OPINIONS.

SPECIAL DISTRICT JUDGE—IS AN OFFICER—PAY OF.

A member of the Legislature qualifying as such vacates his seat *ipso facto*.

ATTORNEY-GENERAL'S OFFICE,
AUSTIN, December 17, 1896.

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

DEAR SIR: Replying to your inquiry regarding the accounts of Hon. A. T. McKinney for services as District Judge in the District Court of Walker County, in several cases, I have to say, the direct question involved is, shall the accounting officers of the State draw or pay a warrant on the treasury in favor of one who serves as Special District Judge regularly appointed and qualified as such under the statute, who at the time of such qualification was a member of the Legislature of the State.

Section 40, Article 16, of the Constitution provides that:

"No person shall hold or exercise at the same time more than one civil office of emolument except that of justice of the peace, county commissioner, notary public and postmaster, unless otherwise specially provided herein."

Section 23 of the same article provides:

"The accounting officers of this State shall neither draw nor pay a warrant upon the treasury in favor of any person for salary or compensation as agent, officer, or appointee, who holds at the same time any other office or position of honor, trust or profit under this State or the United States, except as provided in this Constitution."

The proper solution of the question depends in part upon whether the position of special district judge, as provided for under the Constitution and statutory provisions relating thereto, is an office within the meaning of the sections of the Constitution above quoted.

The Constitution requires the Legislature to provide for the holding of the district court when the judge thereof is absent, or is from any cause disabled or disqualified from presiding. Article 5, Section 7, of the Constitution. Also, this instrument provides that when the district judge is disqualified the parties may, by consent, appoint a proper person to try the case, or upon their failure to do so a competent person may be appointed to try the same. Article 5, Section 11, of the Constitution.

In accordance with these requirements, the Legislature has provided that in case of the absence of the district judge, or in case he is unable or unwilling to hold court, that the practicing lawyers present shall elect one of their number a special judge of said court during such continued absence or inability, and until the completion of any business begun before such special judge. Also the statute provides that in case the district judge is disqualified from trying a case the parties or their counsel may agree upon an attorney to try same, and in case of failure to agree that fact shall be certified to the Governor or the district judge,

and the Governor shall appoint a special judge to try the case. Articles 1069, 1070 and 1071, Revised Statutes.

When such special judge is appointed or selected by any one of the methods above mentioned, we find that Article 1066, Revised Statutes, provides for his qualification as follows:

"The judge of the district court and each special judge hereinafter provided for shall before entering upon the duties of his office take the oath of office prescribed by the Constitution."

Provision is made under the title "salaries," "judicial officers," in same connection with other judicial officers, that special judges shall receive the same pay as district judges for every day occupied by them in performing the duties of judge, including, when appointed by the Governor, time necessarily occupied in going to and returning from the place where they may be required to hold court. The compensation is to be paid out of the State treasury.

It could scarcely be doubted but that a special district judge elected by the bar with the express authority under the statute to hold court and conduct the business thereof, and who has all the power and authority of the judge of said court for the time, and who taking the oath of office and receiving compensation from the State, holds a civil office of emolument. It is the view of this department that within the meaning of the Constitution and statutory provisions above referred to, the position of special district judge, if elected by either of the other methods, is also a civil office of emolument.

It is the duty of the government to provide for the administration of justice and to create courts and agencies for that purpose, and in pursuance of such design our Constitution and laws provide for the appointment of a special district judge, which is but a mode of obtaining a district judge to try a cause when the regular incumbent is disqualified.

Murray vs. Broughton, 46 Texas, 352.

The special judge is an agency provided by law for the administration of justice when conditions arise requiring his service and qualification as such, and in this way there is delegated to him under the law some sovereign functions of government which he exercises for the benefit of the public. He is empowered to try and determine the cause and sit in judgment upon the property and personal rights that are involved. His acts have all the force and verity of a regular incumbent in the case that he tries. His judgments, decrees and sentences must be enforced and obeyed by the officers of the law, and bind the rights of litigants. He can punish for contempt. His acts are subject to review only by appellate courts. He becomes the mouthpiece of the law, and is clothed with its authority. These important functions he exercises by reason of the official capacity which has been conferred upon him by law. His position is not one of contract. He is not a mere employe. As such special judge he may serve one day or many days. It can make no difference whether there be one act or a series of acts to be done, whether the office expires as soon as the act is done or is to be held for years or during good behavior.

State vs. Stanley, 66 N. C., 59.

"Any man is a public officer who hath any duty concerning the public, and he is not the less a public officer where his authority is confined to

narrow limits, for it is the duty of his office and the nature of that duty which makes him an officer, and not the extent of his authority."

Meachem, Public Offices and Officers, Secs. 8 and 9.

A general definition cited by text-writers and courts with approval, and to us seeming sound, is found in Shelby vs. Alcorn, 36 Miss., 273; 72 Am. Dec., 179. It is there said: "We apprehend that the term 'office' implies a delegation of a portion of the sovereign power and the possession of it by the person filling the office; and the exercise of such power within legal limits, constitutes the correct discharge of the duties of such office. The power thus delegated and possessed may be a portion belonging sometimes to one of three great departments and sometimes to another; still it is a legal power which may be rightfully exercised, and its effects will bind the rights of others and is subject to revision and correction only according to the standing laws of the State. An employment merely has none of these distinguishing features."

We also cite—

Vaughan vs. English, 8 Cal., 39.

State vs. Stanley, 66 N. C., 59; 8 Am. Rep.

State vs. Nalle, 41 Mo., 31.

While the duties to be performed is the important and controlling criterion, yet it is said that the fact of taking the oath of office goes far in determining the character of duty. The payment of a salary from the public treasury is another indication of office.

State vs. Wilson, 29 Ohio St., 347.

Meachem's Secs. 6 and 7.

The evil sought to be inhibited by the provisions of the Constitution is the receiving the emoluments of two or more offices by one person, and probably also, that better public service will be obtained by permitting one person to hold but one office. The emolument incidental to the office of special district judge may be small, upon the other hand they may become large. However, we think the inhibition is intended to apply to all civil offices of emolument without reference to the amount of compensation or duration of service.

We therefore conclude that as a special district judge exercises under the law important functions for the benefit of the public, and takes the oath of office and receives his compensation from the State that his position is a civil office of emolument within the meaning of the Constitution. If in this we are correct, it follows that the position of special district judge is incompatible with that of legislator. Both being civil offices of emolument are made incompatible by the Constitution.

It remains to be determined what effect the acceptance of the office of special district judge while the person accepting is a member of the Legislature will have upon his compensation, and if under Section 33, Article 16, above quoted, the accounting officers should draw or pay a warrant for his services.

It is said in Biencourt vs. Parker, 27 Texas, 558:

"On the qualification and acceptance of a person to a second office incompatible with the one he is then holding the first office is *ipso facto* vacated. A resignation by implication will take place by being appointed to and accepting a new office incompatible with the former one. It is said to be an absolute determination of the original office, and leaves no

shadow of title to the possessor. So that neither a *quo warranto* nor a motion is necessary before another may be elected."

The State *ex rel* vs. Brinkerhoff, 66 Texas, 45.

Dillon on Municipal Corporations, Sec. 225.

The authorities seem to be uniform in holding that the acceptance of the second office is a resignation of the former, and that no judicial proceeding is necessary to so declare. It follows that when Mr. McKinney accepted the office of special district judge he was no longer a member of the Legislature, and that his receiving pay as such judge is not obnoxious to the said Section 33, Article 16, of the Constitution.

Respectfully yours,

(Signed) T. A. FULLER, Office Assistant Attorney-General.

LEGISLATIVE CONTEST.

Comptroller not authorized to draw warrant in favor of person against whom any contest is decided in Legislature.

ATTORNEY-GENERAL'S OFFICE,
AUSTIN, February 5th, 1897.

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

DEAR SIR: I am in receipt of yours of to-day containing warrant drawn by the Speaker pro tem of the House of Representatives in favor of J. M. Bennett for the sum of $120.00 per diem and $52.00 mileage, due him as a member of said House.

It is admitted that Mr. Bennett was unseated in a contest between himself and Mr. Brigance, and that Mr. Brigance now occupies the seat formerly held by Mr. Bennett. The pay is sought to be drawn because of a resolution adopted by the House on yesterday. It seems that Article 1804 of the Revised Statutes of 1895 is conclusive of the question. That article prescribes the method of trial in contested cases in the House of Representatives. It prescribes the fees that may be paid to the officers serving the process, and to the witnesses whose attendance is enforced. It then plainly provides that no pay shall be allowed to the party against whom the contest is decided. The language is, *"and in no case shall any mileage or per diem be paid to any party against whom any contest is decided."*

This is too plain to be misunderstood. You are therefore advised, that you are not authorized to pay the warrant because the statute says, "thou shalt not."

The suggestion has been made to me that each house has absolute control of its contingent expenses, and therefore, that this warrant can be paid out of that fund. This is without force. The contingent expense fund is to cover legitimate expenses that cannot be specifically provided for and therefore must be provided for and denominated contingent expenses, because that cannot be made certain. But no warrant can be paid when drawn for a purpose that the Legislature prohibits the officers from recognizing.

Very truly yours,

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

TAXATION OF SCHOOL PROPERTY.

Private property used exclusively for school purposes is exempt from taxation.

ATTORNEY-GENERAL'S OFFICE,
AUSTIN, February 10, 1897.

Hon. A. E. Broussard, County Attorney, Beaumont, Texas.

DEAR SIR: In yours of the 8th inst. you ask the following question: "Whether or not lands and buildings owned by a person or association of persons and used exclusively for school (private) purposes are exempt from taxation, the property having been used since its erection as a private academy?"

In reply, I beg to say that the Constitution of Texas authorizes the Legislature to exempt from taxation "all buildings used exclusively, and owned by persons or associations of persons for, school purposes." (Article VIII, Section 2.) The Legislature, under the above section, among other property specified in the Constitution, exempted from taxation "all buildings used exclusively and owned by persons, or associations of persons, for school purposes." (Article 5065, Revised Statutes, 1895.)

The word "building," as used in the above, has been construed to include land necessary and used for the proper and economical conduct of the school.

Cassiano vs. Ursuline Academy, 64 Texas, p. 673.

Though, as stated by you, the land and buildings are private property, yet if used exclusively for school purposes, they would be exempt from taxation, both the Constitution and statute exempting from taxation private property used exclusively for school purposes, being justified upon the ground that it encourages education which elevates and enlightens society and is directly for the public good. Understand, however, that the property must be used *exclusively* for school purposes, otherwise it is not exempt.

I beg to call your attention to the case of Edmonds vs. The City of San Antonio, 36 S. W. Rep., p. 495.

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

LEGISLATIVE CONTEST—EXPENSES OF.

Expense of unsuccessful one in legislative contest cannot be paid by Legislature. No per diem can be appropriated to unsuccessful contestant.

ATTORNEY-GENERAL'S OFFICE,
AUSTIN, March 20th, 1897.

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

DEAR SIR: I am in receipt of yours of to-day enclosing a copy of a House Resolution in which it is proposed to appropriate to Mr. J. M. Bennett the sum of $294.85 as expenses incurred in his contest with the Hon. A. F. Brigance. It seems from the statement, and from facts within my own knowledge, that Mr. Bennett was seated in the Legislature on a cer-

tificate issued to him by the proper officers. Mr. Brigance filed his contest, and on the trial thereof by the Legislature he was declared entitled to the seat, and Mr. Bennett was deprived thereof. At a former date of the session they passed a resolution to pay to him his per diem and mileage. A warrant for that amount was drawn, which I understand you declined to honor. This account, however, covering nearly the same amount, is made up of the following items: Attorney's fees for getting up reply to notice of contest, $25.00; to typewriter for copying same, $2.85; to officer for going to and getting depositions of one J. D. Keith, $5.00; to expenses of Mr. Bennett from time of leaving home until February 4th, including hotel expenses of his attorneys in Austin, $82.00, attorney's fees, $180.00, making a total of $294.85.

You ask me whether you are authorized to draw a warrant on the State Treasurer for the payment of the account for the amount stated. Your power as Comptroller is limited by the Constitution and statutes of the State. Section 6, Article VIII., of the Constitution reads as follows:

"No money shall be drawn from the treasury but in pursuance of specific appropriations *made by law;* nor shall any appropriation of money be made for a longer term than two years, except by the first Legislature to assemble under this Constitution, which may make the necessary appropriations to carry on the government until the assemblage of the Thirteenth Legislature."

Article 2138 of the Revised Statutes, in so far as applicable, reads as follows:

"He (meaning the Comptroller) shall draw warrants on the Treasurer for the payment of all moneys directed by law to be paid out of the treasury; and *no warrant shall be drawn unless authorized by law;* and every warrant shall refer to the law under which it is drawn."

The first inquiry that arises is, has the money sought to be given to Mr. Bennett been appropriated by law? That a simple resolution passed by one branch of the Legislature is not a law is self-evident. No measure can become a law until it is passed by both branches of the Legislature, and the Governor shall have an opportunity to either approve or disapprove it.

It may be insisted, however, that inasmuch as a law was passed appropriating a certain amount of money to pay the contingent expenses of the Legislature that therefore this sum here sought to be paid to Mr. Bennett has been appropriated by law. It is not believed that that contention can be maintained. In the first place, the resolution seemed to have been based upon an entirely different theory. If the items here involved constitute any part of the legitimate contingent expenses of the Legislature, it is difficult to understand why the House deemed it necessary to pass a resolution to authorize their payment. Contingent expenses are not paid upon a resolution of the House. When they are incurred proper committees pass upon the several items, and upon approval by the proper officers they are paid as a matter of course. This is a well known practice of both the House and Senate.

The further fact that the Legislature has heretofore passed a resolution in which it was sought to pay Mr. Bennett nearly the same amount of money as mileage and per diem clearly demonstrates that the House did not think that the matter could be properly paid as contingent expenses of the Legislature. I take it that they overlooked the constitu-

tional limitation upon the method of appropriating money in passing the resolution. The members of the House were, no doubt, prompted by a desire to relieve Mr. Bennett from a seeming hardship imposed on him by the Constitution and laws in this particular case. It seems plain to me that the money sought to be paid to Mr. Bennett has not been appropriated by law, and therefore that if there was no other objection, you would be precluded from drawing a warrant for the amount.

But it will be noted that the statute above quoted in express terms says that no warrant shall be drawn unless authorized by law. My attention has never been called to a statute which justifies payment of the expenses incurred by a sitting member in undertaking to maintain his seat in the Legislature. Under an Act of the Federal Congress the expenses of the contestant and contestee alike are allowed to the limit of $2,000. But we are not operating under the Federal statute. It, of course, has no application to members of the Legislature. And if these items of expense are allowed Mr. Bennett no reason can be seen why Mr. Brigance might not file his claim for expenses incurred by him in getting his seat, to which it seems the House decided he was entitled from the beginning.

But the Legislature itself, in 1895, passed a law providing for the trial of contested elections in the House. It undertook also to provide for the expenses that should be paid by the Legislature. So much of the statute as refers to that subject reads as follows:

"Such fees shall be paid to the witnesses and the officers serving the process as shall be prescribed by the rules of the house in which said protest is pending, and no mileage or per diem shall be paid to either of the parties to said contest until said case is determined; and in no case shall any mileage or per diem be paid to any party against whom any contest is decided." Article 1804r.

Under the old maxim translated into ordinary English,—that the mention of one excludes all others, it seems to me that it should be held that the expenses of a contested election mentioned in the statute which the Legislature has directed to be paid, excludes the idea that any other expenses than those therein specified can be paid by the Legislature. And inasmuch as the several items embraced in this resolution are not included within those which the statute authorizes to be paid, I think there can be no doubt that you have no authority to draw a warrant on the treasury for the amount therein stated.

If the Legislature desires to allow all contestants and contestees, or either of them, to receive a stipulated sum to cover their expenses in making contests, it seems to me that it can be done in but one way, and that is by a statute passed by both houses of the Legislature.

This question having been presented to me twice in a different form during the present session of the Legislature, I have deemed it necessary to discuss it thus at length. You are, therefore, respectfully advised that you have no authority to draw the warrant for the several items of expense mentioned, for the following reasons:

1. Because the money sought to be paid him has not been appropriated "by law."

2. Because the payment of said amount of money has not been "authorized by law."

3. Because the statute providing for the payment of the expenses

of contested election cases tried in the House of Representatives precludes the idea that the items of expense here involved can be paid by the Legislature in any form.

Very truly yours,
(Signed) M. M. CRANE, Attorney-General.

TIME OF TAKING EFFECT OF BILL.

It is necessary in order to put a bill into immediate effect, which originated in the Senate and passed by the requisite two-thirds vote, and was amended in the House and passed by the requsite two-thirds vote, that the House amendments be concurred in by the Senate by a vote of two-thirds of all members elected, and the yeas and nays entered upon the journal.

ATTORNEY-GENERAL'S OFFICE,
AUSTIN, April 8, 1897.

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

DEAR SIR: Replying to your inquiry as to the time S. B. No. 2 will take effect. The facts out of which arise the question are as follows:

This bill originated in the Senate and was there passed with the emergency clause, providing that it go into effect from and after its passage, by more than a two-thirds vote of all Senators elected. Going to the House it was there amended, and as amended passed by the requsite two-thirds vote with the emergency clause as above. The vote in both instances being by yeas and nays and entered upon the journals of each House respectively. Being returned to the Senate with the House amendments, upon motion these amendments were concurred in by the Senate, without the vote upon said concurrence being taken by the yeas and nays and entered upon the journals. The question is when does this bill take effect under these conditions.

Section 39, Article III, of our Constitution provides:

"No law passed by the Legislature, except the general appropriation act, shall take effect or go into effect until ninety days after adjournment of the session at which it was enacted unless in case of an emergency, which emergency must be expressed in a preamble or in the body of the act, the Legislature shall by a vote of two-thirds of all members elected to each House otherwise direct. Said vote to be taken by yeas and nays and entered upon the journals."

Under this constitutional provision which is mandatory, this enactment could only be put into effect from its passage by a two-thirds vote of all the members elected to each House and it is necessary for the journals to affirmatively show by proper entry, that such vote was had, before it can be held to go into immediate effect.

Williams vs. Hall, 83 Texas, 667.
Ewing vs. Duncan, 16 S. W. Rep., 1000.
People vs. Commissioners, 54 N. Y., 276.
In Re Emergency Clause, 18 Colo., 291.
Cooley's Const. Limitations, 163.

The presumption ordinarily obtaining and conclusively so, in this State as to constitutional regularity of legislative proceedings can have no ap-

plication to the question before us. The journals are to be looked to to ascertain if the vote is sufficient to put the bill into immediate effect. In the first case above cited, it is said by Judge Gaines:

"The signatures of the presiding officers and the approval of the Governor attested the passage of the act, but did not determine that it had taken effect from the date of its passage. There being no method of attesting the fact that a bill which purports to take effect from its passage has received the required two-thirds majority, we deem the journals the best evidence upon the question and look to them for that purpose only."

Doubtless one reason for requiring the vote to be taken by yeas and nays and entered upon the journals, was to thus furnish permanent record evidence of the vote so that it might be seen whether this vote was sufficient to put it into immediate effect. This vote is made as essential as the emergency clause itself, and it certainly was intended to preserve it in some permanent form, hence the entry upon the journals.

It cannot, therefore, be presumed that a two-thirds vote was had upon the motion to concur in the Senate.

The journal of the Senate not showing by what vote that body concurred in the House amendments, it becomes necessary to inquire if it was necessary for the Senate to concur by a two-thirds vote in these amendments, since if this is not necessary, it would be immaterial that the journal fails to show the vote. The provision of the Constitution is that no law passed shall go into immediate effect unless the requisite vote be had. This applies to all the law as passed and as it comes to the people for observance. It cannot be held to apply to one part less than another. These House amendments became by the concurrence of the Senate, as much the law as did the original provisions that remained after the amendments. If it required the two-thirds vote to put the one in force from date of passage, then it was also required as to the other. The entire enactment became the law and the Constitution contemplates that the enactment as it is to be spread upon the statute and in the form it becomes operative as law, shall be passed by this two-thirds vote in order that it may become effective from the date of its passage. The case of Norman vs. Kentucky Managers World's Columbian Exposition, 20 S. W. Rep., 902, is much in point. A bill originated in the Senate and passed that body by a yea and nay vote entered upon the journals by the required majority. It went to the other House where, after being amended, it passed upon a like vote entered upon the journal. It then came back to the Senate where the amendments were concurred in without a yea and nay vote. The Constitution of that State provided that no bill should become a law unless on its final passage it receives the vote of at least two-fifths of the members elected to each House and a majority of the members voting, the vote to be taken by the yeas and nays and entered upon the journal. The court in the opinion says:

"So the question is what is the final passage of the bill. And does the final passage of a bill include the adoption of an amendment by either House that is sent to it by the other House. It seems clear that the final passage of a bill is the vote by which the bill becomes a law when signed by both the speakers and the Governor; and that this definition includes all amendments there can be no manner of doubt."

Again the court says:

"It is said that the constitutional provision as to the number of votes

and the entry of the yea and nay vote on the journal does not apply to amendments nor to reports of conference committees. If so, then no matter how material the change, a majority vote of a quorum may pass the bill. The words 'final passage' as used in our Constitution mean final passage. They do not mean some passage before final one, but the last one. They do not mean the passage of a part of a bill or what is first introduced and which by reason of amendments become the least important."

While our Constitution does not use the language "final passage" as does the Kentucky Constitution, yet it is clear it refers to the law as passed. Upon this must the two-thirds vote be had.

As long as the amendment does not change the original purpose of the bill, the House can by amendment make changes in it important and material. It can substitute if it sees proper, an entirely new bill germane to the subject. When returned to the Senate, if by a majority vote, the bill as amended could be put into immediate effect, it seems to us that the intention of the Constitution would be circumvented. The law as passed by the Senate has not received the required two-thirds vote. Nor can the fact that in another form with different provisions at another stage of consideration, the two-thirds vote was obtained, cure the defect or aid the final vote in any way. Senators who originally voted for the bill may not have favored the amendments of the House and may have been unwilling for it to become law with the changes made. And thus, as really passed, only a majority vote may have been obtained. Mr. Cushing in his work on the Law and Practice of Legislative Assemblies, Section 2232, says:

"It frequently happens that a bill which is passed by one House is not agreed to by the other in precisely the same form, but only with modifications or alterations with which it is returned to the House in which it originated. In this case as each of the two Houses has passed the bill in a different form, there is not as yet, strictly speaking, any agreement, or only a conditional one between them in relation to it."

To make the bill effective as law, it is plain that an agreement must be reached between the two Houses. The provisions of the bill, in order to give it the extra force of taking effect from its date, must have received the necessary two-thirds of all the members elected to each House at the time they were adopted as the law. I think it must follow that the constitutional provisions covers a motion by one House to concur in amendments made by the other. This is the practice followed in Colorado, even upon a motion to recede, which State has a provision similar to ours relating to the emergency clause and the vote necessary to give a bill effect from the date of its passage.

Robertson vs. The People, Colo. Sup., 38, p. 326.

In 62 Ill. we have a case where the bill originated in the House which was amended in the Senate by the requisite vote in each required by the Constitution of the State. A motion in the Senate to recede was carried by a majority, but not by a majority of the members elected as required by the Constitution in the passage of bills. It was held that the bill was not constitutionally passed, the court saying that it had never received the requisite constitutional majority of the Senate in the form it purported to pass. As the journal of the Senate fails to show that the bill now under discussion, with its final provisions received the assent of the requisite two-thirds of all Senators elected necessary to give it force

as law from and after its passsage, our opinion is upon the reasons and authorities given, that it does not take effect until ninety days after the adjournment of the Legislature.

We refer to the following additional authorities bearing upon the question:

The People vs. Chenago, 8 N. Y., 317.
State vs. Buckly, 54 Ala., 599.
State vs. Corbett (Ark.), 32 S. W. Rep., 686.

Very respectfully,

(Signed) T. A. FULLER, Office Assistant Attorney-General.

DEFICIENCY.

Commissioner of the General Land Office can not create a deficiency for clerk hire.

ATTORNEY-GENERAL'S OFFICE,
AUSTIN, April 12, 1898.

Gov. C. A. Culberson, Capitol.

DEAR SIR: This department has your recent favor asking the question: "Whether the Commissioner of the Land Office may create a deficiency for clerk hire?"

In reply, you are respectfully advised that in the opinion of this department the Commissioner would not be authorized to create such a deficiency. Article 2881, Revised Statutes, provides:

"The Commissioner of the General Land Office shall appoint such number of clerks as may from time to time be authorized by legislative appropriation or other law of the State; and such clerks * * * shall receive such compensation for their service as may be appropriated for that purpose."

This statute, in the opinion of this department, limits the authority of the Commissioner to the employment of such number of clerks only as may have been provided for by an appropriation.

Yours very truly,

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

SPECIAL LAW.

Purchase of railroads. Notice of—How published, etc.

ATTORNEY-GENERAL'S OFFICE,
AUSTIN, April 12th, 1897.

Hon. C. A. Culberson, Governor, Capitol.

DEAR SIR: I am in receipt of your note of this morning, in substance as follows: "If by special law a railway company be authorized to purchase for cash, or by an issue of stock or bonds, the railroad and property

of another company, should the notice under Section 57, Article III., of the Constitution be published in every county through which the road of the absorbing company is constructed as well as that of the other company? What, in your opinion, is the constitutional requirement in such case?"

Accompanying the note was the request that the answer be given you by noon. I regret that that has been impossible, and with the press of other matters, which could not be entirely brushed aside, my investigation has not been as thorough even at this time as desirable in a matter of so much importance.

Generally speaking in reference to the provision of the Constitution I have reached the conclusion that the proper construction of it involves a mixed question of law and fact. I do not believe that any statement could be made that would lay down an accurate rule applicable in each particular case. For example: A railway company might extend over as many as one thousand miles of railroad; it might desire the privilege of purchasing a smaller piece, of say five miles in length, which would form a part of the same extension of the branch that it was authorized by its charter to make. In order to be able to purchase this, an act of the Legislature would be necessary. I do not believe that in that character of cases it could be stated that the matter or thing to be affected, as that term is used in the Constitution, would be any other than the five miles of railroad, and hence the notice would not have to be published in any county save the one in which the five miles was located.

Again, a railway company might own a railroad extending only two hundred miles; its charter might authorize it to construct its line two hundred miles further in the same general direction. But in its proposed route there might be a line of railroad nearly equal in extent to that that it owned which it would be desirable for it to purchase, and make a part of its contemplated projection. To do this would largely increase the incumbrances of the property of the purchasing road. It would seem that the matter to be affected by the proposed special act would include as well the purchasing road as the road which it proposed to buy.

These two extreme cases are stated because I believe the general principles which they illustrate should be applied to this class of legislation. It seems to me that these views are more or less supported by the following authorities:

State of Illinois vs. Central Ry. Co., 33 Fed. Rep., 730-64.

Branch vs. Jessup, 106 U. S., 168.

There, of course, will be great difficulty in deciding many cases as to whether they fall within the one rule or the other. But in cases where the length and value of the purchasing road is so greatly disproportionate to that of the small road which it proposes to purchase, it seems that the constitutional provision would not require the notice to be published in any county other than those which the road which it proposed to purchase is located, on the principle stated in the old maxim, *de minimis non curat lex*. But where the value and length of the road which is proposed to be purchased is of such a character as to materially affect the revenues of the purchasing road it seems to me that the reason of the rule would require the notice to be published in the counties through which both run.

Applying this doctrine to the bill which I understand you to have in hand, viz.: the one authorizing the purchase by the G., C. & S. F. Ry. Co.

of a short line of railway through Montgomery and Liberty Counties, I am not prepared to say that if the notice was published in Liberty and Montgomery Counties, the Legislature would not be authorized to pass the bill, if in their judgment the public interest would be subserved thereby. In other words, I cannot say that the publication of the notice was not sufficiently made.

Very truly yours,
(Signed) M. M. CRANE, Attorney-General.

INVESTMENT OF SINKING FUND.

A city can only invest its sinking fund as directed by statute.

ATTORNEY-GENERAL'S OFFICE,
AUSTIN, April 19, 1897.

Hon. B. M. Estes, Mayor, Granbury, Texas.

DEAR SIR: In yours of the 16th inst. you state that your town has on hand a sinking fund of $2,500 that you cannot pay out on bonds, and you ask if the city would be authorized under the law to loan this money to a private individual on real estate security. In reply I beg to call your attention to Article 467, Revised Statutes of 1895, which reads as follows:

"All bonds shall specify for what purpose they were issued, and when any bonds are issued by a city a fund shall be provided to pay the interest and create a sinking fund to redeem the bonds, which fund shall not be diverted nor drawn upon for any other purpose; provided, however, that such sinking fund, as it accumulates, may be invested in bonds of the United States, the State of Texas, or counties in said State, and the city treasurer shall honor no draft upon said fund except to pay interest upon or to redeem the bonds for which it was provided, or for investment in other securities as above provided."

The statute having provided the mode of investment for city sinking funds, you are respectfully advised that in the opinion of this department, you have no right to loan the sinking fund to an individual, but the mode prescribed by statute is exclusive and must be followed.

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

OFFICES OF EMOLUMENT.

City Council—City health physician appointed by—An officer, and receives emolument. Quarantine officers hold civil offices of emolument. No one man can hold both.

ATTORNEY-GENERAL'S OFFICE,
AUSTIN, April 19th, 1897.

Dr. C. M. Swearingen, State Health Officer, Austin, Texas.

DEAR SIR: Replying to your recent inquiry I beg to say that Article 537 of the Revised Statutes provides that the City Council may appoint

a City Health Physician, and shall prescribe by ordinance his powers, duties and *compensation*. Article 543 provides that he may be authorized by the City Council, when the public interest requires, to exercise for the time being such of the powers and perform such of the duties as Chief of Police as the City Council may, in their discretion, desire; and he may be authorized to enter houses and other buildings, private or public, at all times in the discharge of his duties under the law, having first asked permission of the owners or occupants. The City Council has power to punish by fine and imprisonment, or either, any neglect or refusal to observe the orders and regulations of the Health Physician.

Article 4330 provides that all quarantine officers appointed by the Governor shall be selected and commissioned by the Governor of the State, *and shall be paid by the State.* It further provides that all quarantine officers, whether of towns, cities, counties or State, shall be authorized to administer oaths to any person or persons suspected of violating quarantine regulations, and any person or persons swearing falsely, shall be punished according to the provisions of the Penal Code.

It will be noted, therefore, from the above that the Health Physician of the city is an officer recognized under the law, and the City Council may pay him compensation, and as I understand both from your oral and written statements, Dr. Yandell, if appointed City Health Officer, will receive a stipulated salary per month. It will be further noted that the article providing for the appointment of quarantine officers provides that they shall be paid by the State. Both positions are unquestionably offices of emolument and under the provisions of the Constitution no one man can rightfully hold both positions.

Very truly yours,
(Signed) M. M. CRANE, Attorney-General.

SAM HOUSTON NORMAL.

Available school fund cannot be applied to the support of the Sam Houston Normal School.

ATTORNEY-GENERAL'S OFFICE,
AUSTIN, May 21st, 1897.

Hon. C. A. Culberson, Governor, Capitol.

DEAR SIR: Yours asking whether the public free school fund of the State may be applied to the support of the Sam Houston Normal is before me. The question involves a construction of Section 5, Article VII., of the State Constitution, and indirectly involves Section 3 of the same article. Section 3 reads as follows:

"One-fourth of the revenue derived from the State occupation taxes, and a poll tax of one dollar on every male inhabitant of this State between the ages of twenty-one and sixty years, shall be set apart annually for the benefit of the public free schools, and in addition thereto, there shall be levied and collected an annual *ad valorem* tax of such an amount not to exceed twenty cents on the one hundred dollars valuation, as, with the available school fund arising from all other sources will be sufficient to

maintain and support the public free schools of this State for a period of not less than six months in each year; and the Legislature may also provide for the formation of school districts within all or any of the counties of this State by general or special law, without the local notice required in other cases of special legislation, and may authorize an additional *ad valorem* tax to be levied and collected within such school districts for the further maintenance of public free schools and the erection of school buildings therein; *provided*, that two-thirds of the qualified property tax-paying voters of the district voting at an election to be held for that purpose shall vote such tax not to exceed in any one year twenty cents on the one hundred dollars valuation of the property subject to taxation in such district, but the limitation upon the amount of district tax herein authorized shall not apply to incorporated cities or towns constituting independent school districts."

Section 5 reads as follows:

"The principal of all bonds and other funds, and the principal arising from the sale of the lands hereinbefore set apart to said school fund and all the interest derivable therefrom and the taxes herein authorized and levied shall be the available school fund, to which the Legislature may add not exceeding one per cent. annually of the total value of the permanent school fund, such value to be ascertained by the Board of Education until otherwise provided by law; and the available school fund shall be applied annually *to the support of the public free schools.* And no law shall ever be enacted appropriating any part of the permanent or available school fund to *any other* purpose whatever; nor shall the same or any part thereof ever be appropriated to or used for the support of any sectarian school; and the available school fund herein provided shall be distributed to the several counties *according to their scholastic population* and applied in such manner as may be provided by law."

Section 3 seems to indicate the character of free schools to which the funds denominated "Available School Fund" may be applied. It cannot be read without leaving the conviction that the character of school meant was the ordinary district or community public school. This view is very much strengthened by the provision in Section 3 which makes it the duty of the Legislature to supplement the funds on hand by taxation "sufficient to maintain and support the public free schools of this State for a period of not less than six months in each year." This language would be hardly applicable to such schools as the Sam Houston Normal, and evidently was intended by the Constitution makers as relating alone to the ordinary public free schools. Section 5 plainly defines what shall constitute the permanent and available school funds and the sources from which they may be derived. It expressly limits the purposes to which the available fund shall be applied, viz: "to the support of the public free schools." This limited application is made doubly sure by the prohibition, "And no law shall ever be enacted appropriating *any part* of the available school fund *to any other purpose.*" The time when it shall be applied is also stated, "The available school fund shall be annually applied," etc. The manner of distributing this fund for use in the public free schools is also fixed in the section quoted: "And the available school fund herein provided shall be distributed to the several counties," etc. The basis of this distribution is not left in doubt: "The available school fund herein provided shall be distributed to the several counties *accord-*

ing to their scholastic population, and applied in such manner as may be provided by law."

It seems that Section 5 renders construction unnecessary. It in express terms declares:

1. That the available school fund shall be annually applied to the support of the public free schools and to no other purpose.

2. That it shall be distributed to the various counties.

3. That it shall be distributed to these counties according to their scholastic population and applied in such manner as may be provided by law.

The Constitution having declared that the fund shall be used for the support of the public schools and specifically directed the Legislature how it should be distributed so as to reach those schools there is nothing left for the Legislature to do except to indicate its application so as not to conflict with the manifest purposes outlined in the section quoted. The question recurs, will an appropriation by the Legislature to the Sam Houston Normal meet the requirements of this section? It is clear that it will not. In the first place an arbitrary appropriation to the Sam Houston Normal School would be a distribution of the fund among students of one school instead of among counties, as the Constitution commands. The appropriation to the Sam Houston Normal School would be an arbitrary distribution of the school fund instead of distributing it according to the scholastic population of the several counties, as the Constitution requires. It becomes unnecessary to determine, therefore, whether the Sam Houston Normal is a public free school within the meaning of the sections of the Constitution quoted, because if it is it is only entitled to its distributive share of the school fund allotted to Walker County.

The available school fund does not belong to the Legislature to deal with as they think best. The Supreme Court of the State has substantially declared it to be the property of the children of Texas. Jernigan vs. Finley, 38 S. W. Rep., 21-26. Being their property, vested in them by the Constitution of the State, it must be distributed in accordance with the mandates of that instrument.

You are therefore respectfully advised that while the Legislature, under authority of Section 18, Article III., of the State Constitution, may levy taxes to support the Sam Houston Normal and schools of that character, that it is without power to arbitrarily appropriate any part of the available school fund for its maintenance. That fund must be distributed to the several counties in accordance with their scholastic population, as the Constitution requires.

Very truly yours,
(Signed) M. M. CRANE, Attorney-General.

BOARD OF TRUSTEES.

City Council—Cannot abolish board of trustees when city has assumed control of her public free schools under the provisions of the Act of 1883.

ATTORNEY-GENERAL'S OFFICE,
AUSTIN, May 22, 1897.

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

DEAR SIR: It is stated in the letters of parties from Terrell, Texas,

referred to this department for answer, that the City of Terrell at some period, not stated, under the Act of 1883 (Articles 4018 to 4021 inclusive, Revised Statutes), by proper and legal proceedings of its City Council, placed the control and management of the public free schools (said city having theretofore assumed exclusive control of said schools) in a board of trustees; that it is now proposed by said City Council to abolish said board of trustees and for said City Council to assume control and management of said city public schools.

The question propounded to this department for answer is: The City Council having determined that the city public schools should be under the exclusive control and management of a board of trustees under the Act of 1883, has said City Council the power to abolish said board of trustees and assume control and management of said public schools?

By the Act of 1883 it is provided:

1. That the city council of any town or city having one thousand inhabitants or more, and which has or may assume exclusive control of its public schools, may place the control and management of its public schools in a board of trustees.

2. The exclusive power of controlling and managing and governing said schools is vested in said board of trustees.

3. The power of said board of trustees to regulate, control and govern said schools is equal in every respect to that which the City Council had previous to the creation of said board.

That construction of a statute is most correct which nearest approaches the legislative meaning and intent. All rules of construction are framed with the view of such ascertainment. Then the question arises: Did the Legislature intended that the City Council should have the power of abolishing said board of trustees?

In answer to this question it may be said (1) no provisions are made for the abolition of said board of trustees. (2) The trustees are appointed for a specified term; each trustee is required to take an oath of office before assuming the duties of same. (3) In case of vacancy, power to fill is limited to the unexpired term. (4) The management, control and government of said public schools are taken away from the said city council and vested exclusively in said board of trustees. (5) The power and authority of said board of trustees is equal in every respect to that which the City Council had previous to the creation of said board. To my mind the above five specifications all strongly indicate that the Legislature did not intend that said board of trustees should be abolished at the "sweet will" of a City Council. If the City Council can abolish said board of trustees, what steps are necessary, when can it be done, by what procedure? The statutes are silent. Who is to say? Can it be done while the schools are in session, operated under rules and regulations prescribed by said board, conducted by teachers employed and under the government of said board? To say yes, would be to hold that the efficiency and welfare of said schools might be greatly endangered. If such a change can be made, as no time is prescribed by the law, such change may be made at any time. Under the view that the City Council may abolish said board, then it follows that said board having been created may be abolished, and having been abolished may be again created, and so on *ad infinitum*. With each change of city administrations comes a change in the manner and mode of controlling and governing the public

schools of said city. Could anything be imagined that would be more detrimental to the upbuilding of the public schools? I do not believe that the Legislature intended to so jeopardize the best interest of the public schools of said towns and cities by granting, expressly or implied, to the city councils of said towns and cities the power of constantly changing the management of their public schools.

It is true, that it is a correct rule of law, which applies alike to city councils as well as to other legislative bodies, that the expressed authority to enact carries with it the implied authority to repeal that which was enacted. But this rule is not herein in any manner involved, because the vesting of the trustees with power to control, manage and govern the public schools does not emanate from the legislative act of the City Council, but such power is vested in said board by an act of a higher legislative power, viz.: the Legislature of the State of Texas. Therefore, the right to repeal the act vesting in said board the exclusive control and management of said public schools rests, not with the City Council, but with the Legislature. It is true that the City Council has the right of appointing said trustees, and consequently the right to remove from office. But such right of removal must be exercised only in the manner pointed out by law. That is to say, such removal must be made in the manner prescribed in Article 564, Revised Statutes. Besides, such a removal does not abolish the office, but simply creates a vacancy, and the City Council has power (and according to my view may be compelled) to fill said vacancy for the unexpired term. There is another proposition which I think settles this question beyond doubt. It is a familiar rule of law that municipal charters are subject to repeal or amendment at the pleasure of the legislative power granting them. See Am. & Eng. Ency. of Law, Vol. 15, p. 971, and long list of authorities cited. Every additional right, privilege or authority granted to a municipal corporation by the legislative body creating it is an amendment to its charter. To illustrate: By an act of 1879, Chapter 67, all cities and towns within this State were authorized to acquire the exclusive control of the public schools within their limits. The acceptance of the provisions of said act by any city or town has the effect of amending the charter of such city or town in that particular, and the power and privilege granted by said act becomes a part of the charter privileges of said city. The Legislature may, if it chooses, leave it optional with the municipal corporation as to the acceptance of said amendment. 54 Ga., 317; 9 Mo., 507. But if such amendment is accepted by such municipal corporation, then the said municipal corporation is powerless to amend said amendment, just as much so as to annul any other provision of its charter, for that would be amending its own charter, which a municipal corporation cannot do. Within the various acts of the Legislature granting to cities and towns the right of assuming exclusive control and management of their public free schools, such cities and towns could not exercise such right. Neither can such right be exercised by said cities and towns except in the manner and to the extent authorized by said acts. Now, the city of Terrell is incorporated under the general law, Title VIII, of the Revised Statutes of 1895. Said general statute constitutes its charter. Any additional rights, privileges, etc., granted to said city of Terrell is an amendment to its charter, that is, additional charter rights. By the act of 1879, cities and towns are granted the privilege of assuming control of their public schools. By said

act the acceptance of this right is made dependent upon an election ordered for that purpose, and by said act an election is also provided to determine whether or not the control and management of said schools shall be vested in the City Council or a board of trustees to be elected by the voters of said city. If as a result of said election it should be determined that a city should assume control of its public schools and that said control be vested in a board of trustees, then the charter of said city as to its public schools would be to the effect that the city should have exclusive control of its public schools and that said control should be vested in a board of trustees. It could hardly be contended that under such a state of facts the control of the public schools by the city could be abolished by the authority of the city, or that the control of said schools could be other than by a board of trustees in compliance with the charter rights. By the Act of 1883, as heretofore stated, it is provided that any city or town of a certain class having or that may assume control of its public schools, that the City Council of said city may appoint a board of trustees, which board should have exclusive control and management of said public schools. When under this act such town or city appoints such board of trustees as provided therein, such town or city accepts the provisions of said act, and the rights thereunder granted become a part of the charter rights of said town or city. It is plain that the City Council could not create such a board of trustees for the exclusive management and control of its public schools without an express grant of the Legislature. It is true that this amendment to the charter rights of said town or city is left optional with such town or city, yet when accepted (and it is accepted by appointment of trustees under said act) it then becomes a part of the organic law of said town or city, and said town or city is powerless to annul the same. It is in effect the city saying that we accept this provision of the Legislature, and hereafter will control our schools in the manner therein specified. By rejecting the said act or refusing to accept the same, the charter right of the city for the control of its public schools remains in the City Council. As soon as trustees are appointed by the City Council according to the provisions of the Act of 1883, they become vested with the exclusive power of managing, controlling and governing the public schools of said city, not by virtue of any legislative act of the City Council, but by virtue of the act of the Legislature, and in my opinion the City Council is powerless to annul the act of acceptance, because by said act of acceptance the rights provided for in said act become the charter rights of said city, and to annul such an acceptance would be, in effect, amending its own charter, which a city cannot do.

For the reasons herein given, I am of the opinion that the City Council of the City of Terrell cannot abolish the board of trustees and assume control of its public schools.

Yours very truly,

(Signed) JOHN M. KING,
Office Assistant Attorney-General.

DIRECT TAX FUND—DISBURSEMENT OF.

ATTORNEY-GENERAL'S OFFICE,
AUSTIN, June 1st, 1897.

Hon. C. A. Culberson, Governor, Capitol.

DEAR SIR: Replying to your inquiry made some days ago I beg to say that I have considered the question of the disbursement of the fund now on hand as a direct tax fund.

In 1891 Congress appropriated out of any money then in the treasury "such sums as may be necessary to reimburse each State, Territory and the District of Columbia, for all money found due them under the provisions of this act," said money to be paid to the Governors of the States and Territories in full satisfaction of all claims against the United States on account of the levy and collection of said direct tax.

The act further provided:

"Such sums shall be held in trust by such State, Territory or the District of Columbia, for the benefit of those persons or inhabitants from whom they were collected or their legal representatives."

It further provided that "all claims under the trust heretofore created shall be filed with the Governor of such State or Territory and the Commissioner of the District of Columbia respectively within six years after the passage of this act." The act was passed March 2nd, 1891. It was further provided that all claims not on file should be forever barred. (United States Statutes at Large, Vol. 26, p. 822.) The method of proving the claims was seemingly left to the States.

On June 29th, Hon W. H. H. Miller, Attorney-General of the United States, advised the Secretary of the Treasury substantially that the amount of money collected as interest and penalties should be refunded to the several States, under the terms of that act. In other words, he held that it was the intention of Congress to refund the direct taxes, the interest and penalties collected. The act also required the State to accept the provisions thereof before the money could be paid to the several States. This was done by Texas. (See Resolution, approved April 11th, 1892, Acts of 1892, p. 61.) The Legislature by Act approved March 15th, 1893, undertook to direct the manner of disbursing the fund so received. (See Acts of 1893, p. 28.) This act was still further amended in 1895. (See Acts 1895, p. 30-1.)

It seems that in remitting this money to the Governor the Treasurer indicated the amount that had been collected and the amount that had been collected as penalties and interest, as far as the records before that officer enabled him to state. If the State officers were bound by his calculations on that point it would become their duty to refuse to pay any further claims for penalties or interest now on file for the reason that the fund from which these payments could be made is exhausted. But inasmuch as the act of Congress did not authorize the Treasurer to do more than remit the entire sum of money which had been collected from citizens of Texas to the Governor and left the States the duty of determining from all the evidence accessible who should receive the money thus remitted to it, the statement of the Treasurer is not conclusive on that point. It is sufficient, however, to require the State officers to carefully scrutinize and weigh the testimony in support of claims now presented.

It may be that the information upon which the Treasurer made the statement was at fault, because the payment of this money into the Federal treasury was made more than a quarter of a century before the refunding act was passed.

My conclusion is, therefore, that if the State officers whose duty it is to pass upon these claims believe that they are valid and that they have never been heretofore paid, that they are proper charges upon the funds now in the custody of the State, provided, of course, that they were filed within the time fixed by law.

Very truly yours,
(Signed) M. M. CRANE, Attorney-General.

BEQUESTS TO CONFEDERATE HOME.

The general control and management of the Confederate Home being vested by statute in a Board of Managers, they are authorized to accept a charitable bequest for the Home.

ATTORNEY-GENERAL'S OFFICE,
AUSTIN, June 10, 1897.

Hon. Chas. A. Culberson, Governor, Capitol.

DEAR SIR: In yours of the 7th inst. you request an opinion as to whether under existing law the Confederate Home is authorized to accept a charitable bequest, and in reply to same I beg leave to answer as follows:

1. Bequests to charitable uses are not within the constitutional prohibition of perpetuities and entailments.

15 Texas, p. 359.
22 Texas, p. 360.
27 Texas, p. 173.

2. It is undoubted that the State has the capacity to take by deed or devise.

25 Texas Sup., p. 291.
24 Texas, p. 425.
27 Texas, p. 350.

3. It does not require legislation to empower the proper department to act in receiving the bequest. The power exists as an incident to sovereignty, and may be exercised by the proper department if not forbidden by legislation.

25 Texas Sup., 290.
3 Wheat., 172.
5 Peters, 114.
10 Peters, 343.
15 Peters, 290.
12 Howard, 107.

4. The United States and each one of the separate States may sustain the character of trustee. They have the capacity to take and execute trusts for every purpose.

Perry on Trusts, Vol. 1, Secs. 40 and 41.
Lewis on Trusts, p. 22.

5. The statutes of the State of Texas provide that the general control,

management and direction of the affairs, property and business of the Confederate Home shall be vested in a Board of Managers. Under this provision I think that the Board of Managers will be authorized to receive the bequest.

Very respectfully,

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

CORPORATION, FOREIGN.

A corporation chartered under the laws of another State and not thereby authorized to do business in such State, can not be permitted to do business in this State.

ATTORNEY-GENERAL'S OFFICE,
AUSTIN, June 19, 1897.

Hon. J. W. Madden, Secretary of State, Capitol.

DEAR SIR: Your favor to hand relating to the application of the Port Arthur Light and Gas Company for a permit to do business in Texas.

From the charter presented, it appears that it is a corporation created under the laws of Missouri, for the purpose of operating in Texas only, and not in the State creating it. We construe our statute (Article 745) permitting foreign corporations to do business here, to apply to those corporations that also are permitted to do business in the State of their creation. In so far as this statute relates to the class of corporations, in our opinion, it is simply a declaration of the ordinary rules of comity obtaining between the States in such matters, and by this rule corporations are allowed to perform such acts in a foreign State as they are empowered to perform in the State creating them. Bank vs. Earle, 13 Pet., 277.

No rule of comity will allow one State to spawn corporations and send them forth in other States to do business there when they are not authorized to do such business within its own boundaries.

Land Grant R. Co. vs. Coffey Co., 6 Kan., 245.

Hill vs. Buch, 12 N. J. Eq., 31.

6 Thompson, Corporations, Secs. 7875-7896.

You are therefore advised that this permit should not be issued.

Very truly yours,

(Signed) T. A. FULLER, Office Assistant Attorney-General.

JUDGMENT ON LIQUOR DEALERS BOND.

The Governor is not authorized by law to grant relief from a judgment upon a liquor dealer's bond.

ATTORNEY-GENERAL'S OFFICE,
AUSTIN, June 25, 1897.

The Honorable Board of Pardons, Capitol.

GENTLEMEN: We beg to acknowledge receipt of yours of recent date, in which you ask the following:

"Where the State, for the use of the county, sues and recovers for a

breach of one of the conditions of a liqor dealer's bond—say, keeping such a screen as the law prohibits—is the Governor authorized to grant relief from the judgment?"

Article 3380, of the Revised Statutes of 1895 provides that any person desiring to engage in the sale of liquor shall enter into a bond conditioned among other things, that he shall keep an open house; the same section defines an open house to be one in which no screen or other device is used that will obstruct the view, and for a violation of the conditions of the bond authorizes the county and district attorney to institute suit in the name of the State for the use and benefit of the county, against the principal and sureties on the bond, and the amount of $500 as a *penalty* shall be recovered, etc. It is a familiar rule of construction in this State that when the Constitution defines the powers of an officer, he is confined to the powers enumerated, and the express mention of such powers negatives the existence of others. The Constitution of this State declares that in all criminal cases, except treason and impeachment, the Governor shall have power, after conviction, to grant reprieves, commutations of punishments and pardons, and, under such rules as the Legislature may provide, he shall have power to remit fines and forfeitures. Constitution, Article 4, Section 13.

The Legislature, as provided in the Code of Criminal Procedure, Chapter 4, Title XII, has authorized him in all criminal actions, except treason and impeachment, to grant pardons and remit fines and forfeitures of recognizances and bail bonds. A judgment upon a liquor dealer's bond, under the statute above mentioned, is neither a fine nor forfeiture, but a penalty for violation of some of the conditions of the bond. The real inquiry is, whether a proceeding against a liquor dealer and the sureties upon his bond to recover the penalty provided for in the statute is a criminal case within the meaning of Article IV, Section 13 of the Constitution. The Court of Civil Appeals, in the case of Taylor vs. Goodrich, decided February 24, 1897, held that the term "criminal cases," as there used, was intended to be understood as meaning those cases and crimes provided for in the Criminal Code, for which a conviction must be had in the manner provided by law for the trial of criminal cases. Suits for recovery upon liquor dealer's bonds are authorized by Article 3380, Revised Civil Statutes of 1895, which provides that the bond may be sued on at the instance of any person aggrieved by the violation of its provisions, and in addition to civil proceedings for individual injuries brought on said bonds, suit may be instituted in behalf of the State for a breach of the conditions of said bond. The provisions of this statute, we think, necessarily make a suit of this character a civil proceeding, and numerous cases of this character can be found decided by the Court of Civil Appeals, and they seem to have been uniformly treated as civil suits. We conclude, therefore, that as the Constitution and statutes limit the power of the executive to pardon in criminal cases and the remission of fines and forfeitures, that he would not be authorized to grant relief from a judgment upon a liquor dealer's bond, and you are so advised.

Respectfully,

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

OCCUPATION TAXES.

Occupation taxes are payable annually in advance, except where otherwise specially provided.

ATTORNEY-GENERAL'S OFFICE,
AUSTIN, July 20, 1897.

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

DEAR SIR: In your letter of recent date to this department you call attention to the fact that in H. B. No. 24, "An Act to amend Article 5049, R. S.," it is provided that upon the occupations named in said act an annual occupation tax is to be levied and collected, which occupation "*tax shall be paid annually in advance, except when herein otherwise provided,*" etc.; and that in Article 5050 of the Revised Statutes of 1895, this provision is found: "Any one wishing to pursue any of the occupations named in this chapter (occupation tax law), upon which a county occupation tax may be levied, *may do so by paying the same quarterly.*" The intention of the Legislature, as expressed in amended Article 5049, to require occupation taxes (except wherein said act otherwise provided) to be paid for one year in advance could scarcely have been more aptly and clearly expressed—"*which shall be paid annually in advance*" certainly could have no other meaning. This intention is further emphasized by a provision found in subdivision one of said act, to-wit: "Every person, firm * * * desiring to sell goods, wares or merchandise within this State, shall, *before pursuing* such occupation, *pay the tax for one year,* and take out a license," etc. Then again, Article 5049, prior to said amendment, did not contain the words, "shall be paid annually in advance, except when herein otherwise provided." The inserting of this clause was one of the amendments made to said article, and thereby the Legislature called direct attention to the intent to make said taxes annual taxes to be paid in advance. On what occupations should the tax be paid annually? On all occupations except wherein the act otherwise provided. Are persons, etc., pursuing occupations upon which a county occupation tax may be levied required by said act to pay said occupation tax for a year in advance? Certainly so, unless as to such occupation it is otherwise provided in the act: because it is expressly provided in said act that any person pursuing *any occupation named in said act* shall pay an annual occupation tax, which shall be paid annually in advance, *except when herein otherwise provided.* Is it otherwise provided in the act? No, it is not. I, therefore, conclude that the proper construction to be placed upon said act (upon this point) is as follows:

1. The general rule is that all occupation taxes must be paid for one year in advance.

2. That where a different rule prevails it is expressly so stipulated in the act.

3. That occupations upon which counties may levy an occupation tax are not, as such, an exception from the general rule.

Now, if said act of the Twenty-fifth Legislature amending Article 5049 requires persons pursuing occupations upon which counties may levy an occupation tax to pay said tax annually and inadvance, then so much of said act is in direct conflict with so much of Article 5050, which provides: "Any one wishing to pursue any of the occupations named

in this chapter, upon which a county occupation tax may be levied, *may do so by paying the same quarterly.*" One requires the tax to be paid for one year, in advance; the other gives the right to pay quarterly. They can not be reconciled. Both can not stand. Which is the law? There is no clause found in said act repealing all laws or parts of laws in conflict therewith, and if the provision in Article 5050, giving the right to pay quarterly, is repealed by the said act amending Article 5049 it is so done by implication. Repeal by implication is not looked upon by the courts with favor, but the rule seems to be that, "If two statutes on the same subject are mutually repugnant and irreconcilable, the latter act, without any repealing clause, operates, in the absence of expressed intent to the contrary, as a repeal of the earlier. But even in such case the old law is repealed by implication only *pro tanto* to the extent of the repugnancy."

Authorities:

Am. & Eng. Ency. of Law, Vol. 23, pp. 479, 480, 481 and 482 and the numerous authorities cited in notes.

Endlich on Interpretation of Statutes, Sec. 187.

5 Texas, 418; 8 Texas, 62; 20 Texas, 355; 22 S. W. Rep., 665.

Now, applying the above rule of law to the question before us, we find that Articles 5049 and 5050 of the Revised Statutes are upon the same subject, and that Article 5049, as amended by H. B. No. 24 of the Twenty-fifth Legislature, contains, as hereinbefore pointed out, a provision that is repugnant and irreconcilable with a provision found in Article 5050. Therefore, it follows that H. B. No. 24, being the latest legislative expression upon the subject, repeals so much of Article 5050 as is repugnant thereto and irreconcilable therewith—"the old law is repealed by implication only *pro tanto* to the extent of the repugnancy."

You are therefore advised that all occupation taxes are payable annually in advance, except as otherwise stipulated in H. B. No. 24, amending Article 5049.

Very truly yours,
(Signed) JOHN M. KING,
Office Assistant Attorney-General.

INVESTMENT OF SCHOOL FUND.

Counties desiring to purchase county bonds as an investment for the county school fund can pay a premium for said bonds.

ATTORNEY-GENERAL'S OFFICE,
AUSTIN, August 28, 1897.

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

DEAR SIR: This department is in receipt of your favor of recent date asking if counties desiring to purchase county bonds as an investment for the county school fund can pay a premium for said bonds, and in reply I beg to state as follows: Article VII, Section 6, of the Constitution of this State provides:

"All lands heretofore or hereafter granted to the several counties of

this State for educational purposes are of right the property of said counties, respectively, to which they were granted, and title thereto is vested in said counties. * * * Each county may sell or dispose of its lands, in whole or in part, in a manner to be provided by the commissioner's court of the county. * * * Said land and the proceeds thereof, when sold, shall be held by said counties, alone as a trust for the benefit of public schools therein; said proceeds to be invested in bonds of the United States, the State of Texas, or counties in said State, or in such other securities and under such restrictions as may be prescribed by law; and the counties shall be responsible for all investments; the interest thereon and other revenue, except the principal, shall be available funds."

In 1893 the Legislature appended the above section of the Constitution as a part of the school law of this State (Chapter 6, Title 66, Revised Statutes, 1895), but imposed no further restrictions as to the investment of the proceeds of said lands. The law then, as I understand it, confers upon counties the power to invest in bonds of the United States, the State of Texas or counties in the State of Texas, without any limitation as to the price to be paid. There is no question about the authority of the county to invest the fund in county bonds, the Supreme Court of this State having held that Article VII, Section 6, of the Constitution conferred such power (86 Texas, p. 234). The only question is, whether in the exercise of that power, the county is authorized to pay more than the par value of the bonds. The power is given to invest in county bonds "under such restrictions as may be prescribed by law." The interpretation given the language by the Supreme Court is that the Legislature might throw restrictions around the investment, and not that it was bound to do so before the power to make the investment could be exercised. The word "may" ordinarily signifies permission, and not command (86 Texas, p. 239). The Legislature having conferred upon counties the right and power to *invest* the county bonds, and having imposed no limitations or restrictions as to the price to be paid for said bonds, the presumption would be that it was left to the judgment and discretion of the county to carry into effect the power granted, and contemplates the purchase of and investment in such county bonds as in the opinion of the county might be deemed desirable. The object of this provision of the Constitution was to enable the several counties of this State to invest their permanent school fund so as to make it return or yield interest, the latter to be available funds. This object can be accomplished by the purchase of interest-bearing county bonds, either at their face value or less, the Constitution making the counties responsible for the preservation of so much of the fund as may be invested. The Constitution and statute use the word "invest," and in order to harmonize with the purpose and object of the power granted a construction broad enough to give it force and significance must be given. To restrict counties to the investment in such bonds only as could be purchased at their face value would deny them the right to buy the most secure and desirable bonds in the market, and in a large degree nullify the express power granted to "invest," and would be giving the law a construction inconsistent with the right expressly recognized. In conclusion, you are respectfully advised by this department,

1. That the Constitution and statutes of this State expressly authorize the several counties of this State to invest the permanent school fund

of said counties in interest-bearing county bonds, and that the counties shall be responsible for all investments.

2. That the Legislature having failed to avail itself of the permission granted by the Constitution to impose any further limitations or restrictions as to investment of the permanent school fund of the several counties in county bonds, the price to be paid for said bonds is left to the judgment, discretion and control of the counties, and if in the opinion of the commissioners' court of any county, it is deemed advisable to pay a premium for county bonds in making an investment of the permanent school fund of the county, they have authority to do so.

Respectfully submitted.

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

PURCHASE OF LAND.

A resident upon a town lot can not purchase additional lands under Chapter 129, Section 4218fff, Acts of 1897. A person who has only filed his application for a homestead has no right to purchase additional sections as an actual "*bona fide* owner and resident."

ATTORNEY-GENERAL'S OFFICE,
AUSTIN, September 10, 1897.

Hon. A. J. Baker, Commissioner General Land Office, City.

DEAR SIR: Reply to your two questions propounded by your favor of the 4th inst.:

1. Section 4218fff, Acts of 1897, in its entirety, reads as follows:

"Any actual, *bona fide* owner of and resident upon any other lands contiguous to said lands, or within a radius of five miles thereof, may also buy any of the aforesaid lands, but in such case a failure to reside upon either his other lands or a part of the additional lands so purchased by him, so as to make his ownership and occupancy thereof continuous for three years, shall work a forfeiture of such additional lands so bought from the State, unless he shall have sold his lands to another who may and does complete a three years continuous ownership and occupancy of and residence upon his said lands as above stated and as herein required of actual settlers."

In my opinion an owner and resident upon a town lot cannot purchase additional lands under this section. Within the meaning of "other lands" the Legislature did not intend to embrace town lots. While technically "other lands" would include a town lot, yet the common and ordinary use of this language, by which we are to be guided in this instance, it would not be so understood and the Legislature evidently used the phrase in the sense ordinarily given it. Also in other sections of the act, and notably in Section 4318f the terms "lands" and "other lands" are indisputably used in the popular sense above indicated and not as embracing town lots, but meaning agricultural or grazing lands. There is nothing in the context to justify the holding that a different meaning was intended by the use of the phrase in the section quoted.

2. It is my opinion that the Legislature did not intend to embrace within the meaning of "actual *bona fide* owners and resident upon other

lands" a person who has only filed his application and field notes upon public domain as a homestead, but who has not occupied the same for the term required to complete his title. It will be noted that the provisions of the section under discussion permit "the owner or resident" therein mentioned to remove from his own land to the additional land purchased, and that if his residence is continuous for three years upon his other lands or upon a part of the additional lands so purchased, he complies with the law entitling him to the additional purchase.

This could not be applicable to a homestead of the public domain while his title was ripening, because his removal therefrom on to the additional purchase would destroy his homestead right. The Legislature could not have so intended. It is undoubtedly true that a homesteader, generally speaking, while his title is still under process of maturing, is an owner and can maintain the action of trespass to try title, still we think that it was not intended to make this section applicable to such cases, and that he has no right to purchase until his title has fully matured.

Very truly yours,

(Signed) T. A. FULLER, Office Assistant Attorney-General.

OCCUPATION TAX ON BILLIARD TABLE.

Upon every pool or billiard table used for profit occupation tax of twenty dollars must be paid. "Used for profit" defined.

ATTORNEY-GENERAL'S OFFICE,
AUSTIN, October 16, 1897.

Lee Hankins, Esq., County Attorney, Waxahachie, Texas.

DEAR SIR: In your letter of recent date you propound the following questions to this department, viz.:

1. If a party should be prosecuted for having a billiard table in his saloon without paying the tax as required in subdivision 17, of Chapter 18, page 49, Acts of the 25th Legislature, Special Session, could he defeat the action by proof that no fees were charged for using same, but that it was absolutely free to his customers?

2. Is the presumption that the location of the table in the saloon sufficient to indicate that it was used for profit, or can this presumption be rebutted or overcome by proof to the contrary?

Said subdivision is as follows:

"From every billiard, pool table, or anything of the kind used for profit, twenty dollars; and any such table used in connection with any drinking saloon, or other place of business where intoxicating liquors, cigars, or other things of value are sold or given away, or upon which any money or other thing of value is paid, shall be regarded as used for profit."

The first question that arises in this connection is: "When are billiard tables, etc., subject to the tax under this subdivision?" It is necessary to determine this, because no person is subject to prosecution for failure to pay the occupation tax upon the table kept by him, unless said table is such a one as is subject to the tax under the provisions of said subdi-

vision. The answer to the question is very apparent, i. e., a table *used* for *profit*. When is a billiard table, etc., used for profit? If said subdivision had read "from every billiard table, pool table, or any thing of the kind, twenty dollars," then in construing the phrase "used for profit" would have been given its common or proper meaning, which would be, as I take it, charge for the use of said table, or table fees. That is, persons must pay something to play upon said tables; in contradistinction to the use of the table free of charge—no table fees charged—and hence no table would be subject to the tax unless charges were made for the use of the same. It is a general and primary rule of construction, when there is nothing in the statute to indicate that a word or phrase is used in a particular or technical sense, that it is to be taken in its common or proper meaning.

Am. & Eng. Ency. of Law, Vol. 23, page 326.
12 Texas, page 273.
16 Texas, page 382.
26 Texas, page 469.
4 Texas App., page 599.

According to the above rule it follows that unless there is something in said subdivision to indicate that the phrase "used for profit" is used in any other than its common or popular meaning, only tables for the use of which charges are made are taxable. Is the phrase "used for profit" used in any other than its common or popular meaning, or is it used in a peculiar or more extended sense?

This subdivision may be divided as follows:

1. It levies an occupation tax on every billiard table, etc., used for profit.

2. It gives the legislative interpretation of the phrase "used for profit."

What is the legislative interpretation of the phrase "used for profit"? The answer is found in the subdivision itself, to-wit: Any such table is used for profit when,

(1) In connection with any drinking saloon.

(2) When used in connection with any other place of business where intoxicating liquors, cigars or other things of value are sold or given away.

(3) Any table upon which any money or other thing of value is paid.

So it appears that the Legislature in this subdivision gives the phrase "used for profit" a peculiar and more extended meaning than it would have if confined to its popular or common meaning.

That portion of subdivision 17 which provides "And any such table used in connection * * * shall be regarded as used for profit," is nothing more than what is called an interpretation clause: that is, it defines the meaning of some word or phrase used in said subdivision. In this case it defines the meaning of the phrase "used for profit." Now it is a rule of construction that any provision in a statute which declares its meaning or purpose is authoritative, whether it relates to the meaning of the whole act, or of a single section, or of a word, it is a declaration having the force of law.

Southerland on Statutory Construction, Section 402.

Again, where the interpretation clause is that a particular word or phrase shall include a variety of things not within its general meaning,

it is a provision by way of extension as to the meaning to be given said word or phrase. Id., Section 404.

So applying the above rules to said subdivision, we find that the phrase "used for profit" cannot be taken in its popular or common meaning, because, as above pointed out, the Legislature, by an interpretating clause gave said phrase a peculiar and more extended meaning, and such interpretation is authoritative and has the force of law. Hence, in construing this statute, the legislative meaning must be given to the phrase "used for profit," and the meaning so given has been pointed out to be the use of any such table in one or all of the three ways named in said subdivision.

Upon trial of a case, proof that the table was used in connection with any drinking saloon, etc., would establish the fact that said table was used for profit within the legislative definition of the phrase "used for profit," and there would be no question of presumption arising, because, to defeat the prosecution on the ground that the table was not used for profit, it would be necessary to show that the table was not used in *either* of the *three ways* pointed out in said subdivision. To illustrate: Suppose the proof should show that the table was used in connection with a drinking saloon; proof on the part of the defendant that no table fees were charged would only show that the table was not used in the *third* way pointed out by the subdivision, and hence, such proof would only establish that the table was not used for profit in one of the ways named in said subdivision, and such proof would not meet the *issue* made by the State. The peculiar language used in this subdivision perhaps causes the doubt as to the exact meaning, and some contention may arise as to the meaning of the word "regarded" as used in the phrase "shall be regarded as used for profit," but it must be observed that this phrase "shall be regarded as used for profit" relates to the third way as well as to the first and second ways pointed out in said subdivision by which a table may be used for profit; that is, a table "upon which money or other thing of value is paid," shall be *regarded* as used for profit. Suppose the proof in a case should show that table fees were charged for the use of the table, this would be establishing the use of the table in the third way pointed out in said subdivision. Would any one contend that such proof would only raise a presumption, which presumption could be rebutted by proof that such a use was not a use for profit? And yet, if not permissible in this instance, why should it be so in case the proof showed that the table was used in one of the other ways named in said subdivision; does not the phrase "shall be regarded as used for profit" relate with as much force to one as the other?

It is, therefore, the opinion of this department, that any billiard table, etc., used in either one, or all of the ways named in said subdivision, is subject to the tax as provided is said subdivision 17, and any person keeping and so using any such table, upon failure to pay the tax as therein required, is subject to prosecution under Article 112 of the Penal Code.

Very truly yours,

(Signed) JOHN M. KING.
Office Assistant Attorney-General.

OCCUPATION TAX ON INSURANCE AGENTS.

A General Insurance Adjuster and Agent is not subject to a county and municipal occupation in addition to the State occupation tax imposed by law.

ATTORNEY-GENERAL'S OFFICE,
AUSTIN, November 16, 1897.

Hon. J. R. Curl, Acting Comptroller, Capitol.

DEAR SIR: We are in receipt of yours of the 15th inst., in which you ask if a general adjuster and agent, as defined in Subdivision 32, Chapter 18, General Laws, Special Session of the Twenty-fifth Legislature, is subject to a county and municipal occupation tax in addition to the State tax imposed therein. Said Subdivision 32 is a part of an act relating to general occupation taxes, and reads as follows:

"From each and every person acting as general adjuster of losses, or agent of life, fire, marine and accident insurance companies, who may transact any business as such in this State, an annual occupation tax of fifty dollars. By 'general agent,' as used in this law, is meant any person or firm, representative of any insurance company in this State, or who may exercise a general supervision over the business of such insurance company in this State, or over the local agency thereof in this State, or any subdivision thereof; provided, that when such general agent acts as a local agent, he shall pay an additional tax as a local agent, as hereinafter provided."

A tax on business or avocation is a legitimate mode of exercising the taxing power, and the Legislature of this State has constitutional power to tax occupations, and to authorize municipal corporations to tax them; and it is very common in this State for a municipal corporation to require the payment of an occupation tax as a condition precedent to the prosecution of a certain trade or business, and to enforce payment of such tax by the imposition of a penalty. While the power of a municipality in this State to impose such occupation tax upon occupations, professions, trades, etc., cannot be denied, it is equally certain that a city's or county's jurisdiction must be confined within the limits of the municipality, and the power to tax can only be exercised over persons plying vocations within the corporate limits. In other words, to permit a municipality to impose an occupation tax, there must be such a doing of business within the limits of the municipality as would justify its taxation. A "general agent," as we have seen above, is one who may exercise a general supervision over the business of an insurance company in this State; and the information furnished this department is that his business is not confined to any particular county or municipality; that he has no headquarters from which he directs or supervises the business; that his business is not located or done in any one place, but is distributed throughout the entire State; in other words, that the business is uniform, and is co-extensive with and circumscribed only by the limits of the State. This being true, the *locus in quo*, the theory upon which an occupation tax is justified, does not obtain in the case of a "general agent," and it can hardly be said that he does business in any county or municipality in such a sense as would justify taxing it as a privilege by such counties or municipalities, while as to the whole State it might be fair and well enough to tax the privilege as it has been done by this act.

Another thing: All the writers upon the subject of municipal power

are a unit upon the proposition that it is the business which is taxed and not the person engaged in the business; and that the general rule that the powers of a municipal corporation are to be construed with strictness is peculiarly applicable to the cases of taxes on occupations. The business of a "general agent," as we have seen, is not located or done in any particular county, but it is extended all over the entire State; and to permit the levy of a tax in one county in which he does business would confer a like power upon every such county and municipality over which his jurisdiction extends, and the tax would soon reach such an enormous sum as to make it prohibitory. Certainly this was not the legislative intention, and to imply it, in the absence of an express declaration to that end, would be contrary to all sense of justice. We do not mean to be understood as holding, or even suggesting that a city or county has no right to levy an occupation tax in the city or county where the business is located or done. Such a power is unquestioned, but we do hold that in the case of a general insurance agent, doing a general insurance business, having no fixed headquarters in this State from which he conducts his business and to which reports are made, whose business is uniform in its operation upon all the cities and counties alike, the taxing privilege would not be justified in each county and municipality over which his authority extends.

Desty on Taxation, 2 Vol., pp. 1382, 1387-1388.
Cooley on Taxation, pp. 21, 387, and 408.
14 Am. Rep., 140.
42 Fed. Rep., 578.
49 Mo., 559.
29 Iowa, 9.
1 Humph., 156.
Tiedeman on Police Power, 271.

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

MARRIAGE LICENSE.

Fee for issuing and recording marriage license and return thereon, one dollar.

ATTORNEY-GENERAL'S OFFICE,
AUSTIN, December 23, 1897.

C. W. Tidwell, Esq., County Clerk, Meridian, Texas.

DEAR SIR: In your letter of recent date you propound the following question: "What are the legal fees under the law as it now exists for issuing and recording a marriage license and recording the return thereon?"

In reply to the above question I beg to say that in a letter dated December 7th, to J. H. Galbreath, Esq., County Clerk, Corsicana, Texas, this department expressed an opinion to the effect that under the new fee bill (Act of the Special Session of the 25th Legislature, Chap. 5, page 5) that the County Clerk is only entitled to a fee of one dollar for all the services performed in connection with marriage licenses; that is, for issuing, recording the license and the return thereon. In said letter to Mr.

Galbreath I simply stated my conclusions without elaborating the reasons upon which said conclusions were based. But since it appears that it is almost a unanimous opinion among county clerks that said opinion is erroneous, I shall in this letter give you the reasons for said opinion in full.

Adversely to my opinion it is contended that County Clerks are entitled to the following fees for services performed in connection with marriage licenses, to-wit:

(1) For issuing and recording marriage licenses, $1.00.

(2) For recording the return of any marriage license, 50 cents.

Total fees, $1.50.

The point of disagreement is as to the fee of fifty cents for recording the *return* of any marriage license, they contending that they are entitled to said fee, I holding to the contrary. The right to charge said fee of fifty cents for recording the return is based by some upon the contention that said fee of fifty cents accrues under the following clause of Sec. 23 of the new fee bill, viz.:

"Recording the return of any writ, when any such writ is required by law to be returned, the amount of 50 cents."

Others admit that said above quoted clause has no application to marriage licenses, but contend that they are entitled to said fee for the following reasons:

(1) That by Article 2958, R. S., 1895, the return of a marriage license is required to be recorded by the County Clerk.

(2) That by Article 2457, R. S., 1895, a fee of fifty cents is fixed for recording said return.

(3) That by Sec. 2 of Chapter 5, page 13 (new fee bill), Act Special Session of the 25th Legislature, it is provided:

"It is not intended, however, by this act to repeal the present laws with regard to any fees, except where there is a conflict between the fees prescribed by now existing laws and the fees prescribed by this act."

(4) That the Act of the Special Session of the 25th Legislature, Chapter 5 (fee bill), is *silent* upon the question of fee for recording said return.

With the above four propositions as a basis the following conclusion is drawn: There being no provision in Chapter 5, Acts of the Special Session, 25th Legislature, *in conflict* with that provision of Article 2457, R. S., fixing a fee of fifty cents for recording said return, it therefore follows that said provision of said Article 2457, R. S., is not repealed by said Chapter 5 (fee bill), Acts of the Special Session of the 25th Legislature.

Let us examine the two views expressed above in the order named:

1st. Is the County Clerk entitled to a fee of fifty cents for recording the return of a marriage license by virtue of that provision of Sec. 23, Chap. 5, Acts of the Special Session 25th Legislature, reading as follows:

"Recording the return of any writ, when any such return is required by law to be returned, the amount of fifty cents."?

In order to entitle the clerk to any fee under this provision, a marriage license must be, within the meaning of the law, a writ. This proposition is too plain for argument. What is the legal definition for the word "writ"? A writ is, in its general meaning, a mandatory precept issued

by the authority and in the name of the State for the purpose of compelling the doing of something therein mentioned. (Bouvier's Law Dictionary; 34 How. Pr. (New York Sup Ct.), 362; Rapalje & Lawrence Law Dictionary.)

A marriage license, it is true, is issued in the name of the State, but it does not compel the marriage of the parties therein named; it is not mandatory, neither is it compulsory. It only *authorizes* the marriage of the parties therein named—a permission given by the State for a certain male and female to marry—in other words, a mere license. This is apparent when we look into the meaning of the word license. License may be defined generally as a *permission* to do an act. (Anderson's Law Dictionary.) It would cause great consternation to some to say that a marriage license is a mandatory precept issued in the name of the State for the purpose of *compelling* the parties therein named to marry each other. Indeed I can conceive of no good reason for the contention that a marriage license is a writ. The law names it, and that name is "license."

2nd. As to the second contention that that portion of Article 2457, R. S., 1895, fixing a fee of fifty cents for recording the return of any marriage license is not repealed by any provision of the "new fee bill" because of no conflict, I may say that there would be some strength in the contention and the conclusion would be correct if all the assumed premises forming the base of the argument were correct, but herein lies the error. It is assumed that the old law (Art. 2457, R. S.) fixed a fee *for recording the return* of marriage licenses. Is this assumption correct? I here quote so much of Article 2457 as is applicable:

"Issuing each marriage license, $1.00.

Recording each marriage license and return, 50 cents."

I here quote so much of Section 23, Chapter 5, Acts of the Special Session of the 25th Legislature as is applicable:

"Issuing and recording marriage license, $1.00."

Is there any fee fixed by either for recording *the return only?* In Article 2457 a fee of fifty cents is fixed *both* for recording the marriage license and return; no fee is fixed for doing singularly the *one* or the *other*, but a fee is fixed for doing *both*, i. e., for recording the license and the return. How much of said fee of fifty cents is fixed for recording the return *only?* How much for recording the license *only?* Surely not fifty cents for the doing of either, for to earn the fifty cents *both* must be done. It is therefore plain, that the statute fails to fix any fee for the recording of the return singularly and alone. This being true, the well known rule governing officers' compensation would apply, viz.: "An officer can demand only such fees as the law has fixed and authorized for the performance of his official acts." Throop on Public Officers, Sec. 447. "No public officer can collect fees without a law authorizing him to do so, and clearly fixing the *amount.*" State vs. Moore, 57 Texas, 307.

The above case is peculiarly applicable to the question before us, and a full discussion might be advantageous, but I will content myself by observing that under Article 2457, the most that can be claimed is that some part of the fee of fifty cents is prescribed for recording the return. How much of it is uncertain. Now, under the above decision, before the officer is entitled to collect any fee, the amount of the fee must be *clearly fixed by law,* and therefore, the law not clearly fixing the amount of the fee for recording a return of a marriage license the County Clerk would

not be entitled to any fee for said services. So, no question of conflict, or of no conflict between the "old" and the "new" fee law arises, for neither fixes the amount of the fees for recording the return *only,* and therefore, cannot conflict with each other. The statute simply fails to fix a fee certain in amount for said services, and therefore, none can be charged.

The fact that the officer is required by law to record said return (Art. 2958) does not affect the question. All public officers under the fee system, are required to perform many duties without compensation.

For the reasons herein given, I am still of the opinion that County Clerks are only entitled to a fee of one dollar for all services performed in connection with marriage licenses. I beg to remain,

Yours very truly,

(Signed) JOHN M. KING,
Office Assistant Attorney-General.

CHARTER AMENDMENT.

A corporation organized under the laws of this State can not so amend its charter as to reduce its capital stock.

ATTORNEY-GENERAL'S OFFICE,
AUSTIN, February 2, 1898.

Hon. J. W. Madden, Secretary of State, Capitol.

DEAR SIR: By your recent favor to this department you propound the question: "Can a private corporation organized under the laws of this State, so amend its charter as to reduce its capital stock?"

Answer: A corporation organized under the general laws of this State has only such powers as are given thereto by express provision or necessary implication, and more extended powers are expressly negatived by our statutes.

Lyons-Thomas Hardware Co. vs. Perry Stove Mfg. Co., 86 Texas, 143.

And it is well settled that a corporation has no implied power to change the amount of its capital stock as prescribed by its charter, and that all attempts to do so are void, unless such authority is given by legislative enactment.

Scoville vs. Thayer,, 105 U. S., 143.
Ins. Co. vs. Kemper, 73 Ala., 325.
Sunderland vs. Alcott, 95 N. Y., 93.
Salem Mill Dam vs. Roper, 6 Pick., 23.
Thompson, Corporations, Sec. 2114.

Looking then to our statutory enactments upon the subject we find no express provision for the reduction of the capital stock of a corporation, while under the chapter defining their powers and duties, we find that provision is made for increasing their capital stock. It is, however, provided by Article 647, that a corporation may "change or amend" its charter, by filing, authenticated properly, such amendments or changes with the Secretary of State. Should this article be construed to permit by such amendment a reduction of the capital stock? Article 643 of the statute requires that the amount of capital stock of a corporation shall be named in the charter. When subscribed, under all the authorities, it becomes a trust fund for the benefit of creditors and those dealing with

the corporation. The matter of reducing the capital stock is of much more importance to the stockholder and also to the creditors than its increase. By reducing the fund with which creditors are to be paid, various and serious complications might arise affecting a creditor's security and a stockholder's liability. That ultimately, under the general rules of equity, an existing creditor might enforce the trust is not denied, but that it would confuse and weaken his security is evident. These features could not have been ignored or lost sight of, and I am convinced that the Legislature did not intend by the use of the words "change or amend" to give unguarded authority to alter or vary the amount of capital stock. In a subsequent article they provided a method to be pursued when an increase is desired. Conditions are there prescribed for the protection of the stockholder not required in the statute for a simple amendment. It is more important, or equally so at least, to provide safeguards to protect all at interest if a reduction was contemplated. This was not done. It is not to be presumed that the Legislature overlooked this, but rather it occurs to me as evident that it was never intended to grant any authority to reduce the capital stock.

The significance of the fact that special provision was made for the increase, but nothing said about reduction is emphasized by the case of Seignouret vs. Home Insurance Company (U. S. Circuit Ct.) Am. & Eng. Corp. cases, where it is held "As the Constitution and laws of the State of Louisiana provide for the increase of the capital stock, but are silent as to the decrease, the power to reduce the capital stock of a corporation was intentionally denied"; notwithstanding there was a statute of that State providing that "It shall be unlawful for the stockholders of any corporation at a general meeting convened for that purpose to make any modifications, additions and changes in that act of incorporation," it was accordingly held that no reduction could be made.

In Smith vs. Goldworthy, 4 Adol. & E. N. S., 430, quoted in the above case it was held that a provision "that for the better conduct and management of the affairs of the company it should be lawful for a general special meeting called for the purpose from time to time, to amend, alter, annul, either in whole or in part, all or any clauses of said deed, or of the existing regulations and provisions of the company, did not authorize a reduction of the number and value of the shares of the company." We also refer to:

Ry. Co. vs. Veagel, 39 Me., 571.
Knowlton Case, 4 Blatch., 364.
Percy vs. Milladun, 3 La., 569.
Thompson, Corporations, Sec. 2079.
Cook, Stock and Stockholders, Sec. 281.
And notes found in 10 Am. & Eng. Corp. Cases, p. 134.

Some States, notably New York and Illinois, have statutes providing for the reduction of capital stock under certain regulations and safeguards, as also may the capital stock of a national bank be reduced within limitations: but as we have no provision permitting it in this State, you are respectfully advised that the capital stock of a corporation under our laws cannot be reduced by an amendment as is proposed in the case you submit.

Very truly yours,

(Signed) T. A. FULLER, Office Assistant Attorney-General.

STOCK LAW ELECTION.

Only freeholders can vote at stock law election. Freeholder defined.

ATTORNEY-GENERAL'S OFFICE,
AUSTIN, TEXAS, March 17, 1898.

W. F. Freeman, Esq., County Judge, Athens, Texas.

DEAR SIR: In your letter of recent date to this department you state that on the 28th inst. an election will be held in your county to determine whether sheep, hogs and goats will be permitted to run at large, and in this connection you propound the following questions:

Who can vote?

1. Can one whose wife only owns land?
2. Can one holding a lease for a number of years?
3. Can one holding a mere bond for title, whether consideration is paid or unpaid?
4. Can one who holds a general warranty or quit-claim deed, whether the whole or part of the consideration is paid?
5. What does the word "freeholder" mean as used in the statute?

Art. 4986, Revised Statutes, provides as follows:

"No person shall vote at an election under the provisions of this chapter unless he be a freeholder and is also a qualified voter under the constitution and laws."

It is evident that a proper solution or definition of what is a freeholder, as used in the statute, will enable us to answer all of the above questions. The word freehold is used in law to denote an estate in land and according to Blackstone, Kent, and many decisions, a freehold is an estate of inheritance, or for life in real property. So a freeholder is one who owns an estate of inheritance, or an estate for life in real property. Of estates of inheritance there are two kinds, (1) fee simple estate, (2) estate in tail. An estate for life, in its broadest sense, is every estate not of inheritance without a fixed limit. Life estates are divided in two classes, (1) those created by act of law, (2) those created by the act of the parties. Under the first class may be named dower, courtesy, homestead, and estates during coverture. A freehold estate may be legal or equitable. I doubt exceedingly whether the strict definition of the word freehold, as determined by the common law, should be applied to the word freeholder as used in the statute. It was evidently the intention of the Legislature to permit those to vote at said election who owned such an interest in the real estate as the adoption of the stock law would affect their interest, but in determining the questions submitted by you we may give to the word freeholder the meaning as above given, and yet a satisfactory answer may be given to each of the questions propounded.

Answer to 1st question:

Under the law, the husband has exclusive management and control of the separate real estate of the wife; the revenues derived therefrom become community property in which he has a half interest. Furthermore, in case of the death of the wife the husband has a life interest in one-third of said separate property. It has been shown above that a freehold estate is an estate for life, and that an estate for life is an estate not of inheritance without a fixed limit and includes those estates for an un-

determined period created by law, under which we find the classifications of estates during coverture. In the separate real estate of the wife the husband has an estate during coverture, and also following after her death an estate in said property during his life. It is therefore clear that the husband, under our statute, has a freehold estate in the separate property of his wife. This is especially true in case the husband and wife reside upon the said separate property of the wife as a homestead. He then has a homestead interest in said separate property, which also makes it a life estate created by law.

2. A person holding real estate under lease is not a freeholder, because it is a less estate than a life estate.

3. A person holding real estate under bond for title is a freeholder, for he is holding said property for an undetermined period, and may acquire a fee simple title thereto. See the case of Hanna vs. Shepperd, 25 S. W. Rep., 137.

4. A person holding land under a general warranty or quit-claim deed, whether the consideration is paid or unpaid, is a freeholder, for the same reason as given in the answer to the third question. See the case above cited.

Trusting this may be satisfactory, I have the honor to remain,

Yours very truly,

(Signed) JOHN M. KING,
Office Assistant Attorney-General.

UNIVERSITY DONATIONS.

A donation may be made to the University of Texas for a particular purpose prescribed by the donor, and if accepted will become a special fund for the uses specified, and will not constitute a part of the permanent University fund, the interest upon which is subject to appropriation by the Legislature.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, May 11, 1898.

Hons. T. S. Henderson and Beauregard Bryan, Committee Board of Regents.

GENTLEMEN: This department is in receipt of your letter propounding the following questions arising upon the subject-matter thereof:

"The Board of Regents of the University of Texas are in receipt of the enclosed communication from Mr. W. J. Bryan, of Nebraska, transmitting the donation therein referred to, viz.:

"'To the Managing Board of the University of Texas, City:

"'GENTLEMEN: Enclosed please find two hundred and fifty dollars ($250), the same to be invested by the University and the income used for an annual prize for the best essay on the science of government.

"'Yours truly,

"'W. J. BRYAN.'

The undersigned, as a committee, are directed to refer the same to

you for advice as to the power and authority of the Board to accept the donation, and particularly,

"1. Will said donation, as tendered, if accepted, become a part of the permanent University fund?

"2. In what securities can such donation be invested?

"3. Can it be invested in any security approved by the Board?

"4. Can a donor, in making a gift or donation, prescribe the special purpose of the same?

"5. Can such a donor prescribe the manner of the permanent investment of the donation, either specifically or in general terms, in any other securities than those prescribed by the Constitution and statutes for the investment of the permanent fund of the University? And if he may, in what manner should he express his wishes?"

We have the honor to submit, in compliance therewith the following opinion:

1. The donation, if accepted, will become a special fund for the uses specified, and will not constitute a part of the general permanent University fund, as contemplated by our Constitution and laws.

Article I, Section 11, of the State Constitution provides:

"Section 11.—*Funds—how invested.*—In order to enable the Legislature to perform the duties set forth in the foregoing section, it is hereby declared that all lands and other property heretofore set apart and appropriated for the establishment and maintenance of 'The University of Texas,' together with all the proceeds of the sale of the same, heretofore made or hereafter so to be made, and all grants, donations and appropriations that may hereafter be made from the State of Texas, or from any other source, shall constitute and become a permanent University fund. And the same as realized and received into the treasury of the State (together with such sums, belonging to the fund, as may now be in the treasury), shall be invested in bonds of the State of Texas, if the same can be obtained; if not, then in United States bonds, and the interest accruing thereon shall be subject to appropriation by the Legislature to accomplish the purpose declared in the foregoing section; *provided,* that one-tenth of the alternate sections of the lands granted to railroads, reserved by the State, which were set apart and appropriated to the establishment of 'The University of Texas,' by an act of the Legislature of February 11, 1858, entitled "An act to establish 'The University of Texas,'" shall not be included in or constitute a part of the permanent University fund."

Following this provision, our statute provides by Article 3836:

"The following shall constitute a permanent fund for the University of Texas, to be used for the benefit of said University:

"1. All lands and other property heretofore set apart and appropriated for the establishment and maintenance of the University of Texas under any previous law.

"2. One million acres of the unappropriated public domain of the State set apart for that purpose by the present Constitution, and one million acres of land set apart by Act of April 10, 1883.

"3. All bonds that have heretofore or that may hereafter be purchased with the proceeds of the sales of University lands.

"4. All proceeds of the sale of University lands that are now or may hereafter be placed in the treasury of the State.

"5. In addition to the foregoing, all grants, donations and appropria-

tions that may be hereafter made, or that may be received from any other source."

The permanent fund defined by the above provisions, is that fund appropriated and donated by the State or by others for the general support and maintenace of the University, the interest upon which, when reduced to cash, is subject to appropriation by the Legislature for the general support, maintenance and direction of the University.

This fund is donated by Mr. Bryan for a particular purpose, and the interest thereon is not subject to appropriation by the Legislature for any other purpose. It cannot go into and become a part of the general permanent fund, but must, under the terms of the donation, remain distinct therefrom for a particular specified use.

Second and third. While the donation is permanent in character, still, for the reason above given, it is not a part of the permanent fund within the meaning of the above provisions, therefore, it may be lawfully invested in any securities approved by the Board of Regents.

Article 3846, Revised Statutes.

Semmoy vs. Cole, 1 Barb., 361.

Allen vs. McKean, 1 Summ. (U. S.), 276.

Fourth. A donor in making a gift may prescribe the special purpose of same, and the Board of Regents may accept the same with such conditions, if not inconsistent with the objects and proper management of the institution. The purpose of the donation by Mr. Bryan is not inconsistent with the objects and proper management of the Texas University.

Ladies Collegiate Ins. vs. French, 16 Gray (Mass.), 196.

State vs. Vicksburg Ry. Co., 57 Miss., 366.

Fifth. The conclusions above reached make answer to the fifth question unnecessary and immaterial, except in so far as it has already been answered in previous questions. Respectfully,

(Signed) T. A. FULLER, Office Assistant Attorney-General.

OFFICIAL TELEGRAMS AND EXPRESS RECEIPTS.

The law requiring internal revenue stamps to be placed on telegrams and express receipts does not apply to official telegrams sent by and express receipts issued to State officials.

ATTORNEY-GENERAL'S OFFICE,
AUSTIN, TEXAS, July 6, 1898.

Hon. Webster Flanagan, Internal Revenue Collector, Austin, Texas.

DEAR SIR: The Western Union Telegraph Company and the several express companies of this city have informed the departments of the State government that they will not receive messages or packages for delivery unless the internal revenue tax is paid thereon and properly stamped In other words they treat the departments of the State government as private individuals. I understand it to be well settled that the Federa government is without authority to tax the agencies of the State government. (Cooley on Constitutional Limitations, 592; Collector v. Day, 1 Wall., 113-241; Ward v. Maryland, 12 Wall., United States v. Railway 17 Wall., 327.)

It occurs to me, therefore, that the United States government has no right to tax the State departments on telegraphic messages sent on purely State business. For example, if the Attorney-General's Department sends a message to a district attorney in relation to the prosecution of a case in which the State is interested, the message ought not to be taxed. The postal laws furnish no fair precedent for this demand. The Federal government undertakes to convey letters for the State, as well as for private individuals, at the nominal cost of two cents per letter. For that particular purpose it furnishes vehicles in the way of mail cars, and indeed, all transportation facilities. For this service thus rendered, of course, the State should be expected to pay, but the Federal government does not carry our telegraphic messages. We send them by a private corporation for a stipulated consideration. It is the privilege of sending these messages which the Federal government purposes to tax, if the construction of these corporations be accepted. It is the power to tax for the privilege of sending these messages that I deny.

What is said on this point fairly applies to express companies. An instance has just occurred in which this Department has sought to send some court papers from here to Washington, to be filed in the Supreme Court of the United States. We tender to the express company our money for the service which we ask them to perform, and they demand of us the internal revenue tax.

When the Adjutant-General's Department sends out arms and ammunition for the State Rangers to enable them to assist in enforcing the State statutes, he sends them by express and pays them for the services rendered. Now he is asked to pay a tax for this privilege. It is made the duty of the Secretary of State to distribute the statutes and the reports of the courts of last resort among the various subordinate officers in order to advise them as to their duties. He sends these by express, and also of him is demanded this internal revenue tax for the privilege of sending these packages by express.

These examples will suffice to show the application of the construction of the express companies and telegraph companies to the agencies of the State government. Plainly, if the old maxim prevails, that the power to tax carries with it the power to destroy, the power to tax the agencies of the State in the manner indicated carries with it the power to prevent the State from performing this service for which the tax is demanded.

I have made these observations upon the hypothesis that the statute justified the contention of the telegraph and express companies. I desire to add, however, that I do not believe that the Federal statute recently passed by Congress will bear such construction. I think that if fairly considered the language of the law requires the telegraph company to pay the tax, and not the sender of the message. Plainly it requires the express companies and railroad companies to pay the tax, without reference to whom the sender may be.

My contention is, therefore, (1st), that the statute does not require the sender of the telegraph message or express package to pay this internal revenue tax; and (2nd), that the Federal Congress is without power to impose this tax upon packages necessary to be distributed by the agencies of the State government in the carrying on of that government, nor upon the messages necessary or desirable to be sent in the enforcement of

her laws, nor in the discharge of the official duties of the various State officers.

I beg, therefore, to ask your construction of this statute, and through you to invoke a ruling of the Department at Washington, to the end that the matter may be adjusted without any unnecessary friction.

Thanking you in advance for as speedy a consideration of the question as possible, I beg to remain,

Yours very truly,

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

REGISTRATION OF VOTERS.

A volunteer in the U. S. Army who will be discharged before the election entitled to registration. Certificate should indicate that holder is in the army at time of registration.

ATTORNEY-GENERAL'S OFFICE,
AUSTIN, October 7, 1898.

Wm. M. Boerner, Esq., Registrar, San Antonio, Texas.

DEAR SIR: In your letter of recent date to this department you submit the following: "I should respectfully ask for instructions regarding the right to register of volunteer on furlough who subsequently will be mustered out of service after period of registration, but before the election for which he seeks to register."

Article VI., Section 1, of the State Constitution provides:

"The following classes of persons shall not be allowed to vote in this State, to-wit: * * * . Fifth. All soldiers, marines and seamen employed in the service of the army or navy of the United States."

Under this provision of the Constitution this department has held that no soldier, volunteer or regular, employed in the service of the United States army is entitled to register or vote. But, the query you propound presents a different question. Has a volunteer soldier of the United States who will be mustered out of service of the army before the election for which he seeks to register the right to register? He is not a qualified voter at the time he seeks to register, but by virtue of being discharged from the service he will become a qualified elector at the time of the election. To this state of facts Article 1786, Revised Statutes, 1895, would seem to directly apply. Said article reads as follows:

"Every male person * * * who shall have become a qualified voter of the city by the day of the election for which the registration is made, and is a *bona fide* citizen of the city in which he offers to register, shall be entitled to register as a qualified voter of the city," etc.

Granting that a volunteer soldier is otherwise qualified to vote, he is disqualified by being in the service of the United States army. This disability is removed whenever he is discharged from said service, and if discharged prior to the election for which the registration is made, he then "shall have become a qualified voter of the city by the day of the election," and hence, entitled to registration. Of course, the above conclusion is based upon the statement in your question that the volunteer *will be mustered out* prior to the election for which he seeks to register.

The discharge of the volunteer prior to the election being granted as a *fixed certainty* the question is easily answered in the affirmative, i. e.: that he is entitled to registration. But our knowledge of the circumstances which give rise to the question causes us to believe that an answer confined strictly to the question would fail to give the information desired. The question, no doubt, arises from the following facts: The War Department of the United States government has furloughed the volunteer soldiers of certain Texas regiments, preparatory to their final discharge. It is given out and so understood generally that these soldiers will be mustered out at a given time. From the above facts it will be seen that the fact these soldiers will be discharged by a certain time is *not a fixed certainty.* The intention of the War Department to muster out said soldiers at the time announced may be changed and the mustering out orders never given, or if given, countermanded. Hence, their being mustered out at a given time is not a fixed certainty, but is dependent on a certain contingency—which contingency may never happen. Therefore, the real question is, under these conditions are said volunteer soldiers entitled to register? Suppose he is permitted to register, and when the election is held he is still in the service of the United States army, would said certificate held by him be conclusive, or only prima facie evidence of his right to vote? Cases are found holding that said certificates are conclusive of the right of the holder to vote, but these decisions are based on expressed power given by the statutes to the Board of Registration. Paine on Elections, Sec. 364, and authorities cited. The general rule seems to be that the holder of the certificate has only a prima facie right to vote, and that if any person, whose name is on the register, be prohibited by any statute from voting, the fact that he is registered will not entitle him to vote, or relieve him from any penalty for illegally voting.

Paine on Elections, Sec. 363, and authorities cited.

Am. & Eng. Ency. of Law, Vol. 6, p. 291.

McCreary on Elections, Sec. 275.

It is important to determine whether or not, under our statute of registration, the certificate of registration is conclusive or only prima facie evidence of the holder's right to vote; because, if conclusive, it is manifest that the volunteer soldier whose discharge is dependent upon a contingency would not be entitled to register. If only prima facie, a different conclusion may be reached.

Our registration statutes gives the registrar power to examine the applicant for registration touching his qualifications as an elector: he may put the applicant under oath, require additional evidence than that of the testimony of the applicant, etc. See Arts. 1769, 1780 and 1781, Revised Statutes, 1895. Said statutes nowhere in terms make the act of registration conclusive as to the right of the person registered to vote. If conclusive his right to vote cannot be challenged, the judge of the election cannot inquire into his qualification, he may vote without fear of suffering the penalty for illegally voting—all of this would rest upon the act of the registrar in passing upon the qualification of the applicant. Without something more is found in the statute tending to show that registration is conclusive of the right to vote than the mere right of the registrar to inquire into and hear evidence under oath touching the qualifications of the applicant said registration should be held not to be conclusive, but only prima facie. There are no such other provisions found

in the statute, and I therefore draw the conclusion, based upon provision of the statutes, and the above authorities that regisration is only prima facie evidence of the right to vote.

This being true, are volunteer soldiers in the United States service whose discharge at a fixed time (which time is previous to the election) is announced by the proper authority, and who in all probability will at said time be discharged, entitled to registration? Permitting him to register does not give him the conclusive right to vote. If on the day of the election he is still in the army service, he is not a qualified elector, and cannot vote even though he holds a registration certificate. The penalty for illegal voting, should he vote, may be inflicted upon him.

On the other hand, should he be denied registration, and is discharged before the election, he cannot vote, because not registered. Art. 1768, R. S. And hence, a person "who shall have become a qualified voter of the city by the day of the election for which the registration is made" would be denied the right to vote.

Upon the whole, I think the better view to take is that volunteer soldiers whose discharge have been announced, and the time fixed therefor (the time being at a period previous to the election) should be permitted to register. Of course, the registrar should carefully inquire into all matters touching his qualifications as an elector, including that of his prospective discharge from the army service, and as a matter of precaution the certificate and the books of registration should show, among other things, that said person is a volunteer soldier in the service of the United States Army. See Art. 1778, R. S.

Yours truly,

(Signed) JOHN M. KING,
Office Assistant Attorney-General.

OFFICIAL BALLOT.

The name of a candidate should be placed, under the provision of Aritcle 1785, Revised Statutes, upon the official ballot with each party whose candidate he actually is, whether one or more.

ATTORNEY-GENERAL'S OFFICE,
AUSTIN, October 31, 1898.

Hon. J. O. Terrell, San Antonio, Texas.

DEAR SIR: We reply to your recent favor relative to the form of ballot, written in behalf of Judge J. L. Camp, as follows:

Article 1785, Revised Statutes, provides: "All ballots used by the voters at said election shall be furnished by the officers conducting said election, upon which shall be printed the names of all the candidates for State, county, precinct or city officers upon one ticket, and arranged according to the respective parties to which the candidates may belong."

Within the meaning of this article, a candidate belongs to that party or political organization whose candidate he becomes. The purpose is not to inquire into the political views of the candidate, or to restrict his party affiliations to one organization, but to group together all those candidates under one ticket representing a collection of citizens who have united for a common political purpose, so that a voter may be enabled to

readily know who they are, and, if he so desires, to vote for in a single group or list, the candidates of his party without looking elsewhere on the ballot for them. One person may become the candidate of more than one political organization, which may differ as to other matters and candidates, but agree as to a particular name, a known and frequent condition within the knowledge of the Legislature passing the act. Its proper construction, as contemplated by the framers, in my opinion, is that the name of a candidate should be arranged or grouped on the ballot with the ticket of each party or political organization that presents him as a candidate, whether one or more. The term "party," as here used, means a number of persons united in opinion against others of a contrary opinion upon questions of public policy.

To hold that the name of such candidates should not appear but once would deprive all but one of these political organizations of the right to place his name in their list, although he may be their candidate, and notwithstanding the statute expressly says that *all* the candidates for the respective parties shall be arranged together. Should one be omitted from a particular group, and it thus left incomplete and less than all, because he is also the candidate of another party and on the ticket in another place? I think not. The placing of the name of all candidates of all parties in their respective groups is required. The omission of the name of a single candidate of any party is unauthorized.

As above indicated, one purpose in view by the Legislature in providing for the grouping according to respective parties, was to enable the voter to see before him upon his ballot the names of those candidates having the endorsement and bearing the recommendation of his political associates. To leave off one of the names and put it somewhere else would mislead and confuse the voter, and deprive him of the very means of the information deemed essential, and sought to be given him by the law. The candidate would also be deprived of the benefit to him contemplated by the arrangement provided in the law. It is significant, too, that while many States prohibit the name of a candidate appearing upon the ballot more than once, ours does not, although later in being passed. Where there is doubt courts adopt that construction which affords the citizen the greater liberty in casting his ballot.

Many States of the Union have the Australian ballot system, and while none coming under my notice are identical in language with ours in this respect, still all having the group system of arrangement announce views leading to the conclusion we have here reached. The following authorities bear upon the subject:

Phelps vs. Piper, 33 L. R. A., 53 (Neb.).
Fisher vs. Dudley, 74 Md., 242.
Bateman vs. Bolle (Ohio), 34 L. R. A., 34.
Atkinson vs. Lay, 115 Mo., 536.
Savin vs. Pease, 42 Pac. Rep., 256.
Simpson vs. Osborn, 34 Pac. Rep., 747.

You are, therefore, respectfully advised that the name of Judge Camp should be placed upon the official ballot with each party or political organization whose candidate he becomes. Views heretofore expressed by this department in conflict with this conclusion are not followed.

Very truly yours,

(Signed) T. A. FULLER, Office Assistant Attorney-General.

OFFICIAL BONDS.

Official bonds of State and county officers are not required to bear internal revenue stamp.

ATTORNEY-GENERAL'S OFFICE,
AUSTIN, December 19, 1898.

Hon. John W. Griggs, Attorney-General, Washington, D. C.

SIR: My attention has been called to a ruling of the United States Commissioner of Internal revenue in which he holds that an internal revenue stamp is required to be placed on all official bonds of State and county officers. Not believing that this ruling is sustained by the law, I take the liberty of calling your attention thereto, to the end that confusion may be avoided and unnecessary litigation prevented.

For the purposes of this letter, it is not necessary to make any distinction between State and municipal officers. (United States v. Railroad Company, 17 Wall., 327.)

The power to tax involves the power to destroy. (McCulloch v. Maryland, 4 Wheat., 431.) For that reason it has always been held that a State government has no power to tax the agencies of the Federal government, and that the Federal government has no power to tax the agencies of the State government. (Cooley's Const. Lim., 592; McCulloch v. Maryland, 4 Wheat., 400; Collector v. Day, 11 Wall., 113; R. R. Co. v. Peniston, 18 Wall., 5; Weston v. City of Charleston, 2 Pet., 466.

It has been held that a State is prohibited from taxing the officers of the general government for their fees or emoluments, since such a tax having the effect to reduce the compensation for the services performed and provided by the Act of Congress would to that extent conflict with such Act and tend to nutralize its purpose. (Dobbing v. Commissioners of Erie County, 16 Pet., 435; Cooley's Const. Lim., 591.)

It has also been directly held that Congress may not impose a tax on the salary of a State officer. (Collector v. Day, 11 Wall., 118; Freeman v. Seigel, 10 Blatch., 327.)

The power to tax for State purposes is as much an exclusive power in the State as the power to lay and collect taxes to pay debts and provide for the common defense and general welfare of the United States is an exclusive power in Congress. (Ward v. Maryland, 12 Wall., 418-27.)

Congress has no power to make a tax deed issued by the State void for the want of a stamp. (Sayles v. Davis, 22 Wis., 225.)

Nor can Congress forbid the recording of an unstamped instrument, under the State laws. (Moore v. Quirk, 105 Mass., 49.)

A law of Congress requiring authorized judicial process to be stamped could not be applied to the process of the State courts. (Warren v. Paul, 22 Ind., 275; Jones v. State, 19 Wis., 369; Fiffield v. Close, 15 Mich., 305; Smith v. Short, 40 Ala., 385.)

The precise question in point has been determined, however, by the Supreme Court of Indiana in the case of the State v. Gordon, 32 Ind., 1, in which it was held that Congress cannot require a stamp upon the official bond of a State officer.

I have thus given you the reasons for the view that I entertain, that the Federal government is without authority to impose a tax on bonds given

by State or county officers. An examination of the authorities cited will disclose the fact that they are based upon the fundamental proposition that the State and Federal governments are each sovereign within their well defined spheres; that a State cannot interfere with the agencies of the Federal government in the transaction of strictly governmental business, and that the Federal government cannot interfere with the State agencies in the transaction of State business. Remembering that a State is but a corporation, and that it cannot act except through its agents, the State and county officers, and that the official bonds are the contracts by which its officers are constituted its agents, it is plain that it has the right to enter into such contracts with its officers without any hindrance or interference on the part of the Federal authorities. If, as Chief Justice Marshall has said, the power to tax involves the power to destroy, the power of the Federal government to tax a contract entered into by the State government with its citizens involves the power to destroy the right of making these contracts. It is universally conceded that the Federal government may not tax bonds and other obligations issued by the State government and delivered to its citizens. Why? Because the issuance of such bonds is necessary for the transaction of governmental business. They constitute contracts between the State and the citizens. But bonds issued by the citizen as a condition precedent to his accepting office from the State are contracts between the State and the citizen, and necessary to be entered into before the State can transact its business through governmental agencies. If the Federal government can impose a tax on the official bond of a State or county officer, it can levy a tax upon the privilege of a citizen of a State to act as an agent of the State. In other words, the Federal government may levy a franchise tax or occupation tax on the privilege of a citizen accepting a State or county office, and therefore the Federal government may, by a prohibitive franchise tax, destroy the right of a citizen to accept an office at the hands of a State or municipal government. It will then follow that the Federal government can by taxation prevent the States from securing agents to transact its business, and therefore absolutely destroy the State governments.

With an abiding conviction that the construction of the Internal Revenue Collector is wrong, and believing in the right of the State to conduct its own business through its own agencies without congressional interference or without paying tribute to the Federal government either directly or indirectly, I have, as above indicated, taken the liberty of addressing this communication to you. I trust, therefore, that if it is not one of which you should at first take cognizance, that you will refer it to the proper officer, so that a consideration of the question may be secured.

Very respectfully,

M. M. CRANE,
Attorney-General of Texas.