $3550. There was no statute regulating the salaries of these officers, and an annual appropriation, in obedience to the terms of the Constitution, of $3550 has been made since its adoption for each of said officers. The amendment above quoted, which was declared adopted September 22, superseded the Constitution of 1876, and became, at the time of its adoption, the controlling law, and determined and fixed the salaries of these officers at four thousand dollars per annum until otherwise provided by the Legislature.

In the case of Watson v. Aiken, 55 Texas, 536, a similar constitutional provision was held to be self-executing, regarding the legal rate of interest. Section 11, article XVI, of the Constitution provided substantially that all interest charged above 12 per cent shall be deemed usurious and the Legislature shall at its first session provide appropriate pains and penalties to punish usury. In the above case it was held that any contract for a greater rate of interest than 12 per cent was illegal, and that the interest could not be collected, notwithstanding that the Legislature had enacted no law providing appropriate pains and penalties. In the case submitted the amended Constitution is the only law now in existence which fixes the salaries of the justices of the Supreme Court, and it is the paramount law and needs no legislative action to give it force. The Legislature has authority to change the salary provided for under the Constitution, but until such change has been made by the Legislature the salaries remain at four thousand dollars.

Very respectfully,

(Signed) FRANK ANDREWS,
Office Assistant Attorney General.

Municipal Elections.—City councils of incorporated cities cannot increase or diminish the number of election judges and clerks provided for by the act of 1887. General Laws, page 21.—It is the duty of the presiding officer of each precinct who has been appointed in the manner prescribed by law to appoint the judges and clerks of election, and this power is vested exclusively in this officer.—If from any cause the presiding judge of an election precinct should fail or refuse to act, or none should have been appointed, the electors assembled at the polling place would have authority to appoint a presiding judge, who would have the same power and authority and be subject to the same duties as if such officer had been duly appointed by duly constituted authority.

ATTORNEY GENERAL'S OFFICE.
AUSTIN, February 11, 1893.

Hon. A. I. Lockwood, Mayor, San Antonio, Texas.

DEAR SIR—We have your favor relative to election regulations in the City of San Antonio, and have given the same careful consideration. You ask substantially:

Whether the city council of the city of San Antonio would have the authority to appoint judges and clerks of election after the presiding officer has been duly and legally appointed by the proper authority?

Whether or not the city council of the city of San Antonio has authority to increase or diminish the number of judges and clerks of election as provided for under the State law?

And whether or not the electors assembled on the day of election have authority to select a presiding officer in case the duly authorized presiding officer for the polling place fails to appear?

The amendment to the charter of the city of San Antonio of April 12, 1891, section 29, provides "that all elections in the city shall be held in accordance with the State law governing elections, and returns shall be made to the mayor in the same manner that returns are made under the State law."

Section 42 of the charter of said city also provides that the city council shall have power to enact and ordain any and all ordinances not repugnant to the Constitution and laws of this State.

Article 1673 of the Revised Statutes provides that the presiding officer of each election precinct shall, on or before the day of election, select from among the qualified voters of the precinct two judges and two clerks. This section under our present law is applicable to those election precincts only which voted less than one hundred votes at the last preceding election.

The act of 1887, General Laws, page 21, provides that the presiding officer of each election precinct which shall have cast more than one hundred votes at the last preceding election, shall, on or before the day of election, select from among the qualified voters of the precinct three judges and four clerks: to be made from the different political parties, if demanded, as far as practicable. It further provides that said officer shall name two of said judges and clerks as canvassing judges and clerks, and said presiding officer and the other judge shall be the receiving judges, and the remaining two clerks shall be receiving clerks.

In both of these statutes the power of appointing judges and clerks of election is unqualifiedly and unmistakably vested in the presiding judge of the election precinct.

Article 1671 of the Revised Statutes provides that in case the presiding officer appointed should fail to attend on the day of election, or refuse or fail to act, or in case no presiding officer has been appointed, it shall be lawful for the voters present at the precinct voting place on that day to appoint from among the qualified voters of such precinct a presiding officer to act as such at that election.

Section 30 of what is commonly known as the registration law, passed by the special session of the Twenty-second Legislature, General Laws, page 13, provides that cities containing a population of ten thousand inhabitants or more may, through their city councils, adopt such methods not inconsistent with this act to protect the purity of the ballot box in their municipal elections.

It is not believed that this section of the act referred to intended to confer, or did confer, power upon the city council to increase or diminish the number of election judges or clerks. No different rule is prescribed in this act for any different number of judges or clerks, nor for any different method of appointment of such officers than that heretofore cited. Section 26 of said act provides

that when an elector is unable to prepare his ballot, he may be accompanied "by the two judges," which evidences the legislative mind upon this proposition, showing that the Legislature, in the passage of the act, was not intending to change the number of judges, and was contemplating the law as it now stands, and the two judges referred to, evidently means the two judges denominated as receiving judges.

It is not believed, therefore, that in view of the provisions of the charter and the laws above cited, that the city council of the city of San Antonio would have authority to pass any election regulations that were inconsistent with the State laws upon the subject.

You are therefore advised:

1. That the city council can not increase or diminish the number of election judges and clerks provided for by the act of 1887 above cited.

2. That it is the duty of the presiding officer of each election precinct, who has been duly appointed as such in the manner prescribed by law, to appoint the judges and clerks of election, and that this power is vested exclusively in this officer.

3. If from any cause any presiding judge of an election precinct should fail or refuse to act, or none should have been appointed, the electors assembled at the polling place would have authority to appoint a presiding judge, who would have the same power and authority and be subject to the same duties as if such officer had been duly appointed by other duly constituted authority.

In this connection it may be well to say that this department does not attempt to say how far these rules may be disregarded, or to what extent irregularities might be indulged without vitiating the election, but a strict observance of the statutory rules ought to obtain, thus avoiding and eliminating all questions as to the validity of the election. As to what statutory provisions in regard to the manner and details of holding elections have been held directory, you are referred to the following authorities:

Hunnicutt v. State, 75 Texas, 233.
Fowler v. State, 68 Texas, 30.
Williamson v. Lane, 52 Texas, 336.
Ex parte Towles, 48 Texas, 413.
Cooley Cons. Lim., Secs. 617, 618.
Owen v. State, 64 Texas, 500.
McCrary on Elections, Secs. 54, 1666.

Upon an examination of these authorities, you will be better advised to what extent irregularities may enter into an election without vitiating the entire poll.

Very respectfully,

(Signed) FRANK ANDREWS,
Office Assistant Attorney General.

Release of surety on saloon bond.—A surety on the bond of a saloon keeper can not be released from liability thereon before the expiration of the time for which the license was granted.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, February 18, 1893.

Hon. B. M. Baker, Austin, Texas.

DEAR SIR—The letter of W. S. Pugh, addressed to you, in which he asks how he can be released from a saloon bond, referred by you to this department, is received.

You are respectfully advised that there is no provision of law which authorizes the release of a surety on the bond mentioned. Section 4, page 59, of the act of 1887, provides that any person engaging in the sale of spirituous, vinous or malt liquors shall, before engaging in such occupation, be required to enter into a bond in the sum of five thousand dollars, with at least two good and sufficient sureties. Said act further provides, in addition to civil proceedings for individual injuries brought on said bond, that if the principal shall violate any of the conditions of the bond the district or county attorney may institute suit thereon in the name of the State for the use and benefit of the county, and the

amount of five hundred dollars shall be recovered from the principal and sureties upon any breach of the conditions thereof.

We infer from the letter that the principal on the bond in question has violated its provisions; if notice of this fact is brought to the district or county attorney in the district where the saloon is located, he would no doubt immediately institute suit for a breach of its conditions. In the event of such breach we know of no provision of law which would release the surety from liability. Will say, however, that section 5 of said act provides: "If any county clerk shall issue a license to any dealer in intoxicating liquors, without first requiring the bond provided for in this act, he shall be fined not less than one hundred nor more than five hundred dollars." Under this provision this department holds that at the expiration of the time for which license was issued, it is necessary for a new bond to be filed and approved. If, as in a great many instances, license has been renewed and no new bond executed, there is no liability as against the sureties since the issuance of the new license.

Very respectfully,

(Signed) MANN TRICE,
Office Assistant Attorney General.

Registration of Municipal Bonds.—Articles 423 and 424 of the Revised Statutes do not require the Comptroller to register bonds which have been forwarded to him accompanied by a statement of the taxable values and tax levies, without regard to the validity of the bonds or the legality of the tax levies, but it is the duty of the Comptroller before he registers the bonds to see that they are valid and that the tax levies are legal.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, April 14, 1893.

Hon. John D. McCall, Comptroller, Austin.

DEAR SIR—Your letter of the 3d instant, with enclosures, was received; delay in answering the same has been occasioned by other matters imperatively requiring immediate attention, and by the desire of this department to give the question submitted the serious consideration which its importance demands.

To the proposition of law made in the letter of Senator Atlee, assent cannot be given. The contention appears to be that articles 423 and 424 of the Revised Civil Statutes require the Comptroller to register bonds which have been forwarded to him accompanied by a statement of the taxable values and tax levies, without regard to the validity of the bonds or the legality of the tax levies.

Article 423 provides: "It shall be the duty of the mayor, whenever any bond or bonds are issued, to forward the same to the Comptroller of Public Accounts of the State, whose duty it shall be to register said bond or bonds in a book kept for that purpose, and to endorse on each bond so registered his certificate of registration, and to give at the request of the mayor his certificate certifying to the amount of bonds so registered in his office up to date."

Without, in this connection, considering article 424 at all, it is apparent that there devolves primarily upon the Comptroller the necessity of determining if bonds had been issued by the city. If his duties be considered as entirely ministerial, there still devolves upon him the necessity of arriving at a conclusion as to whether or not circumstances have arisen which would require the exercise of his official functions. It is certainly not every piece of lithographed paper that may be forwarded to the Comptroller that must be registered. The mere circumstance that the mayor and secretary of a city sign a piece of paper, upon which is printed a recitation to the effect that the city will pay so much to bearer at a designated time, does not create an obligation against the city, and does not make a bond issued by the city. A counterfeit presentment of a dollar is not a dollar; a lithographed recitation of obligation, signed without authority, is not an obligation; a putative bond issued without warrant of law is not a bond. More than the mere signature of officers is required; there must be authority to sign. A bond is evidence of indebtedness. Upon the existence of the debt the existence of the bond is dependent.

In the case of Bank v. Terrell, 78 Texas, 450, this language is used: "While our Constitution authorizes the creation of a debt * * * its mandate is im-

perative that no such debt shall be created without making provision at the time of its creation to assess and collect annually a suficient sum to pay interest thereon and create a sinking fund of at least two per cent on the principal. Until this is done the debt is not created and none exists."

The action of the Comptroller is predicated upon the issue by a city of bonds; the bonds are dependent upon the creation of a debt; the debt is dependent upon compliance with the constitutional requirements regarding the levy of taxes. If it should appear to the Comptroller that no adequate tax levy has been made, would it also not appear that no duty devolved upon him with reference to what merely purported to be bonds of the city?

One of the purposes which article 423 evidently intended to accomplish was to give notice to the world of the obligations outstanding of the city; it was to benefit alike the investing public and the debtor city. The former could examine this record in an investigation of a contemplated investment; the latter could exhibit it as evidence that the authority of the city to issue bonds had not been exceeded. The book of registration would serve much the same purpose with regard to cities that the mortgage record of a county would with regard to an individual. If the construction contended for should be given, this salutary purpose of the law would be defeated, and instead of giving notice of the obligations of the city, the certificate would, at least until it became understood that registration was merely nonsense prescribed by law, serve as an instrument to aid unscrupulous officials to defraud the innocent and unsuspecting.

But registration was intended to more than merely give notice of the amount of city bonds issued. The certificate placed upon the bond was expected to perform a still more important function. It was to be evidence that the bond upon which it had been placed had been brought to the attention of an officer charged thenceforth with the duty of seeing that the purchaser of the bond be paid the interest thereon as it fell due, and that provision be made for the payment of the principal. Article 424 is to the effect, "that it shall be the duty of the mayor at the time of forwarding any of said bonds for registration, to furnish the Comptroller with a statement of the value of all taxable property, real and personal, in the city; also, with a statement of the amount of tax levied for the payment of interest and to create a sinking fund. It is hereby made the duty of the Comptroller to see that a tax is levied and collected by the city sufficient to pay the interest semi-annually on all bonds issued, and to create a sinking fund sufficient to pay the said bonds at maturity, and that said sinking fund is invested in good interest-bearing securities."

A duty is here imposed upon the Comptroller to be performed for the benefit of the bondholders; the certificate is an earnest to the purchaser that the Comptroller has assumed its discharge.

The duty placed by the law upon the Comptroller, it would be impossible for him to perform if the bonds were not valid. He could not "see that a tax is levied and collected by the city sufficient to pay interest and create a sinking fund" if no debt was created by the city council in attempting to issue bonds. By registering bonds that were invalid, he would place it beyond his power to comply with the balance of the law. That construction certainly will not be given the law which would require of the Comptroller that which is impossible. In order to prevent the occurrence of such contingency provision is made by the law that at the time bonds are forwarded for registration, the Comptroller be furnished with a statement of the value of all taxable property and of the taxes levied. This is certainly the purpose for which these statements are required. If this be not true, what other purpose was in contemplation? No provision is made for their preservation or record; no provision is made to the effect that the city should be estopped from denying the facts which they purport to recite. They are evidently for the use of the Comptroller alone. It may be that the Comptroller is not the tribunal to finally adjudicate the legality of city bonds. Doubtless his decision is incapable of adding to their force or taking away from their effect. But certainly, so far as his own duties are concerned, the question of validity he must incidentally pass upon. He must pass upon it just as the mayor should consider it when the paper is ready for his signature; just as the city secretary should examine it before he affixes the official seal of the city. It may doubtless be the case in many instances, even where the tax levy is apparently regular and the tax values justify the bond issue, that the bonds are invalid; possibly the law does not contemplate that the Comptroller shall go behind these statements, but certainly he must apply to them the plain terms of the law. If upon the face of

these statements invalidity appears, and if, nevertheless it is the duty of the Comptroller to register, then the law prescribes that which is folly and permits that which is fraudulent.

The facts upon which a controversy has arisen between yourself and Senator Atlee as to your duty in this matter are not before this department. The questions which we attempt to discuss are, whether or not the Comptroller is, with reference to the registration of bonds, merely a ministerial officer in whom no discretion is lodged, and whether bonds that appear to you invalid should be registered.

You are advised that in the opinion of this department you are not merely a clerk whose duty it is to act at the instance and under the direction of city officials, but that with reference to the registration of municipal bonds you are clothed with ministerial and executive functions, and that if you should register bonds that are invalid, knowing them to be invalid, you will violate the law and disregard your duty.

Very respectfully,

(Signed) R. L. BATTS,
Office Assistant Attorney General.

Officers' Costs.—Whenever convicts have been hired out and a sufficient amount of money has been paid upon the bond to pay the officer's costs, it is competent for the County Judge to draw his warrant in favor of the officers for the costs due them respectively, and it is not necessary to wait until the fine is paid also.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, April 14, 1893.

Hon. Thomas M. Hunt, County Judge, Caldwell, Texas.

DEAR SIR—We have your favor of April 11, wherein you state that Burleson county has made a contract for hiring all its convicts to a certain person, and that under such contract whenever a convict is turned over to the hirer and bond is executed, the hirer pays all the costs accrued in the case at once. You inquire whether you would have authority to pay the officers the costs, or whether it would be necessary to wait until the fine was also paid.

Upon comparison of articles 3602 and 3609, Sayles' Statutes, I am of the opinion that when the amount of costs have been paid it would be competent for the county judge to draw his warrant in favor of the officers for the costs due them respectively.

Article 3602, Sayles' Statutes, is a subsequent enactment to article 3609, and it specially directs that when the proceeds of such hiring are collected, they shall be applied first to the payment of the costs, and second to the payment of the fine. This provision clearly contemplates that officers shall be paid their costs if the amount realized from the hiring shall for any reason be insufficient to pay both fine and costs, and I see no reason why the amount of costs, when paid in on the bond, should not be paid out to the officers to whom it is due.

Article 3609, id., is, in my judgment, a directory statute, and is intended to direct the county judge to make the payment when the fine and costs have been paid in full.

Article 3602, as it existed in the Revised Statutes, and as it existed when article 3609 was passed, made no provision as to how the fine and costs should be paid, but only provided that the person should be hired until the fine and costs adjudged against him had been paid. The amendment of July 4, 1887, directed the manner in which it should be paid, and it is believed to be entirely competent for the county judge to draw his warrant as above indicated before the fine has been paid.

Very respectfully,

(Signed) FRANK ANDREWS,
Office Assistant Attorney General.

Taxation.— The Comptroller has no authority to refund any money paid as taxes to the State when the same has been duly and legally assessed and collected as provided by law.

ATTORNEY GENERAL'S OFFICE.
AUSTIN, March 18, 1893.

Hon. John D. McCall, Comptroller, Austin.

DEAR SIR—We have your favor of the 15th instant, with its enclosures from First National Bank of Abilene, Texas, relative to refunding certain taxes paid to the State for the year 1891. It appears from the statements that the assessment of the tax was properly made, and it is not shown but what the rolls were properly made out by the assessor and duly approved by the commissioners court as required by law. In due time the taxes were paid. It seems that afterwards it was discovered by some one that the court only intended to assess the property at three-fourths of its value, and at the regular term of the court in February, 1893, an order was entered which purported to correct the assessment and reduce it to three-fourths of its cash value, and ordered one-fourth of the county taxes to be paid back to the bank.

The question propounded by you is, whether, under the circumstances stated, you, as Comptroller of Public Accounts of this State, have the authority to refund to the bank one-fourth of the State taxes so paid.

Ample rules are made for the protection of the citizens from excessive valuation of property and the payment of excessive taxes thereon, but the remedy provided for in the statute must be pursued.

Article 1517a, Sayles' Statutes, provides that the county commissioners courts of the several counties of this State shall convene and sit as a board of equalization on the second Monday in June, or as soon thereafter as practicable before the first day of July, to receive all the assessment lists or books of the assessors of their counties for their inspection, correction, equalization, and approval. Section 2 of the same article provides that the board shall cause the assessor to bring before them all the assessment books of the county for their inspection, to see that each and every person has rendered its property at its fair market value as contemplated by law. Section 3 provides that the board of equalization shall have power to correct any errors in the assessment of property at any time before the tax is paid on said property.

When the taxes have been paid, it must be observed from the reading of section 3 that the authority of the commissioners court sitting as a board of equalization is exhausted, and they can not correct any errors in the assessment. If the tax was illegally assessed it would not be necessary to go before the board, as the collection could be enjoined in the courts.

Commissioners Court v. Conner, 65 Texas, 334.

Hardiste v. Fleming, 57 Texas, 395.

There is no claim of an illegal assessment in this case, and in so far as shown by the papers submitted, the grievance complained of is, that the property was assessed at "its fair market value as contemplated by law."

The bank had the right to appear before the court at any time prior to the payment of its taxes, and have any error in its assessment corrected. This it failed to do. The assessment was placed upon the rolls, submitted to the board of equalization, the rolls approved, finally made out and accepted, and the taxes paid.

When this has been done the assessment is no longer subject to revision or correction by the court, and the action so taken by the court is final.

Buck v. Peeler, 74 Texas, 763.

Railroad Company v. Harrison County, 54 Texas, 119.

Railroad Company v. Smith County, 54 Texas, 1.

There is no statute which authorizes the Comptroller to refund any money paid as taxes by the State under the circumstances above stated.

Article 2754, Sayles' Statutes, which authorizes the Comptroller to "remit or make an allowance to every tax collector in the auditing of his accounts for all sums of money which, in his judgment, have been illegally assessed," is no warrant for refunding taxes already paid in a case like this. The purpose of this article seems rather to have been intended as authority to the Comptroller to examine the rolls before payment, and if tax is illegal, to so remit and allow it upon his accounts and charges against the collector.

It is not believed, therefore, that the law authorizes you to refund the $70 claimed by the bank or its stockholders.

Very respectfully,

(Signed) FRANK ANDREWS,
Office Assistant Attorney General.

A county judge by accepting and qualifying as justice of the peace vacates the office of county judge.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, April 14, 1893.

Hon. C. J. Hinson, County Judge, Groveton, Texas.

DEAR SIR—In reply to your favor of the 4th instant, wherein you ask: "Does the county judge by accepting and qualifying as justice of the peace thereby vacate the office of county judge?"

You are respectfully advised that this department answers this in the affirmative. "It is a well settled rule of law that he who, while occupying an office, accepts another incompatible with the first, ipso facto vacates the first office, and his title is thereby terminated without any other act or proceeding."

Mechem on Public Offices, sec. 420.

State v. Brinkerhoff, 66 Texas, 45.

"The incompatibility which shall operate to vacate the first office exists when the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for one person to retain both."

Bryan v. Cattell, 15 Iowa, 438.

People v. Green, 58 N. Y., 295.

Stubbs v. Lee, 64 Maine, 195.

Mechem on Public Officers, sec. 422, et seq.

That such an incompatibility exists between the office of county judge and justice of the peace when united in one, we think there can be but little question. It is true that, in the case mentioned, the civil and criminal jurisdiction of the county court has been diminished; still the court retains its probate jurisdiction and, as such, has supervisory control of guardianships and administrations pending in the county: this being the case, you can readily see when the justice might be called upon to sit in judgment in a suit when the original claim had been disallowed by him as county judge, or where he might be called upon to act upon some right or claim that he had acted upon in another capacity. We, therefore, conclude that the two offices should not be united in one person. It is true that in Gaal v. Townsend, 77 Texas, 464, it is held that one person may at the same time hold either of the offices mentioned in section 40 of article XVI of the Constitution and any other office, but the question as to whether the offices were incompatible was not before the court, nor do we think the rule therein announced will extend to the present case.

Very respectfully,

(Signed) MANN TRICE,
Office Assistant Attorney General.

The position of Supreme Court Librarian is not a civil office of emolument, and the Comptroller is not prohibited by Article XVI, Section 33, of the Constitution, from drawing his warrant in favor of the Clerk of the Supreme Court, for whom, as Librarian, there is provided a salary in addition to the salary provided for him as Clerk of the Supreme Court.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, May 18, 1893.

Hon. John D. McCall, Comptroller, Austin.

DEAR SIR—Your favor of May 13th received and duly noted. You inquire whether or not the account of C. S. Morse for salary as librarian can be paid by your department, in view of the fact that said Morse is drawing a salary as clerk of the Supreme Court.

Article XVI, section 40, of the Constitution of this State, provides, in effect, that no person shall hold or exercise, at the same time, more than one civil office of emolument, unless otherwise specially provided herein.

Article V, section 3, of the Constitution, provides that the Supreme Court shall appoint a clerk, who shall receive such compensation as the Legislature may provide.

Article 1024 of the act of the special session of the Twenty-second Legislature, putting into operation the amendments to article V of the Constitution, of September 22, 1891, expressly provides that the clerk of the Supreme Court shall be librarian in charge of the library of said court. The position of Librarian is therefore evidently not considered or treated by the Legislature as an office, as the clerk of the Supreme Court is *ex officio* librarian.

There is, however, one other question to be considered. Article XVI, section 33, of the Constitution, provides that the accounting officers of this State shall neither draw nor pay a warrant upon the treasurer in favor of any person for salary or compensation as agent, officer or appointee who holds at the same time any other position of honor, trust or profit under this State or the United States, except as prescribed in this chapter. Under the provisions of the Constitution first cited it will be seen that it was entirely competent for the Legislature to provide such compensation as it saw fit for the services of the clerk of the Supreme Court, and it also had authority to impose upon the incumbent of that office such additional duties as to the Legislature seemed proper, not inconsistent with his duties as clerk of the Supreme Court. The duties of the librarian of the Supreme Court are not believed to be inconsistent with the duties of the clerk of the Supreme Court, and there seems to be no good reason why the duties of librarian may not be imposed upon and discharged by the clerk of the Supreme Court. The general appropriation bills for the years 1893 and 1894 appropriated, under the head of "Supreme Court," for clerk's salary, $2500 each year, and under the same head, "Salary of librarian at Austin, $720 each year."

It must be presumed that the Legislature made this appropriation with a knowledge of the law which constitutes the clerk of the Supreme Court librarian for said court, and places in his charge the safe keeping of the Supreme Court library, and with knowledge that the Legislature has heretofore annually appropriated various sums for the librarian, while the clerk of the Supreme Court held that position and received the pay. The power being by the Constitution vested in the Legislature to fix the compensation of the clerk at such sum as it saw fit, his compensation was by law fixed at $2500 per annum, and in addition to this the Legislature appropriated for his services in the care and control of the library the sum of $720 per annum. These items should be construed together, and both be given effect if possible. It is plain that no other person than the clerk of the Supreme Court can draw the salary appropriated for a librarian, because that officer is expressly constituted librarian by the law above cited, and the Legislature had knowledge of this when both these items were passed. Construing the two together, it is believed that they should be given the same effect as if the Legislature had appropriated $2500 per annum for the clerk of the Supreme Court for his services as such, and $720 per annum for the clerk of the Supreme Court for his *ex officio* services and attention to the Supreme Court library, or as if the Legislature had enacted a law fixing the salary of the clerk and then providing additional compensation for his attention to the library, or as if it had appropriated in one item the total sum for services as both librarian and clerk.

The conclusion follows from what is above said that you are authorized to draw your warrant in favor of the said C. S. Morse for the salary appropriated for librarian.

Very respectfully,

(Signed) FRANK ANDREWS,
Office Assistant Attorney General.

Confederate certificates.—Where the surveys for the holder of the Confederate certificate and the school fund are not contiguous, the surveys are void. In such case, if the land located for the holder of the certificate has been patented, it is "land titled" within the meaning of the Constitution and statutes, and not subject to the homestead donation law. If the land has not been patented, it is neither "land titled," nor land "equitably owned under color of title from the sovereignty of the State," and if it is otherwise vacant and unappropriated it is subject to the homestead donation law.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, May 19, 1893.

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

DEAR SIR—Your letter of yesterday is received, in which you say: "Your opinion is requested regarding locations made by virtue of Confederate certificates, where the individual and school surveys are not contiguous. Are the individual surveys illegal, and is such land subject to the homestead donation law?"

In reply I beg to say:

(1) That where the surveys for the holder of the certificate and the school fund are not contiguous the surveys are void.

Von Rosenberg v. Cuellar, 80 Texas, 255, 256.

(2) In such case if the land located for the holder of the certificate has been patented, it is "land titled" within the meaning of the Constitution and statutes, and not subject to the homestead donation law.

Constitution, article XIV, section 2.
Revised Statutes, articles 3937, 3951.
Day Land and Cattle Company v. State, 68 Texas, 525.
Winsor v. O'Connor, 69 Texas, 571.
Adams v. R. R. Co., 70 Texas, 252.
Gunter v. Meade, 14 S. W. Reporter, 562.

(3) In such case if the land located for the owner of a certificate has not been patented it is neither "land titled" nor land "equitably owned under color of title from the sovereignty of the State," and if it is otherwise vacant and unappropriated, it is subject to the homestead donation law.

Revised Statutes, article 3937.
Gunter v. Meade, 14 S. W. Reporter, 563.
Adams v. R. R. Co., 70 Texas, 268, 269.

Very respectfully,

(Signed) C. A. CULBERSON,
Attorney General.

Students. Qualifications of as Voters.—Persons who are at college merely as students, and have theretofore resided elsewhere, are not entitled to vote in the precinct in which the college is located.—In order that such persons may be legally entitled to vote therein, they must in good faith have adopted the college precinct as their residence or home for the time being, to the exclusion of all others.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, May 26, 1893.

Robert A. John, Esq., County Attorney, Georgetown, Texas.

DEAR SIR—Your letter of yesterday is received, in which you inquire as to the qualification of voters, otherwise qualified, who are attending the Southwestern University at Georgetown as students. Among other things you say: "I have ruled that if they have no fixed residence elsewere, have been in the State twelve and in the county and precinct six months, they are qualified, being twenty-one years old. To illustrate, if "A" in Georgetown attending the University declares that he has no residence elsewhere to which it is his intention to return and permanently reside, that, being otherwise qualified, Georgetown, he being a single man, would be his residence and he could legally vote."

On the points inquired about and under the facts stated you are advised:

(1) That persons theretofore residing elsewhere, who are at Georgetown merely as students of the Southwestern University, are not entitled to vote.

The rule, which appears to be general throughout the Union, is thus stated by different courts:

"We think it clear that if they had gone to Bloomington with the intention of remaining simply as students, and there was no change of intention, they would not have acquired a residence. * * * If he is at a place merely as a student, then he is not a resident, but if he has selected that place as his abode, he acquires a residence which entitles him to vote, if he possesses the other qualifications."

Pedigo v. Grimes, 113 Ind., pp. 151, 153.

"But the intention to remain only so long as he is a student, or only because a student, is not sufficient. The intention must be not to make the place a home temporarily, not a student's home, a home while a student, but to make an actual, real, permanent home there; such a real and permanent home there as he might have elsewhere. The intention must not be conditioned upon or limited to the duration of the academical course."

Sanders v. Getchell, 76 Me., 165.

"Having, as the case states, come to Allenton for no other purpose than to receive a collegiate education, and intending to leave after graduating, they have not lost their home domicile, and could vote there on returning to it, though they should not re-enter their father's house."

Fry's Election Case, 71 Pa., 311.

"He is entitled to vote only in the county where his home is—where his fixed place of residence is for the time being. Such place is and must be his domicile or place of abode, as distinguished from a residence acquired as a sojourner for business purposes, the attainment of an education, or any other purpose of a temporary character."

Vanderpoel v. O'Hanlon, 53 Iowa, 248, 249.

"In applying these rules to the proposed question, we take it for granted that it was intended to apply to a case where the student has his domicile of origin at a place other than a town at which the institution is situated. In that case we are of the opinion that his going to a public institution and residing there solely for the purpose of education would not of itself give him the right to vote there, because it would not necessarily change his domicile, but in such case his right to vote at that place would depend upon all the circumstances connected with such residence."

Opinion of Justices, 5 Metcalf (Mass.), 589.

McCrary on Elections, sec. 41.

Paine on elections, sec. 70.

(2) If such persons, in addition to attending the University, have in good faith adopted Georgetown as their residence or home, they are entitled to vote. There must be something more than mere bodily presence. They must do more than temporarily abide there for the attainment of an education. There must be an intention, and such persons must, in fact, make themselves for the time being part of the community in a broader and more substantial sense than a student attending a university located there, willing, or if not, legally compellable, to share its governmental burdens and responsibilities.

On this subject the courts have said:

"His position will not give him a right to vote there if he has a domicile elsewhere, nor will his connection with a public institution solely for the purposes of education preclude him from so voting, being otherwise qualified, if his domicile is there."

Opinion of Justices, 5 Metcalf (Mass.), 588.

"Others who testify they are entirely free from parental control and regard Upper as their home, having no other to which to return in case of sickness or domestic affliction, are unquestionably as much entitled to vote as any other resident of a town pursuing his usual avocation."

Dale v. Irwin, 73 Ill., 182.

"He gets no residence because a student, but being a student does not prevent his getting a residence otherwise."

Sanders v. Getchell, 76 Me., 165.

"And on the other hand, it would probably be admitted if when he went to Iowa City (where the college is situated), or at any time thereafter before he offered to vote, his intention was to make that place his home and residence when he ceased to attend the university, that such place was and became his

place of residence in such sense that he would have become a legal voter in Johnson county."

Vanderpoel v. O'Hanlon, 53 Iowa, 248.

"It can, we conceive, make no difference that a person is a student, if he has in good faith elected to make the place where the college is located his residence, since there is no imaginable reason why a person may not be both a student at a college and a resident of the place where the college is situated."

Pedigo v. Grimes, 113 Ind., 153.

(3) But the rule above announced does not require, in order to be entitled to vote, that such persons shall intend to reside at Georgetown indefinitely. It is sufficient if they intend to make it their home in good faith for the time being, to the exclusion of all others.

"It is not necessary, however, that there should be an intention to remain permanently at the chosen domicile. It is enough if it is at the time the domicile of the voter, to the exclusion of other places. Judge Cooley says: 'A person's residence is the place of his domicile, or the place where his residence is fixed without any present intention of removing therefrom.'

"Cooley Const. Lim. (5th ed.), 574.

"Judge Story makes substantially the same statement of the rule.

"Conflict of Laws, section 43.

"In the case of Cessna v. Meyers, reported and strongly approved by Judge McCrary, it was said: 'A man may acquire a domicile if he be personally present in a place and elect that as his home, even if he never designed to remain there always, but designed at the end of some short time to remove and acquire another.'"

McCrary on Elections, page 494.

Pedigo v. Grimes, 113 Ind., 153, 154.

Cooley Const. Lim., page 754.

McCrary Elections, section 39.

Putnam v. Johnson, 10 Mass., 488.

It follows from what has been said that while the case of each voter must rest upon its own peculiar facts, upon which it is impracticable to advise you, yet generally speaking your inquiry must be answered in the negative, subject to the foregoing explanation.

Very respectfully,

(Signed) C. A. CULBERSON,
Attorney General.

Parties whose lands were sold for taxes on May 2, 1893, cannot redeem the same under the provisions of the act approved May 2, 1893, but are required to redeem under the provisions of article 4758 et seq., Sayles' Civil Statutes.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, June 6, 1893.

Hon. John D. McCall, Comptroller, Austin.

DEAR SIR—Your favor of the 11th ultimo, together with the letter of J. C. Wortham, collector of Galveston county, is received. The question propounded is: Can parties whose lands were sold for taxes on the 2nd day of May, 1893, redeem the same under the provisions of the act approved May 2, 1893, or whether they should be required to redeem under the provisions of article 4758 et seq., Sayles' Civil Statutes?

The latter articles provide the general rule by which lands sold for taxes in this State may be redeemed, and under it parties have two years within which, on the terms therein provided, they may redeem the same. The act approved May 2, 1893, is entitled: "An act to extend the time within which lands that have been sold for taxes and bought in by the State, cities and towns may be redeemed," and the Constitution provides in substance that an act shall have but one purpose, which shall be expressed in its title. Under this constitutional provision it must be held that it provides for an extension of the time within which lands sold for taxes may be redeemed, and was not intended to repeal the general law on this subject.

Under the facts stated with reference to the sale of lands of parties in Galves-

ton county, whatever may be thought of the time within which the act of May 2, 1893, takes effect, upon which no opinion is expressed, it is clear that said act does not extend the time within which they could redeem, they having two years under articles 4758 et seq., of the Revised Statutes, and it must be held that the latter provision is applicable to their case.

Very respectfully,

(Signed) C. A. CULBERSON,
Attorney General.

ATTORNEY GENERAL'S OFFICE.
AUSTIN, June 14, 1893.

Hon. John D. McCall, Comptroller, Austin.

DEAR SIR—We have a communication from your department requesting the opinion of this department upon a question propounded to you by R. E. L. Tomlinson, county clerk of Falls county, of date May 31. The questions propounded are: "Whether or not a party who pays an occupation tax to the tax collector must file the tax collector's receipt with the county clerk, and have the clerk issue an occupation license to the person filing the receipt? If the clerk must issue the license and if he is entitled to the fee therefor; if so, what fee?"

In support of the proposition that this course should be pursued, article 945 of the Revised Statutes is cited. That article provides, in substance, that upon presentation of receipts for occupation taxes, the county clerk shall issue a license to the person paying the tax, authorizing him to pursue the occupation named in the receipt during the time for which he has paid the tax. Prior to the act of 1870, upon the subject of occupation taxes and the manner of keeping accounts with collectors, the law regulating the keeping of such accounts was different from that prescribed in the act of 1879 (General Laws, p. 143.) Formerly it was necessary for the county clerk to have the receipt presented to him and to issue a license thereupon, and by this means keep a check upon the tax collector as to the amount of occupation taxes paid to that officer.

The act of 1879, however, provided a different method for keeping accounts with tax collectors, relative to occupation taxes. Section 9 of said act, which was also inserted by the codifier in the Revised Statutes, provides, in substance, that the Comptroller shall cause occupation tax receipts for each occupation, to be printed with his signature for all occupations payable to collectors, and forward the same to each collector, and charge him with the amounts represented by the receipts sent him, and cause him to account therefor. It also requires the collector to keep stubs and to report to the Comptroller. It further contains the following provision: "And no person shall pursue any occupation unless he has a receipt signed as herein provided by the Comptroller and collector." This clearly means that every person having such receipt may pursue the occupation. It is believed that the Legislature intended to provide and did provide a different system of keeping accounts upon tax collecters, and intended, among other things, by such amendment to relieve the tax-payer of the unnecessary burden of contributing to the county clerk a fee for the issuance of a license based upon a receipt, when the receipt would answer all practical purposes, and the Comptroller would have a check upon the collector for all receipts issued. It is not believed therefore that the law requires any person to take out a license from the county clerk to pursue an occupation after he has paid his occupation tax and received his receipt from the tax collector. This view is strengthened by a further act of the Legislature subsequent to the act of 1879, which expressly requires a person pursuing the occupation of a liquor dealer to pay an occupation tax and to apply to the clerk for a license for the pursuit of such occupation. Where the statute does not otherwise require the issuance of a license by the clerk, it is not believed that the person pursuing the occupation is required to take the same out.

Very respectfully,

(Signed) FRANK ANDREWS.
Office Assistant Attorney General.

Printing Board.—When the Printing Board has refused to audit an account for public printing, the Comptroller has no authority to draw a warrant upon the Treasurer for payment of the same. When the Printing Board has declined to approve claims for advertising in newspapers on the ground that it is not necessary that such claims be audited and approved by the Printing Board, the Comptroller would not be prohibited from auditing and paying the same if there is any law authorizing the expenditure.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, June 22, 1893.

Hon. John D. McCall, Comptroller, Austin.

DEAR SIR—Replying to your letter of the 20th inst., you are respectfully advised:

(1) That the law plainly confers upon the Printing Board the authority and duty to examine and in the first instance audit claims against the State for printing department reports, such as that of the Superintendent of Public Instruction, and under this law you can only draw a warrant upon the treasury after the approval of the Board. It follows from this that, in my judgment, the Printing Board having refused to audit the account of Superintendent Carlisle for binding two hundred copies of his biennial report for 1892 in cloth, you have no authority to issue the warrant.

Revised Statutes, articles 3994, 4017.

(2) With reference to the accounts for advertisements, approved by Commissioner Hollingsworth and Superintendent White, as well as those for advertising free lectures at the University, your attention is called to the fact, of which you are doubtless already aware, that the Printing Board, as at present constituted, has uniformly ruled under article 3995 of the Revised Statutes and other laws relating to public printing, that it is not its duty to audit or approve such claims, and being a member of the Board and voting for the proposition, that, in my judgment, is the law. The fact that the Printing Board declined to approve these claims for advertising in newspapers, expressly upon the ground that such claims do not require auditing by the Board, would not prohibit you from auditing and paying the same if there is any law governing the several departments named authorizing such expenditures and any appropriation by the Legislature out of which the same can be paid.

Very respectfully,

(Signed) C. A. CULBERSON,
Attorney General.

District and County Clerk—Vacancy.—In counties having a population of more than eight thousand inhabitants, the District Judge is authorized to fill vacancies in the office of District Clerk, and in counties with a population of less than eight thousand persons, when only one person discharges the duties of District and County Clerk, the power to fill vacancies is lodged in the Commissioners' Court.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, June 26, 1893.

Judge E. W. Terhune, Greenville, Texas.

DEAR SIR—Your letter of the 23d instant is received, the substance of your inquiry being, In whom is vested the authority to fill the vacancy in the office of the clerk of the District and County Courts of Rains county, which has a population of less than eight thousand inhabitants.

Section 9 of article V of the Constitution provides there shall be elected a district clerk for each county, and in case of vacancy the judge of the District Court shall have power to appoint a clerk. By section 20 of article V of the Constitution, it is provided that a county clerk shall be elected for each county, and that a vacancy in said office shall be filled by the Commissioners' Court, "*Provided*, that in counties having a population of less than eight thousand persons there may be an election of a single clerk, who shall perform the duties of district and county clerks." The statutes (articles 1101, 1115, 1116a, 1143, and 1159) contain similar provisions. In the county of Rains, at the general

election in 1892, one person was chosen to discharge the duties of these two offices, and having died since his qualification, the question submitted is, By whom shall the vacancy be filled?

The Constitution does not command the election of only one clerk in counties with a population of less than eight thousand. Mere authority for such action is there given. This authority has been exercised by the Legislature, however, and it has expressly enacted that in such counties "only one clerk shall be elected."

Revised Statutes, articles 1, 115, 1159.

Although both the Constitution and the statutes employ the terms "election" and "elected" only in this connection, yet it appears clear that the statute especially evidences a legislative intention that only one person shall discharge the duties of district and county clerk in such counties. That the Legislature so intended when there is an election is manifest, and no reason is perceived for a different rule where an appointment is made. The ground for such action is not that there is an election rather than an appointment, but that there are less than eight thousand people in the county, and until the law unmistakably rests the distinction upon the narrower reason of election instead of appointment, it can not logically be adopted.

Being of the opinion therefore that only one person can be appointed to the vacancy, the more difficult question arises. By whom shall he be designated? It is believed the appointment is confided by the Constitution to the Commissioners Court of Rains county. It is well known that the duties of county clerk are more important and affect more intimately a larger number of citizens of the county than those of the district clerk, and it is to be presumed that in consolidating these offices the purpose was to merge the least into the more important, and to lodge the appointive power in officials of the localities most concerned and interested. It will be noted, also, that the authority of the district judges to fill vacancies in the office of district clerk is for temporary purposes, and the person appointed shall hold only "until the office can be filled by election." It is true the Legislature has not provided for a special election in the former case, but no one will doubt its authority to do so under this constitutional provision. So far as the Constitution bears on the question, the authority given the district judge to appoint was not intended as a permanent induction into office, though the statute seeks to make it such. The power given the Commissioners Court, on the contrary, extends to filling the vacancy for the balance of the constitutional term of two years, and this difference should certainly have some weight in determining the question which authority should be superseded in case of apparent conflict.

Regardless of these minor considerations, the conclusion reached is, in my judgment, the proper construction of the Constitution. Sections 9 and 20 of article V should be construed together, and thus considered it is believed that in all counties with a population of more than eight thousand persons the district judge is authorized to fill vacancies in the office of district clerk; and in counties with a population of less than eight thousand persons, when only one person discharges the duties of district and county clerk, the power to fill vacancies is lodged in the Commissioners Courts. It will certainly not be contended that the Constitution confides the authority jointly to the district judge and Commissioners Court. Besides the want of definite language indicating such purpose, its manifest incongruity places it beyond serious contemplation. Section 9, which alone confers power in this particular upon district judges, is silent both as to the consolidation of the offices and the person authorized to fill vacancies in such cases. Such is not the case, however, with section 20. Providing for the election of county clerks, it also prescribes that vacancies in those offices shall be filled by the Commissioners Courts, and in the same sentence authorizes a consolidation of the offices. The proviso in this section which authorizes the consolidation has immediate reference to the paragraph that a county clerk shall be elected for each county, and defining his duties. Generally speaking, the office of a proviso is to impose a limitation or condition upon a preceding clause, and in this case, read in the light of the context, the condition is only upon the duties to be performed. That is to say, there shall be elected for each county a county clerk, who shall be clerk of the County and Commissioners Courts and recorder of the county, subject to the right of the Legislature, in counties having a population of less than eight thousand, to cause a single clerk to be elected who shall perform the duties of district clerk. The limitation imposed by the

proviso does not affect the power of the Commissioners Courts to appoint to a vacancy, for neither by implication nor express words is reference made to that subject. Keeping in view the greater importance of the office of county clerk, the rights of communities to control their local affairs, and the fact that the provision for the consolidation of the offices is contained in the same sentence with the authority of the Commissioners Court to appoint to vacancies, without limitation thereon, it is believed that the framers of the Constitution intended that in these cases to all intents and purposes a county clerk should be elected who should also perform the duties of district clerk, rather than that a district clerk should be elected who should also discharge the duties of county clerk, and consquently that the Commissioners Courts are empowered to fill vacancies therein. It is obvious that the question discussed is difficult, and if the construction adopted is deemed somewhat arbitrary, as any construction of these provisions must in some measure be, justification is found in the merger of the less into the greater and the practical application of the fundamental principle of local self-government.

Very respectfully,

(Signed) C. A. CULBERSON,
Attorney General

Liquor Dealer's Bond.—A married woman cannot execute as principal a valid liquor dealer's bond.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, June 27, 1893.

Hon. John H. Rice, County Judge, Corsicana, Texas.

DEAR SIR—In reply to your favor of the 24th inst., wherein you ask "if a married woman can execute as principal a valid liquor dealer's bond," I beg to say this depends upon whether she can bind her separate property by the execution of such an instrument. When, under what circumstances, can a wife bind her separate property? Under all authorities she is limited to two cases, viz.: (1) For necessaries furnished herself or children. (2) For expenses incurred by the wife for the benefit of her separate property.

Wallace v. Fenberg, 46 Texas, 35;
Cox v. Miller, 54 Texas, 25;
Brown v. Chancellor, 61 Texas, 437;
Green v. Ferguson, 62 Texas, 525.

Under the facts stated it cannot be maintained that the obligation in question is for necessaries furnished the wife or her children. Then, is it for expenses incurred for the benefit of her separate property?

This, it seems, should be answered in the negative. "If the wife joins her husband in the execution of a note for goods purchased for the wife to replenish a stock of goods that was the separate property of the wife, such purchase would not be for the benefit of the wife's separate property in contemplation of the statute so as to make her liable on the note."

Wallace v. Fenberg, 46 Texas, 35;
Miller v. Marx & Kempner, 65 Texas, 131.

The proposed bond not being for necessaries furnished the wife and children, nor for expenses incurred for the benefit of her separate property, we do not think she would be bound by it. A liquor dealer's bond is a statutory obligation, and the law clearly contemplates that all parties to such bond should be liable thereon; if, then, the principal in such an obligation would not be bound by it, the sureties would not be bound.

You are therefore respectfully advised not to approve the proposed bond.

Very respectfully,

(Signed) MANN TRICE,
Office Assistant Attorney General.

Salary of Special Judge.—The account of L. D. Brooks for ten day's service as Special Judge in the Court of Criminal Appeals in case of State v. Thomas P. Varnell, alleged to have been performed between June 17, 1892, and February 28, 1893, cannot be paid out of deficiency appropriation.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, June 27, 1893.

Hon. John D. McCall, Comptroller, Austin.

DEAR SIR—In reply to your favor of the 26th instant, wherein you ask if the account of L. D. Brooks, Esq., for ten days' service as special judge in the Court of Criminal Appeals in the case of State v. Thomas P. Varnell, alleged to have been performed between the 17th day of June, 1892, and the 28th day of February, 1893, can be paid out of the deficiency appropriation, you are respectfully advised that said account should not be paid out of said appropriation.

The last clause of section 1 of the Deficiency Appropriation act provides: "That no part of the appropriation herein made for the salaries of special judges shall be applied to the payment of any such judges, who, sitting as judges of the Court of Criminal Appeals, shall have held under advisement for as long a period as three months the case or cases that they were appointed to try, thereby denying persons charged with crime the constitutional right of a speedy trial and depriving them of their liberty." (Page 44 General Laws, 23d Legislature.)

It appears that on the 17th day of June, A. D. 1892, Mr. Brooks was appointed one of the special judges of the Court of Criminal Appeals to try the case of State v. Thomas P. Varnell, charged with murder, pending on appeal to said court. At the Austin Term, on the 22nd day of June, 1892, said cause was submitted to said Court of Appeals; that said court adjourned within one week after its submission and no opinion was rendered; the case was then transferred to the Tyler Term, during which time neither Judge Brooks nor Terrell appeared at Tyler, or, so far as disclosed by the papers you submit, offered in any manner to decide or dispose of such case. About the close of the Tyler Term of court, to-wit, the last week thereof, Judge Terrell tendered his resignation as special judge in the case, whereupon Mr. Marsh was appointed in his place. The case was then transferred to the Dallas Term of said court, and on the 6th day of March was again submitted, but no decision was reached in the case during that term of court, and at the close of the term the case was transferred to the Austin Term, where it was decided on April 22, 1893. It further appears that after the case was submitted on June 22, 1892, a consultation of the judges was held on the subsequent Friday, at which only Judges Hurt and Brooks were present; that at said consultation it was ascertained that these judges could not agree, and consequently the record was sent to Tyler; and that so far as we are advised neither Judge Brooks nor Judge Terrell took any action in said case until the last week of the Tyler Term. This alone, regardless of the subsequent delays at Dallas and Austin, was for "as long a period as three months."

To hold a case under advisement means to withhold a decision after submission for the purpose of consultation, for the convenience of the judges, because of their negligence or for such other reasons as may cause delays, and thus considered it is believed this case was held under advisement within the meaning of this act.

Judge Brooks submits an affidavit to the effect, that the failure to render a decision at the Tyler Term was due to the "sickness, inability, or neglect" of Judge Terrell. If this be conceded, the conclusion reached is not affected, for we are of the opinion that, because of the delicacy and difficulty of inquiring satisfactorily into the causes which have induced special judges to postpone decisions in causes, the Legislature, by this act, did not intend to devolve upon the Comptroller or other officers the duty of determining to what special judges the delay is attributable. Wherever a case has been submitted and a decision is postponed for three months for any of the reasons stated, whatever may have been the action of individual special judges, none of them are entitled to salaries out of the deficiency appropriation.

Very respectfully,

(Signed) MANN TRICE,
Office Assistant Attorney General.

Timber Lands.—Cannot be sold to persons other than actual settlers.—More than one section of timbered land cannot be sold to one purchaser.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, June 27, 1893.

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

DEAR SIR—I reply to your letter of the 21st instant with reference to the sale of timbered land. A communication from Messrs. Mantooth & Townsend, of Lufkin, with whom you have, I presume from your letter, had correspondence, has also had consideration in the same connection.

The questions presented may be succinctly stated:

May lands classified as "timbered" be sold to persons other than actual settlers?

May more than one section of timbered land be sold to one purchaser?

Section 3 of the act of April 1, 1887, regarding the sale and lease of school and other public lands (General Laws 1887, page 52), makes provision for the classification of lands belonging to the funds mentioned, into "agricultural, pasture, and timber lands." Section 5, as amended in 1889 (General Laws 1889, page 51), provides that when the classification has been made "such land (that is the land classified) shall be subject to sale, but to actual settlers only" in quantities between 80 and 640 acres. There is an exception to this limitation, to the effect that lands classified as "purely pasture lands, and without permanent water thereon," may be sold in quantities not exceeding four sections to the same settler. It will be noted that the exception is not to land other than agricultural, but extends only to a portion of the lands classified as pasture lands. It will be further noted that even the excepted lands must be sold to the actual settler. The proviso does not include "timbered lands."

Section 7 fixes the prices of the several classes, placing lands "valuable chiefly for the timber thereon" at a minimum of five dollars.

Section 8, as amended in 1889, provides for sale to a former purchaser of an agricultural or watered section of three "strictly pastoral" sections. The provision is not extended to timbered lands.

Section 9 makes it the duty of the Commissioner to prescribe regulations whereby all purchasers shall be required to "reside upon as a home the land purchased by them for three consecutive years next succeeding the date of their purchase." This section also requires an affidavit that the purchaser desires the land as a home and has settled thereon. It also prescribes the terms of payment, and to the regulations then made there is a proviso to the effect that if the land applied for be "timbered land," the purchaser shall pay cash in full at the time of purchase.

Section 13, as amended in 1889, is with reference to timber and timbered land exclusively. It gives the Commissioner authority to adopt such regulations regarding the sale of timber on timbered land as may be deemed necessary; prescribes minimum prices of timber per acre, and period within which purchaser must remove timber. In it there appears the following: "and in no case * * * shall less than one section of timbered land be sold to any one purchaser." The section is concluded with this proviso: "All timbered lands from which the timber has been cut and taken off may be placed on the market and sold for not less than two dollars per acre, as other lands are sold under the provisions of this act."

All sections of the act having a bearing upon the question submitted having been reviewed, the law may be thus summarized: Lands having been classified as agricultural, pasture, or timbered may be sold to actual settlers only in quantities, of agricultural land of not less than 80 acres or more than 640 acres; of pasture lands, same with named exceptions: of timbered lands, not more nor less than one section.

The conclusion reached therefore from a strict and literal construction of the law, is that both interrogatories must be answered in the negative.

It is suggested, however, that it was the intention of the Legislature to apply the provisions of the statute requiring settlement and continued occupancy, and prescribing a limitation as to the amount that might be purchased, to agricultural and pasture lands only.

It may be that a different rule might with propriety have been prescribed with reference to lands valuable chiefly for the timber and with regard to agricultural lands.

It is doubtless also true that in most cases ownership of a single section of timbered land will not justify the erection of saw-mills or the construction of ways of transportation of saw-logs. In fact, it may be that the terms of the law as here construed preclude the possibility, ordinarily, of sale of timbered land.

However this may be, the opinion is entertained that this is not a case in which the legislative intent may be looked to in order to destroy the plain terms of the legislative act. "Courts are not at liberty to speculate upon the intentions of the Legislature when the words are clear, and to construe an act upon their own notions of what ought to have been enacted. While it is the duty of one attempting the interpretation of a statute to ascertain its intent, yet the statute itself furnished the best means of its own exposition."

There are not in this law grammatical ambiguities, clauses or phrases that are absurd, provisions contradictory or inconsistent with the main proposition. I do not conceive it a case in which that which the Legislature has done may be disregarded, in order that that which the Legislature might have intended to do may be so considered. I do not conceive it a case in which the certain import of language may be ignored in order that a court, or an officer charged with interpretation, may enter the conjectural field of public policy.

In an effort, however, to ascertain if possible that which the Legislature intended should be done, the writer has examined carefully the journals of the Senate and House of the Twentieth Legislature, by whom the law was passed, and has attempted to become familiar with the circumstances attendant with the passage of the bill and with the conditions that required its enactment.

It appears that the original bill, or committee substitute therefor, was a complete and symmetrical measure. The general provisions of the bill were subjected to an exception with reference to timbered land, expressed in section 13. This section placed the sale of timbered lands almost entirely within the discretion of the Commissioner, as it places now sale of timber within his discretion. Amendments were made that had the effect to entirely change the purport of the section. Except as to a single provision, which has been quoted, its provisions were made applicable to timber instead of timbered land.

If more than the language of the law is to be looked to in attempting to determine the legislative intent, it would not be improper to consider in that connection the history of this section. A proposition was made that the Commissioner of the Land Office be given authority to sell timbered lands, under such rules as he might prescribe. This proposition was repudiated, but authority was given to sell timber at discretion.

There can be no inference that the Legislature intended to do that which it refused to do. If the general terms of the bill are not applicable to timbered lands, then there are no restrictions upon the authority of the Commissioner with reference to this character of land, except as to minimum price and minimum amount that may be sold. Any number of sections might be sold to any person or corporation. Leaving out of consideration the refusal of the Legislature to give such authority, there ought not to be inferred from silence a legislative intent to revive a land policy bitterly deplored and promptly repudiated.

If an intent is to be conjectured, it would be less difficult to suppose that the Legislature favored the policy of first selling the timber and then the lands. Especially could this be assumed as the policy of the Twenty-first Legislature, which amended section 13 by adding the proviso to the effect "that all timbered lands from which the timber has been cut may be sold as other lands under the provisions of this act."

Did the Legislature intend to enact that land valuable chiefly for timber might be sold in unlimited quantities to any person, while the same land, when its chief value had been taken away, might be sold to actual settlers only in quantities not exceeding one section?

If the legislative intent be inquired into, the conclusion must be the same. Timbered lands may be sold to actual settlers only, in quantities not exceeding one section.

No opinion is expressed as to whether, under section 22, timbered land within the territory prescribed by the law might, if detached and isolated, be sold to persons other than actual settlers.

Very respectfully,

(Signed) C. A. CULBERSON,
Attorney General.

Municipal Bonds.— The act of March 23, 1887, is not applicable to cities of more than ten thousand inhabitants incorporated under the general law. Under article 420 of the Revised Statutes cities of this class are authorized to issue bonds to the amount of six per cent of their taxable values; the application of this article is limited, however, by the right of taxation prescribed by article 426, Revised Statutes, as amended by the law of 1889.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, June 29, 1893.

Hon. John D McCall, Comptroller.

DEAR SIR—Your letter of May 5, regarding the registration of bonds by the city of Laredo, was duly received. A determination of the question submitted has required an exhaustive examination of all the laws which have been passed by the Legislature with reference to the incorporation of cities and towns, and a careful study of the constitutional provisions affecting taxation. This fact will explain delay in the reply.

You ask, substantially, whether cities of more than ten thousand inhabitants, incorporated under the general laws, may issue bonds in excess of an amount that a tax of twenty-five cents on the $100 valuation will pay interest on and create a necessary fund sufficient for their redemption at maturity.

The first general incorporation law passed in this State was approved January 27, 1858. (Chapter 61, General Laws 1858, page 69.) This law drew a distinction between villages and towns, and towns and cities. Its first section provided for the incorporation of a village of more than three hundred inhabitants into a town. Its 36th section provided for the incorporation of a village or town containing fifteen hundred inhabitants into a city.

The only provision with reference to taxation was the 18th section, which provided that the board of aldermen should have power to levy taxes, not to exceed fifty cents on the one hundred dollars. This law remained unamended until 1873, when by an act approved May 26, 1873 (chapter 65, General Laws 1873, page 98), section 1 was so changed as to provide that where a village or town may contain a population of two hundred souls, it might be incorporated as a town in the manner prescribed by the act.

On March 15, 1875, an act was passed "regulating the incorporation of cities of one thousand inhabitants or over," etc. This act was evidently intended to cover the entire subject of municipal corporations, containing 158 sections, and covering substantially every matter that could properly be the subject of municipal regulation.

It provided, however, no terms upon which a city or town not incorporated could be incorporated. The first section was to the effect, "that any city containing one thousand inhabitants or over may accept the provisions of this act." The 157th section was, that "the provisions of this act shall not apply to any city within the limits of this State until its acceptance by the city council of such city in accordance with the provisions of section 1 of this act." It had been the universal custom before 1858 for cities and towns to incorporate by special act of the Legislature. After the act of 1858, incorporation under the general law was permitted, but it appears that prior to the adoption of our present Constitution this was rarely done. Cities incorporated under that law and cities incorporated under special charters were permitted to adopt the law of 1875.

Section 81 of the act of 1875 provides "that the city council shall have power to annually levy and collect taxes, not exceeding 1 per cent; provided, that by consent of two-thirds of the voters of said city, the city council may levy and collect an additional tax, not exceeding 1 per cent."

The authority to issue bonds is regulated by section 76, to the following effect: The city council shall have power "to appropriate so much of the revenues of the city, emanating from whatever source, for the purpose of retiring and discharging the accrued indebtedness of the city, and for the purpose of improving the public markets and streets, erecting and conducting city hospitals, city halls, waterworks, and so forth, as they may from time to time deem expedient; and in furtherance of these objects they shall have power to borrow money upon the credit of the city and issue coupon bonds of the city therefor, in such sum or sums as they may deem expedient, to bear interest not exceeding 10 per cent per annum, payable semi-annually at such places as may be fixed by city ordinance; provided, that the aggregate amount of bonds issued by the city council shall at

no time exceed 6 per cent of the value of the property within said city subject to *ad valorem* tax."

Section 78 provided that said bonds should be signed by the mayor and countersigned by the secretary, payable at such places and at such times as may be fixed by ordinance of the city council, not less than ten nor more than fifty years.

"The act of 1875 was in force when our present Constitution took effect, and remained in force thereafter, except in so far as it was repugnant to the Constitution."

Gould v. City of Paris, 68 Texas, 517.

Section 4, article XI, of the Constitution prescribes: "Cities and towns having a population of ten thousand inhabitants or less may be chartered alone by general law. They may levy, assess and collect an annual tax to defray the current expenses of their local government, but such tax shall never exceed, for any one year, one-fourth of one per cent, and shall be collectible only in current money."

Section 5, article XI, of the Constitution is to the effect: "Cities having more than ten thousand inhabitants may have their charters granted or amended by special act of the Legislature, and may levy, assess and collect such taxes as may be authorized by law, but no tax for any purpose shall ever be lawful, for any one year, which shall exceed two and one-half per cent of the taxable property of such city, and no debt shall ever be created by any city, unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon and create a sinking fund of at least two per cent thereon."

Section 7 of this article makes provisions for the levy and collection of taxes in cities on the Gulf of Mexico, and it has the following general clause: "But no debt for any purpose shall ever be incurred in any manner by any city or county, unless provision is made at the time of creating the same for levying and collecting a sufficient tax to pay the interest thereon and provide at least two per cent as a sinking fund."

See Terrell v. Bank, 78 Texas, 452.

Section 9 of article VIII of the Constitution, as originally adopted, was as follows: "The State tax on property, exclusive of the tax necessary to pay the public debt, shall never exceed fifty cents on the one hundred dollars valuation, and no county, city or town shall levy more than one-half of said State tax, except for the payment of debts already incurred, and for the erection of public buildings, not to exceed fifty cents on the one hundred dollars in any one year, except as in this Constitution is otherwise provided."

The articles of the Constitution quoted must be taken and construed together, and the powers conferred on cities and towns may be thus summarized: Cities and towns of less than ten thousand inhabitants could have levied a tax not exceeding one-fourth of 1 per cent to defray current expenses. If a less sum than one-fourth of 1 per cent should have been sufficient to pay the current expenses, a tax of one-half of the State tax could have been levied, including the amount levied to defray current expenses.

Gould v. City of Paris, 68 Texas, 518.

For payment of debts incurred prior to the adoption of the Constitution, such tax as might have been necessary could have been levied.

Cities having more than ten thousand inhabitants could have levied such tax as might be authorized by law, not exceeding 2½ per cent.

Construing the sections of the Constitution quoted in connection with the law of 1875, which was still in force, the following conclusions may be reached as to the power and authority to issue bonds after the adoption of the present Constitution. The power of cities of less than ten thousand inhabitants being specifically set forth, and this power being limited by section 9 of article VIII of the Constitution to exclude all other power to tax, section 81 of the act of 1875, so far as it applied to cities and towns of less than ten thousand inhabitants, was repealed and the section of the Constitution above quoted took its place.

There was no necessary conflict between section 5, article XI of the Constitution and section 81 of the law, section 5 fixing the maximum of taxation and section 81 continuing to provide for the levy of "such taxes as may be authorized by law."

The power to issue bonds under section 76 was affected by the Constitution to this extent: First, no bonds could be issued without at the time of their issu-

ance provision being made for their payment; second, the bond issue was limited by the taxing power conferred.

Construing together section 76 of the law of 1875 and the articles of the Constitution quoted, these conclusions may be reached: Cities of less than ten thousand inhabitants had authority to issue bonds for the following purposes: (1) For the purpose of discharging and retiring the accrued indebtedness of the city. (2) For the erection of public buildings. Bonds for the last named purpose were limited to such an amount as a tax, not exceeding fifty cents on the one hundred dollars, would pay interest upon and create a sinking fund for of at least 2 per cent. The bonds for indebtedness previously accrued were not limited by any rate of taxation. Bonds for both these purposes must not aggregate more than 6 per cent of the value of the property subject to tax. As none of the purposes mentioned in section 76 could be the subject of bonded indebtedness, except the two just mentioned, this rule would exclude bonds for the purpose of improving the public markets and streets, conducting city hospitals, erecting and conducting water works, and whatever improvements may have been included under the very general expression "and so forth."

Cities of ten thousand inhabitants continued, after the adoption of the Constitution, to have the right to issue bonds for all purposes mentioned in section 76, and no limitation was imposed upon this right except that at the time bonds were issued provision must be made for their payment, and such provision could be made under the Constitution and laws as they then existed to the extent mentioned in section 81.

By the law of 1858, as amended in 1873, a distinction was made between towns and villages containing two hundred inhabitants or more and towns and cities containing a population of fifteen hundred or more. The act of 1875 distinguished between towns and villages of two hundred and less than one thousand inhabitants and cities with more than one thousand inhabitants. By the Constitution of 1876, cities having more than ten thousand inhabitants were distinguished from cities and towns having a population of ten thousand inhabitants or less.

In Waxahachie v Brown, 67 Texas, 527, it is said, speaking of article XI of the Constitution: "As to towns, there is no provision indicating any authority to create a debt, nor any to issue bonds, except possibly for the purpose of paying any indebtedness which had accrued up to the time the Constitution went into effect. (Constitution, article XI, section 6.) By section 5 the power of annual taxation in cities having over ten thousand inhabitants is limited to 2½ per cent of their taxable property, and the amount of indebtedness authorized to be incurred is correspondingly restrained by the declaration that no debt shall be created 'unless at the time provision is made to assess and collect annually a sufficient tax to pay the interest thereon and create a sinking fund of at least two per cent thereon.' The right of cities and towns having ten thousand inhabitants or less to issue bonds, being neither granted nor prohibited, was evidently left to the wisdom of the Legislature." In the same opinion, page 526, it is said: "Section 9 of article VIII of the Constitution, as amended, would seem merely intended as a limitation of the extent of taxation, and in itself not a self-executing grant of power."

The construction placed upon these constitutional provisions by the court in this case is not subject to criticism, but since, as suggested in Gould v. City of Paris, supra, the law of 1875 continued in force, except so far as its provisions were changed by the Constitution, the rights of cities and towns to issue bonds after the adoption of the Constitution is not affected by the decision.

The next legislation, regarding the incorporation of cities and towns and their authority under the law, was the adoption of the Revised Statutes of 1879. The first ten chapters of title 17 were practically a re-enactment or continuance of the law of 1875, with the constitutional provisions regarding cities and towns added, together with the very few changes and amendments which, so far as they appertain to the matter under discussion, will be mentioned. Chapter 11 of this title was taken from that part of the act of 1858, as amended in 1873, referring to towns and villages. Practically the only effect, so far as cities and towns were concerned, of the adoption of the Revised Statutes was to omit the provisions by which towns of more than one thousand inhabitants could incorporate in the first instance, and to change the authority of cities with reference to taxation. As suggested, the first ten chapters of this title are devoted to defining the powers and duties of cities containing one thousand inhabitants or

over. By article 426 the distinction made by the Constitution between cities having more than ten thousand inhabitants and cities having ten thousand or less, is recognized, and cities of the former class are given, in the language of the Constitution, "authority to levy, assess and collect such taxes as may be authorized by law, not to exceed 2½ per cent of the taxable property of such city." This is the only place in the statute where, in terms, cities of this class are distinguished from other cities having more than one thousand inhabitants. To the distinction clearly made by the Constitution, the Legislature, in the adoption of the Revised Statutes, paid little attention, it perhaps being thought that advantage would be taken of the authority given the Legislature to incorporate cities of more than ten thousand inhabitants under special charters. It was suggested in Muller v. City of Denison, 21 Southwestern Reporter, page 392, the "graver burdens and the more important functions of cities of the latter class demanded the difference in the extent of the powers conferred." As a matter of fact, the burdens and functions imposed by law upon cities of the two classes are exactly the same. However this may be, this case is authority for the proposition that section 426 put into effect the constitutional provision authorizing a tax of 2½ per cent in cities of more than ten thousand inhabitants.

To again define the authority of the cities of the different classes, the following authority as to taxation and indebtedness existed after the adoption of the Revised Statutes of 1879: Cities and towns of more than one thousand inhabitants, and not more than ten thousand inhabitants, had authority to levy and collect taxes, not exceeding one-fourth of one per cent. This was conferred by article 425, which is a copy of a portion of article I, section 4, of the Constitution; it impliedly repealed all former authority to levy taxes and did not confer upon city councils as much authority as would have been warranted under article VIII, section 9 of the Constitution. This article, as to cities of ten thousand inhabitants or less, operated as a repeal of section 81 of the law of 1875.

Article 420 of the Revised Statutes was a re-enactment of section 76 of the law of 1875, but inasmuch as sections 5 and 7 of article XI of the Constitution required provision to be made for the payment of interest and the creation of a sinking fund when bonds were issued, and inasmuch as it must be construed that article 425 was passed in response to the constitutional provision, which provided for a tax of one-fourth of one per cent for the current expenses of the city, and inasmuch as only some of the purposes mentioned in the article could be construed as current expenses, this article was practically ineffectual so far as cities of less than ten thousand inhabitants were concerned; or at all events the limit of 6 per cent of the taxable values prescribed by article 420 was further reduced by article 425, which defined, and by defining, limited the power of taxation. Unless it be held that article IX, section 8, of the Constitution, taken together with article XI, section 6, of the Constitution, were self-executing, no provision was made even for the issuance of bonds to pay indebtness that had accrued prior to the adoption of the Constitution, because at no other place is authority to levy a tax for this purpose given.

Cities of more than ten thousand inhabitants had, after the adoption of the Revised Statutes, authority, according to Muller v. City of Denison, supra, to levy and collect the maximum tax of 2½ per cent permitted by the Constitution, and they had authority to issue bonds, not exceeding in amount 6 per cent of the taxable values of the city, for the purpose of retiring and discharging the accrued indebtedness of the city, for the purpose of improving the public markets and streets, erecting and conducting city hospitals, city halls, water-works, and so forth.

The question that now arises is whether this authority has been abridged.

Section 9, article VIII, of the Constitution, was amended by a joint resolution, submitted April 7, 1883, and after amendment read as follows: "The State tax on property, exclusive of the tax neccessary to pay the public debt and of the taxes provided for the benefit of the public free schools, shall never exceed thirty-five cents on the one hundred dollars valuation, except for the payment of debts incurred prior to the adoption of this amendment, and for the erection of public buildings, streets, sewers, and other permanent improvements."

On March 31, 1885, an act was passed "to authorize cities and towns to levy and collect a tax for the erection, construction or purchase of public buildings, streets, sewers, and other permanent improvements." In this it is provided that any city or town council, or board of aldermen of any incorporated city or town within the limits of this State shall have power, by ordinance, to levy and collect

an annual ad valorem tax of not exceeding twenty-five cents on the one hundred dollars valuation of the taxable property within such city or town, for the erection, construction or purchase of public buildings, streets, sewers, and other permanent improvements, within the limits of such city or town. [General Laws 1885, chapter 107, page 99.]

This act was intended to affect cities of ten thousand inhabitants or less only. This conclusion is reached from the circumstance that it purports to be an affirmative grant of power, from the circumstance that it has no repealing clause, that cities of more than ten thousand inhabitants had, prior to this time, the rights which are here conferred. This conclusion is further reinforced by the recitations in section 2 of the act, to the following effect: "Whereas, many cities and towns of this State are without the necessary funds to defray the expense of erecting public buildings and other needed permanent improvements for the reason that no law has been enacted to conform the tax law of such cities and town to the amended Constitution, etc." The law was evidently passed in conformity with the constitutional amendment of 1883. This amendment did not affect the taxing power of cities of more than ten thousand inhabitants. Cities of this class, incorporated under the general laws were not "without the necessary funds to defray the expense of erecting public buildings and other needed permanent improvements for the reason that they were not authorized to levy the requisite tax;" on the contrary, they had the authority to levy the requisite tax. After the passage of this law, cities of more than ten thousand inhabitants continued with authority to levy a tax of 2½ per cent and to issue bonds to the amount of 6 per cent of the taxable values.

The case of Muller v. City of Denison is authority for the proposition that the act of March 23, 1887, which will hereafter be discussed, does not operate as a repeal of article 426. If this be true, then there can be no doubt of the correctness of the proposition just made.

We are brought to the act of March 23, 1887, and to the construction of its effect upon the authority of cities to levy taxes and issue bonds. This was entitled "An act to authorize cities and towns to levy and collect taxes for the construction or purchase of public buildings, water works, sewers, improvements of streets, and other permanent improvements, and to issue bonds therefor, and to repeal all laws in conflict herewith." It provides for the levy and collection of a tax sufficient to meet the interest and sinking fund on all indebtedness incurred prior to the adoption of the constitutional amendment of 1883; for the levy and collection of a tax of twenty-five cents for current expenses; for the levy and collection of an additional tax of twenty-five cents for the construction or the purchase of public buildings, water works, sewers, streets, or other permanent improvements within the limits of such city or town; and it provides that for such improvements such city shall have the power to issue coupon bonds of the city therefor, but it is provided that the "aggregate amount of bonds issued for the purpose named shall never reach an amount where the tax of one-fourth of one per cent will not pay current interest and provide a sinking fund sufficient to pay the principal at maturity, and the amount of bonds legally issued under acts passed prior to the adoption of the present Constitution shall not be computed in estimating the amount of bonds which may be issued for the above named city improvements." Section 2 repeals all laws in conflict with the act. Section 3 (the emergency clause) recites that there is some doubt as to the existing power of cities and towns to levy and collect taxes for the purpose of improving such cities and towns, and further, that there are many cities and towns without the necessary means to make the needed permanent improvements, and that it is important that definite power should be given to conform the tax law of such cities and towns to the amended Constitution.

It is apparent that this act supersedes the act of 1885, heretofore mentioned, which had superseded article 425 of the Revised Statutes, and, as stated, the case of Muller v. City of Denison is authority for the proposition that article 426 was not amended by the act under consideration.

It is suggested in this opinion, that the "scheme of municipal taxation, as devised by the framers of our Constitution, proceeds upon different plans according as it refers to cities and towns with a population of less than ten thousand inhabitants, and to cities with a population of more than ten thousand inhabitants," and this is shown by the argument of the court.

The question that now arises is whether the provisions placed in this law, permitting a tax of twenty-five cents, which the Constitution authorizes in cities of

ten thousand inhabitants or less, for public improvements, to be taken as the basis for a bond issue, operates as a limitation or repeal of the law which permitted cities of more than ten thousand inhabitants to issue bonds to an amount not exceeding 6 per cent of its taxable value. Section 2 of the law repeals all laws in conflict with this act. This would perhaps result without such a repealing clause. One law without a repealing clause supersedes a prior one to the extent of a conflict. The question then arises as to whether or not a conflict exists. Under the decisions cited, this permit of an additional tax does not in any manner conflict with the tax which cities of ten thousand inhabitants or more were already permitted to levy. Why, then, should it be held that this bond issue, based upon this tax, dependent upon it, comes in conflict with the authority given cities of more than ten thousand inhabitants to issue bonds dependent and based upon an entirely different and independent levy? How, indeed, leaving these views out of consideration, can it be said that the giving here of this authority to issue bonds providing for the improvements here mentioned, comes in conflict with authority previously given to issue bonds for some of the purposes here named and for other purposes? Could it not be as easily held a cumulative right, a cumulative authority? Glancing over the laws which have been mentioned, it will appear that from the adoption of the present Constitution up to the present time, every legislative act has been an extension of the authority of cities and towns with reference to taxation and the right to incur indebtedness. A review of the same laws indicates that every extension has been directed to cities and towns of less than ten thousand inhabitants, and that up to the law of 1889, which will hereafter be reviewed, no amendment affecting cities of more than ten thousand inhabitants was made to the law, unless by inference or implication.

Article 426, as originally adopted, gave authority to levy a tax of twenty-five cents on the one hundred dollars in cities and towns of less than ten thousand inhabitants. When the Constitution was amended in 1883, this authority to tax was extended to conform to its provisions. This authority was again extended in 1887, and there was attached to the power of taxation thus extended the right to issue bonds. Article 426 and the constitutional provision upon which it was based, article V, section 11 of the Constitution, were independent primarily of section 8, article IX, of the Constitution, and the changes to that article and the legislation which has resulted from such changes have not affected them. Why should it be assumed that legislation evidently intended to enlarge the powers of one class of cities resulted by implication in the abridgement of the authority of the cities of another class? The plain intimation of the court in Muller v. City of Denison, and the case of Texas Water and Gas Company v. Cleburne (21 Southwestern Reporter, 391, 393), is to the effect that the legislation mentioned has affected cities of ten thousand inhabitants or less only, and has in no degree abridged the powers or lessened the duties of cities of more than ten thousand inhabitants.

At no point in the history of legislation is article 420 of the Revised Statutes in terms repealed. By chapter 3, General Laws Twenty-first Legislature, 1889, page 2, article 421, which is immediately connected with and dependent upon article 420, is amended. By chapter 4, General laws 1889, page 3, article 426 is amended to read as follows: "Cities having more than ten thousand inhabitants may levy, assess and collect taxes not exceeding one and one-half per cent on the assessed value of real and personal estate and property in the city, not exempt from taxation by the Constitution and laws of this State, and assessments, levy and collection of taxes made by such cities for the year 1889 are hereby made valid to the amount aforesaid, and such cities are hereby authorized to levy, assess and collect a further tax of twenty-five cents on the one hundred dollars worth of property for the purpose of paying the debts of such city, lawfully contracted prior to the first day of January, 1889, not to include any bonded debt. Any funding warrants that may be issued for any such debt by any such city shall not be included in the limit of 6 per cent prescribed by article 420; provided, that this act shall not apply to or in any manner affect any city organized under a special charter, and shall not be construed to validate any debt contracted by any city without authority of law existing at the time the same was contracted." Attention is called to the following language, which appears in that act: "Any funding warrants that may be issued for such debt by any such city shall not be included in the limit of 6 per cent prescribed by article 420." It is not necessary to discuss to what extent a legislative construction shall be

considered when a judicial construction is attempted, but certainly this is as clear a statement as could have been made of the legislative opinion of the laws which have been passed after the adoption in the Revised Statutes of article 420. It not only indicated an opinion that article 420 has not been repealed, but it clearly shows that in the judgment of the Legislature the 6 per cent prescribed by the article was then the limit of the authority of cities of more than ten thousand inhabitants to issue bonds.

It would be well to consider, even if the legislative construction were incorrect, if this act, by specifically naming the per cent which should be the limit of taxation, did not prescribe the rule which must govern.

An opinion heretofore rendered in this department, under date of December 8, 1888, was based upon the proposition that cities of more than ten thousand inhabitants could levy only such taxes as are provided for in the act of March 3, 1887. This view of the law is not in accord with Muller v. City of Denison and Gas Company v. Cleburne, supra, in which writs of error have not been applied for, and the law as enunciated in those cases must be accepted as the latest competent judicial expression upon the subject. Without regard to these cases, the act of April 8, 1889, clearly prescribing the limit of taxation of cities of more than ten thousand inhabitants—the opinion referred to—if originally sound, would now be inapplicable.

The conclusion reached is that cities having more than ten thousand inhabitants are limited in their issuance of bonds by article 420 of the Revised Statutes and by article 426 thereof, as amended by the law of 1889, and that the limitation prescribed by the act of 1887 has no application. The general principles to be applied are alone given, and no effort is made to determine whether or not the bonds of the city of Laredo mentioned in your letter are legally issued and should be registered by your department.

Very respectfully,

(Signed) R. L. BATTS,
Office Assistant Attorney General.

City authorities have no power to contract a debt against a county without the consent and authority of the county commissioners court, duly passed in open session. Although not legally liable, it would be competent for the commissioners court to appropriate a part of a county's funds for the payment of any part of an expense incurred by a city if such expense is for a purpose for which said court might have contracted an obligation in the first instance.—The refusal of the commissioners court to pay a claim is not in the nature of a final judgment which settles the question, but it may be opened and again repeatedly passed on by the court from time to time.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, June 29, 1893.

Hon. W. B. Hopkins, County Judge, Corpus Christi, Texas.

DEAR SIR—Your favor of June 4 has been duly considered. You state substantially, that during the years 1890—91 an epidemic of smallpox prevailed in the town of Corpus Christi, in the county of Nueces; that the city authorities took charge of affairs and spent about $3500 for the benefit and protection of the public health during said epidemic; that the commissioners court of Nueces county as such never agreed with the city or undertook to bear any portion of the expense incurred by said city, though said court was in session several times during the prevalence of said epidemic; that at a meeting of said court subsequent to the incurring of said expense by said city a bill was presented by said city to said court for one-half the amount incurred by the city, and that at the time the bill was presented the said court was composed of the same persons that were members thereof during the prevalence of the epidemic, and that by unanimous vote of the court the account or bill was rejected; that at the May term, 1893, of said court said bill was again presented to said court and again refused.

From your letter I deduce three propositions:

First. Is the county legally liable for any part of the expenses incurred by the city, and can the same be collected from the county by law?

Second. If not legally liable would it be competent for the Commissioners Court to appropriate any part of the county funds to the payment of any part of the expenses incurred by the city?

Third. Whether or not the action of the Commissioners Court in refusing to pay the claim was in the nature of a final judgment which settles the question or may it be opened and again repeatedly passed upon by the court from time to time?

It seems that the first proposition must be answered in the negative. The city authorities had no power to contract a debt against the county without the consent and authority of its Commissioners Court duly passed in an open session of that body. The said court never having agreed and undertaken to pay any part of said expense, collection thereof cannot be enforced by the city through the courts.

Fears v. Nacogdoches county, 71 Texas, 337.

In a former letter from this department, written before the claim was passed upon by the court in the first instance, it was said in effect that as the county had authority to take proper action and make proper expenditure for the protection of the public health and co-operate with the city to accomplish this purpose it would be competent for the Commissioners Court to bear a *pro rata* part of the expense incurred by the city if said court saw proper to assume the obligation, even after the expenditure was made, it being a purpose for which said court might have contracted obligations if it had been shown to be necessary for the public health. No good reason now appears why this conclusion should be changed.

Rev. Stats., 1520a, 4098, 4098a, Laws 1891, p. 191, sec. 15.

It appears, however, that the account of the city was presented to the Commissioners Court and was by that body unanimously rejected.

The question then presented is: Is it competent for the said court to again consider the question, or must it be considered as settled by the action of said court at its former term? It is not believed that the action of said court was in the nature of a final judgment which renders the matter *res adjudicata*, but rather that the action was of the same nature that would have been in the refusal to pay any other claim against the county, or in refusing to do any other act which it was competent for that court to do. While the auditing or refusal to audit a claim may be considered *quasi* judicial, yet it is not believed that the refusal is a final judgment, as that term is judicially understood, and it would be competent for the Commissioners Court to again consider the question at any subsequent term.

In reply to your last question, as to whether this claim could be passed and allowed by three commissioners, two of whom favor it, you are referred to article 1510, Revised Statutes, which provides that the four commissioners, together with the county judge, shall compose the Commissioners' Court, and the county judge, when present, shall be the presiding officer of said court. Under the law the county judge, as a member of said court, has the same power and authority as any other member thereof, and may vote upon all questions before the body for consideration, and in the case above stated it would be competent for the county judge to cast his vote upon the proposition, and thus create a tie and defeat the allowance of the claim. It is believed, therefore, that as the Commissioners' Court would have had the authority to have made such an expenditure as was made by the city, that said court would have the authority to assume an expenditure made by the city for this purpose, if in the exercise of a sound discretion it saw proper so to do, and this notwithstanding the court may have formerly refused to allow any part of the claim.

Very respectfully,

(Signed) FRANK ANDREWS,
Office Assistant Attorney General.

Residence on School Land.—A purchaser of school land under the act of 1887; who prior to the expiration of the three years' occupancy required, has been elected county clerk of his county, and removes temporarily from his section, intending to return to it upon the conclusion of his term of office, in the meantime improving it and claiming it as his permanent home, has complied with all the requirements of law and is entitled to a patent.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, June 30, 1893.

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

DEAR SIR—You submit the following statement: Purchaser of school land under act of 1887, prior to expiration of three years of occupancy required, having been elected county clerk of his county, removed temporarily from his section, intending to return to it upon the conclusion of his term of office, in the mean time improving it and claiming it as his permanent home. You request an opinion as to whether, other requirements of the law having been compiled with, he is entitled to patent.

Section 5 of the act of 1887 provides for sale "to actual settlers only." Section 9 makes it the duty of the Commissioner to prescribe regulations whereby purchasers shall be required "to reside upon as a home" the land. The section also makes "proof of such residence and occupancy" necessary. It also prescribes an affidavit to the effect that applicant "desires to purchase the land for a home." At the time of the sale the purchaser was "an actual settler." To the date of his election as county clerk he "occupied" the land and "resided upon" it "as a home."

It is provided by statute that certain county officers shall keep their offices at the county seat. When the purchaser of State lands was elected to the county clerkship, it became necessary for him, under the statute, to remove to the county seat and there remain during his incumbency.

Did he by responding to the wishes of his fellows, the terms of the statute, and the requirements of his official position, abandon his "occupancy" and his "residence upon the land as his home," though he still regarded the land as his home, continued to improve, and intended to return to it upon the termination of his official career?

The word "occupancy" as used in the statute cannot have a broader meaning than "actual possession," and the facts considered do not preclude the only possession that may be had of real estate. In Foreman v. Meroney, 62 Texas, 727, it was said that the words "use or occupancy as a homestead" did not require a person to "actually remain upon the land." The phraseology of the clause "residence upon the land as a home" naturally suggests analogy to our homestead laws.

So far as these laws are concerned, there is no question that under the facts stated abandonment of the homestead has not resulted, and that as against creditors of the purchaser the land claim, notwithstanding his temporary removal, would be exempt from execution.

By the word "residence" is usually meant the place of permanent abode, as distinguished from the place where caprice of pleasure or the demands of business may require a temporary abode. When it is used in connection with the phrase "as a home" it becomes clear that this was the significance intended to here attach.

It was said in Foreman v. Meroney, *supra:* "The homestead is not to be likened to prison bounds, within which the family must always remain, but to a sanctuary to which they may always return." If a distinction may be made between "homestead" and "home," it must be held that the former is more technical and limited. Character as a home will not be taken away from a place because its former owner may find it necessary in the struggle for existence to temporarily reside elsewhere. To save it may be the very purpose of his absence. It will not be lost to him because a temporary location at some other point may offer better rewards for his industry. His object may be to beautify and adorn it. The enticements of pleasure may carry him for long years to other climes, but the home of his thoughts may remain his home in law and in fact. When the suffrage of his fellows gives him honors and imposes upon him duties, the absence which the law requires in their discharge will not deprive

him of that for which he has labored, that which the law has encouraged him to acquire, and love of which is characteristic of highest and best citizenship.

If, however, the word "home" is not in the statute used in its broadest and most comprehensive sense, still it ought not to be held to have so limited an application as to impose upon the purchaser conditions little less restricted than those assessed as punishment for crime. He is not absolutely bound to the little piece of earth that the State has sold him. It must be his headquarters, his base of operations. It must be the place to which, when the ventures of trade bring reward or ruin, he may return to enjoy the fruits of good fortune or recuperate from the effects of folly or mischance. Its character as a home is not limited by restrictions more onerous.

When a home has been once acquired, it will not be considered as abandoned because the owner does not uninterruptedly remain within its limits. If he continues to regard it as a home, and the absence is coupled with an intention to return, its character as a home will not be destroyed.

The following quotation further defines the word "residence," and indicates the rule that ought in this case to be invoked: "The place of a man's legal residence is that of his permanent establishment and true home, to which, as such, when he is absent, he intends to return. This legal residence does not preclude an actual temporary residence at another place; nor is it suspended or interrupted by such temporary residence. The temporary residence and the legal residence may, and often do, run along contemporaneously through an extended period of time, the former in no way affecting the validity or continuity of the latter."

Paine on Elections, p. 32.

The statement submitted is to the effect that the purchaser claims the land as his home, and that it is his intention to return to it at the expiration of his term of office. I can not understand why a different rule should apply to a county officer in Texas and to a representative of Texas in Congress. With reference to the latter this rule is announced: "The senator or representative of the United States has a legal residence in his own State. There is the principal and fixed residence and true home, to which, when absent, he intends to return. He has a temporary residence at the seat of Government, but that is not his legal residence. He may actually reside with his entire family in his own house at Washington during a large part of each year, but his residence in Washington is not his legal residence."

Paine on Elections, p. 32.

In our own State it is a recognized principle that officers of the State and employes of the Government may stay at Austin as long as they choose to, or are permitted to remain, without losing their citizenship or residence in the counties from which they came to serve the State.

It appears upon authority and reason that neither residence nor the existence of a home is dependent upon an actual, uninterrupted, continued presence upon the real estate, and while the principles heretofore suggested by the quotations are possibly too broad for application in the interpretation of the statute under consideration, yet certainly, where the owner continues to look upon the land as his home, where there exists in his bosom an intention to return to it upon the expiration of his temporary employment, where he acquires no other home, where he continues to improve the land purchased from the State, where he occupies and uses it to the exclusion of all other persons, there could be little danger in holding that every claim of the law has been fulfilled, every benefit acquired, every purpose subserved.

To decide differently would be to hold that the State required of her customer to disregard his interests and hers; that to secure honors from his fellows is to incur penalties from the State; that all other officers may discharge their official functions without affecting their private rights, while the purchaser of State land must surrender his office or give up his land, would be to hold that a new qualification has been made to the right to hold office, would be to hold that the patriot who, in the shade, develops the country with his tongue, is preferred to the pioneer who, with his plow, turns the virgin soil, and adds to the material prosperity of the State.

The conclusion is reached that such a construction ought not to be given to law, but that under the facts detailed in your letter, all other requirements of the law having been complied with, a patent could properly issue.

It must be obvious that a lax application of the principles here announced

would open up opportunities for fraud not heretofore equaled, even in the administration of our land laws. To avoid this these facts must be kept in view: To entitle a person to patent land purchased under the act of 1887 "occupancy" of the land and "residence as a home" upon it for a period of three consecutive years are required. If the purchaser remove, it must be shown that he continues in a legal contemplation to occupy the land, and that it remains in legal contemplation his residence as a home. To this end it must be shown that he retains an actual control over it; that his removal is temporary; that he intends to return to it; that he regards it as his home; and that he has acquired no other home.

Very respectfully,

(Signed) R. L. BATTS,
Office Assistant Attorney General.

Insurance companies—Taxation.—Life insurance companies and life and accident insurance companies are subject to an annual State tax of one and one-fourth per cent on the gross amount of premiums received in this State during the preceding year. Fire, marine, health, live stock, guarantee, and accident insurance companies are subject to an annual tax of one half of one per cent on the gross amount of premiums received in the State during the preceding year.—All such companies are subject to State, county, and municipal ad valorem taxes upon their real and personal property within the State.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, July 10, 1893.

Hon. John E. Hollingsworth, Commissioner Insurance, etc.

DEAR SIR—By your letter of to-day you inquire "What county and State taxes insurance companies are required to pay." It is presumed your inquiry has reference to the act approved May 11, 1893, which goes into effect August 9, 1893, and you are advised that under said law insurance companies are subject to the following taxes only:

(1) Life insurance companies and life and accident insurance companies, an annual State tax of one and one-fourth of one per cent on the gross amount of premiums received in this State during the present year.

(2) Fire, marine, health, live stock, guarantee, and accident insurance companies an annual State tax of one-half of one per cent on the gross amount of premiums received in this State during the preceding year.

(3) State, county, and municipal *ad valorem* taxes upon the real and personal property of all of such companies within the State.

Sec. 1, chapter 102, Laws 1893, page 156.

This law expressly provides that "no occupation tax shall be levied on insurance companies by any county, city, or town," and this is not believed to be in conflict with the Constitution. The only constitutional provision which bears upon the question is section 1 of article VIII. This is not a grant of power to counties and municipalities to levy occupation taxes not to exceed one-half of that levied by the State, which would be beyond legislative control or interference, but is a limitation upon their right to levy occupation taxes under express legislative grants and where the State has levied such taxes. To put the proposition differently, counties and municipalities, if expressly authorized by general law or their charters, may levy occupation taxes not exceeding one-half of that which may have been levied by the State. If so authorized and the State has not levied an occupation tax upon such person or corporation this limit does not apply. But in either case, the Constitution not granting affirmative power to levy such taxes to counties and municipalities, the Legislature may lawfully prohibit the exercise of such authority as it has done in this instance.

See Hirshfield v. Dallas, 29 Ct. Apps., 242.

Very respectfully,

(Signed) C. A. CULBERSON,
Attorney General.

Confederate Land Certificates.— Where Confederate land certificates are located for the owners of said certificates and patented, and an equal number of acres is located for the school fund, but the lands located for the individual and the State are not contiguous, the land thus set apart by reason of the location of said certificates for the school fund are not subject to location by a veteran certificate until the patents to the individuals are cancelled.

ATTORNEY GENERAL'S OFFICE.
AUSTIN, July 22, 1893.

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

DEAR SIR—Your letter of the 18th instant is received. From this letter it appears that a Confederate land certificate for 1280 acres of land was located for the owner of the certificate and 1280 acres for the school fund, but the location for the individual and the State were not contiguous. The land surveyed for the individual under the certificate has been patented, and you inquire whether the land set apart by reason of location of said certificate for the school fund is subject to location by a veteran certificate.

On the 19th of May last I wrote you that in such case the land patented to the individual would be "titled" within the meaning of section 2, article XIV of the Constitution, and therefore not subject to location. Inasmuch as by the location and patent of the land to the individual 1280 acres of land were surveyed and set apart for the school fund, thereby segregating it from the public domain, I am of the opinion that it is also not subject to location until the patent to the individual is cancelled.

Gunter v. Meade, 14 S. W. Rep., 563;
Adams v. R. R. Co., 70 Texas, 268;
Land and Mortgage Co. v. State, 1 Civ. Apps., 616.

Very respectfully,

(Signed) C. A. CULBERSON,
Attorney General.

Railroad, General Office.— The land department of a railroad company is not a general office under the terms of the act of March 7, 1889.

ATTORNEY GENERAL'S OFFICE.
AUSTIN, August 2, 1893.

Hon. J. C. Hutcheson, Houston, Texas.

DEAR SIR—The complaint of the citizens of Houston, submitted by you, that the Houston and Texas Central Rail*road* Company has violated the laws of the State in removing its land department from that city to the city of San Antonio, has been carefully considered. The material facts appear to be that this company is practically the successor of the Houston and Texas Central Rail*way* Company, and now operates the road formerly owned by the latter company; that by its charter its principal office is fixed at the city of Houston, and that recently what is termed the "land department" of the company, consisting of its land commissioner and clerks, and all books, documents, and records pertaining thereto, have been removed to San Antonio, and all the business of that department is now being transacted there. Since the complaint was made it is understood the books, documents, and records which pertain to their right of way, town lots, and depot and switching facilities, the use of which enters into the operation of the road, have been returned to Houston and placed in charge of a competent official, leaving at San Antonio only such records as affect the lands claimed to have been granted the original company by the State. It is insisted by the Land Commissioner that the present company is not the owner and does not control any of the lands donated by the State, and consequently has no "land department" in charge of such lands, but that the lands are owned and controlled by a private individual. For several reasons the contention cannot be sustained, but in the view taken of the case it is unnecessary to enter into a discussion of this matter. Assuming that these lands are owned and controlled by the company now operating the road, the question presented is whether our laws require railway companies to keep and maintain their land de-

partment, to which are given the sale, lease and general custody of lands donated by the State, and not used or available in the operation of their roads, at the place where the general offices are located.

The Constitution (article X, section 3) requires railway companies to keep a public office in this State. The first Legislature which convened after the adoption of the Constitution required them to maintain a public office on the line of their road in this State (Laws 1876, page 144), and this requirement was retained (Revised Statutes, article 4115) in the Revision of 1879. There was no other legislation on this subject until the passage of the act of March 28, 1885 (General Laws 1885, p. 67), in which it was provided that railway companies should have and maintain a public office in the locality where their principal business is carried on in this State, on the line of their roads, for the transaction of their business, "where transfers of stock shall be made, where the auditor, treasurer, general traffic manager, and general superintendent of such roads, or where an agent of such corporation, duly authorized to adjust and settle all claims against such corporation for damages, shall have their respective offices, and where shall be kept for the inspection of the stockholders," and such officers or agents of the State as may be authorized to inspect them, the books of the companies showing the capital stock, ownership thereof, amount paid, transfers of stock, amounts of assets and liabilities and the names and places of residence of their officers.

The only other legislation applicable to the subject is the act approved March 27, 1889. By the first section of this act it is provided, among other things, that every railroad company chartered by this State or owning or operating any line of railway within this State shall keep and maintain permanently its general offices within this State at the place named in its charter for the location of its general offices. So much of section 2 as is pertinent to this inquiry is as follows: "It shall be the duty of said railroad company to keep and maintain at the place within this State where its general offices are located, the office of the president or vice president, also the offices of its secretary, treasurer, local treasurer, auditor, general freight agent, traffic manager, general manager, general superintendent, general passenger and ticket agent, chief engineer, superintendent of motive power and machinery, master mechanic, master of transportation, train master, stock and fuel agent, claim agent, and each and every one of its general offices shall be kept and maintained, by whatever name it is known, and the persons who perform the duties of said general offices, by whatever name known, shall keep and maintain their offices at the place where the general offices of said railroad are required by law to be kept and maintained; and if the duties of any of the above named offices are performed by any person, but his position is called by a different name, it is hereby made the duty of said railroad company to have and maintain said offices at the place where its general Texas offices are kept and maintained as required by this act, * * * the object and meaning of this statute being to require every railroad company owning or operating a line of railway within this State, to keep and maintain its general offices within this State at such places as required herein, and the name of the above as general offices shall not be understood to allow the railroad company to have any of the offices usually known as general offices at any other place than the one it is required to keep its general offices at, and each and every railroad is hereby required to have and maintain its general offices at the place named herein."

From this statement it is apparent that if the land department of this company is one of its general offices within the meaning of these statutes, it must be kept and maintained permanently at Houston. This is the sole question to be determined. If the act of 1885, in its application to this subject, may not be considered as superseded by the act of 1889, it is manifest that the land department is not included in the offices there named, for the commissioner is neither auditor, treasurer, general traffic manager, nor general superintendent, nor does he perform any of the duties usually discharged by such officers, nor is he an agent of the company authorized to settle and adjust claims against it for damages, nor the custodian of the books required to be kept by the act. It is equally plain that it is not included in the act of 1889 *eo nomine*, and whether it is embraced in certain general provisions of the act is the difficult question presented. The first section of the act requires, without naming them, that the "general offices" of the company shall be kept and maintained at the place where its "general offices are located, the office of the president or vice president," etc., and by this the Legislature seems to have intended to enumerate the general officers who

shall reside and keep their offices at that place, adding the general clause that "each and every one of its general offices shall be so kept and maintained. by whatever name it is known. and the persons who perform the duties of said general offices, by whatever name known, shall keep and maintain their offices at the place where said general offices are required to be located and maintained, and the persons holding said general offices of a railroad shall reside at the place and keep and maintain their offices at the place where the general offices of said railroad are required by law to be kept and maintained; and if the duties of any of the above named offices are performed by any person, but his position is called by a different name. it is hereby made the duty of said railroad company to have and maintain said offices at the place where its general Texas offices are kept and maintained as required by this act." and that "the name of the above as general offices shall not be understood to allow the railroad company to have any of the offices usually known as general offices at any other place." The first of these general provisions refers in terms to the preceding enumeration of officers. and consequently is not more comprehensive; and. regarding the purpose of the act, the use of the words "usually known as general offices" in the second section was not intended to do more than supply the possible omission of offices connected with the operation of the road as a railway and of a kindred nature to those previously named. The purpose of the act is to deal only with officers of the company whose duties pertain to its business as a common carrier of freight and passengers.

This construction accords with the history and policy of this legislation. Prior to the act of 1885 many of the railways of the State were controlled by an illegal combination. and such of their general offices as are named in said act were kept and maintined in other States. All business in charge of the general superintendents, general managers. treasurers. auditors. freight and passenger agents. and claim agents were transacted there. All complaints of passengers and shippers were required to wait upon the tedious and unsatisfactory process of adjustment under such a system. Unquestionably the Constitution required the maintenance of a public office in the State. but legislation was necessary to enumerate the several offices and provide adequate penalties. and consequently this act was passed. The policy of this and subsequent legislation rests largely in the convenience of the people. and is indicative of its purpose. The officials of the companies charged with their management, brought together on their lines. can more rapidly and satisfactorily discharge their duties: obviously more people living on the line of roads have business with the companies as common carriers than elsewhere. and public interests are subserved by the concentration and maintaining of such offices on the line of road. These considerations. however. do not affect the land department. for it can neither be said that the commissioner can conduct the business more advantageously at some point on the road. nor that purchasers and lessees will be more numerous along the line of railway.

The history of the act of 1889 is particularly significant of its bearing upon this question. The Texas and Pacific Railway Company contracted to locate and maintain permanently its general offices. roundhouses and machine shops at Marshall, and did locate them there. About 1884 the land department of that company, which had been maintained at Marshall. was removed to Dallas; and afterwards the company removed its general offices to Dallas. It is well known that the law of 1889. the authors of which represented Marshall in the legislature. was intended to have particular application to that case. yet while it was understood that the land department had been removed, and while the representatives of that city exercised the precaution to enumerate all general offices connected with the operation of the road whose designation was known. and by general provision to guard against changes of destination and every character of evasion, this department was not named. In view of these facts and the apparent ambiguity of the law, this ommission must be given controlling weight.

Contrary to my first impression. I am of the opinion that the land department of this company, as now conducted at San Antonio, is not one of the general offices within the meaning of the statutes.

Very truly yours,

(Signed) C. A. CULBERSON,
Attorney General.

Local Option Election.—Justice Precinct.—After prohibition has been defeated in a justice precinct, an election cannot be immediately ordered for a smaller subdivision in said justice precinct.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, August 5, 1893.

Hon. John H. Rice, County Judge, Corsicana, Texas.

DEAR SIR—Your favor of August 4 is received. You inquire whether or not, "under the act of the Twenty-third Legislature, page 50, after prohibition has been defeated in a justice precinct, an election may be immediately ordered for a smaller subdivision in said justice precinct, say in one of the election precincts or a school district."

Article 3236 of the amended law provides that no election under the preceding articles (that is those articles providing for election for local option purposes, whether the election resulted in favor of prohibition or not) shall be held within the same prescribed limits in less than two years after an election under this title has been held therein. It is believed that this provision precludes an election for any subdivision of the territory for which the former election was held, unless it comes within the exemptions of article 3238, and that the law does not intend to say that no election for the identical limits prescribed in the first application, shall be held, but that no election shall be held within a part of the territory which was within the limits prescribed for the territory in which the election was formerly held; that is to say, if the election be for an entire county, no subdivision within such county could legally vote upon the proposition again for two years. There are, however, certain exemptions, and the question submitted by you must be determined by those exemptions.

Article 3238, Sayles' Civil Statutes, provides that the failure to carry prohibition in a county shall not prevent an election for the same from being immediately thereafter held in a justice precinct, town or city of said county; nor shall the failure to carry prohibition in a town or city prevent an election from being immediately thereafter held for the entire justice precinct or county in which said town or city is situated; nor shall the holding of an election in a justice's precinct in any way prevent the holding of an election immediately thereafter for the entire county in which the justice precinct is situated.

The fact that the Legislature undertook to enumerate the different circumstances under which an election might immediately be held, after the proposition had once been voted upon and defeated, excludes the idea that it intended that under any other circumstances an election might be immediately held. It is provided that the failure to carry prohibition in any town or city shall not prevent an election from being immediately thereafter held for the justice precinct, but it is not provided that where prohibition fails to carry in a justice precinct, a subdivision of the precinct may vote upon the proposition before the expiration of the two years; and it is therefore believed that where an election has been held for an entire justice precinct, no subdivision of such precinct within the prescribed limits may vote upon the proposition for such subdivision until the expiration of two years.

Very respectfully.

(Signed) FRANK ANDREWS,
Office Assistant Attorney General.

Commissions of District Attorneys.—General Laws, 1893, chapter 98, Judiciary Department, page 156, appropriating thirty thousand dollars for the payment of District and County Attorneys' commissions on forfeitures, was not intended to cover that class of cases where forfeitures were obtained, but the judgments were not effectual for want of proper parties.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, August 29, 1893.

Hon. John D. McCall, Comptroller.

DEAR SIR—You favor of August 10th, with its accompanying enclosures, has been duly considered.

The question, substantially, is whether or not you should audit the accounts of district attorneys who have obtained judgments for lands sold under the act of July 8, 1879, as amended by the act of April 6, 1881, against the original purchasers of such lands, transfers from said original purchasers to other persons being on file in proper form in the General Land Office prior to the institution of the suit.

As you have heretofore been advised upon this proposition, it is believed that the law authorizing the payment of these fees contemplated a valid judgment in favor of the State, which concluded the interest of all parties adverse to the State in the land, The act of April 16, 1881, amends the caption and sections 1, 2, 3, 4, 5, 6, 7, and 8 of the act of July 8, 1879, and does not amend the sections of said last act relative to forfeiture and transfer of the lands.

Section 15 of the act of 1879 provides that if any purchaser desires to sell said land after he has made his first payment on the same, he may do so; but in that event his vendee shall file in the General Land Office a properly authenticated transfer from said purchaser, and said vendee shall be liable to the obligations and penalties imposed upon said original purchaser. It may be that the declaration in this section that the vendee shall be liable to the obligations and penalties imposed upon said original purchaser is tantamount to a declaration that when the obligations and liabilities are so assumed by the subsequent vendee, the original purchaser shall be released from all further liability. If the original purchaser had sold the land and the transfer, properly authenticated, was filed in the General Land Office, and he thereby became released from further liability, and parted with his interest in the land, he would neither be a necessary nor a proper party to the suit. But, however this may be, the subsequent vendee of the original purchaser who held the transfer from the original purchaser would not only be a proper but a necessary party to the suit to obtain a valid judgment for the property sued for, and without such vendee being made a party to the suit, his interest would not be concluded, because the lien of the State on the land is not expressly reserved, but arises by implication only. Foster v. Powers, 64 Texas, 247. If it be said that the doctrine of purchase money liens is not applicable to the question, and it be conceded for the sake of argument, the same result follows, for in that case the title passes to the subsequent vendee by force of the statute and transfer, and before it can be divested he must be made a party to the suit.

The general rule, as stated in Black on Judgments, section 600, is: "It is a universal rule that all who are neither parties to a judgment nor privies to such parties, are wholly free from the estoppel of the judgment. This rule is firmly imbedded in our own law as is attested by a multitude of decided cases. * * * It contravenes the first principles of justice to hold a man bound by a judgment against which he has neither an opportunity to defend or notice in any way that he was to be directly involved in its consequences."

This rule is more clearly stated perhaps in Freeman on Judgments, section 162: "No grantee can be bound by any judgment in an action commenced against his grantor subsequent to the grant: otherwise a man having no interest in property could defeat the estate of the true owner."

In Black v. Black, 62 Texas, 296, in passing upon a question of parties similar to the one under consideration, the court said: "Nor is the title or claim there admitted to be held by them (that is the subsequent vendees) to the land in question in the least degree affected by the proceedings had by the appellant against Hargrove and wife, so far as is disclosed by the record now before us for consideration. In cases of this character, after the foreclosure of a deed of trust, or a mortgage, or a vendor's lien, or like claim on real estate, it has been repeatedly held by this court that persons holding the relation to the subject matter in controversy sustained by the appellant and her husband in this suit (that is the vendees of the original purchaser of the land) are in the very nature of things necessary parties to the foreclosure suit and the decree there rendered."

In Foster v. Powers, 64 Texas, 247, Chief Justice Willie, delivering the opinion of the court said: "No person can be divested of title to his property in a suit between other parties of which he has no legal notice, and a judgment rendered in such a suit is not binding upon him and is not admissible in evidence against him in any future proceeding in which the title to the property is in controversy."

To the same effect is Morrison v. Loftin, 44 Texas, 16; McKoy v. Crawford, 9 Texas, 356; Hardin v. Blackshear, 60 Texas, 132; Beck v. Tarrant, 61 Texas,

404; Slaughter v. Owens, 60 Texas, 671, and many other cases in our own reports.

It is believed, therefore, that where an original purchaser had properly transferred the land purchased by him under the above cited acts, and such transfers, properly authenticated, were on file in the General Land office prior to the institution of the suit, and the original purchaser only was made a party to the suit, the judgment is void, being against only one who has no interest, claim, or title to the land. The judgment being void, it is not believed that the law on page 151, General Laws 1893, appropriating thirty thousand dollars for the payment of district and county attorneys for commissions and forfeitures, was intended to cover that class of cases where forfeitures were obtained, but the judgments were not effectual for want of proper parties. In these cases the district and county attorneys are the legal representatives of the State, and the statute under consideration simply makes compensation for services they are required to perform. It is their duty to see that proper legal steps are taken to protect and enforce the rights of the State in the premises, that the suits settle the question of title to the lands in controversy, and that effectual judgments are rendered. Failing in this, they have not complied with their contract. It is inconceivable that the Legislature intended to compensate them for something utterly barren and worthless, resulting from their failure to take the ordinary precaution due from an attorney to his client.

Very respectfully,

(Signed) FRANK ANDREWS,
Office Assistant Attorney General.

State Farms.—Chapter 94, General Laws Twenty-third Legislature, which provides that the Penitentiary Board may, with the consent of the Governor, purchase lands for the purpose of establishing thereon State farms and employing thereon convict labor, is unconstitutional and void because in conflict with section 49, article III of the Constitution.

ATTORNEY GENERAL'S OFFICE.
AUSTIN, September 14, 1893.

General W. R. Hamby, Member Penitentiary Board, Austin.

DEAR SIR—In reply to your favor of 11th instant, wherein you ask, whether chapter 94, General Laws Twenty-third Legislature, is in conflict with section 49, article 3, of the Constitution of Texas, I beg to say the act in question in substance provides that the Penitentiary Board may, with the consent of the Governor, purchase agricultural lands or improved farms to the amount of three hundred thousand dollars, for the purpose of establishing thereon State farms and employing thereon convict labor on State account; that for making such purchase the fund necessary therefor shall be loaned by the State Board of Education to the Penitentiary Board out of the permanent school fund on certificates of indebtedness, issued by the Penitentiary Board and countersigned by the Governor; and that such loans shall bear interest at the rate of 5 per cent per annum, and the principal shall be payable back to to the permanent school fund in twenty annual installments of fifteen thousand dollars each.

If the Penitentiary Board should make the purchase contemplated by said act, the faith and credit of the State would be pledged and the State become a debtor to the permanent school fund in the sum of three hundred thousand dollars principal, together with interest thereon at the rate of 5 per cent per annum. This can not be doubted. The act, it is true, provides that the purchase shall be made by the Penitentiary Board, but, for obvious reasons, the purchase is for the State, and provision is made for the payment of the debt thus created with the revenue of the State. The inhibition is against the creation of a debt by or on behalf of the State. The school fund is devoted exclusively to the support and maintenance of the public free schools. It can not be lawfully used for any other purpose, though it may be invested in the securities named or provided for in the Constitution.

Article VII, section 4.

In this case the State offers and is authorized to borrow three hundred thousand dollars of the fund, and the question is, is it such a debt as may be created. The power of the State to create a debt is by section 49 of article III of the Con-

stitution limited to the following language: "No debt shall be created by or on behalf of the State, except to supply casual deficiencies of revenue, repel invasion, suppress insurrection, defend the State in war, or pay existing debt; and the debt created to supply deficiencies in the revenue, shall never exceed in the aggregate at any one time $200,000."

If, then, the debt proposed by said act is permissible under the above clause of the Constitution, the act is valid. We do not think, however, that the purchase of agricultural and farming lands for the purpose of utilizing convict labor thereon can be said to come within the letter, spirit, or meaning of either class of cases wherein it is permissible for the State to pledge its credit under the above quoted provision of the Constitution. There can, of course, be no pretense that the debt is to be created to repel invasion, suppress insurrection or defend the State in war. It is not proposed to create it to pay existing debt. There is no casual deficiency in the revenue, and the act exceeds the constitutional limit of such debt a hundred thousand dollars. The act is an undisguised proposition to create a debt, not for any of the purposes named in the Constitution, but to purchase land on which to employ convict labor. The provision of the Constitution is clear, plain and explicit, and limits the power of the Legislature to create any debt except for the purposes therein enumerated, and whatever reason may exist for creating a debt for any other purpose, we cannot disregard the plain provisions of the Constitution. The Constitution cannot be changed by the varying suggestions of public policy in the management of State institutions, but the provisions therein contained having been inserted by the people, must remain the inflexible law until altered by them.

You are therefore respectfully advised that the act is unconstitutional and void.

Very respectfully,

(Signed) MANN TRICE,
Office Assistant Attorney General.

Commissions of Tax Assessor.—A tax assesssor, for assessing taxes in special school districts, is entitled to receive a commission of one per centum upon the amount of the tax assessed against the district, and is not entitled to a commission upon the amount of the property assessed.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, October 17, 1893.

R. E. Crozier, Esq., Tax Assessor, Cleburne, Texas.

DEAR SIR—Your favor of October 14, to the Comptroller, has been referred to this department for attention and reply. You state that you and the Commissioners Court differ as to the compensation to be paid you for assessing the taxes in special school districts, you contending that you are entitled to one per centum upon the value of the property assessed, and the Commissioners Court contending that you are only entitled to one per centum upon the amount of the tax assessed against the property.

Your attention is called to section 48 of the act of 1893, regulating the public free schools of this State. The latter clause of said section provides that the tax assessor shall receive a commission of one per centum for assessing such tax, and the tax collector a commission of one per centum for collecting the same. You will readily see that if the one per centum to be paid the assessor is to be one per centum upon the value of the property assessed, you will be entitled to receive one dollar upon every hundred dollars worth of property situated in the district, whereas the law only authorizes a school district to levy a tax of twenty cents on the one hundred dollars. You would thus be receiving five times as much as the highest limit that could be levied on the district, and the district would of course come out very largely in debt. It is clear that the Legislature in the language used intended that you should receive only one per centum upon the amount of the tax assessed against the district. To illustrate, if the district has fifty thousand dollars in taxable property and a tax of twenty cents is levied on each one hundred dollars, one thousand dollars would be the amount of the tax assessed against the property and you would be entitled to receive one per cent upon the thousand dollars assessed for the district. It is true the compensation is small, but the contrary construction could not be given the language

used, for if it were held that one per cent upon the amount of the property assessed was allowed, the assessor's compensation would greatly exceed the amount of the tax the district could collect.

Very respectfully,

(Signed) FRANK ANDREWS,
Office Assistant Attorney General.

Witness Fees.—The act of April 23, 1883, does not provide fees for witnesses in an examining trial or habeas corpus for the purpose of raising a defendant's bond.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, October 26, 1893.

Hon. John D. McCall, Comptroller.

DEAR SIR—Your favor, submitting for examination certain fee bills to this department, has been received. You desire to be advised whether or not the State is liable for the fees of the witnesses under the act of April 23, 1883, General Laws, pages 117, 118.

It appears from an examination of the papers that the witness fees are claimed in an examining trial had for the purpose of raising the defendant's bond. Section 1 of the act above referred to provides that "any witness that may have been recognized or attached and given bond for his appearance before any court out of the county of his residence, to give testimony in a felony case, and who shall appear in compliance with the obligations of such recognizance or bond, shall be allowed his actual traveling expenses, not exceeding three cents per mile going to and returning from the court by the nearest practicable conveyance, and one dollar for each day he may be necessarily absent from home as a witness in such case."

The real question to be determined is whether a habeas corpus or examining trial before a district judge for the purpose of raising a defendant's bond is a "felony case" within the meaning of this section and the subsequent provisions in the law.

A careful examination of the subsequent sections leads to the conclusion that a felony case, as therein referred to, is an actual trial had upon the merits of the case, and that a witness must be attached or recognized for the purpose of giving his testimony upon a trial held upon the merits of the case, and not upon a trial for the purpose of determining the amount of bail the defendant shall be allowed.

In addition to this, I am informed by your department that the uniform construction placed upon this law by your office for the past ten years has been that no fees in such cases have been allowed. During this time the Legislature has frequently met, and, in its investigation of fees, etc., as appertaining to your department, has had actual knowledge, through its committees, of such construction, and the entire body has at least had constructive knowledge thereof, and no new law has been enacted upon the subject. This strengthens the construction that a "felony case," within the meaning of said law, means an actual trial upon the merits of the case, and that the witnesses are attached and are recognized for that purpose.

We, therefore, conclude that the law referred to does not provide fees for witnesses in an examining trial or habeas corpus for the purpose of raising a defendant's bond.

The accounts are herewith returned you.

Very respectfully,

(Signed) FRANK ANDREWS,
Office Assistant Attorney General.

County Commissioner.—A county commissioner must be a resident of the precinct which he represents, and a failure to reside in said precinct vacates the office.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, October 28, 1893.

Hon. J. L. Chambers, County Judge, Garden City, Texas.

DEAR SIR—Your favor of October 24 received. You state that a county commissioner in your county is about to remove from the commissioner's precinct he represents into another precinct of the same county, and you inquire whether or not such removal would vacate his office.

Section 18, article V, of the Constitution provides, that each county shall be divided into four commissioners' precincts, in each of which precincts there shall be elected by the qualified voters thereof one county commissioner.

Article 1509, Sayles' Statutes, provides that each county shall be divided into four commissioners' precincts, in each of which precincts there shall be elected by the qualified voters thereof one county commissioner. Article 1513, Sayles' Statutes, which is a subsequent section of the same act of the Legislature as article 1509, provides that in case of a vacancy in the office of county commissioner, the county judge shall appoint some suitable person living in the precinct where such vacancy occurs to serve as commissioner for such precinct until the next general election.

In view of these provisions, I am of the opinion that the law requires a county commissioner to be a resident of the precinct which he represents, and that failure to reside in the precinct vacates his office, and it is the duty of the county judge to appoint his successor.

Very respectfully,

(Signed) FRANK ANDREWS,
Office Assistant Attorney General.

Minor—County Clerk.—A person under twenty-one years of age whose disabilities have been removed is eligible to the office of county clerk.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, November 15, 1893.

E. E. Perrenot, Esq., Victoria, Texas.

DEAR SIR—Your favor of November 14th received. You state substantially that you are a married man, only twenty years old, and that your disabilities as a minor have been removed, and you inquire whether or not you are eligible under the laws of this State to hold the office of county clerk.

Article 3361a, Sayles' Civil Statutes, provides that after the removal of the disabilities of a minor the said minor shall be deemed and held for all legal purposes of full age, and shall be held responsible and shall have all the privileges and advantages as if he were of full age, saving only that he shall not vote until he arrives at the full age of twenty-one years. The statutes of this State do not prescribe any particular age for the office of county clerk. In this State that particular question has not been passed upon. In the 80th Texas, page 428, Steusoff v. State, the question there presented was whether or not one not a qualified voter for want of residence was eligible to the office of tax assessor. The court held that the person was eligible to the office, though not entitled to vote, and in discussing the general rules of qualifications for office holding, Justice Gaines lays down the following: "In Barker v. People, 3 Cowan, 703, the Chancellor who delivered the opinion of the court said: 'Eligibility to office is not declared as a right by principle by any express terms of the Constitution, but it rests as a just deduction from the express powers and provisions of the system. The basis of the principle is the absolute liberty of the electors and the appointing authorities to choose and appoint any person who is not made ineligible by the Constitution. Eligibility to office belongs, therefore, not exclusively or specially to electors enjoying the right of suffrage. It belongs equally to all persons whomsoever not excluded by the Constitution.' When a Constitution has been framed which contains no provision defining in terms who shall be eligible to office, there is strength in the argument that the intention

was to confide the election to the untrammeled will of the electors. Experience teaches us that in popular elections those only are chosen who are in sympathy with the people both in thought and aspirations, and that no law is needed to secure the selection of those only who reside in the county or district in which their functions are to be performed."

This language by our Supreme Court seems to recognize the right of the elective or appointive power, in the absence of constitutional or legal restrictions, to select such persons to fill the office as to them seem meet and proper, and in view of the declarations in article 3361a above quoted, and of this declaration by our Supreme Court, it is believed that you are eligible to the office of county clerk.

Very respectfully,

(Signed) FRANK ANDREWS,
Office Assistant Attorney General.

Issuance of bonds by Commissioners Court.—County Commissioners Court has no authority to issue bonds for the purpose of building roads only.

ATTORNEY GENERAL'S OFFICE.
AUSTIN, December 2, 1893.

Col. M. F. Mott, Galveston, Texas.

DEAR SIR—Your favor of November 15th has been duly considered. You inquire: "Can a county issue bonds for the purpose of applying the proceeds of their sale to the building of roads?" You state substantially that the county of Galveston desires to issue such bonds for the purpose of building *roads only*, and in connection therewith such culverts and small bridges as may be necessary, but the primary object of the bonds is to acquire funds to build roads permanent in their character. In the opinion of this department such authority is not conferred upon the Commissioners Court. Chapter 84 of the Acts of 1893 provides that the counties of this State shall have authority to issue bonds "for purchasing or constructing bridges for public purposes within the county or across a stream that constitutes a boundary line of a county." This, in our judgment, would not authorize the issuance of bonds to build roads permanent in their character, and such small bridges and culverts as might be necessary in building the roads, the primary object of the bonds being to acquire money with which to build the road. We know of no statutory authority other than this bearing upon the question, and we do not consider that this authority would justify the issuance of bonds for such a purpose.

Very respectfully,

(Signed) FRANK ANDREWS,
Office Assistant Attorney General.

Election—Removal of County Seat.—In an election held to determine the removal of a county seat the county judge as returning officer has no authority to open the ballot box and count the ballots; he can only ascertain what are the true returns of the election, and having ascertained such facts, it is his duty to estimate the vote and declare the result as shown upon the face of the true returns made to him.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, December 7, 1893.

Hon. William A. Little, County Judge, Helena, Texas.

DEAR SIR—Your favor of the 23d instant has been duly considered. You state that on December 21 an election was held in Karnes county for the removal o the county seat; that charges of fraud and illegal voting have been made, an that while the returns from one voting precinct show that 190 votes were cast, i has been asserted by those interested that only 109 votes were cast in fact at sai voting box, and that one of the managers of the election at said box asserted tha only 109 votes were in fact cast. You ask substantially what is your duty in th premises in estimating the vote; whether you shall estimate the returns and d

clare the result as shown upon the face of the same, or whether you shall hear testimony, examine the ballots, pass upon their legality, and declare the result as thus ascertained.

Article 700, Sayles' Statutes, provides that in elections for the removal of county seats "the officers holding the election shall make return thereof to the officer ordering said election within ten days after the same was held, who shall then proceed to open said return and count the same and declare the result," etc.

Article 702, Sayles' Statutes, provides for the manner of contesting such elections, but this article was declared unconstitutional by our Supreme Court in Harrell v. Lynch, 65 Texas, 146. It is therefore without force except in so far as it may aid in the construction of the statute bearing upon the question at bar, as showing the legislative intent at the time of the passage of the act relative to removing county seats in 1879.

Article 700, supra, also provides that such elections shall be conducted as near as may be as elections for county officers. The provision reasonably includes the manner of making returns and counting the same as well as other duties imposed upon officers holding an election for county officers.

No case is found or shown wherein our Supreme Court has passed upon the question presented. In Worsham v. Richards, 46 Texas, 441, it was held by our Supreme Court that the duty of ascertaining whether or not a place was within five miles of the geographical center of a county should be performed by the County Court, and that in the event of fraudulent votes the matter could be properly contested before that court, notwithstanding no provision for contest was in the law as it then existed. Since that decision the law has been in many material respects amended, with a legislative view, no doubt, to meet the objections to the old law pointed out in that opinion. It could scarcely be considered as an authority even by analogy under the present law, the County Court as then constituted being entirely different from our present County Courts, and also our entire election system having been changed. The law, as it now is, does not confer upon the county judge any authority or jurisdiction to sit in a contest of such an election. Nor is it believed that such authority can reasonably be inferred from that given, for that, the legislative mind is clearly expressed that the contest shall be elsewhere held. Article 702, supra.

This is further made to appear by the amendment to article V, section 8, of the Constitution, adopted September 22, 1891. Under said section, prior to amendment, there was no jurisdiction conferred upon the District Court of such contested elections. The amendment expressly confers upon the District Court the *original* jurisdiction "of contested elections." It is believed, therefore, that the county judge has no jurisdiction in any capacity of a contest of such election, and can, therefore, perform only the ministerial duties imposed upon him by statute as the returning officer of such election, the election in this case having been ordered by that officer. The rule as to a returning officer's duty is thus stated: "They must receive and count the votes as shown by the returns, *and they can not go behind the returns for* any purpose." McCrary on Elections, section 82.

The same author, section 84, says: "The doctrine that canvassing boards and return judges are ministerial officers, possessing no discretionary or judicial power, is settled in nearly or quite all the States." These propositions have many cases cited under them which fully support the text.

"The duties of county, district and State canvassers are generally ministerial. They are to determine the result shown by the returns, which are by law made the basis of their action. Unless authorized by statute, they can not go behind these returns. In the absence of express legislation to the contrary, the return of the precinct canvassers is conclusive upon the county canvassers, as the return of the county canvassers upon the district or State board. The duty of the canvassers is to take the returns as presented to them according to law, add them up, and declare the result. * * * The canvassers are to be satisfied of the genuineness of the returns; that is, that the papers presented to them are not forged or spurious: that they are returns, and are signed by the proper officers; but when so satisfied, they may not reject any returns because of informalities therein, or because of illegal or fraudulent practices in the election. The simple duty of the canvassing board is to declare the apparent result of the voting." Paine on Elections, section 603. See, also, cases cited by the author. This is believed to state the correct rule applicable to the question presented.

You are, therefore, advised that it is your duty as county judge, if satisfied

that the returns are genuine, to count or add up the returns of the election as made to you by the proper election officers in accordance with law, and you should not open the ballot box to count the votes nor hear evidence of its contents, and declare the result as shown by the returns made in accordance with law. As said by Justice Gaines in Ewing v. Duncan, 82 Texas, 230, which involved the location of a county seat: "The certificate of an officer whose duty it is to canvass the vote and declare the result is *prima facie* evidence of the correctness of the result so declared. But when the election is drawn in question in a judicial inquiry, the legal votes actually cast will determine the result."

Very respectfully,

(Signed) FRANK ANDREWS,
Office Assistant Attorney General.

Feme sole may hold and exercise the office of deputy county clerk, her duties being merely ministerial.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, December 23, 1893.

G. W. Gayle, Esq., County Clerk, Brazoria, Texas.

DEAR SIR—We have your favor of November 27, wherein you state that you desire to appoint a lady deputy clerk, and ask if her certificates in such capacity will be legal.

The Constitution and laws of this State prescribe no disqualification for such office on account of sex, and do not prohibit, expressly, women from holding such position. It has been held by this department that a woman twenty-one years old may legally exercise the functions of a notary public, and for the reasons therein stated it is believed that a feme sole may be a deputy clerk. It has generally been held that where no disqualification on account of sex is prescribed by the Constitution and laws of a State, that a feme sole may exercise a merely ministerial office where skill and diligence only are required, and it is believed that a feme sole twenty-one years old may act as deputy county clerk, her duties being merely ministerial only.

Very respectfully,

(Signed) FRANK ANDREWS,
Office Assistant Attorney General.

Where a patent is issued to one person, and the land is sold to another by deed duly registered in which a lien is retained to secure payment of purchase money, and afterwards the patent, on account of defective description of the land, is returned to the Land Office for cancellation and correction, the corrected patent should be issued to the original grantee and not to his assignee, unless there is evidence showing a sufficient and properly authenticated transfer to said assignee.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, December 27, 1893.

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

DEAR SIR—The letter of Chief Clerk Groos of the 22nd instant is received. The question submitted is this, substantially: A patent was issued to C. H. Collier; Collier afterwards sold the land to Mary Ogden by deed duly registered, in which a lien was retained expressly to secure the payment of a portion of the purchase money. The records do not show that this lien has been satisfied, nor that there is any other transfer to the vendee from Collier. By reason of a defective description of the land the patent has been returned to the Land Office for cancellation and correction, and the vendee insists that the corrected patent be issued to her as the assignee of Collier.

By the express reservation of a lien the legal title remained in Collier, and under the facts stated is still in him.

Foster v. Powers, 64 Texas, 247.

R. R. Co. v. Whitaker, 60 Texas, 634.

You are not authorized in such a case as this to issue the patent to an assignee or vendee until there is presented to you "a sufficient and properly authenticated chain of transfer, assignment or obligation of title, or power of attorney, showing a transfer from the original grantee to the assignee."

Revised Statutes, article 3959.

In this case it does not appear that the chain of title is complete to the vendee of Collier. On the contrary, it is shown affirmatively that Collier has expressly retained the title until the land is paid for, and I concur with you in the holding that until the statute is complied with patent should not issue to the vendee. When the lien is cancelled or a transfer of the title is filed with you, or the statute be in any other manner complied with, patent may lawfully issue to the vendee.

Very respectfully,

(Signed) C. A. CULBERSON,
Attorney General.

Franchise Tax.—"Austin Hook and Ladder Fire Company No. 1" is not subject to the payment of the franchise tax imposed by section 5, chapter 102, of the Acts of the Twenty-third Legislature.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, January 8, 1894.

Hon. George W. Smith, Secretary of State.

DEAR SIR—Your letter of the 5th instant has been considered, in which you inquire if the "Austin Hook and Ladder Fire Company No. 1" is subject to the tax imposed by section 5, chapter 102, of the Acts of the Twenty-third Legislature.

The purposes of the organization of the company, as stated in the charter, are "all that pertains to or are embraced in the prompt and active discharge by its members of all the duties of a volunteer fire company, in suppressing fires and conflagrations, and for the protection and preservation of life and property from loss and destruction thereby, within the corporate limits of the city of Austin, Travis county, Texas; social, in all that pertains to and is promotive of social intercourse and the exchange of courtesies between the members of the company, their families and friends: benevolent, in all that pertains to the caring for, rendering pecuniary aid to, and the relief of the sick or disabled and burying the dead of its members." It is also provided in the charter that "this corporation shall have all the rights and powers *incident under the laws of the State of Texas to corporations created for like purposes*, including the right to accumulate funds, to borrow and lend money in such sums and for such objects as *shall be necessary to effect its purposes*." It is therefore a volunteer fire company with the incidental powers named. Before the passage of the tax law under consideration the purpose for which corporations could be formed were expressly enlarged to include those for the "organization and maintenance of volunteer fire companies."

Laws 1893, p. 112, sub. 3.

The law in question is intended, as shown by the caption, to "fix the rate of taxation on insurance companies, telephone companies, sleeping and dining car companies, and other corporations." The first three sections of the act impose a tax on insurance, telephone, and sleeping, palace, and dining cars. By the fifth section it is provided "that *each and every* private domestic corporation heretofore chartered, or that may be hereafter chartered, under the laws of this State, * * * shall pay to the Secretary of State, annually, on or before the 1st day of May, a franchise tax of $10." By section seven it is provided that "corporations organized for the purpose of religious worship, or for holding places of burial, not for private profit, or for school purposes, or for purely public charity, are exempted from the tax imposed by this act."

As the act imposes a tax on every domestic corporation, it is apparent that this corporation must rest its right to exemption on the ground that it is organized "for purely public charity." It is quite probable that the Legislature did not have in mind the intricate doctrine of legal charities when this act was passed, and it is not proposed to discuss or apply it strictly here. Yet it is to be oberved that under the English statute, which is the principal test of what are in law

charitable uses, bequests were valid for the repair and maintenance of public buildings and works, for promoting commerce and navigation, and for protecting the land against the encroachments of the sea. Gifts for supplying water to a town for the improvement of a town have been held to be charitable uses within the meaning of this doctrine.

3 Am. and Eng. Enc. Law, 122 et seq.

Mr. Justice Gray, now of the Supreme Court of the United States, has said that "a charity in a legal sense may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, * * * or by erecting and maintaining public buildings or works, or otherwise lessening the burdens of government."

Jackson v. Phillips, 14 Allen, 556.

In a still larger view a charity is said to be whatever is given "for the love of your neighbor, in the catholic and universal sense—given from these motives and to these ends—free from the stain or taint of every consideration that is personal, private or selfish" and "a gift to a general public use, which extends to poor as well as to the rich."

3 Am. and Eng. Enc. Law, 123.

Coggeshall v. Pelton, 7 John. Ch. 294, Kent Chancellor.

Perin v. Carey, 24 How. (U. S.), 465.

Paschal v. Acklin, 27 Texas, 199.

Under these well established rules it would seem clear that a gift for the creation and support of a volunteer fire company in a certain town or city, in view of the manifest protection it would afford to life and property of the general public, would be valid as a charitable bequest.

In this case, however, it is only necessary to inquire if the corporation is organized "for purely public charity." Prior to the passage of the act of the Twenty-third Legislature, heretofore noted (chapter 83), corporations of this kind, including this one, were organized under subdivision 2 of the incorporation law for the "support of any benevolent, charitable * * * undertaking." Of this construction and general practice it is to be presumed the Legislature had knowledge, and that the exemption was framed with reference to them. The company is not organized for gain or profit, but to subserve a public purpose without charge or remuneration. In view of these and the considerations already adverted to, the purpose of the corporation is charitable; and that it is purely public, benefiting alike all the residents of the City of Austin as members of the community, and excluding all ideas of private gain or profit, cannot admit of question.

Gerke v. Purcell, 25 Ohio St., 229;

Orphan Asylum v. School District, 9 Pa. St., 35.

The charter enumerates certain special and benevolent features, but these appear to be inconsequential incidents to the main purpose. The power conferred to borrow and lend money is expressly limited to carrying out the purposes of the organization, and is a mere aid to effectuate that object.

Judged by the charter, it is therefore believed that this company is exempt from the payment of the franchise tax. If, in fact, though organized as a volunteer fire company, it should engage in other business, not merely incident to but in evasion of the characteristic features of the charter, it would subject itself to the payment of this tax.

In truth, as applied to this case, an exemption from taxation would be void under the Constitution (article VIII, section 2), unless the company were organized for purely public charity. To avoid confusion and evasion, it would be wise to see that charters hereafter filled be plainly restricted to the purposes expressed in the law, and that they do not include those not clearly germain to the main object of incorporation.

Very respectfully,

(Signed) C. A. CULBERSON,
Attorney General.

Judicial Features.—A judicial ascertainment of forfeiture is not necessary upon default in the payment of interest where lands are sold under the Act of 1887.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, January 10, 1894.

Hon. W. B. Wortham, State Treasurer, Austin.

DEAR SIR—Your letter of the 6th is received, in which you inquire whether a judicial ascertainment of forfeiture is necessary upon default in the payment of interest where lands are sold under the act of 1887.

It is presumed you refer to the act approved April 1, 1887, being chapter 99 of the acts of the Twentieth Legislature. The law applicable to the question propounded is contained in section 11 of this act, and this has been amended at each subsequent regular session of the Legislature. So much of the original section and each amendment as appears pertinent is given below in parallel columns:

1887.	1889.	1891.	1893.
"If upon the first day of August of any year the interest due on any obligation remains unpaid, the Commissioner of the General Land Office shall endorse on such obligation 'land forfeited,' and shall cause an entry to that effect to be made on the account kept with the purchaser, and thereupon said land shall be forfeited to the State, without the necessity of re-entry or judicial ascertainment, and shall revert to the particular fund to which it originally belonged, and be resold under the provisions of this act or any future laws."	"If upon the first day of August of any year the interest due upon any obligation remains unpaid, the purchaser shall have until the first day of the following January in which to pay said interest, and for said default said purchaser shall pay 50 per cent penalty on said interest then past due; and if said purchaser shall fail to pay said past due interest and penalty on or before said first day of January, the Commissioner of the General Land Office shall endorse on such obligation 'land forfeited,' and shall cause an entry to that effect to be made on the account kept with the purchaser, and thereupon said land shall be forfeited to the State, without the necessity of re-entry or judicial ascertainment, and shall revert to the particular fund to which it originally belonged, and be resold under the provisions of this act or any future law."	"If upon the first day of November of any year the interest due on any obligation remains unpaid, the purchaser shall have until the first day of April following in which to pay said interest, and for said default said purchaser shall pay 20 per cent penalty on said interest then past due; and if said purchaser shall fail to pay said past due interest and penalty on or before said first day of April the Commissioner of the General Land Office shall endorse on such obligation 'land forfeited,' and shall cause an entry to that effect to be made on the account kept with the purchaser, and thereupon said land shall be forfeited to the State, without the necessity of re-entry or judicial ascertainment, and shall revert to the particular fund to which it originally belonged, and be resold under the provisions of this act or any future law."	"If upon the first day of November of any year, the interest due for the year next preceding on any obligation remains unpaid, the Commissioner of the General Land Office shall endorse on such obligation 'land forfeited,' and shall cause an entry to that effect to be made on the account kept with the purchaser, and thereupon said lands shall be forfeited to the State, without the necessity of re-entry or judicial ascertainment, and shall revert to the particular fund to which it originally belonged, and be re-sold under the provisions of this act or any future law."

It appears from these provisions in the law that upon default in the payment of interest in sales under the act of 1887, *as provided in the amendment of 1893*, when the Commissioner of the General Land Office has endorsed on the obligation "land forfeited" and caused the proper entry to be made, the land thereupon becomes forfeited to the State and reverts to the particular fund to which it originally belonged, subject to be resold under the act or any future law, without the necessity of judicial ascertainment or forfeiture. The question is not affected by the decision of the Supreme Court in Berrendo Stock Company v. McCarty, 85 Texas, 412. That decision applies only to sales under the act of 1883, which is controlled by the act approved February 23, 1885, in which it is expressly provided that a failure to pay interest shall not work a forfeiture. The act of 1887 and amendments thereto being subsequent laws pertaining to sales thereunder are not affected by the said act of 1885.

See Report of Attorney General 1892, pp. 42, 83.

King v. James, 78 Texas, 285.

Very respectfully,

(Signed) C. A. CULBERSON,
Attorney General.

Matriculation fees—Increase of Salaries.—The Board of University Regents have the authority to use the amount of matriculation fees for paying salaries, over and above those in General Laws of 1893, under the head of "Medical Branch of the University," and also to change the salary of the provost from $1200 to $1500.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, January 18, 1894.

Hon. John D. McCall, Comptroller, Austin.

DEAR SIR—Your letter of the 17th is received, in which you inquire: "The Board of Regents of the University desire to use the amount of matriculation fees for paying salaries, over and above those enumerated on page 146, General Laws 1893, under the head of Medical Branch of University, and also to change the salary of the provost from $1200, as fixed by the appropriation, to $1500, as additional duties have been imposed upon him; paying the additional amount of $300 out of the matriculation fund.

"Your opinion is respectfully desired as to whether this department can pay these salaries."

The objection urged to the proposed action of the Board of Regents, it seems, rests upon the suggestion that the salaries of the professors and others connected with the Medical Branch of the University are fixed by the appropriation act of 1893 (pp. 145, 146), especially those of demonstrators of anatomy and physiology, provost and janitor, and that the Board of Regents may not exceed the salaries so fixed. If it be true that the salaries are thus fixed, the conclusion reached necessarily follows. But such is not believed to be the case. On September 30, 1893, you were advised in answer to an inquiry that the "Legislature appropriated out of the general revenue the specific sum named for the maintenance and support of the Medical Branch, and *in addition* appropriated the tuition fees the students of said University might pay in." A careful re-examination of the question convinces us that this is the proper construction of the act, for the reasons given. The course proposed by the Board of Regents accords with this construction. If it be held that the specification of it in the act is tantamount to a limitation upon the amount the Regents are authorized to pay for the purposes respectively named, it will overthrow this interpretation, and lead logically to the conclusion that the sum to be used for the support and maintenance of the Medical Branch of the University is limited to the amount appropriated out of the general revenue. Obviously this would destroy that portion of the act appropriating the matriculation fees of students supplementary to that taken from the general revenue. It is a familiar rule that that construction should if possible be adopted which will give effect to every provision of a law. It seems to be admitted that this is the true meaning of the act with reference to all items except for the salaries of professors, demonstrators of anatomy and physiology, provost and janitor, it being insisted that no greater amount may be paid for the salaries of professors than $21,800, and that the salaries of the others named are limited to the amounts specified. But there is nothing in the act which shows an intention to discriminate in these cases by fixing the salaries and leaving without limit amounts used for laboratories, school of pharmacy, etc., and unless such intention appears, such item must be held to be governed by the general object of the law. Considered in connection with the authority expressly conferred upon the Board of Regents to fix the salaries of professors and other officers (2 Sayles' Statutes, article 3681b, section 8), the Legislature by the act in question appropriated for the support and maintenance of the Medical Branch of the University (1) the matriculation fees of students, and (2) an aggregate sum out of the general revenue, the latter of which must be limited and used for the purpose sspecifically pointed out in the act. The authority being expressly given the Board of Regents by a general law to fix the salaries of professors and other officers of the University, it would not be held to be revoked by an appropriation bill unless such purpose unmistakably appears.

Very respectfully,

(Signed) C. A. CULBERSON,
Attorney General.

Lands containing valuable deposits of marble, etc., situated within the eighty mile reservation in El Paso county, cannot be purchased under the act approved May 2, 1893.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, February 15, 1894.

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

DEAR SIR—Your letter of January 31 is received, in which you inquire "whether lands containing valuable deposits of marble, situated within the eighty mile Pacific reservation in El Paso county, may be purchased under the act approved May 2, 1893."

By the act approved July 14, 1879, the lands included in the Pacific reservation in El Paso county were expressly appropriated and set apart under the terms and provisions thereof. This act was amended March 11, 1881, but in a particular not pertinent to your inquiry. By the act approved January 22, 1883, it is provided that all of the public lands heretofore authorized to be sold under the two acts above referred to are withdrawn from sale; provided, that nothing contained therein shall be construed to return said land to the mass of the public domain, but the same shall be considered to be reserved for the purposes for which said land was originally set apart and designated by said act until the Legislature shall otherwise provide. It would seem from this to be clear that the public lands situated within the reservation, notwithstanding the fact that they have been withdrawn from sale, are yet reserved and set apart for the purposes named in the act of July 14, 1879, and the amendment referred to. The act of March 29, 1889, is entitled "An act to promote the development of the mining resources of Texas," and has for its purpose the "sale of all the public school, university, asylum, and public lands containing valuable mineral deposits." Section 10 of the act provides that "any person or association of persons, qualified as provided by section 1 of this act, shall have the right to locate and obtain a patent on any quantity of these lands containing deposits of coal, iron ore, kaolin, marble, etc." The act approved May 2, 1893, is an amendment to section 10 of the act of March 23, 1889, above referred to, and provides "that any person shall have the right to purchase and obtain patent, by compliance with this act, on any public school, university, asylum, and public lands containing valuable deposits of kaolin, etc." It is understood from your letter that the attempt is to purchase, not public school, university or asylum, but public lands. The term "public lands" is no doubt used synonymously with "public domain" which has been defined by our Supreme Court to be "unappropriated public domain" (Day Co. v. State, 68 Texas 550), and I am of the opinion that it does not include the public land situated within the Pacific reservation, because said land by the acts of 1879, 1881, and 1883 is expressly appropriated and reserved for the purposes named in said acts.

Your conclusion to that effect is therefore concurred in, and the more readily because neither the act of March 29, 1889, nor that of May 2, 1893, contain any provision to protect the interest of the school fund in the public lands therein authorized to be sold. R. R. Co. v. State, 77 Texas, 357, 385, 386.

Very respectfully,

(Signed) C. A. CULBERSON.
Attorney General.

The judge of the Criminal District Court of Dallas County has no authority to perform the rite of matrimony.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, February 24, 1894.

Judge Charles F. Clint, Dallas, Texas.

DEAR SIR—Your letter of the 21st instant, inquiring as to your authority, as Judge of the Criminal District Court at the City of Dallas, to perform the rites of matrimony, has been received and considered.

It is provided by article 2838, Revised Statutes, that ministers of the gospel, judges of the district and county courts, and justices of the peace may celebrate

the rites of matrimony. By the first section of the act approved May 4, 1893, it is provided that there is "hereby created and established at the city of Dallas a criminal district court which shall have and exercise all the *criminal jurisdiction* now vested in and exercised by the district courts of Dallas county," and by the second section it is declared that the district courts of that county shall thereafter cease to exercise "*any criminal jurisdiction.*" From these sections it plainly appears that none except criminal jurisdiction is given the *court* of which you are judge or taken from the district courts. The powers conferred upon the *judge* of the criminal district court are contained in section 3, where it is provided that "he shall have and exercise all the powers and duties now or hereafter to be vested in and exercised by district judges in *criminal* cases." In the same section it is enacted that said "judge" may exchange with district judges, and and when that is done he is impliedly vested with all the powers necessary to perform the duties devolved upon him when holding the courts of district judges, but this is not believed to enlarge the general powers conferred upon him as judge of the criminal district court in the preceding paragraph. The general powers of the judge of the criminal district court being thus specifically confined to such as may be exercised by district judges in criminal cases, it seems to me they do not extend to the celebration of the rites of marriage. This, at least, is the safe rule.

Very truly yours,

(Signed) C. A. CULBERSON,
Attorney General.

Pool Table.—A pool table, when not conducted in violation of the penal laws, may be run in connection with a saloon.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, March 1, 1894.

W. P. Williams, Esq., County Attorney, Kaufman, Texas.

DEAR SIR—Your favor of February 27th has been received. You inquire whether or not the law permits the running of pool tables in connection with saloons.

Section 9 of the act of 1893, regulating the sale of liquors, provides the bond and its conditions which is required of each person selling liquor, to be drunk on the premises. Among other things, it provides that the person so selling liquor "will not permit any games prohibited by the laws of this State to be played, dealt, or exhibited in or about such house or place of business." Article 260 of the Penal Code enumerates "pool" as one of the prohibited games. The keeping of pool tables was, however, licensed by the act of 1889, General Laws, page 24, and the question is presented whether a license issued for the purpose of keeping a pool table would bar a prosecution therefor.

It has been held in Reaves v. State, 12 Court of Appeals, 199, and Parker v. State, 13 Court of Appeals, 213, that the mere fact that the game has been licensed by the State will not bar a prosecution when the game is run in violation of the penal laws. It would therefore seem that a pool table clearly can not be run in connection with a saloon, but for the decision of Smith v. State, 28 Court of Appeals, 102. Your attention is called especially to this case, which decides that the playing of pool in the manner therein stated is not an offense against the law. If it be no offense against the law to play pool, then it does not violate the conditions of the bonds required of dealers above recited. It therefore appears that the manner of playing the game, being a question of fact, would determine the liability of the saloon keeper on his bond.

Very respectfully,

(Signed) FRANK ANDREWS,
Office Assistant Attorney General.

Local Option Election.— The provisions of the statute regulating the manner of ordering and holding elections for the purpose of determining whether a subdivision of a county will adopt local option or not, must be strictly complied with in all details, or the election will be absolutely void and may be attacked collaterally in any proceeding where its validity is involved.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, February 27, 1894.

J. B. Price, Esq., County Attorney, Bastrop, Texas.

DEAR SIR—Your favor of February 25th has been duly considered. It has been expressly held in ex parte Cramer, 19 Court Appeals, 123; Smith v. State, Id., 444; Lipari v. State, Id., 431; McMillan v. State, 18 Court Appeals, 375, and Boone v. State, 10 Court Appeals, 418, that unless the provisions of the statute regulating the manner of ordering and holding elections for the purpose of determining whether a subdivision of a county would adopt local option or not, were strictly complied with in all details, the election so held would be absolutely void, and might be attacked collaterally as well as directly in any proceeding where its validity would be involved.

Article 3227, Revised Statutes, as amended by the act of April 1, 1887, provides the method in which a Commissioners Court may authorize a local option election to be held in any county, justice precinct, city or town. If the Commissioners Court, in ordering the election referred to, attempted to order the same in the justice precinct, and yet defined the line with such certainty as to exclude a portion of such precinct, and the voters in such excluded portion were thereby prevented from voting on the proposition, it is believed that the election would be void, as the court under the present law has no authority to subdivide a justice precinct for the purpose of holding a local option election. Such an order could not be treated as mere surplusage when it defined the lines with certainty and excludes a portion of the precinct from the territory in which the election was ordered. If, however, the election was ordered specifically in Precinct No. 7, and a description should be given of the precinct in the main correct, and did not definitely exclude any portion of the precinct, it is believed the election would be valid.

Very respectfully,

(Signed) FRANK ANDREWS,
Office Assistant Attorney General.

Where a County Commissioners Court has duly created the office of county superintendent of public instruction, and has duly appointed a person properly qualified to the office thus created, said court has no authority to abolish the office to take effect immediately, and the person appointed by the court is entitled to hold the office until the expiration of his term.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, March 19, 1894.

Hon. B. E. Moore, County Judge, Woodville, Texas.

DEAR SIR—Your favor of March 17 received. In your first question you state substantially, that on the 12th day of February, at the regular term of the Commissioners Court, the court duly created the office of county superintendent of public instruction for the county of Tyler. In pursuance of said act creating said office, the court duly appointed a person properly qualified to the office thus created; that such person did every act on his part necessary to qualify to said office, and tendered his bond to the Commissioners Court for approval, and that the court was thorougly satisfied with the validity of the bond so presented. On the 17th day of February, after the presentation of the bond, and after the oath of office had been taken by the appointee, the court passed an order to abolish said office. About these facts there is no controversy. The question presented is, whether or not the action taken by the Commissioners Court in the first instance, and after the attempted qualification of the appointee, the court had authority to abolish the office to take effect immediately, or whether or not such action could only take effect after the next election, that being the term for which the appointee would be entitled to hold his office.

Section 37 of the act of 1893, regulating the public free schools of this State, provides for the office of county superintendent of public instruction, and authorizes the County Commissioners Court, when in their judgment they deem it advisable, to provide for the election of county superintendent of public instruction at each general election, and when the office is so created it is the duty of the court to appoint a superintendent, who shall perform the duties of such office until a county superintendent shall have been elected as subsequently provided in the act and shall have qualified. Subdivision (i) of said section provides that the County Commissioners Court shall have power to abolish the office of county superintendent of public instruction by an order entered on the minutes of their court at a regular term thereof. Subdivision (j) of the same section provides that when the office is abolished the county superintendent shall serve out the term for which he was elected. There is perhaps no difference in the status of an officer legally appointed by the Commissioners Court having proper authority to make such appointment and one duly elected by the people at a general election. It is also well known as a part of the history of this law that this limitation upon the authority of the Commissioners Court to abolish the office was to prevent the Commissioners Court from legislating a person out of office who was objectionable to that body, either personally or otherwise, and it is believed that the appointment would give the person the same status in the office that an election would have given him. The question then arises as to whether or not the person had been duly appointed to the office; that is, whether his appointment was complete or whether it was subject to revocation. The authorities upon this point are perhaps not in entire accord. The weight of authority, however, seems to be to the effect that where an officer has been appointed by a body competent to make the appointment, and has done and stands ready to do all acts required of him in qualifying for the office, the appointment thus made is not subject to revocation, but is complete in so far as the appointing power is concerned.

In the case of State v. Barber, 58 Conn., 76, it was held, that where a joint convention of the city council met for the purpose of making an appointment for prosecuting attorney, and a ballot was properly taken, and one person received a majority of all the votes cast, and the result was announced by the presiding officer, and subsequently a motion was made to take another ballot, and some other person was by motion declared elected, it was held that the appointment of the first person was complete and that he was entitled to the office and entitled to qualify. See also Mechem on Public Officers, section 114, and authorities there cited; Throop on Public Officers, sections 88 and 89, and authorities there cited.

From these we conclude that the weight of authority is to the effect that the person having been duly appointed by the Commissioners Court had a definite and well defined term of office to fill, extending from the date of his appointment until the election and qualification of his successor, and that under the statute he cannot be deprived of the office under the appointment so made until the expiration of his term. This question, however, has never been passed upon, so far as I can ascertain, in this State, and if the Commissioners Court continue to refuse to approve the bond, the appointee would of course have his remedy at law. The question would by that means be definitly and positively settled.

Very respectfully,

(Signed) FRANK ANDREWS,
Office Assistant Attorney General.

Franchise Tax.—I. O. O. F.—Independent Order of Odd Fellows of the State of Texas is exempt from the payment of the franchise tax imposed by chapter 102 of the acts of the Twenty-third Legislature.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, April 7, 1894.

Hon. George W. Smith, Secretary of State, Austin.

DEAR SIR—In reply to your inquiry, asking whether the Grand Lodge, I. O. O. F., of the State of Texas is exempt from the franchise tax imposed by chapter 102 of the acts of the Twenty-third Legislature, I beg to say that section 3 of

said act provides that each and every private domestic corporation heretofore chartered, or that may hereafter be chartered under the laws of this State, and each and every foreign corporation that has received, or may hereafter receive, a permit to do business under the laws of this State, shall pay the Secretary of State an annual franchise tax of ten dollars. Section 7 of the act expressly exempts from the payment of the tax "corporations organized for the purpose of religious worship, or for holding places of burial not for private profit, or for school purposes, or for purely public charity."

The general objects and purposes of the Grand Lodge of I. O. O. F., as expressed in its charter, are "for better providing the means and associated effort for visiting the sick, relieving the distressed, burying the dead and educating the orphans, and for the better diffusion of the principles of benevolence and charity." Section 10 of the charter provides that it shall have power "to establish, endow, superintend and control one or more manual labor, mechanical, agricultural, scientific and classical colleges and universities; also to institute, regulate and maintain houses for the widows and orphans of deceased Odd Fellows.

It is apparent from the above that the general objects of the order are twofold, viz., charitable and educational. In so far as the establishment of schools is concerned, there can be no question but that the same would be exempt under the very terms of section 7; but as to whether the practice of charity and benevolence, visiting the sick and distressed, caring for, educating, and maintaining the widows and orphans of deceased Odd Fellows come within the meaning of the term "purely public charity" is a question not so easy of solution. That the practice of these commendable virtues is charitable there can be no question, but inasmuch as a portion of the dispensation of charity by the order is limited to members of the order, it is seriously contended that this eliminates the purely public features of the charity, and renders the institution subject to the payment of the tax. This question has never been decided by the courts of this State, but it has frequently been presented to and decided by the courts of other States, and the opinions widely differ; some holding that inasmuch as the dispensations of charity by such orders are limited to the members of the orders and not open to the public, such institutions are not for "purely public charity," while other courts hold that it is not necessary for the institutions to be open to the indefinite public, but that if the institution is administered for charity, and not for private profit or gain, this gives it the character of a "purely public charity."

One of the leading cases holding that such an institution is not for "purely public charity" is the case of Bangor v. Masonic Lodge, 73 Maine. It was there held that as the lodge was for the mutual benefit and protection, and the end to be attained private and personal, and its benefits confined to privileged persons and not open to an indefinite public, it could not be considered for "purely public charity." This case is supported by a strong array of authorities on the same line.

From the language used by the courts in deciding these cases, we infer that the charters of the institutions limited the right to dispense charity to members of the order. It will be noted, however, that the charter of the order under consideration does not limit the dispensation of charity to a particular class, except in a single case—that is, widows' and orphans' homes, which are limited to the widows and orphans of deceased Odd Fellows. In no other instance is its charity limited to any specified class of persons.

But suppose the right to dispense charity be limited to members of the order exclusively; even then there is a strong array of authorities which hold that the institution would be for "purely public charity" within the meaning of the statute exempting such institutions from taxation. For instance, in a case where a testatrix in her will provided for the establishment of an orphan asylum, whose object should be the maintenance of white female children, who had been baptized in the Episcopal church, and were not less than four nor more than eight years of age; the will further directing that the form of worship should be that observed and taught in the Episcopal church, it was contended in a suit against the orphan asylum to collect the tax, that as the benefits of the institution were confined to a particular enumerated class of persons, it was not a "purely public charity," and was, therefore, subject to taxation. The judge of the trial court held that, inasmuch as the charitable dispensations of the institution could only reach a certain designated sex within a prescribed age and baptized in a certain faith, the institution was not a "purely public charity," and was, there-

fore, subject to taxation. On appeal, this view was at first sustained by the Supreme Court.

Afterwards, however, a rehearing was granted, and the former judgment was reversed and a judgment entered in favor of the defendant, excepting its property from taxation. In its final opinion the court, among other things, said: "It is conceded that the devise has created a charity which is in a sense public, but it is urged that it is not "purely public." Now it must be conceded, and it has been decided, that the word "purely" is not to have its largest and broadest significance when used in this connection. Without doubt an asylum for the support of fifty blind men or an equal number of paupers would not be obnoxious to the objection that it was not purely public. A charity for the maintenance of disabled seamen or of aged and infirm stonemasons would undoubtedly be a purely public charity, and so also would a charity for the education and maintenance of the children of such persons, and if such charity should be limited to the white female orphan children of such persons between the ages of four and eight years, such limitations, though they would greatly restrict the number and class of beneficiaries, would constitute no objection to the purely public character of the charity. Why, then, would not a charity for the support of poor Episcopalians, Catholics, Jews or Presbyterians of a State or city be a purely public charity? No private gain or profit is subserved; the objects of such a charity are certain and definite, and the persons benefitted are indefinite within the specified class. The circumstance that the beneficiaries are to be of a particular fa' h is only of importance as designating the class. As to the meaning of the w d "purely," when used in this connection, we concur in the construction g' by the Supreme Court of Ohio in the case of Gerke v. Purcell, 25 Ohio State, page 229; that is, 'when the charity is public, the exclusion of all idea of gain or private profit is equivalent in effect to the force of the word "purely" as applied to "public charity" in the Constitution.'"

See Burd Orphan Asylum v. School District, 90 Pa. St., 21.

Again, the Supreme Court of Kentucky, in Zabet v. Louisville Baptist Orphan Home, 17 S. W. Rep., page 212, says: "It is urged that the appellee renders no public service, and that therefore the Legislature could not constitutionally exempt it from taxation. It is, however, a charity, and as such renders a public service. Its very name indicates its object and entitles it to privilege and gratitude. It is the duty of the State to care for its indigent orphans, and if done by another, he renders what is properly a public service, and the Legislature may, therefore, without regard to the extent of it, exempt the property devoted to such use from taxation."

So far as can be determined from the charter, constitution, and by-laws of the order in question, it is wholly devoid of any idea of business profit or gain whatever. But its principal object and purpose is to administer tender offices of charity and benevolence to the needy and distressed, who, but for the existence of the order, would be dependent upon the public for support.

We therefore conclude that the Grand Lodge I. O. O. F. is for "purely public charity" within the meaning of the act in question, and as such should be exempt from the payment of the franchise tax.

Very respectfully,

(Signed) MANN TRICE,
Office Assistant Attorney General.

Under our Constitution and laws this State can not retain a lien on a railroad or equipments to secure the amount due for the work of convicts hired by a railroad from the State.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, May 7, 1894.

Hon. R. W. Finley, Financial Agent, Huntsville, Texas.

DEAR SIR—Your letter of April 24 has been received and duly considered.

You state substantially that you are negotiating with the Houston East and West Texas Railroad to place some convict gangs on their road to be worked on the grade, broadening the gauge, etc., the railroad management offering to pay for their labor partly in cash and balance to be closed by the company's notes.

You ask whether the State under this character of contract could retain the laborer's lien for the labor performed by the convicts, in the same manner as a private contractor.

Pretermitting the question as to whether the State would stand in the same attitude as a private contractor, as from the view I take of it that question need not be determined in this case. it seems to be well settled that the law which gives to "mechanics. laborers, and operatives" a lien upon a railroad and equipments for work done. does not apply to contractors. but only to laborers for wages due for *personal* service. Section 37 of article XVI of the Constitution reads: "Mechanics. artisans. and material men of every class shall have a lien upon the buildings and articles made or repaired by them for the value of their labor done thereon, or materials furnished therefor. and the Legislature shall provide for the speedy and efficient enforcement of said lien."

The law enacted in pursuance of this section now reads, "Any person or firm, lumber dealers, artisan, laborer, mechanic or sub-contractor. who may labor or furnish material * * * to erect any house or improvement. or to repair any building or improvement whatever, * * * shall have a lien on such house, buildings. fixtures or improvements. and shall also have a lien on the lot or lots of land necessarily connected therewith." This law could not be construed so as to give a lien upon structures such as railroads.

Tyler Tap Railroad Company v. Driscol. 52 Texas, 13.

Therefore if contractors can retain any lien upon railroads, it must be by virtue of what is known as the "railroad laborers' lien law."

Section 35, article XVI of the Constitution of 1876 provides: "The Legislature shall. at its first session. pass laws to protect laborers on public buildings. streets. roads, railroads. canals and other similar public works. against the failure of contractors and sub-contractors to pay their current wages when due. and to make the corporation. company or individual for whose benefit the work is done, responsible for their ultimate payment."

In pursuance of this section the Legislature of 1879 passed the following law: "All mechanics, laborers and operatives who may have performed labor in the construction or repair of any railroad locomotive, car or other equipment to a railroad. or who may have performed labor in the operating of a railroad. and to whom wages are due and owing, shall hereafter have a lien prior to all others upon such railroad and its equipments for such wages as are unpaid." General Laws. Sixteenth Legislature. page 8.

In construing section 35, article XVI. of the Constitution. the Supreme Court says, in Tyler Tap R. R. v. Driscol, supra, "We think it manifest that this section has no reference to contractors or builders. and the law enacted in pursuance of the section (that is the act of 1879 supra) shows that such is the view taken of it by the Legislature."

In Texas and St. Louis R. R. v. Allen & Humphreys. 1 White and Wilson. section 568 et seq., the question was raised whether the lien could be retained for teams and tools furnished. The court held that the lien is restricted to personal labor, and does not embrace teams. tools. etc. In rendering the opinion this language is used: "The object and purpose of this statute is to secure to mechanics, laborers. and operatives. and no others. wages due or owing to them for work and labor done and performed in constructing, repairing. or operating the road. It is the wages for the individual personal labor of the mechanic. laborer or operative that it has reference to. It does not extend to work and labor done by others, nor to the use of teams, nor to the use of tools and implements other than such as are personally used by the person claiming wages, etc.

Atchison v. Troy & Boston R. R., 6 Abb. Pr. (N. Y.), 329.

Balch v. R. R., 46 N. Y., 524.

In Balch v. Railroad. the court in construing a similar statute says: "The term 'laborer' cannot be construed as designating one who contracts for and furnishes the labor of others. or who contracts for and furnishes one or more teams for work, whether with or without his services."

The Legislature of 1887 amended the laborers' lien law so as to include tools and teams. but no further. Indeed. they indicate clearly that it is not intended to include contractors who furnish the labor of others. as it restricts the lien, as the former law did, to mechanics, laborers and operatives. and in specifying for what the lien shall be retained reads, "For the amount due him for personal services or for the use of tools and teams." General Laws, Twentieth Legislature, page 17.

It seems clear, therefore, that in construing this law its application must be restricted so as to protect only those named in the Constitution. That is, not to protect contractors in the amount due them by the railroad, but "to protect laborers against the failure of contractors or sub-contractors to pay their current wages."

You are therefore respectfully advised that in the opinion of this department the State would not, under the law above referred to, retain a lien on the railroad or equipment to secure the amount due for the work of convicts hired by said railroad from the State.

Very respectfully,

(Signed) W. F. BOWMAN,
Office Assistant Attorney General.

The act passed by the Twenty-second Legislature establishing the Railroad Commission prescribes the only rule for the regulation of freight rates, and was intended to cover the whole subject matter thereof, and therefore repeals article 4257, Revised Statutes.

ATTORNEY GENERAL'S OFFICE.
AUSTIN, May 29, 1894.

Hon. John H. Reagan, Chairman Railroad Commission, Austin.

DEAR SIR—Your inquiry relative to the repeal of article 4257 of the Revised Statutes by the passage of the act to create the Railroad Commission of Texas, has been duly considered. Your question is substantially whether or not said article 4257, in so far as it establishes a maximum rate which may be charged by railroad companies, is repealed by the act establishing the Railroad Commission.

Article 4257, in so far as it affects the question presented, reads as follows: "Railroad companies may charge and receive not exceeding the rate of fifty cents per hundred pounds per hundred miles for the transportation of freight over their roads; but the charges for transportation on each class of freight shall be uniform, and no unjust discrimination in the rates or charges for the transportation of any freight shall be made against any person or place on any railroad in this State."

The act to establish the Railroad Commission of Texas is entitled "An act to establish a Railroad Commission for the State of Texas, whereby discrimination and extortion in railroad charges may be prevented, and reasonable freight and passenger tariffs may be established," etc. Section 1 establishes the Commission and provides for the appointment of the Commissioners. Section 2 provides for the organization of the Commission; and section 3 prescribes the authority and declares the duty of the Commission. Subdivision "a" of said section confers power upon the Commission to classify and subdivide all freight, and subdivision "b" provides that "the Commission shall have power and it shall be its duty to fix to each class or subdivision of freight a reasonable rate for each railroad, subject to the act for the transportation of each of said classes and subdivisions." Subdivision "d" provides that the Commission may fix different rates for different roads. Subdivision "e" authorizes the Commission to fix rates for connecting lines of road. Subdivision "h" confers upon the Commission the power and duty from time to time to alter, change, amend, or abolish any classification or rate established by it when deemed necessary. Subdivision "j" provides that the Commission shall make reasonable and just rates of charges for each railroad for the transportation of loaded and empty cars. Section 23 of said act declares that all laws and parts of laws in conflict with this act are hereby repealed.

Under well settled rules of construction, where there is an express repeal of all laws and parts of laws in conflict with an act passed, it is evident that in the legislative mind there were other laws existing in the State in conflict with the provisions of the act to which the declaration of repeal is made. It shows therefore an intention to repeal, and is not in a strict legal sense merely a repeal by implication.

Section 154 of Sutherland on Statutory Construction lays down the following rule: "Though a subsequent statute be not repugnant in all its provisions to a former, yet if it was clearly intended to prescribe the only rule which should govern, it repeals the former statute," and in section 155, *id.*, it is said: "Where

there are two acts on the same subject, and a later embraces all the provisions of the first and also new provisions, the later act operates without any repealing clause, as a repeal of the first."

These propositions are sustained by numerous authorities.

Harris v. Watson, 56 Ark., 574.
Publishing Co. v. Whitney, 32 Pac. Rep.. 237.
Bryan v. Sunberg 5 Texas, 418.
The State v. Stoll, 17 Wall., 425.
United States v. Tinen, 11 Wall., 88.
Fayette County v. Harris, 44 Texas, 514.
Tracy v. Tuffy. 134 U. S., 206.

Authorities might be multiplied indefinitely upon this proposition. It seems to us to be clear that the primary object of the act of April 3, 1891, referred to, was to confer upon the commission the power to fix reasonable rates. Heretofore that power was vested in railroad companies, subject to the limitation prescribed in article 4257, that the rates should not exceed fifty cents per hundred pounds per hundred miles. If it should be held that the maximum rate therein prescribed was not repealed, it seems that it would follow that the converse of the proposition would be true, and that the railroads would still be authorized to charge fifty cents per hundred pounds per hundred miles. It is clear to our minds that the act of April 3, 1891, intended to prescribe, and does prescribe, the only rule as to freight obtaining in this State, and that article 457, in so far as it fixes the maximum freight rate, is in conflict with the act of April 3, 1891, and is therefore to that extent repealed.

St. Louis Ry. Co. v. Kay, 22 S. W. Rep., 685.

In the last cited case the question was as to whether article 279 of the Revised Statutes was repealed by the act of April 2, 1887. Article 279 refers to all carriers indiscriminately. The act of April 2, 1887, refers only to railroads. The court say that in the case presented there is no necessary inconsistency or repugnancy between the two statutes, but "it seems to us that the later statute was intended to cover the whole field as to railroad companies, and to lay down the only rule for a recovery against them for the particular wrong it points out. For these reasons we think article 279, in so far as it relates to railroad corporations, is repealed by article 4227." (Act of April 2, 1887.)

We believe that the act establishing the Railroad Commission prescribes the only rule of regulation of freight rates, and that it was intended to cover the whole subject matter, and it therefore repeals article 4257 as above indicated.

Very respectfully,

(Signed) FRANK ANDREWS,
Office Assistant Attorney General.

Transcribing County Records.—County clerk is entitled to receive fifteen cents for transcribing old records of a county under article 4281 of the Revised Statutes.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, June 21, 1894.

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

DEAR SIR—Your favor of June 16th, with its enclosure, received. We understand the substance of the question propounded as follows: Under the order of the Commissioners Court you transcribed as county clerk one volume of the county's old record under the authority of article 4281 of the Revised Statutes. The question is, are you entitled to receive for this service fifteen cents per hundred words?

Chapter 1 of title 85 of the Revised Statutes, which provides for the transcribing of such records, does not expressly and specifically state the compensation to be received for such service. Chapter 99, General Laws 1879, which provides for the transcribing of records for newly organized counties, fixes the compensation of the clerk for such service at fifteen cents per hundred words. This is merely indicative of the legislative intention and expression of the legislative mind upon the value of such work.

Article 2393, Sayles' Statutes, fixes the fees of the county clerk, and two subdivisions of that article might be said to bear upon the proposition stated. The

first reads: "Copies of interrogatories, cross-interrogatories, and all other papers or records required to be copied by him, including certificate and seal, when not otherwise provided for, each one hundred words, fifteen cents."

The records transcribed are records which are required to be recorded by the county clerk, and in our judgment the clerk is entitled to receive from the county fifteen cents per one hundred words for making such record.

Very respectfully,

(Signed) FRANK ANDREWS,
Office Assistant Attorney General.

County Attorney—Minor.—A minor, after having his disabilities removed under article 3361a, Sayles' Statutes, is eligible to the office of County Attorney.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, September 26, 1894.

Mr. C. E. Gustavus, Madisonville, Texas.

DEAR SIR—In reply to your favor of the 6th instant, wherein you ask if a minor, after having his disabilities removed, is eligible to the office of county attorney, I beg to say article 3361a, Sayles' Statutes, provides that after the removal of the disabilities of minority, said minor shall be deemed and held for all legal purposes of full age, and shall be held responsible, and shall have all the privileges and advantages as if he were of full age, saving only that he shall not vote until he arrives at the age of twenty-one years. You will note that the Constitution requires that a person shall be twenty-one years of age in order to vote, but there is no such provision with reference to holding the office of county attorney. Articles 249 and 251, Sayles' Statutes, provide that the county attorney shall be duly licensed to practice law in the District Courts of this State, and shall reside in the county for which he was elected. There is no provision of law nor clause in the Constitution which requires a county attorney to be twenty-one years old. This being the case, we conclude that after the removal of the disabilities of a minor, and after he has been duly licensed to practice law in the District Courts of this State, and is a resident of the county, he is eligible to the office of county attorney.

In discussing this question our court used the following language: "Eligibility to office is not declared as a right or principle by any express terms of the Constitution, but it rests as a just deduction from the express powers and provisions of the system. The basis of the principle is the absolute liberty of the electors and the appointing authorities to choose and appoint any person who is not made ineligible by the Constitution. Eligibility to office belongs, therefore, not exclusively or specially to electors enjoying the right of suffrage. It belongs equally to all persons whomsoever not excluded by the Constitution. When a Constitution has been framed which contains no provision defining in terms who shall be eligible to office, there is strength in the argument that the intention was to confide the selection to the untrammeled will of the electors. Experience teaches us that in popular elections those only are chosen who are in sympathy with the people both in thought and aspiration."

Steusoff v. State, 80 Texas, 429.

Very respectfully.

(Signed) MANN TRICE,
Office Assistant Attorney General.

Marginal Releases.—Entry on the margin of the deed record releasing a vendor's lien is not permissible.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, December 4, 1894.

T. W. Hudson, Esq., County Clerk, Sherman, Texas.

DEAR SIR—In reply to your favor of the 3rd inst., you are respectfully advised that you are not only authorized, but it is your duty, to forbid parties to

make entries on the margin of the deed record releasing a vendor's lien. No one but the county clerk is authorized to record instruments in the deed records, and if a party wishes to release a vendor's lien, the release should be executed in proper form and filed for record with the county clerk.

Very respectfully,

(Signed) W. F. BOWMAN,
Office Assistant Attorney General.