

**THE FOLLOWING ARE SOME OF THE MOST IMPORTANT  
OPINIONS RENDERED BY THE DEPARTMENT  
BETWEEN THE DATES OF JANUARY  
1, 1905, AND SEPTEMBER  
1, 1908.**





## TAXATION—POLL TAX.

Poll tax may be paid without at same time paying property taxes, but except in case of homestead, property taxes can not be paid without payment of poll tax.

AUSTIN, TEXAS, January 3, 1905.

*Hon. J. W. Stephens, Comptroller, Austin, Texas.*

Dear Sir: This department is in receipt of yours of the 28th ult., which is as follows:

“In cases where an assessment embraces personal property, real estate and poll, it has been the uniform ruling of this department not to allow payment of the property taxes without payment of the poll tax also except in cases where a homestead is involved, or where the real estate has changed hands.

“Article 5176 of the Revised Statutes of 1895, and that portion of Section 10, Chapter 103, Acts 25th Legislature which provides: ‘If no personal property be found for seizure and sale, as above provided, the collector shall, on the 31st day of March each year for which the State and county taxes, for the preceding year only, remain unpaid, make up a list of the lands and lots on which the taxes for such preceding year are *delinquent, charging against the same all taxes and penalties assessed against the owner thereof,*’ are the authorities upon which this ruling is made.

“I respectfully submit this question to you and will thank you for an opinion on same.”

There is no provision of the Statute so far as we can find that specifically requires the taxpayer to pay all of his taxes, or taxes on all of the property rendered by him, before demanding receipt, or that specifically authorizes him to pay a part of such taxes and demand a receipt therefor, except the provision in Section 12 of the Terrell Election Law authorizing the payment of poll tax without the payment of other taxes.

There is no conflict between the provisions of the Terrell Election Law and the laws for collection of taxes with regard to collection of poll tax, nor are the laws regarding the collection of poll taxes affected thereby, with the single exception that it is positively and specifically provided that a taxpayer shall have the privilege of paying his poll tax and demanding a receipt therefor without paying his other taxes. The law for the enforced collection of poll taxes, if not voluntarily paid by January 31st, remains the same.

You say that it has been the uniform ruling of the Comptroller’s Department not to allow the payment of property taxes without payment of the poll tax, also (except in case of homestead, etc., as stated in your letter). This does not appear to us to contravene any specific provision of law and you are so advised.

It was not the purpose of the poll tax amendment of the Constitution, nor the Terrell Election Law, to give the person against whom a poll tax is assessed the option of paying or not under penalty of losing the right to vote if the poll tax is not paid before February 1st, but the remedies for the enforced collection of this tax, if not

voluntarily paid, remain as under the General Laws for the collection of taxes.

Yours truly,

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CONSTRUCTION OF LAWS—STENOGRAPHER LAW—FEES.

Under chapter 60, page 84, General Laws 1903, in a district composed of more than one county, the official stenographer's compensation is payable only out of the fees collected under that act.

AUSTIN, TEXAS, January 4, 1905.

*C. B. Howard, Richmond, Texas.*

Dear Sir: Yours of the 2nd inst., addressed to the Attorney General has been duly received.

Your question involves a construction of what is known as the "Official Stenographer's Act" passed by the Twenty-eighth Legislature. The construction of Section 9 of said act in its relation to the whole act is that in judicial districts composed of more than one county the official stenographer must depend for his compensation on the fund accumulated from the fees taxed under Section 5. Section 9 provides that he shall receive his compensation "out of the fees collected for that purpose," while in fixing the compensation for official stenographers in districts composed of only one county it is provided that the compensation shall be paid "monthly out of the general fund of the county," thus making it in the latter case a charge against the county fund. It was the evident intent of the Legislature to prohibit, in those districts composed of more than one county, the compensation due the official stenographer from becoming a charge against the general funds of the respective counties as is shown by the proviso to Section 9 that out of the fees "collected" for that purpose by the counties composing said judicial district each county should be liable only for such services as are rendered for the district court in that county sought to be charged, thus evidencing the purpose of the act to make the position of official stenographer self-sustaining.

This is further evidenced by the discretion given the district judge as to whether an official stenographer should be appointed.

In providing for the compensation in those districts composed of more than one county the act invariably says that he shall be paid out of the "fees collected."

It is the ruling of this department that in those districts composed of more than one county where an official stenographer has been appointed, that the several counties composing the district are not liable to him in any amount in excess of fees which have been "collected" under Section 5 of the act, and it was not the intent of the Legislature that a county should advance his compensation and risk a replenishment of the general fund out of fees taxed and not collected.

Yours truly,

## CONSTRUCTION OF LAWS—PECULATION—OFFICERS.

Article 266, Penal Code, is violated by a county attorney issuing policies of insurance upon the county court house.

AUSTIN, TEXAS, January 5, 1905.

*Hon. R. S. Hauseels, County Attorney, Childress, Texas.*

Dear Sir: We have your favor of the 3rd inst., in which you say that previous to your election to the office of county attorney you wrote a line of insurance insuring the court house of the county, and ask whether you can renew these policies without violating the law. Article 266 of the Penal Code is as follows:

“If any officer of any county of this State or of any city or town therein shall become in any manner pecuniarily interested in any contracts made by such county, city or town, through its agents or otherwise, for the construction or repair of any bridge, road, street, alley or house, or any other work undertaken by such county, city or town, or shall become interested in any bid or proposal for such work or in the purchase or sale of any thing made for or on account of such county, city or town, or who shall contract for or receive any money or property, or the representative of either, or any emolument or advantage whatsoever in consideration of such bid, proposal, contract, purchase or sale, he shall be fined in a sum not less than fifty nor more than five hundred dollars.”

Construing this article, Judge Willson in the case of Rigby vs. the State, 27 Texas Ct. App. Rep., page 57, said the purpose of the statute is “to prevent the officers of such corporations from using their official knowledge and influence to their individual pecuniary advantage in the financial transactions of such corporation,” and the conclusion of the court was stated as follows:

“Our construction of the statute is that it inhibits any officer of a county, city or town, from selling to or purchasing from such corporation *any property whatsoever.*”

It would seem that the language of Judge Willson in this case is broad enough to cover, and prohibit, such a contract as that proposed.

Yours truly,

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 CONSTITUTIONAL AMENDMENT.

An amendment to the Constitution is adopted if a majority of the votes cast upon the question were in favor of it, notwithstanding it may not have received an affirmative vote equal to a majority of the votes cast for Governor or other officer voted for at the same election.

AUSTIN, TEXAS, January 6, 1905.

*Mr. C. A. Beasley, Richmond, Texas.*

Dear Sir: I beg that you will pardon my delay in replying to your letter of the 2nd inst. It came to hand, however, shortly after I had assumed charge of this department, and the reply was unavoidably delayed owing to pressure of other matters incident upon the change of the administration.

I recollect reading the statement which is referred to in the clipping which you enclosed me. As I remember it the objection made is that the constitutional amendments failed to carry because the vote for each amendment was not equal to a majority of the aggregate votes cast for Governor, or other office, notwithstanding that the vote in favor of each amendment was largely in excess of the vote against it. I do not know whether the fact is as claimed, but even if it is, I am of the opinion that the result contended for does not follow.

Article 17, Section 1, of the Constitution prescribing the mode of amending the Constitution authorizes the Legislature to propose amendments to be voted upon by the qualified electors for members of the Legislature which proposed amendments shall be fully published, etc.

It shall be the duty of the several returning officers of said election "to open a poll for, and make returns to the Secretary of the State of the number of legal votes cast at said election for and against said amendments; and if more than one be proposed, then the number of votes cast for and against each of them; and if it shall appear from said return that a majority of the votes cast have been cast in favor of any amendment, the said amendment so receiving a majority of the votes cast shall become a part of this Constitution, and proclamation shall be made by the Governor thereof."

It will be seen that the result of the election is to be determined from the return which is required to show the number of legal votes cast for the the amendments, and the number of legal votes cast against the amendments.

The declaration that "if it shall appear from said return that a majority of the votes cast have been cast in favor of any amendment, the said amendment so receiving a majority of the votes cast shall become a part of this Constitution," must be construed in the light of the requirement that the return from which this is to be determined must show the votes cast for and against the amendments. I am of the opinion, therefore, that the plain meaning of the provision is that if from the return it appears, that of the aggregate of the legal votes cast for any amendment, and those cast against it, a majority were cast in favor of it, the amendment was carried. The phrase "majority of the votes cast," in each instance means a "majority of the votes cast upon the particular proposition." Plainly, this must be so, or otherwise there would have been no necessity for the requirement that the returns should show the number of votes cast against the amendment, because, upon the assumption that the construction contended for by Mr. Senter is correct, then, if the votes cast in favor of any amendment had not been equal to a majority of all the votes voting for some candidate at the election the amendment would have failed to take effect, notwithstanding no votes had been cast against it at all.

Such a holding would be unreasonable, I think, in the absence of an express provision that a majority is required of all who voted at the election whether they voted on the amendment or not.

I will add that the returns of the election on these amendments

were duly canvassed and the Governor's proclamation has been issued declaring all of them a part of the Constitution of this State.

Yours truly,

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QUARANTINE—COUNTY COMMISSIONERS' COURT—MUNICIPAL CORPORATIONS.

County commissioners' court may establish a quarantine against a case of smallpox in an incorporated city, notwithstanding the city has already done so.

AUSTIN, TEXAS, January 11, 1905.

*Hon. Geo. R. Tabor, State Health Officer, Austin, Texas.*

Dear Sir: In yours of January 9th, you submit the following:

"A case of smallpox occurred in the incorporated town of Seguin. The city physician took charge of the case. Thereafter, the county physician establishes a quarantine around the premises, placing guards, etc., to protect the balance of the county. The city physician disputed the authority of the county physician in the matter."

You desire to know who is the proper person to take charge of and quarantine this case, the city physician or the county physician, or which is the superior authority.

You are advised that, while under the law governing quarantines, the commissioners court is invested with the discretion to determine whether their county, or any part of the same is threatened with the introduction or dissemination of dangerous, contagious or infectious diseases, yet, when they believe such to be the case, notwithstanding the use of the word "may," in the statutes, it is their imperative duty, enjoined upon them by law, to cause their physician to establish and maintain a necessary quarantine, etc. The city authorities are given merely a permissive right to maintain a quarantine in the city limits, and, in the event of the failure or refusal of the commissioners court to discharge its duty as to the quarantine, it becomes the duty of the city authorities to establish and maintain the necessary quarantine within the city limit.

The law contemplates and provides for the co-operation between the county and city authorities. In the present case, it seems that there is a dispute existing between the city and county authorities as to upon whom the duty is placed by the law of maintaining the quarantine. The duty is primarily upon the county, and, secondarily, upon the city.

It is made the plain duty of the commissioners court to take charge of and control and maintain throughout the county, including incorporated cities and towns, by giving the right to declare, maintain and pay for legal quarantine in such cities and towns, or any may co-operate with each other.

It is the opinion of this department, that, notwithstanding, the town of Seguin may establish a quarantine to protect the city, yet

if the commissioners court of the county, or the county physician thinks it necessary to also establish a quarantine around the premises, in order to protect the balance of the county, he has perfect authority to do so under the law.

Trusting that the above will meet with the requirement, I am,  
Yours very truly,

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#### JUSTICE OF THE PEACE—NOTARY PUBLIC.

Justice of the peace must qualify as notary public, as well as justice of the peace.

AUSTIN, TEXAS, January 11, 1905.

*Mr. J. M. Young, Justice of the Peace, Kennedy, Texas.*

Dear Sir: In reply to yours of the 9th inst., you are advised that the Constitution of the State (Article 5, Section 19) provides that justices of the peace shall be ex-officio notaries public.

Article 1564 of the Revised Statutes of 1895 provides that each justice of the peace shall be commissioned as justice of the peace of his precinct and ex-officio notary public of his county, and shall take the oath of office prescribed in the Constitution and give the bond prescribed by law.

This department has ruled that in those counties where, by reason of not having sufficient population, the sheriff shall be ex-officio tax collector, that the sheriff would not be allowed to qualify as sheriff, without also qualifying as tax collector and giving the bonds required by that office.

The wording of the Constitution and of the statutes, in reference to justices of the peace, makes it imperative on a justice of the peace to qualify as notary public by taking the oath of office as such and giving the bond as such, and, while we are not inclined to make a positive ruling in the matter, yet we are strongly of the opinion that a justice of the peace should not be allowed to qualify as such, without, he at the same time, qualify as notary public.

Very truly yours,

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#### LOCAL OPTION LAW—SALE. (WHAT CONSTITUTES SALE, DISCUSSED—POSSUM CLUB.)

The distribution of liquors by a bona fide club among its members is not a sale within the inhibition of the liquor law, even though the person receiving the liquor gave money in return for it.

AUSTIN, TEXAS, January 11, 1905.

*Hon. James S. Parkins, Rusk, Texas.*

Dear Sir: Yours of January 10th addressed to the Attorney General has been referred to me for attention.

You inquire as to whether an opinion desired by a county attorney upon a question arising in a criminal case, or involving the con-

struction of a criminal statute, should be asked of this office. You are advised that it should.

You state in your letter that if the opinion should come from this office that you desire one in the letter attached to your inquiry. The matter inquired about in the attached letter is as follows:

It is stated that some two weeks ago a number of persons calling themselves a "Possum Club" decided to have a possum supper. The facts are, that several days before the supper quite a number of persons, probably a club, resolved to have a supper, and they appointed committees to get the various things they desired, and among the committees was one to get beer and whisky, and that each person attending the supper should pay 75 cents to defray expenses. A sufficient number contributed to pay for what whisky was consumed, and it was ordered, the gentleman who was indicted receiving the principal part of the money for this and other purposes and ordered the liquors and paid over the money for it. After the arrival of the whisky and beer it was understood that each person who attended was to receive a bottle of beer and some whisky, which each person did who desired it.

Among those attending were some guests who paid nothing, but all, except those, paid 75 cents. Also after the arrival of the beer ordered by this gentleman some persons contributed their money and became participants in the supper.

In the special instance in mind, just a short time before the supper, a party who had had nothing to do with the ordering of the liquors and had no permission or invitation to attend the supper, approached the gentleman who was managing the finances of the affair and told him that he wanted in on the supper, that he understood they were to have some beer, etc., and the gentleman assented and the 75 cents was paid. This party did attend the supper and received a bottle of beer at his plate, and some whisky. There was just enough money, and no more collected than, to pay all of the expenses of the supper.

It is not the province of this department to take a statement of facts in a case pending in the courts and from that statement of facts say whether or not the defendant should be convicted, and we will not undertake to do so in this case, but as the matter has come to this office in a shape that requires us to give an opinion we will give you the benefit of our investigation of the matter.

The gist of the offense of a violation of the local option law is a "sale" within the prohibited territory, and in order to violate the local option law the party accused of the crime must be the seller in some way, either directly or indirectly, as contra-distinguished from the purchaser. A conviction is not authorized if the party charged is acting as agent of the purchaser. These principles are well settled and announced in the following cases:

- Hood vs. State, 36 App., 585.
- Thompson vs. State, 34 S. W. Rep., 937.
- Bennett vs. State, 34 S. W. Rep., 936.
- Wright vs. State, 34 S. W. Rep., 935.
- Bowman vs. State, 35 S. W. Rep., 931.
- Phillips vs. State, 40 S. W. Rep., 270.

Van Arsdale vs. State, 34 S. W. Rep., 931.

From the statement of facts presented to us it appears that the man who is charged with the violation of the local option law was the committee appointed by the "Possum Club" to provide the refreshments in the way of whisky and beer, and in providing these refreshments he was acting as the agent of the "Possum Club" and in no way interested in the sale of the beer except to the extent of providing it for those who desired it at the "Possum Club" supper.

It does not appear that this "Possum Club" is an incorporated institution, but the principles of law regulating the sale of liquor would be the same as applied to a distribution of liquor amongst the members of this club as it would be if the club was incorporated.

The distribution of liquors by a bona fide club among its members is not a sale within the inhibition of the liquor law, even though the person receiving the liquor gave money in return for it.

See: Amer. & Eng. Ency. of Law, Title "Intoxicating Liquors;" State vs. McMaster, 14 Southwestern Rep., p. 290.

In the McMaster case cited above, the question for decision was whether defendant was guilty of a violation of the Statute making it an offense for any person or persons to sell liquor without license, the decision being a construction of what it took to constitute a sale. The defendant was one of the managing committee to provide accommodations, refreshments, etc., for the club.

Among the refreshments purchased and kept on hand with the funds of the members, obtained by assessments, was a small quantity of liquor which was distributed to the members as they required the same, the members paying an amount of money equivalent to the cost price of the article, which amount was fixed by the committee and was not intended for profit, but solely to cover cost.

The court held the defendant was not guilty of selling liquors and said:

"We think the proper doctrine is announced in the text of the American & English Encyclopedia of Law, Volume 11, Title 'Intoxicating Liquors,' page 727, as follows: 'The distribution of liquors by a bona fide club among its members is not a sale, even though the person receiving the liquor gives money in return for it. It is otherwise, however, where such club is simply a device resorted to as a means of evading the statute.'"

I also call your attention to the case of Winters against the State, 33 App., 395, and to the case of the State against Austin Club, 33 S. W. Rep., page 113.

Trusting the above will be satisfactory, I am,  
Yours very truly,

INDEPENDENT SCHOOL DISTRICT—TAX ASSESSOR—  
DEPUTY.

Tax assessor elected by trustees of an independent school district cannot appoint a deputy.

AUSTIN, TEXAS, January 13, 1905.

*Mr. J. C. Reynolds, Treasurer, Moody Independent School District.*

Dear Sir: This department is in receipt of your letter of the 12th,



in which you say that the Moody Independent School District has elected one of its trustees to the office of tax assessor and collector, that he is not in a position to himself make the assessments, but wants to appoint a deputy to do so. You ask whether a deputy can legally assess the taxes.

We understand, though you do not say so, that Moody is not incorporated for municipal purposes. Chapter CXI of the laws of the Twenty-seventh Legislature (page 273, General Laws) which provided that the trustees in independent school districts not in a city or town having an assessor and collector should choose from their number an assessor and collector of taxes, was amended by Chapter LXVI, of the laws of the Twenty-eighth Legislature (page 91, General Laws), in which latter act it is not required that the assessor and collector shall be chosen by the trustees from their number.

In Section 2 of Chapter CXI of the Twenty-seventh Legislature, it is provided that the assessor and collector "shall have the same power and shall perform the same duties with reference to assessment and collection of taxes for free school purposes that are conferred by law upon the city marshal of incorporated towns or villages."

We find no provision in this act for the appointment of a deputy assessor and collector. Article 608 requires the marshal in incorporated towns and villages to assess and collect the corporate taxes, but we find no provision for a deputy marshal.

In Mechem on Public Offices and Officers, it is said (Section 567): "In those cases in which the proper execution of the office, requires on the part of the officer, the exercise of judgment or discretion, the presumption is that he was chosen because he was deemed fit and competent to exercise that judgment and discretion, and, unless power to substitute another in his place has been given to him, he can not delegate his duties to another."

The assessment of taxes clearly involves and requires the exercise of judgment and discretion upon the part of the officer, and finding no grant of power to appoint a deputy, we conclude that your assessor and collector is without authority to make such an appointment.

You will notice, that with respect to the assessment and collection of State and county taxes, express power is given the assessor to appoint deputies (Article 5095), and the deputies are expressly authorized to do and perform the duties required of the assessor. (Article 5096.)

We are in receipt of a letter from Mr. John S. Patterson of your town, asking the opinion of this department on the same question as that which you have propounded, and we have advised him today that we have written you upon the subject.

Very truly yours,

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#### LOCAL OPTION LAW.

It is not a violation of the law to give liquor to a minor, habitual drunkard or other person in territory where local option law has been adopted.

AUSTIN, TEXAS, January 14, 1905.

*Hon. G. S. Arnold, Lampasas, Texas.*

Dear Sir: You desire to know if the adoption of the local option law repeals and suspends the entire law regulating the sale, gift or procurement of intoxicating liquors to minors, and habitual drunkards, or only the sale thereof to said minors and habitual drunkards.

Section 20, Article 16 of the Constitution under which our present local option law was enacted provides that the Legislature shall at the first session enact a law whereby the qualified voters of any county, justice precinct, town, city (or such other subdivision of a county as may be designated by the commissioners court of said county) may by a majority vote, determine from time to time whether the sale of intoxicating liquors shall be prohibited within the prescribed limits. This act was declared adopted September 22, 1891, and is the same as the one of which it is an amendment with the exception of the provision in the marks of parenthesis.

Under these provisions of the Constitution there have been enactments making it an offense for any person to "sell, exchange, or give away with intent to evade the law" any intoxicating liquors in the prohibited territory. As far back as 1883 the Court of Criminal Appeals held that that portion of the act of the Legislature which attempted to make it an offense to "give away" intoxicating liquors in a local option territory was unconstitutional, for the reason that the intention of the framers of the Constitution was to prohibit a "sale," and that they did not intend that a "gift" should be prohibited.

(See *Holly vs. State*, 14 App., 505; *Stalworth vs. State*, 16 App., 345; *McMillan vs. State*, 18 App., 375; *Steel vs. State*, 19 App., 425.)

So the correct principle is, under the Constitution and authorities, that the Legislature can only authorize localities to prohibit a "sale" of intoxicating liquors within the prescribed limits.

The court has held, however, that that proviso of the law authorizing a sale within the prohibited territory "of wine for sacramental purposes, alcoholic stimulants as medicine in cases of actual sickness on prescription," etc., is within the power of the Legislature and is constitutional. (See *Bowman vs. State*, 38 App., 14.)

When local option has been carried and is in operation it has the effect to suspend and abrogate, during its continuance, all laws and provisions of law which are inconsistent with it. (See *Adkinson vs. State*, 9 Texas Court Rep., page 756; *Robertson vs. State*, 5 App., 155.)

Now, when local option is in operation within a given territory the only offense prescribed by the law, consistent with the Constitution and authorities above cited, is a "sale" within the local option territory. A "sale" is not an offense if made for sacramental purposes or in case of actual sickness on a prescription. "Giving away" liquors within the prohibited territory is not an offense whether given to a minor, habitual drunkard, or any other person. A "sale" is an offense when made to any person, except for the purposes named in the exception contained in the statute.

Trusting the above will be satisfactory, I am,

Yours truly,

## INDEPENDENT SCHOOL DISTRICT—OFFICES AND OFFICERS—PUBLIC EDUCATION.

Trustees of independent school district hold office until election and qualification of their successors.

AUSTIN, TEXAS, January 14, 1905.

*Hon. R. B. Cousins, State Superintendent of Public Instruction,  
Austin, Texas.*

Dear Sir: I understand the facts in the case, which you verbally stated to me yesterday, to be substantially as follows:

An independent school district was duly incorporated in 1904, but prior to the first Saturday in May of that year, at the election for incorporation, seven trustees were elected. Three drew for terms as required by the second section of the trustee law (Acts 1900, page 18). The election having taken place but a short time before the first Saturday in May, 1904, it was supposed to be unnecessary to hold another election in May to elect successors to the four members drawing the numbers 1, 2, 3, and 4, when drawing for terms. You ask whether these four members are still legal members of the board, or whether a vacancy exists, which may be filled by an appointment, of the remaining members of the board, under Section 8 of the act.

While the language of Sections 1 and 2 of the act is in part applicable to only those independent school districts existing on the first Saturday in May, 1900, yet in the light of Section 10 of the act, which extends its provisions to the independent school districts thereafter to be incorporated, I think it clear that the seven trustees elected, in the present case, those who drew the numbers 1, 2, 3, and 4 held until the 1904 election, and those drawing the numbers 5, 6, and 7 held until the 1905 election. There should, therefore, have been held another election on the first Saturday in May, 1904, to elect successors to the four members whose terms expired on that date. No such elections having been held, the question presented is, what is the status of these four members, to whom no successors were elected.

It will be noted, that Section 2 of the act provides that the members 1, 2, 3, and 4 shall serve until the following May, "and until their successors are elected and qualified," and that the members drawing the numbers 5, 6, and 7 shall serve for two years "and until their successors are elected and qualified."

The section concludes \* \* \* "and regularly thereafter, on the first Saturday in May of each year, four trustees and three trustees, alternately, shall be elected for a term of two years, to succeed the trustees, whose terms shall at that time expire."

I do not understand that it was intended by this language to limit the future terms of the trustees to two years, but the section undoubtedly means "two years and until their successors are elected and qualified."

Section 30 of Article XVI of the Constitution provides: "The duration of the offices not fixed by the Constitution shall never exceed two years \* \* \*." Section 17 of Article XVI provides: "All

officers in this State shall continue to perform duties of their offices until their successors shall be duly qualified.”

I conclude, therefore, a vacancy was not created by failure to hold the election in May, 1904, but that the four members whose terms expired on that date held over until their successors are elected and duly qualified.

The trustee law makes no provision for an election for trustees other than the annual election on the first Saturday in May. Therefore, on the first Saturday in May, 1905, as I understand it, there should be an election of *seven trustees* in this district: three will be elected for a term of two years, each to succeed the members who drew the numbers 5, 6, and 7 and four will be elected for a term of one year (unexpired part of the term which began in May, 1904) to succeed the members who drew the numbers 1, 2, 3, and 4.

Thereafter, in each even year there will be elected three trustees, and each odd-numbered year four trustees for terms of two years each.

Yours very truly,

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#### PUBLIC EDUCATION.

City superintendent is not required to hold a teacher's certificate.

AUSTIN, TEXAS, January 14, 1905.

*Hon. R. B. Cousins, State Superintendent of Public Instruction,  
Austin, Texas.*

Dear Sir: You have asked whether or not a superintendent of city schools must have a teacher's certificate. Your inquiry being based upon Article 390 of the Revised Statutes, as amended by the act of 1899 (page 326), reads as follows:

“A city or town which has 500 scholastic population or more and has become an independent school district, \* \* \* and which has employed a superintendent of city schools, may have a city board of examiners. Said board of examiners shall in all cases consist of a city superintendent of the city schools, together with two other persons, who shall be appointed by him, and who shall be teachers, and the superintendent *shall not be subject to examination \* \* \**”

The question which you propound, in effect, is, whether in the light of Article 3981-c of the Revised Statutes, the language “and the superintendent shall not be subject to examination” prescribed a qualification of the superintendent or expresses an exception to Article 3981-c.

Section 11-n of the trustees law (Acts of 1900, page 18) reads:

“Each board of trustees provided for in this act shall elect a superintendent or principal of schools of such independent district, for not more than one year.”

The qualifications of a city superintendent are not prescribed, nor is it even required that he shall be a teacher.

The reading of Article 3980, as amended, suggests that a distinction is made between a superintendent of city schools and a teacher.

I can find no requirements that the city superintendent, whom the board of trustees is required to elect, shall be a teacher, and if he is not a teacher, he would not come within the provisions of Article 3981c.

While the language "and the superintendent shall not be subject to examination" might be construed to mean that the city superintendent to be elected by the trustees must hold a valid teacher's certificate, yet such a construction would be an unnatural one, particularly in view of the fact that the provision is not found in section 11b of the act of the trustee law, but in the amended Article 3980, which treats of the board of examiners and examination by them.

From my investigation of the school laws I have concluded that the language "and the superintendent shall not be subject to examination" must be given its obvious meaning, which is, that the superintendent of city schools is not required to stand examination for and obtain a teacher's certificate in order to entitle him to act as such superintendent. I am inclined to think that the language may have been used in view of the fact that the county superintendent is required to hold a first grade teacher's certificate.

Very truly yours,

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CONSTITUTIONAL LAW—TAXATION—EXEMPTIONS—  
SOUTHWESTERN UNIVERSITY.

Lands owned by Southwestern University while used for its support or endowment are exempt from taxation.

A bill exempting certain property from taxation (under Constitution 1869) passed House by two-thirds vote, passed Senate with amendment by two-thirds vote, House concurred—vote not shown in Journal. Presumption is that amendments were concurred in by two-thirds vote.

AUSTIN, TEXAS, January 14, 1905.

*Hon. J. W. Stephens, Comptroller, Austin, Texas.*

Dear Sir: The Attorney General is in receipt of yours of the 14th inst., which is as follows:

"The Southwestern University, located at Georgetown, Williamson County, owns real estate in Dallas County upon which taxes are delinquent for several years past.

"In the charter of the University, which was granted to it by the Fourteenth Legislature, it is provided that the 'buildings, libraries, lands, apparatus and other property shall be exempt from any kind of tax so long as used for the support or endowment of the University., (Vol. 8, Laws of Texas, page 617.)

"This department has been requested to cancel the taxes delinquent upon the real estate above referred to upon the grounds that said real estate is exempt from taxation as the property of said University.

"I would thank you for an opinion as to the Comptroller's duty with respect to cancelling said taxes."

Upon investigation of the question referred to we find that the Southwestern University was incorporated by an act of the second session of the Fourteenth Legislature, approved February 6, 1875. (Chapter 18.)

The fourth section of the act provides that the building, libraries, land, apparatus and other property shall be exempt from any kind of tax so long as used for the support or endowment of the University.

Section 19 of Article 12 of the Constitution of 1869 authorizes the Legislature to exempt such property as two-thirds of both houses of the Legislature may think proper to exempt from taxes.

With reference to the journals of the House and Senate of the Second Session of the Fourteenth Legislature, they disclose that the bill incorporating the "Wesleyan University" (being House Bill No. 106) was passed in the House, the vote being ayes, 63; noes, 2. (House Journal, page 161.) In the Senate, the bill having been amended by changing the name from "Wesleyan" to "Southwestern" University, was passed by a vote of 27 ayes, noes none. (Senate Journal, page 107.)

In the House it appears from the Journal that the Senate amendment above referred to was concurred in (House Journal, page 237), but the vote upon this concurrence is not given.

If it be admitted that it was necessary, in order that the bill should carry this exemption from taxation, that the amendment must have been concurred in by the House by a vote of two-thirds of the members, still we think that in the absence of positive evidence that it was not so concurred in, it must be presumed that the amendment was so concurred in in the manner required by the Constitution in order to give effect to all of the provisions of the bill, especially in view of the positive evidence as to the passage of the bill through both houses by the necessary two-thirds vote. (Will Stobe et al. vs. Stumper, 1 Texas Ct. App. Civ. Cases, page 139.)

According to our view, then, it appears that under the provisions of the Constitution of 1869, all of the property of the Southwestern University was exempt from taxation by the terms of the act referred to so long as such property is used for the support or endowment of the University. The question must be decided upon the provisions of the act referred to, without regard to the provisions of the subsequent Constitution of 1876.

You are, therefore, advised that if the land referred to in your letter is used for the support or endowment of the Southwestern University, and so long as it shall so remain, it is exempt from taxation. Whether the facts still exist as to its being so used is a question of fact to be determined by you.

Yours truly,

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#### FEES—COUNTY ATTORNEY.

Where a defendant pleads guilty in justice court the fee of county attorney is \$5. If defendant pleads not guilty, and upon trial he is convicted, and no appeal is taken, or if appeal be taken and the case affirmed, county attorney is entitled to \$10.

AUSTIN, TEXAS, January 16, 1905.

*Mr. H. B. Edgar, County Attorney, DeWitt County, Cuero, Texas.*

Dear Sir: Yours of the 16th instant, addressed to the Attorney General, enclosing a copy of an opinion given by Mr. R. C. Walker, Office Assistant Attorney General under the preceding administration has been referred to me for attention.

It seems, from the copy of the opinion sent, that Mr. Walker ruled that if the county attorney was present or had taken action in a plea of guilty in the justice court, he would be entitled to a fee of \$10. I am at a loss to know how he reached this conclusion.

Article 1130, White's Penal Code Criminal Procedure, provides that the attorney who represents the State in a criminal action in the justice court shall receive for each "conviction," where no appeal is taken, or where, upon appeal, the judgment is affirmed, \$10. There is but one way to construe this article, and that is, if the defendant pleads "not guilty" and upon a trial of the case he is convicted, the attorney who represents the State is entitled to \$10 provided no appeal is taken, or the case is, upon appeal, affirmed.

Article 1130 as clearly provides that where a defendant "pleads guilty" to a charge before a justice, the fee allowed the attorney representing the State shall be \$5.

These two articles of the statute were passed February 21, 1879, and have not been amended from that time until now, and are still in force.

Article 1132 was amended by the acts of the Twenty-eighth Legislature (page 219). Under this article, before it was amended, the county attorney was not allowed a fee in any case where he was not present and representing the State upon the trial, unless he had taken some action for the State, but the fee he should have been entitled to was taxed in the bill of costs for the benefit of the county. The effect of the amendment is, that if a defendant pleads guilty in vacation, the county attorney shall receive this \$5, which, before the amendment, was taxed up for the benefit of the county. If the county attorney is present and ready to represent the State at each regular term of the court in which a criminal action is pending, he is entitled to his fee under the amendment, notwithstanding the case may be tried at some time when he is not present. This fee is \$10 for a "conviction" and \$5 for a plea of guilty.

There is no statute which provides that the county attorney shall receive more than \$5 in a plea of guilty in the justice court.

Very truly yours,

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#### PUBLIC LANDS—SHELL-REEFS—LEGISLATURE.

Legislature may provide for sale or lease of shells from waters of lakes, bays and inlets of Gulf of Mexico.

AUSTIN, TEXAS, January 19, 1905.

*Hon. George B. Griggs, Senate Chamber, Austin, Texas.*

Dear Sir: The Attorney General has requested me to reply to your favor of the 18th instant.

After a careful investigation, I have been able to find no provision of the law authorizing the Commissioner of the General Land Office to dispose of, by sale or lease, lands under waters of navigable streams.

You will note that the act of 1901 (page 253), settling the account between the school fund and the State, in granting the unappropriated public domain to the school fund, specially excepted and included in lakes, bays, and islands on the Gulf of Mexico within the tide water limits.

I am unable to find any constitutional provision against the enactment of a law providing for the sale or lease of shells from the waters of lakes, bays and inlets of the Gulf of Mexico. Such a law, however, must not infringe upon the rights of the government of the United States in its power to regulate commerce, and any act passed upon the subject should carefully provide that rights under the law must be exercised subject to the approval and permission of, and, under such regulations as may be prescribed by, Secretary of War of the United States; and it should also recognize and protect any rights which may have been acquired under the fish and oyster law. (Acts, 1899, page 312.)

Very truly yours,

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#### COURTS—CONSTITUTIONAL LAW—LEGISLATURE.

Under Section 17, Article 5 of Constitution the Legislature cannot provide for less than four terms annually of the county court.

AUSTIN, TEXAS, January 19, 1905.

*Hon. F. W. Seabury, Speaker of the House of Representatives of Texas, Austin, Texas.*

Dear Sir: Replying to your favor of the 18th instant wherein you propound to me the following question:

“In view of Section 17, Article 5 of the Constitution of Texas, can the Legislature provide for a less number of terms of the county court for civil business than once every two months?”

I beg leave to say that Section 17, Article 5 of the Constitution which provides that the county court shall hold a term for civil business at least once in every two months, was amended on September 25, 1883, by adding to said Article 5, Section 29, and which section, in so far as it relates to your inquiry, is as follows:

“The county court shall hold at least four terms for both civil and criminal business annually, as may be provided by the Legislature or by the commissioners court of the county under authority of law.”

Therefore, I advise you that the Legislature has no power to provide for a less number of terms of the county court for civil business than the terms fixed by the above amendment, viz.: four terms annually.

Yours respectfully,



## ELECTION LAW—CITY POLL TAX.

Before a person is qualified to vote in a city election he must have paid his city poll tax.

AUSTIN, TEXAS, January 19, 1905.

*Hon. D. M. Reedy, Tyler, Texas.*

Dear Sir: You desire to know if it is necessary under the Terrell Election Law, that a person subject to a city poll tax should pay the same in order to be a qualified elector at a city election.

Article 489 of the Revised Statutes of 1895 provides that the city council shall have power to levy and collect an annual poll tax, not to exceed \$1 of every male inhabitant of said city over the age of twenty-one years (idiots and lunatics excepted), who is a resident thereof at the time of such annual assessment.

Section 5 of the Terrell Election Law provides that all of the provisions of this act which regulate the holding of elections and voting, shall be observed in all elections in cities.

Section 81 provides that if a proposition or question is to be voted on by the people of any city, the evidence required by this act that the citizen has paid his poll tax, or received his certificate of exemption, must be produced before he can be permitted to vote.

Section 2 of the act provides, after setting forth the qualifications as to age, residence, etc., that any voter who is subject to pay a poll tax under the laws of the State of Texas shall pay the said poll tax before he offers to vote. If the city has levied a poll tax it was levied under the laws of the State of Texas as provided for in Article 489.

Section 3 of the act provides that the qualified electors in this State "as described in the foregoing sections" who shall have resided for six months immediately preceding an election within the limits of any city, or corporate town, shall have the right to vote for mayor, and all other elective officers.

This section, in setting forth the qualifications of voters in the city, or corporate town, provides that they shall be qualified electors of the city "as described in the foregoing sections."

To be a qualified elector, as described in Section 2, there must have been paid by every person subject thereto, the poll tax due by him under the laws of the State of Texas.

A poll tax levied by a city against every person subject thereto would be a poll tax levied under the laws of the State of Texas, and before a person would be a qualified voter at a city election he must have paid his city poll tax.

The confusion in reference to this matter has probably arisen from a misunderstanding of the latter part of Section 3, which provides as follows: "In elections to determine the expenditure of money, or assumption of debt, or issuance of bonds, only those shall be qualified to vote who pay taxes on property in such city or incorporated town; provided that no poll tax for the payment of debts thus incurred shall be levied upon the persons debarred from voting in relation thereto."

We understand this section to mean that in elections held in a

city to determine the expenditure of money, assumption of debts, or issuance of bonds, if either of these measures, at an election in said city is determined on, said city could not levy upon the persons debarred from voting in relation to such matters (that is, those persons who pay no taxes on property in said cities or incorporated towns), a poll tax for the payment of the measure or measures determined on at said election.

If a city should attempt to levy a city poll tax for the purposes named, a person could not be deprived of the right to vote because he refused to pay this poll tax, but if a city levies a poll tax for the purpose of defraying the expense of the city government, or for any other purpose, except those named in Section 3, this poll tax would have to be paid before the person subject thereto would be a qualified elector at a city election.

Yours very truly,

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#### COUNTY TREASURER—COMMISSIONS.

County treasurer is entitled to custody of funds of county, and in the sale of bonds of the county, is entitled to commissions, whether proceeds of sale pass through his hands or not.

AUSTIN, TEXAS, January 21, 1905.

*Mr. Malcom Black, Sterling City, Texas.*

Dear Sir: Yours of the 18th has been duly received.

You desire to know whether, if your county sells court house bonds and the money is paid to the contractor, is the county treasurer entitled to his commissions, and further, whether, if the contractor, as the authorized agent of the commissioners court sells the bonds to the State Board of Education when the court house is completed, and the proceeds do not actually pass through the hands of the county treasurer, is the treasurer entitled to his commission for receiving and disbursing the \$25,000.

You are advised that the county treasurer is entitled to the custody of funds belonging to the county, and it is not within the lawful power of any other officer or officers to deposit them elsewhere. He has the right to commissions upon money of which he is so entitled to custody, though it has been wrongfully divested from his hands. (See Waller County vs. Rankin, 31 S. W. Rep., page 876; Bastrop County vs. Hearne, 70 Texas, page 563.)

In the Waller County case referred to, the facts were substantially the same as those contained in your inquiry. There, the commissioners court appointed the contractor as the agent to sell and disposed of the bonds, and after selling same to apply the proceeds to the payment of his debt as contractor. In this case, the court held, that the county treasurer was entitled to his commissions for receiving and disbursing the amount of the bonds, notwithstanding the fact, that never at any time were they in his actual possession. When your bonds are sold the proceeds thereof should be paid to your county treasurer, and there is no other person entitled to the custody thereof, and the commissioners court could not, by passing an

order to the effect that the contractor be the agent to sell the bonds, deprive the county treasurer of his commissions for receiving this fund, though, in fact, it has never been paid to him. He would also be entitled to his commission for disbursing this fund, though in fact, it was never in his possession to disburse. Understand, however, that the commissioners court could make a contract for a public building and provide that the contractor may receive the bonds, themselves, as his compensation, and under this state of facts the bonds never having been sold, the county treasurer would not be entitled to any commission.

Yours very truly,

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### OFFICERS—JUSTICE OF THE PEACE.

Where a justice of the peace was not a candidate for re-election, and party who was elected failed to qualify, the party who was justice of the peace at date of election will hold his office until his successor qualifies.

AUSTIN, TEXAS, January 23, 1905.

*Mr. W. A. Hadden, County Clerk, Fort Stockton, Texas.*

Dear Sir: We have your favor of the 18th instant, in which you say that at the last general election, the justice of the peace of precinct number two of your county was not a candidate for re-election, and that the person who was elected to the office has failed to qualify. We understand your question to be whether a vacancy exists such as may be filled by appointment of the commissioners court, or whether the former incumbent holds over.

We presume that your inquiry is prompted by desire of your commissioners court, of your county to know its duty in the premises, and, accordingly we reply.

Article 1560 of the Revised Statutes provides for the election of a justice of the peace, "who shall hold his office for two years and until his successor shall be elected and qualified."

Section 30 of Article 16 of the Constitution provides that: "The duration of the offices not fixed by the Constitution shall never exceed two years \* \* \*." Section 17 of the same article is as follows: "The officers within this State shall continue to perform the duties of their offices until their successors shall be duly qualified."

Article 3541 of the Revised Statutes is as follows: The county officers who are required to give official bonds, and shall fail to execute their bonds within the time prescribed by law \* \* \* may also be removed from office for such failure by the district judge on the matter being brought before him in the manner hereinafter provided for bringing such matters before the court."

We find that these provisions have been before our courts for construction. In the case of the State vs. Cooks (54 Texas, 482), the facts were that one Bickford was elected to the office of county tax assessor. At the next succeeding election, one Crawford was elected to the office, but failed to qualify within the twenty days

prescribed by law. Thereafter, Crawford presented to the commissioners court his resignation which was accepted, and the court appointed Cooke, who accepted and qualified. The court held that the election of Crawford, his failure to qualify, his subsequent resignation and the appointment and qualification of Cooke as his successor ended the term of office of Bickford.

As we understand this decision, its effect is to hold that the election of Crawford terminated Bickford's term of office, and that Crawford's failure to qualify authorized his removal, under Article 3400 of the Revised Statutes of 1879 (which is Article 3541 of the present Revised Statutes) but, that was rendered unnecessary by Crawford voluntarily resigning. And this seems to be the view of our present Supreme Court.

In the case of Maddox vs. York, the facts were that one York had been elected and duly qualified as sheriff. At the next general election he was defeated for re-election, and one Lasater was chosen to succeed him. Before the receipt by Lasater of his certificate of election, he sustained an injury, from which, without regaining consciousness, he died, after the issuance of the certificate of election. After his death, the commissioners court declared the office vacant and appointed Maddox to fill the vacancy.

The Court of Civil Appeals of the second district, by a divided court, held (54 Southwestern, 24) that the appointment by the commissioners court was valid. Judge Hunter dissented, holding that York was entitled to the office until a successor had been elected and qualified. The question thus at issue was certified to the Supreme Court, which answered (93 Texas, 278) that the decision of the majority is correct, and properly construed the provisions of the Constitution controlling the subject in accordance with previous provisions of the Supreme Court. In the majority opinion of the Court of Civil Appeals, it was said, construing Article 16, Section 17 of the Constitution: "It is evidently the intention of the framers of that instrument that no county officer should hold more than one term of two years without re-election or appointment, only the failure to elect or appoint a successor would entitle the incumbent to so remain in office \* \* \*."

From this, we understand the law, as declared by our Supreme Court, to be that the term of the justice of the peace for precinct number two was terminated by the election at the last general election of his successor, notwithstanding that his successor failed to qualify within the time prescribed by law.

We do not understand, however, that the failure to qualify ipso facto created a vacancy such as would authorize the county commissioners court to fill the office by appointment for the unexpired term, but the office may be declared vacant by proceedings had in conformity with Article 3541. If, however, the person who was elected to the office, but failed to qualify, shall voluntarily present to the county commissioners court his resignation, it may, as we understand the decisions, be accepted by the court, who, thereupon, under Article 1565, may declare the vacancy and fill the office by appointment.

Very truly yours,

## COMMISSIONERS COURT—LIQUOR DEALER'S BOND.

Commissioners' court can not compromise with a solvent judgment debtor a judgment recovered on a liquor dealer's bond.

AUSTIN, TEXAS, January 24, 1905.

*Hon. E. B. Ritchie, County Judge, Palo Pinto, Texas.*

Dear Sir: The department is in receipt of your letter of the 21st. We understand the question submitted to be whether or not your county commissioners court can compromise a judgment recovered by the county against the principal and sureties upon a liquor dealer's bond, the principal being of doubtful solvency, but the sureties, who are also judgment debtors, being solvent.

We understand that it is proposed by the judgment debtors to pay a sum less than the amount of the judgment in full satisfaction thereof.

We quite agree with your construction of the law, and you are advised that it is the opinion of this department that the commissioners court is without authority to make such a compromise.

In the case of *Lindsey vs. State*, 66 S. W. Rep., 352, referred to by you, the court discussing Section 55, Article 3 of the Constitution, said: "The language of this provision is explicit and comprehensive and it is too clear to admit of question that by reason of such provisions no compromise made with the sureties by the commissioners court of Edwards County whereby a less sum than the amount of the judgment was to be received by the county would be valid." And referring to Article 845 of the Revised Statutes which attempts to give authority to the commissioners court to sell judgments when the principal and sureties are insolvent, the court said: "If the statutes had in contemplation to authorize a compromise or sale of a judgment, either directly or indirectly to the judgment debtors, it is a violation of the Constitution, and consequently invalid."

Yours truly,

## PERMANENT SCHOOL FUND.

Legislature may enact law providing for investment of permanent school fund in State warrants, and providing that same shall bear interest. Section 4, Article 7 of Constitution authorizes investment of such fund in bonds of United States, the State of Texas, or counties in said State. This provision refers to permanent school fund.

Legislature can not provide for the investment of available school fund in State warrants.

AUSTIN, TEXAS, January 24, 1905.

*Hon. A. M. Kennedy, House of Representatives, Capitol.*

Dear Sir: This department is in receipt of yours of the 24th instant. I think there is nothing in the Constitution to prevent the Legislature from enacting a law providing for the investment of the permanent school fund in State warrants, and providing that the warrants in which such investments are made shall bear interest.

Section 4 of Article 7 of the Constitution authorizes such investment in bonds of the United States, of the State of Texas, or counties in said State, or in such other securities and under such restrictions as may be prescribed by law. This provision refers to the permanent school fund.

Section 5 of Article 7 of the Constitution provides that the available school fund shall be applied annually to the support of the public free schools, and no provision is made for its investment. I do not think the Legislature would have authority to provide for the investment of the available school fund in State warrants.

Yours truly,

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#### CITY COUNCIL—NUISANCE.

Council can not declare theater building a nuisance when it is not, within itself, a nuisance.

Council may regulate, license, tax, or prohibit theaters, circus, etc.

AUSTIN, TEXAS, January 28, 1905.

*Hon. John B. Howard, City Attorney, Longview, Texas.*

Dear Sir: Yours of the 23rd addressed to this department has received our careful attention.

You desire to know if the city council of your city can declare a building used for the purpose of theatrical exhibitions, and other public exhibitions, a nuisance.

You are advised that the city council can not declare that a nuisance which is not within itself a nuisance. A building would not be within itself a nuisance. (See *Baltimore vs. Radecke*, 33 Am. Rep., 239; *City of Waco vs. Powell*, 32 Texas, 258; *Milne vs. Davidson*, 16 Amer. Dec., 192.)

A municipal corporation may exercise such powers as are granted to it expressly, and such incidental powers as are necessary or appropriate to the exercise and enjoyment of those expressly conferred.

(See *Memphis against Adams*, 24 Am. Rep., 331; *Pye vs. Patterson*, 45 Texas, 312.) And, as to the general powers which may be exercised by a city council, see an extensive note to *Robison vs. Meyer*, 34 Amer. Dec., 627.

Under a grant of power to a municipal corporation to make all regulations necessary for the promotion of health, it was held in the case of the State against *Heidenhain* that the city council could prevent smoking in street cars. (See 21 Am. State Rep., 388.)

Article 429, Sayles' Civil Statutes provides that the city council of any city or town shall have the power to license, tax and *regulate*, or prohibit theatres, circuses, and exhibitions of common showmen, etc.

"Regulate," has been construed by the courts to mean, a right to adjust by rule, method, or established mode; to direct by rule or restriction; to direct and control; it includes within itself meaning the power to control. (See *State vs. Ream*, 16 Neb., 681.)

When a municipality is invested with a general power to "license, regulate, or entirely prohibit," it is wholly discretionary with the

municipality to license, regulate, or entirely prohibit. (See *Gunnersshohn vs. Sterling*, 92 Ill., 569; *Kettering vs. City of Jacksonville*, 50 Ill., 39; *Martin vs. People*, 88 Ill., 390.)

A municipal corporation can, under its general police power, compel the owner of public halls and theatres to provide means to prevent fires, and to supply fire escapes in case of fire. (See 22 Amer. & Eng. Enc. of Law, 2nd Ed., page 925.) The right to regulate theatres necessarily involves the right to prescribe and enforce the reasonable conditions and limitations under which they may be conducted. (See *Ayers vs. City of Dallas*, 25 S. W. Rep., 631.)

We believe that under Article 429, Sayles' Civil Statutes that the city council of your city would have a right to pass ordinances which are reasonable to regulate theaters, by providing the conditions under which they will be allowed to be exhibited, and the places at which they may exhibit.

We have drawn an ordinance which we think the city council of your city has the right to pass under the article above mentioned, a copy of which we enclose you herein.

Yours truly,

#### FEES OF OFFICERS—SHERIFFS—DISTRICT CLERKS.

Sheriff is entitled to fee for serving depuplicate subpoena placed in his hands for execution. District clerks are not entitled to fee for issuing same.

Where a sheriff serves various witnesses in various cases against same party, he is only entitled to 50 cents for each witness in a single case—and same as to mileage.

AUSTIN, TEXAS, February 3, 1905.

*Hon. B. H. Gardner, Palestine, Texas.*

Dear Sir: Yours of the 2nd instant has been duly received.

You call our attention to Articles 1012 and 1022 of the Penal Code of the State.

The writer of this letter has very recently had occasion to receive a kick by referring to these two articles in answer to a query propounded to this department as to whether or not a district clerk has the right to reissue subpoenas at the beginning of each term of the district court, which query we answered in the negative and referred to the articles above mentioned. We regret to say that, notwithstanding these two articles of the Penal Code, it is the custom in many districts to duplicate the process for witnesses at the beginning of each term of the district court.

The Court of Criminal Appeals has held substantially that where a witness has once been served with a subpoena he is obliged to appear from day to day and from term to term until discharged by the court.

The statute prescribing what constitutes disobedience of a subpoena does not provide that a witness is in default if he fails to appear from day to day and from term to term, but the provisions

of the article have been construed by the Court of Criminal Appeals to mean that he must do so.

The penal offense prescribed by Article 1012 is aimed at the clerk for issuing or duplicating process, and there is no provision of the law which makes it penal for a sheriff to execute process when he knows that same has been illegally issued.

Your first query is whether or not you should approve the account of the sheriff for serving process when is duplicate process.

We are inclined to the opinion that when the process is placed in the hands of the sheriff it is his duty to execute same, and if same is executed by him his account for his labor should be approved.

It would be otherwise, however, if the item of issuing the process should enter into the district clerk's account and come before you for approval. You could then say that "you issued this process illegally without my order, and I will not approve your accounts," but the process, though illegally issued, having been placed in the hands of the sheriff, we believe it would be his duty to execute same and for this labor he would be entitled to his fees.

In your second query you state that there were twenty-six indictments returned against one party; that on the back of one of the indictments were the names of all the witnesses in the whole twenty-six cases, and each of the other indictments referred to the first for the names of the witnesses.

You state further, that one of the subpoenas is for all the witnesses and for all cases, that is, from No. 30 to 55, both inclusive.

You state further, that other subpoenas were issued on the same date, being carbon copies, except that they give the numbers of the two cases each, and that all of these were marked, executed and in full by the sheriff.

You desire to know whether you should approve this account for summoning all of these witnesses in each case. The last act passed on this subject was passed at the First Called Session of the Twenty-seventh Legislature, 1901, page 21. The wording of it is the same as preceding laws on the subject, and subdivision 2 provides that the sheriff shall receive for summoning or attaching each witness 50 cents.

It appears to us from the reading of your letter that the sheriff made but one trip in summoning these witnesses, and in making the summons he had in his possession only one subpoena and made the summons for the witnesses to appear in the cases against Harris, Nos. 30 to 55, inclusive.

A "summons" is to notify a witness to appear in court and give testimony on a day named in the writ. (See Bouvier's Dictionary, Vol. 2.) It is a warning to appear in court and testify as a witness. (See Webster's Dictionary.)

Now for giving this warning to each witness the sheriff is entitled to 50 cents. If he has but one subpoena and gives the witness warning in 26 cases at the same time, we believe that he would be entitled to 50 cents for *each* witness, but not for each witness in each case; and the same as to mileage. If he made only one trip in summoning these witnesses to appear in all these cases he is entitled to mileage



in only one case. In passing on a matter of this kind we beg to refer you to the act of the Twenty-eighth Legislature, 1903, page 122, which is an amendment of Article 1028. It is provided that you shall examine accounts against the State carefully and inquire into the correctness thereof and approve same in whole or in part, or disapprove the entire bill as the facts and law may require. It is a universal principle that no officer should be allowed pay for labor which he does not perform.

We do not understand your reference to Section 6, Article 1077-d, Sayles' Supplement, C. C. R. We presume, however, that you refer to the fee bill and the several amendments thereto in reference to the sheriff's fees. Article 108, White's Code of Criminal Procedure, prescribes the fees for sheriffs in counties containing less than 3000 votes, or, in other words, was the fees of sheriffs under the old law.

The Acts of 1897, Special Session, page 5, Section 4, prescribed the fees for sheriffs in counties voting more than 3000 votes at the last preceding Presidential election. This section made the fees of the sheriff less than those he was allowed under the old law. This section was amended by the acts of the First Called Session of the Twenty-seventh Legislature, 1901, page 21, and the fees, as prescribed in Section 4 of the so-called fee bill, were made the same as existed under the old law; and as the law now stands, the sheriff's fees are the same as are prescribed in Article 1083, Code of Criminal Procedure, whether the county polled 3000 votes or less.

Trusting that the above will meet your demands, I am,

Yours truly,

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#### CONFEDERATE PENSIONS:

The widow of a Confederate soldier after re-marriage is not entitled to a pension as the widow of her first husband.

AUSTIN, TEXAS, February 4, 1905.

*Mr. J. W. Stephens, Comptroller, Capitol.*

Dear Sir: We are in receipt of yours of 31st ult., which is as follows:

"The amendment to the Constitution authorizing the issuance of pensions to disabled and dependent Confederate soldiers, sailors and their widows, provides, with respect to issuing pensions to widows, as follows: 'Their widows in indigent circumstances, who have never re-married and who have been bona fide residents of the State of Texas since March 1, 1880, and who were married to such soldiers or sailors anterior to March 1, 1888.' (Under the amendment carried at the last general election, the date is changed to March 1, 1880.)

"The question is raised as to whether the provisions of this law would exclude a widow of a Confederate soldier, after the death of her first husband, was re-married subsequent to March 1, 1886, to another Confederate soldier, or whether the intention was to exclude only those widows of Confederate soldiers whose second husbands were not in the Confederate army.

"Please advise this office upon the question raised and oblige."

You are advised that it is our opinion, under the provisions of the Constitution referred to that a widow of a Confederate soldier, who, after the death of her Confederate soldier husband, re-marries, is not entitled to the benefits of the pension law, notwithstanding her second husband may be a Confederate soldier. I mean by this that she would not be entitled to a pension as the widow of the first husband referred to. If she re-married another Confederate soldier and he should also die, she might be entitled to a pension as the widow of the last husband, if circumstances otherwise were such as to entitle her to such pension.

So far as the re-marriage of a widow of a Confederate soldier is concerned, it would make no difference whether such re-marriage was to another Confederate soldier or to one who was never in the Confederate army. This is our construction of the provision of the Constitution referred to.

Very truly yours,

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PUBLIC EDUCATION—COMMON SCHOOL DISTRICT.

After the apportionment of the school funds and after the trustees of a common school district had contracted with teachers a city including part of the territory of the district voted to assume control of its schools. Held that the control so acquired operated prospectively and that until the end of the current scholastic year the trustees of the common school district should continue to conduct the schools.

AUSTIN, TEXAS, February 6, 1905.

*Mr. J. W. Stitt, Fort Worth, Texas.*

Dear Sir: As we heretofore advised you we referred your letter of the 1st inst., to the State Superintendent of Public Instruction, but as the question presented by you seems never to have been ruled upon heretofore, Mr. Cousins has requested us to reply to your letter.

We understand the facts to be as follows:

The city of North Fort Worth, incorporated under the General Law, embraces a part of the territory, and one of the school houses of common school district No. 21 of Tarrant County. In November, 1904, the city assumed control of its public schools and it now demands of the county superintendent that a transfer be made to the city of a part of the State and county apportionment made to the common school district for the current scholastic year. In September, 1904, the trustees of District No. 21 contracted with teachers at each of its schools including the school now within the corporate limits of North Fort Worth for a nine months term.

The question is, is the city of North Fort Worth entitled to any of the apportionment made to district No. 21 for the current scholastic year? We conclude that it is not.

Though Chapter 16 of Title 86 does broadly authorize a city to assume exclusive control of its schools, we think it clear from other

provisions in the school laws that the control so acquired is intended to operate prospectively but is not intended to attach during the current scholastic year, or so as to interfere with existing contracts with teachers.

The provisions that "the pro rata of the available school fund of the State appropriated and set apart to such city or town shall be by the proper officer, or department of the State, paid over directly to the treasury of the board of trustees" (Article 4015); that the State apportionment may be supplemented by a special tax, (Article 4025); and that the city may issue bonds to provide for school buildings (Article 4034), are clearly prospective in their operation.

The scholastic year runs from September 1st to August 31st (Article 3906); and the State apportionment is made on or before August 1st of each year (Article 3923). This is payable by the State Treasury upon the coupons issued to the several counties, cities and towns in accordance with the apportionment, and there is no provision of law for any change in the State Treasurer's accounts with the various counties, cities and towns, or in the coupons so issued.

When the county superintendent receives the certificate of the State's apportionment he makes a pro rata distribution of it among all the common school districts in his county, and a pro rata distribution of the income from the county's school fund among all the school districts, common and independent. The county treasurer is required to keep a separate account with each district of the county of its proportionate share of the apportionment (Article 3935d); and Article 3934a directs that: "Except as herein provided, no part of the school fund apportioned to any district or county shall be transferred to any other district or county."

Transfers of school funds is provided for in the case of consolidation of county line districts (Article 3934a); in the case of the establishment of county line districts (Article 3946a); and in the case of consolidation of districts within a county (Article 3963). In the latter case the statute expressly requires the consolidation to be made before the apportionment is made.

Article 3982 provided for the transfer of a child from one district or independent district, to another before the apportionment of the school fund by the county superintendent, *and before* the trustees have employed a teacher.

We understand the purpose of Article 3982 to be to prevent the impairment in any manner of a teacher's contract, whether by increasing the enrollment of pupils unduly, or by reducing the school fund of the district so as to make it impossible to pay the teacher's salary.

The trustees of a district determine how many schools shall be maintained, and for what term, and make the contract with teachers, subject to the approval of the county superintendent. The county superintendent, in approval of a teacher's contract, must consider the number of schools to be maintained, the time they are proposed to run, and the number of children within scholastic age within the district. The teacher's salary is based upon the number

of pupils within the scholastic age registered within the district. (Article 3957.) And is paid by the check of the trustees on the county treasurer. (Article 3962.)

It is our understanding of the law, looking to all of the provisions above referred to, that when a contract has been made with a teacher and approved by the county superintendent, the funds in the hands of the county treasurer to the credit of the district, is charged with the contract, and no change in the district, and no transfer of the fund can thereafter be made during the scholastic year.

We seem to be confirmed in this opinion by the provisions of Article 3934a, looking to the transfer of "*all the children*" of a school district to another district "upon such terms as may be agreed upon by the trustees of said districts interested." This is the only provision of law which we can find authorizing the transfer in any manner of any part of a district's apportionment after the employment of a teacher.

It not being expressly provided, or provided by necessary implication, that a city may assume control and actual management of its public schools during a current scholastic year, after the State apportionment has been certified to the county superintendent and distributed by him in accordance with the law, and after the trustees of a district have employed teachers, we conclude as above stated, that it was not so intended by the Legislature, but that the prohibition of Article 3934-a applies to the present case.

The city of North Fort Worth has acquired control of its schools to the extent that it may, in preparation for the ensuing scholastic year, provide suitable school buildings, and may levy a tax to supplement the State apportionment which will be made to it on or before August 1st, next; but we believe until the expiration of the present scholastic year, District No. 21 should continue to conduct its schools just as it was doing before the city of North Fort Worth elected to acquire exclusive control of the public schools within its limits.

Yours truly,

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TAXES—CITY.

City council has right to exempt certain persons from payment of poll taxes, provided the exemption keeps within the provision of the Constitution.

AUSTIN, TEXAS, February 7, 1905.

W. A. Field, Timpson, Texas.

Dear Sir: In reply to yours of 3rd you are advised that it is the opinion of this department that the city council has the right to exempt from the payment of poll taxes such persons as they may decide to exempt; provided the exemption keeps within the provision of the Constitution that all taxes shall be equal and uniform. For instance, they can exempt all members of the fire department, all persons over 60 years of age, or over any other age they may

deem fit. They have not the authority exceeding the grant of power given them by statute to levy a poll tax. For instance, they could not require a person under 21 years old to pay a poll tax, and they could not require idiots and lunatics to pay poll tax.

As was said in Dillon on Municipal Corporations, Section 94, "The power to do an act is often conferred upon municipal corporations in general terms without being accompanied by any prescribed mode of exercising it. In such cases the common council, or governing body, necessarily have, to a greater or less extent, a discretion as to the manner in which the power shall be used."

And as was said by the same author, Section 100, "Municipal corporations are instituted by the supreme authority of the State for the public good. They exercise by delegation from the Legislature a portion of the sovereign power. To enable them beneficially to exercise these powers and discharge these duties they are clothed with the authority to raise revenues, chiefly by taxation, and subordinately by other modes, as by fine and penalties."

Incident to the power to tax is the power to exempt from taxation so long as they do not violate the constitutional inhibition against unequal taxation.

The general rule on the subject is familiar, and has been too often declared to be open to question. The right to make exemptions is involved in the right to select subjects of taxation and apportion the public burden among them, and must, consequently, be understood to exist in the law-making power wherever it has not in terms been taken away. (See Cooley on Taxation, Vol. 1, page 343.)

It has been held, however, that a city council has no authority to exempt from taxation certain personal property or real estate which they may select in consideration of concessions made by the owners of said property to the city council.

Yours truly,

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WITNESSES—SUBPOENA—OUT-COUNTY.

Witnesses can be forced to attend all courts, even in counties other than their residence, by subpoena. (Act July 3, 1897.)

AUSTIN, TEXAS, February 7, 1905.

*Hon. J. E. Neal, Georgetown, Texas.*

Dear Sir: You present orally to this department the following inquiry: "What process should be issued for out-county witnesses—in misdemeanor criminal cases pending in the county court, should an attachment issue, or an out-county subpoena?"

By the Act of July 3, 1897, the attendance of witnesses upon all courts, even where the courts are sitting in counties other than that of their residence, can be enforced under subpoenas.

Before the enactment of the Act of 1897 the rules governing the enforcement of the attendance of witnesses were contained in Articles 513 to 519, inclusive, of the Code of Criminal Procedure, Revised Statutes of 1895. Under the provisions of Articles 526 to 535, both inclusive, where a witness resided out of the county in which

the prosecution was pending, the defendant and the State was each entitled to an attachment for said witness, and under the articles last above referred to this was the only mode of enforcing the attendance of out-county witnesses.

The Act of 1897 repealed Articles 525 to 534, both inclusive, and if you will refer to the title of the Act of 1897 you will see that each of these articles is set out and each is repealed. The Act of 1897 also repeals all laws and parts of laws in conflict with it.

Therefore, as the procedure now stands, the only way the attendance of out-county witnesses in any cause is by a subpoena.

The Act of 1897 repealed the articles of the Code of Criminal Procedure which had theretofore provided for the enforcement of the attendance of out-county witnesses in all cases, whether felony or misdemeanor. The only important difference between the old law and the new one is the fact that a subpoena is now issued instead of an attachment under the old law. The caption of the act is entitled "An Act to enforce the attendance of witnesses in criminal cases upon district court, grand juries and magistrates sitting as examining courts in counties other than that of their residence, under subpoena \* \* \*, and to repeal Articles 525 to 534, both inclusive, Title (7), Chapter (4) of the Code of Criminal Procedure."

It is well known that the same rules apply in reference to the enforcement of the attendance of witnesses upon the county court as apply to the enforcement of the attendance of witnesses upon the district courts. In fact, there is no mode of procedure especially prescribed for the conduct of business in the county court. There is but one mode of procedure for the enforcement of the attendance of witnesses and it applies to all courts.

Before the enactment of the Act of 1897, Articles 525 to 534, both inclusive, prescribed the mode of enforcing the attendance of out-county witnesses in all cases. The above articles were repealed and the Act of 1897 substituted in their stead.

The above has been the uniform ruling of this department and was first given out on August 23, 1899, in an opinion by Hon. N. B. Morris, at that time Office Assistant Attorney General, and afterwards the same opinion was expressed by this department by letter dated....., 1899, and addressed to W. H. Young, County Attorney, Aransas Pass, Texas, this opinion being given by Hon. D. E. Simmons, at that time Office Assistant Attorney General.

Trusting the above will meet with your requirements, I am,

Yours truly,

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#### CONVICTS—JURISDICTION.

A convict may be brought from penitentiary and tried for an offense committed in a county, for which he has not been tried.

AUSTIN, TEXAS, February 8, 1905.

*Hon. C. C. Harris, Hondo, Texas.*

Dear Sir: Yours of February 7th has been duly received.

You desire to know whether it is possible for the grand jury to indict and for you to try a party who is confined in the penitentiary for an offense committed in a county for which he has not been tried.

While there is no procedure authorized by legislation to bring a defendant from the penitentiary to some court for a trial in another case, yet there is no law to the contrary, and such has been the usual practice.

Article 3554, Sayles' Civil Statutes, provides that the Board of Commissioners of the State Penitentiary shall have the general management and control of the State penitentiaries and of all convicts sentenced to State penitentiaries, and Article 3659 gives them authority to prescribe rules and regulations for the government of penitentiaries. It is under these two articles of the Statute that the custom has prevailed of taking men from the penitentiary and trying them for offenses for which they have not been tried, and the Court of Criminal Appeals has held that in the absence of some express provision prohibiting this from being done that the prisoner can not complain. (See Gaines against the State, 53 S. W. Rep., page 623.) You desire to know the procedure.

The writer of this letter had occasion, while district attorney of the Fourth District, to get men out of the penitentiary and try them for offenses for which they had not been tried, and the procedure used was this, which we think is an entirely proper one, and which, in our case, always resulted in our being able to get the convicts, viz.:

Let the indictment be presented as in any other case—as though the defendant was not in the penitentiary; let the district clerk issue a *capias* addressed to the sheriff of the county in which the indictment was returned; have the district judge endorse on the *capias* or warrant the following words: "Let this warrant be executed in any county of the State of Texas." (See Article 259, Code of Criminal Procedure.)

In addition to this, have the district judge write an order to the superintendent of the penitentiary where the convict is confined, directing him, after stating the fact that the indictment has been returned, etc., to deliver to the sheriff holding the warrant the convict required.

I have never had any trouble when this procedure was followed.

The superintendent usually retains the order of the district judge, and, I think, takes a receipt from the sheriff for the convict.

Trusting the above will meet with your requirements, I am,

Yours truly,

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#### WITNESSES—OUT-COUNTY.

A witness, recognized or attached and given bond for appearance before any court or grand jury out of the county of his residence, in a felony case, shall be allowed actual traveling expenses, not exceeding 3 cents per mile and \$1 per day each day he may be necessarily absent from home.

AUSTIN, TEXAS, February 10, 1905.

*T. J. Young, Sheriff, Lampasas, Texas.*

Dear Sir: Yours of the 9th has been received. Up to 1897 the provision of the law regulating fees of witnesses was contained in Article 1061-b, Willson's Code of Criminal Procedure. This article provided as follows:

"That any witness who may have been recognized or attached and *given bond* for his appearance before any *court* out of the county of his residence to give testimony in a felony case, and who shall appear in compliance with the obligation of such recognizance and bond, shall be allowed his actual traveling expenses, etc."

Under this statute out-county witnesses were not allowed any compensation for their attendance upon the grand jury. To cure this defect the Legislature of 1897 attempted to amend the law, and Section 5 of said act reads as follows:

"Witnesses shall receive from the State for attendance upon district courts, magistrates sitting as examining courts and grand juries, in counties other than their residence, in obedience to subpoenas issued under the provisions of this act, such compensation as is now received by a witness attending such *under attachments*."

The construction of this law by this department was to the effect that under its provisions a witness would not be entitled to fees for attending upon a grand jury by reason of the fact that the law says they shall receive such compensation as is now received by a witness attending such "under attachment," and under attachment, as it existed at that time, witnesses were not allowed any fees for attending upon the grand jury.

The Legislature of 1903 (see page 299), amended Article 1061b, and the amendment reads as follows:

"Any witness who may have been recognized or attached, and *given bond* for his appearance before any court, or before any grand jury, out of the county of his residence, to give testimony in a felony case, and who shall appear in compliance with the obligations of such *recognizance or bond*, shall be allowed his actual traveling expenses, not exceeding 3 cents per mile going to and returning from the court or grand jury by the nearest practicable conveyance and \$1 per day for each day he may necessarily be absent from home as a witness in such case."

This is the law as it now exists governing the compensation of out-county witnesses for their attendance upon the grand jury, and you are advised that witnesses will not be allowed any compensation for such attendance unless they have entered into bond or recognizance; and the approval of their account by the judge must show that they have given such bond or recognizance.

You desire to know, further, what your duty is if a witness is unable to give bond or refuse to do so.

Section (6) of the Acts of 1897, Special Session, page 59, provides that if a subpoena be returnable at *some future day*, the officer shall have authority to take a good and sufficient bond \* \* \* but if said witness refuse to give bond he shall be kept in custody until such time as he shall start in obedience of said subpoena, when he



shall be, upon affidavit being made, provided with funds necessary to appear in obedience to said subpoena."

You will see from the provisions of this Section (1) that you are not authorized to take bond unless the subpoena is returnable at some future date. (2) If the witness refuses to give bond you shall keep him in custody until such time as he shall start in obedience of said subpoena. (3) That if a witness has no funds sufficient to enable him to appear in obedience to said subpoena you shall require him to make affidavit to that effect, and provide him with the necessary funds. (See Section 3 of said act.)

Trusting the above will be satisfactory, I am,  
Yours truly,

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#### CONSTITUTIONAL LAW—CRIMINAL LAW—WITNESSES.

An act arbitrarily limiting the number of witnesses for whom a defendant may have compulsory process violates Section 10, Article 1 of Constitution.

AUSTIN, TEXAS, February 10, 1905.

*Hon. S. Webb, House of Representatives, Capitol.*

Dear Sir: We have had under consideration at your request House Bill No. —, being an act entitled "An Act to protect the people against unlimited and unnecessary service as witnesses, and the State against unnecessary witness accounts."

The essential provisions of this bill are such as to arbitrarily limit the number of witnesses for whom the defendant shall have compulsory process in criminal cases.

It is expressly provided in the Bill of Rights (Section 10, Article (1) of the Constitution), that in all criminal prosecutions the accused shall have compulsory process for obtaining witnesses in his favor. While the Legislature may regulate the issuance of process for the attendance of witnesses in criminal cases, with the end in view of preventing its reckless use, we very much doubt the authority to arbitrarily limit the number of witnesses for which process may issue at the request of the accused, in any criminal case.

It is true that Section (8) of this bill authorizes the trial court to allow process for a greater number of witnesses than the limit prescribed in the other sections of the bill, if it is believed that a greater number are necessary to a due administration of justice in any case still this authorizes the court arbitrarily to limit the number of witnesses for whom process may be allowed to issue. We very much doubt whether the Legislature can do this or authorize the court to do it.

With regard to this particular act we suggest further that the caption hardly seems to state clearly enough the subject of the act.

As you specially invited further opinion from this office as to the subject matter of this legislation very fully agreeing with you that under the present statute the constitutional right to the use of compulsory process for the attendance of witnesses is grossly abused at a great expense to the State and inconvenience to citi-

zens generally we think that the object of this bill could probably be better accomplished, within the limits of the Constitution, by legislation clearly and specifically prescribing the conditions under which process for witnesses may issue, in regard to the statements required to be made in applications for such process as to the materiality of the testimony, and the facts expected to be proven by the witness.

It will be found upon examination that the present statute upon that subject is not satisfactory. (See case of Roddy against the State, 16 App., 502; Homan against the State, 23 App., 212.)

See, however, the case of Moore against the State, 33 S. W. Rep., page 980, which seems to throw some doubt upon the right of the Legislature to do even this.

Yours truly,

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#### POLL TAX.

City Council has a right to exempt persons over age of 60 years from payment of poll tax.

AUSTIN, TEXAS, February 14, 1905.

*Hon. Dan Walker, Timpson, Texas.*

Dear Sir: Yours of the 9th has been duly received and we have given same our careful attention. After a close reading of all of the authorities within our reach, we conclude that our former ruling in regard to the matter inquired about is correct, and that the city council has the right to exempt persons over the age of sixty years from the payment of poll tax.

Article 8, Section 1 of the Constitution provides as follows: "The Legislature may impose a poll tax." Article 7, Section 3 of the Constitution provides as follows: "A poll tax of \$1 on every male inhabitant of this State between the ages of 21 and 60 years shall be set apart annually for the benefit of the public free schools."

These are the only two provisions in the Constitution relating to the levying of poll taxes, except Article 6, Section 3 of the Constitution, which has no relation to the matter under discussion. Article 8, Section 2 of the Constitution provides what property and under what circumstances the Legislature may exempt from taxation the property therein set out. It, however, does not mention any exemption which the Legislature may make in reference to the payment of poll tax. Now, you will see from Article 7, Section 3, that a poll tax of \$1 on every male inhabitant in this State between the ages of 21 and 60 years is provided for the benefit of the public free schools. Under the above named provisions of the Constitution, the Legislature of this State has provided as follows: "There shall be levied and collected from every male person between the ages of 21 and 60 years, resident within this State on the first day of January of each year (Indians not taxed, and persons insane, blind, deaf and dumb, or those who have lost one hand or foot, excepted), an annual poll tax of \$1.50, \$1 for the benefit

of free schools and 50 cents for general revenue purposes?" (See Article 5048 Sayles' Civil Statutes.) Now, you will see from the above that the Legislature has exempted from the payment of poll tax, in addition to those exemptions named in the Constitution, the following persons, namely: Indians not taxed, persons insane, blind, deaf and dumb and those who have lost one hand or foot. If the authority of the Legislature to make these additional exemptions has ever been questioned, we have been unable to find any decisions to that effect, and the presumption is that they have acted within the scope of their authority.

Article 489, Sayles' Civil Statutes provides that the city council shall have power to levy and collect an annual poll tax not to exceed \$1 of every male inhabitant of said city over the age of 21 years (idiots and lunatics excepted). Now, you will see from this provision that the Legislature has granted to municipal corporations additional exemptions to those named in the Constitution. In the case of Perry vs. The City of Rockdale, 62 Texas, page 451, Judge Stayton, in rendering the opinion for the court said that the statute granting authority to city councils to levy poll taxes conferred the power as fully as the Legislature possessed it. It was held in the case of Faribault vs. Misemar, 20 Minnesota, page 396, that under a power granted by the Legislature to levy a poll tax, the city council could exempt from the payment of this poll tax members of the fire department without exceeding their authority.

In our judgment, the only restrictions on the authority of the city council on the levying of a poll tax is that they shall not violate the provisions of the Constitution, which requires equality and uniformity in taxation. They must not exceed the power granted them by the Legislature, but they have the authority to exercise that power to the extent that they see proper, keeping within the limits of the constitutional provision relating to equality and uniformity. "A poll tax may be levied by municipal corporations for municipal purposes without violation of any constitutional requirement as to uniformity; even though certain persons, such as members of the fire companies, are exempted." (See Teidman on Municipal Corporations, 260-a.)

We are aware of the decision of the Supreme Court in the case of Austin vs. The Gas Company, 69 Texas, page 180. In this case, the court held that the requirement of the State Constitution that *all property* in the State shall be taxed in proportion to its value and that taxes shall be equal and uniform controls municipal, as well as State taxation. The assumption by a city council of the power to exempt property from taxation is ultra vires and violative of the Constitution. The decision was rendered while there was in force in the State the following statute, namely: "The city council may by ordinance provide for the exemption from taxation all such property as they may deem just and proper." (See Article 497, Sayles' Civil Statutes.) So it is very clear to us that the Supreme Court held that the city council had exceeded its authority, because it had violated the provisions of the Constitution relative to uniformity of taxation, and not because it had no authority to exempt from taxation.

We are aware of the well settled principles of law that municipal corporations have not an inherent power to exempt property from taxation, but that this power must be expressly granted them by the Legislature, and all the authorities laying down this principle, which we have examined, and we have examined several, deal with the proposition of exempting property from taxation, instead of the exemption of persons. We do not believe that the same rule would apply in regard to the authority for municipal corporations to exempt property from taxation that would apply to its authority to exempt persons from the payment of poll tax, and this is very evident to us from the fact that the Legislature of this State has exempted from the payment of poll tax persons who are not exempt under the Constitution. In other words, the Constitution says that every man between the ages of 21 and 60 years must pay a poll tax of \$1 for the benefit of the public free schools. The Legislature has seen proper to exempt persons between the ages of 21 to 60 years, who come within the exceptions prescribed in Article 4058, and in granting authority to municipal corporations, they have made the exceptions different from those which exempt people from the payment of the State and county poll tax.

It is the unanimous opinion of this department that a municipal corporation has the authority to exempt from the payment of poll tax persons over the age of 60 years, and it is not necessary for the council to pass an ordinance exempting members of the Texas National Guard from the payment of poll tax.

Yours truly,

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#### ELECTION LAW—OFFICIAL BALLOT.

In all elections by the people, vote should be only by official ballot; in cities and towns, as well as county elections, and no name shall go on official ballot of a general or special election unless nominees have been selected according to election law.

If any party makes nominations, all parties must make nominations.

Nominations shall be made as the respective party executive committee directs.

Definitions of a "party."

AUSTIN, TEXAS, February 17, 1905.

*Hon. F. C. Davis, City Attorney, San Antonio, Texas.*

Dear Sir: Yours of the 14th has been duly received. You ask the following questions:

"1. Can the names of candidates who have been selected in a movement of representative citizens belonging to various political parties, but which movement is the organization of no political party which cast votes at the last general election, be placed on the official ballot?

"2. Would it be necessary to show that such organization had cast ten thousand votes or any number of votes in the last general election to come within the term 'political party' as found in the law?

“3. Could the ticket of such a movement be nominated in a convention, or would a primary election be necessary?”

In order to make ourselves clearly understood on the questions above propounded, we crave your indulgence for the length of this communication.

Section 54 of the Terrell election law provides that in all elections by the people the vote shall be only by official ballot, either written or printed, or written in part and printed in part.

Section 75 provides that official ballots shall be provided by the commissioners court at each polling place for every election at which public officers are to be elected by the people and for all primary elections of political parties which nominate by primary election and *no other shall be used.*

Section 76 provides that there shall be one official ballot for each political party lawfully nominating candidates for office to be voted for at each general or special election in each \* \* \* city or town.

Section 77 provides that the official ballot of each political party shall contain the names of all candidates whose nominations for elective office have been duly made by such party and not withdrawn together with the *title of the political party* as certified in the certificate of nomination.

Section 94 provides that the vote in all primary elections shall be by official ballot.

We refer to the above sections for the purpose of making it clear that the Legislature contemplated that in all elections by the people the vote should be only by official ballot. That the provisions of the Terrell election law requiring the vote to be by official ballot apply to elections to offices in cities and towns is made clear by several provisions in the act prescribing under what circumstances official ballots may be dispensed with. For instance, Section 59 provides that at elections for school district officers, or school officers of a city, town or village, at which no other officer is to be elected, and election of officers of fire departments, any ballot may be used prescribed by local authorities.

The question next arises, what names shall go on this official ballot? Section 76 provides that no name shall be placed on the official ballot of the general or special election unless the nominees of the party have been selected according to this act. This section refers to elections in *counties, cities and towns.* So we conclude that where one political party has nominated its candidates for office, the names of the candidates of other political parties can not go on the official ballot unless they have also been nominated under the provisions of the Terrell election law.

The question next arises as to how these nominations shall be made. Section 84 provides that nominations of party candidates for office to be filled in any city or town shall be made not less than twenty days prior to the city or town election at which they are to be chosen, in such manner as the party executive committee for such city or town shall direct and *if made by primary election,* all the laws applying to county primary elections shall apply to them; provided, any political party may permit or order the hold-

ing of any *primary convention* at such hour such party may deem advisable and *on said day*. We conclude from this provision that nominations of party candidates for city offices shall be made: First, either by primary election or primary convention as the respective party executive committees shall direct. Second, if made by primary election, all the laws applying to county primary elections shall apply to them. So we have reached these conclusions:

1. There must be an official ballot.
2. If any party makes nominations, all political parties must make nominations.
3. Nominations shall be made as the respective party executive committees shall direct.

The next question which presents itself is, what is a political party within the meaning of the Terrell election law? "A party is a number of persons joined in opinion or action as distinguished from or opposed to the rest of the community, especially one of the parts into which a people is divided on the questions of public policy." (See Webster's Dictionary.) It is a "company or number of persons ranged on one side, or united in opinion or design in opposition to others in a community; those who favor or are united to promote certain views or opinions." (See Century Dictionary.)

"Political" means "of or pertaining to public propositions, or to politics; relative to the affairs of State or administration." (See Webster's Dictionary.) It means "relating to or concerned in public policy and in the management of the affairs of the State or nation; of or pertaining to civil government or the enactment of laws and administration of civil affairs."

We conclude that a political party, as contemplated by this act, is a company or number of persons ranged on one side or united in opinions or design, in opposition to others in the community, for the purpose of influencing the policy of a government, or public opinion. If there is a *definite* and *distinct organization* of persons for either of the purposes named above, the said organization would come within the meaning of the term "political party," and would have the right to nominate its candidates and have their names placed on the official ballot.

We do not see that it would be material as to the length of time the party has been organized. There is no provision of the law prescribing how long a party shall have been organized before they will be such "political party" as would have the right to nominate candidates for office and have their names placed on the official ballot. Neither does the law prescribe the manner in which they shall be organized. It would not be necessary, in order that such party might have the right to nominate candidates and have their names placed on the official ballot that they should have ten thousand votes, or any number of votes, at the general election.

Section 84 has no reference to city elections in so far as it provides that parties casting ten thousand votes shall nominate candidates under this act before the name of said candidates can go on the official ballot.

Very truly yours,

## TAXATION—DELINQUENT TAX RECORD.

Delinquent tax record must be compiled and published separately. If not published in 1898, may be published at any time thereafter.

AUSTIN, TEXAS, March 4, 1905.

*Hon. J. W. Stephens, Comptroller, Capitol.*

Dear Sir: We are in receipt of yours of 3rd instant enclosing a letter of H. H. Jacoby, tax collector of Dallas County, and requesting the Attorney General to advise you in answer to certain questions propounded in Mr. Jacoby's letter.

These questions will be answered seriatim:

The delinquent tax law of 1897 evidently contemplated and intended that the delinquent list of lands sold to the State for taxes for any of the years from 1885 up to the date of the act, and which, when recorded, is denominated the "delinquent tax record," should be entirely separate and disconnected from the annual delinquent lists of lands upon which taxes are unpaid for subsequent years. The one is the list of lands sold to the State for taxes, the other is the lot of lands upon which taxes are unpaid for each year.

Having failed to make due publication of the "delinquent tax record," in accordance with the requirements of Article 5232e, and of the annual delinquent lists for subsequent years, I do not think that the law authorizes the publication now of a list combining the delinquent tax record, which should have been published in 1897, with the subsequent annual delinquent lists. Such publication would not be a sufficient compliance with the law. If the publication is made now it should be of separate lists.

2. The statute clearly requires the "delinquent tax record" provided for in Article 5232-c to be delivered to the county clerk, and a duplicate thereof to be made out and filed with the Comptroller. No other copy is required, but this record is required to be further recorded after examination and correction by the commissioners court in a book which is denominated the "delinquent tax record of Dallas County." (Art. 5232d.)

The annual delinquent list must be in triplicate. (Art. 5232j.)

3. I do not think that it is necessary to a valid assessment of lots and blocks in a city to give the certificate, abstract or survey number. (Art. 5118.)

4. This is substantially answered in (1) above. I don't think a publication of the consolidated list embracing the "delinquent tax record" and also the annual delinquent tax lists is authorized by law.

5. It is my opinion that the collector would be authorized in making publication now to eliminate all those tracts on which payments of taxes have been made since the lists were made out.

6. As to this question I have some difficulty. The question is as follows: "The delinquent tax record was prepared in the year 1898, as herein before stated, and have only been published for two years. Would publication at this late day of such tax record and delinquent lists be proper."

I suppose your correspondent means that the "delinquent tax

record" proper, referred to in Article 5232c, has never been published, and that the annual delinquent lists referred to in Article 5232j for only two years have been published.

The law evidently contemplated that the delinquent list or delinquent tax record of all lands sold to the State for taxes from 1885 to 1897, should be published at once after the passage of the Act of 1897.

As a publication of this "delinquent tax record" is necessary as a basis for suits to collect those back taxes under this act, there is nothing to be done by the authorities of Dallas but to make the publication now.

I return Mr. Jacoby's letter.

Yours truly,

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#### PUBLIC EDUCATION—SCHOOL DISTRICTS.

A county to which is attached several unorganized counties can not establish a county line district, of which no part is within the organized county.

AUSTIN, TEXAS, March 6, 1905.

*Hon. Geo. R. Bean, County Judge, Lubbock, Texas.*

Dear Sir: We have your favor of 27th ultimo, from which we understand it is desired to establish a county line common school district, to be composed of parts of Yoakum and Cochran Counties, both of which are unorganized and attached to Lubbock County for judicial purposes, but no part of which lie within Lubbock County.

Replying to your question, we beg to advise you that, in our opinion, this can not be done. As we understand Articles 3946a and 3946b, their provisions are inapplicable to a case such as the one submitted. You will notice that Article 3946a requires the petition for establishment of a district to be presented to the commissioners court of one of the counties in which a part of the district will be situated. Neither Yoakum nor Cochran Counties has a commissioners court.

Article 3926b provides that the district, when established, shall be regarded and treated in all respects as a district of the county by whose commissioners court it is established. This can not be so in the present instance. A common school district is authorized to vote upon itself a special tax to supplement its State apportionment, but we find no statute authorizing the commissioners court of an unorganized county to levy and collect a special school tax upon the lands in an unorganized county. Reading the two sections together, it seems clear that it authorizes the commissioners court of any county, upon proper application, to establish a common school district lying partly within the county and partly in adjoining county or counties, but it is difficult to see how a district lying in Yoakum and Cochran Counties can be regarded and treated for any purpose as a school district of Lubbock County.

You can readily see the anomalous condition which would exist when Yoakum and Calhoun Counties became organized, if this dis-



trict were established and "regarded and treated" as a district of Lubbock County.

We conclude, as above stated, that these articles do not authorize the establishment by the commissioners court of your county of a school district of which no part is within Lubbock County.

Very truly yours,

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#### LEGISLATURE—TAXATION—CONSTITUTIONAL LAW.

Legislature can not create a board with authority to levy the State ad valorem tax.

AUSTIN, TEXAS, March 10, 1905.

*Honorable Chas. Soward and Y. W. Holmes, of the Committee on Revenue and Taxation, House of Representatives.*

Gentlemen: Complying with your request for my opinion as to the constitutionality of House Bill No. 531, I beg leave to advise you that I am of the opinion that this bill is violative of the Constitution of this State, in that it proposes to delegate to a board, named in the bill, the power to levy the State ad valorem tax.

Taxes to raise revenue for the administration of the State government must be levied by the Legislature. I quote you from Cooley on Taxation (pages 99, 100):

"It is a general rule of constitutional law, that a sovereign power conferred by the people upon any one branch or department of the government is not to be delegated by that branch or department to any other. \* \* \* The power to tax is a legislative power. The people have created a legislative department for the exercise of the legislative power; and within that power lies the authority to prescribe the rules of taxation and to regulate the manner in which those rules shall be given effect. The people have not authorized this department to relieve itself of the responsibility by a substitution of other agencies."

This bill requires the board named therein to make a complete estimate of the amount of taxes collected from all other sources than ad valorem taxes for the current year, and the probable amount that will be collected, and, upon the basis of the appropriations, to levy such a rate of ad valorem tax as "*appears to such board*, will be sufficient to cover the appropriations made for the current year and commissions and other charges for collecting such ad valorem taxes, after having deducted the amount of taxes collected, and that which *will probably* be collected from other sources of taxation for the current year."

It seems to me that this bill does undertake to require the board to exercise the judgment and discretion which the Legislature must exercise in exercising the amount of tax necessary to be levied, and, therefore, is not authorized by the Constitution.

Yours very truly,

COURTS—DISQUALIFICATION OF JUDGE—CONSTITUTIONAL LAW.

When a district judge is disqualified to try a case he is not authorized for that reason to exchange districts with another judge, but the parties, under Section 11 of Article 5, have the right to select a special judge to try the case.

AUSTIN, TEXAS, March 10, 1905.

*Hon. D. E. Decker, State Senate, Capitol.*

Dear Sir: I understand Judge L. S. Kinder, in his letter to you, to propound two questions: (1) If he is disqualified to try a case, pending upon his docket, civil or criminal, is he authorized to exchange courts with the district judge of an adjoining county, under Article 1108; and, (2) If he is not, have the parties to the case the right to agree upon an attorney of the bar as special judge to try the case, or must Judge Kinder's disqualification be certified to the Governor and the Governor make appointment of a special judge.

The constitutional provision upon the subject is to be found in Section 11 of Article 5 and is as follows:

“When a judge of a district court is disqualified by any of the causes above stated, the parties may, by consent, appoint a proper person to try said case, but upon their failing to do so a competent person may be appointed to try the same in the county where it is pending, in such manner as may be prescribed by law. And the district judges may exchange districts or hold courts for each other when they deem it expedient, and shall do so when required by law.”

I think it clear that it is not contemplated that the exchange of districts should be made in case and because of disqualification of a judge to try a case. The privilege of exchanging districts is given generally, but a particular course is prescribed in case of disqualification. I, therefore, answer the first question in the negative. If Judge Kinder is disqualified to try a case, civil or criminal, he is not authorized in such a case, and for that reason, to exchange districts with another district judge.

Section 16 of Article 5 of the Constitution contains the following provision, relating to the county courts: “When the judge of the county court is disqualified in any case pending in the county court, the parties interested may, by consent, appoint a proper person to try said case, but upon their failing to do so, a competent person may be appointed to try the same in the county where it is pending in such manner as may be prescribed by law.” You will note that this is the same as the provision with respect to district courts, above quoted. In the case of Parker County vs. Jackson, 5 Texas Civil Appeals, 31, this provision relating to the county courts was under consideration, a special judge having been agreed upon by the parties, the regular judge being disqualified. After the adoption of the constitutional provision above quoted, but before there has been any legislation upon the subject, Justice Head said: “We see no necessity for legislation to put in force that part of the Constitution above quoted, which authorizes the parties in such cases

to appoint a judge by consent, and we, therefore, hold the proceedings in the court below, in this respect, regular."

The conclusion is inevitable that the Constitution confers upon the parties to the case, in the first instance, in case of the disqualification of the regular judge, the right to agree upon and select a special judge. I, therefore, answer the second question by saying that in any case, civil or criminal, in which Judge Kinder is disqualified, the parties to the cause have the constitutional right to select a special judge to try the case.

I return herewith the letter of Judge Kinder.

Very truly yours,

#### TAXATION—INDEPENDENT SCHOOL DISTRICT.

Lands devised to a town incorporated for free school purposes only; and held as a part of the school fund, are exempt from taxation.

AUSTIN, TEXAS, March 13, 1905.

*Hon. J. W. Stephens, Comptroller, Capitol.*

Dear Sir: I beg that you will pardon my delay in replying to your request for the opinion of this department upon the question whether lands devised to a town incorporated for free school purposes only are exempt from taxation. While it has taken only a few minutes to investigate the point, since I have gotten to it, I have been quite unable to reach it before now.

Section 9 of Article 11 of the Constitution provides, that "All property of counties, cities and towns owned and held for public purposes, such as public buildings and sites therefor \* \* \* and all other property devoted exclusively to the use and benefit of the public shall be exempt from forced sale and from taxation."

Section 10 of the same article authorizes the Legislature to constitute any city or town a separate and independent school district.

The Belleville independent school district, I understand, was incorporated under the general laws, and is a town or village incorporated for free school purposes only, under article 616a.

In discussing Section 9 of Article 11 of the Constitution, Justice Stayton, in the case of Dougherty vs. Thompson, 71 Texas, at page 201, said:

"In view of the provisions made by the Constitution of this State for the establishment and maintenance of public free schools, no one would contend that lands held by counties for that purpose were not held solely for a public purpose. Lands so set apart and solemnly appropriated for a purpose so essentially public as is the maintenance of public free schools must be said to be 'properly devoted exclusively to the use and benefit of the public.' Such property the Constitution exempts from taxation. \* \* \*

"County school lands, when leased to raise an available school fund, are as exclusively devoted to the use and benefit of the public as would they be if covered with school houses and the Constitution prohibits the taxation of the means through which such lands may

be made to yield a revenue, without sale, as fully as does it prohibit the taxation of the lands."

The language of Justice Stayton is equally applicable to cities and towns, and to towns, whether incorporated for municipal purposes or for free school purposes only.

I beg to advise you that it is the opinion of this department that lands devised to a town incorporated for free school purposes only and held as part of its school fund are, by Section 9 of Article 11 of the Constitution, exempt from taxation.

I herewith return the letter of Mr. Brewer.

Very truly yours,

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### CONSTITUTIONAL LAW—COUNTIES.

To create a new county out of an existing county, under Article 9, Section 1, Subdivision 2 of Constitution, requires a two-thirds vote of the members present in each house, there being a quorum, and not two-thirds of all members elected.

AUSTIN, TEXAS, March 13, 1905.

*Hon. H. P. Brwelsford, House of Representatives, Capitol.*

Dear Sir: You have asked for my construction of the phrase "two-thirds of each House of the Legislature" in the following provision contained in subdivision 2 of Section 1 of Article 9:

"Counties of a less area than 900 but to 700 or more square miles within counties now existing, may be created by a two-thirds of each House of the Legislature, taken by yeas and nays and entered on the journals."

You ask if this means two-thirds of all the members elected to both Houses of the Legislature. I am of the opinion that it does not.

I find the following similar provisions in the Constitution:

"Two-thirds of each House" shall constitute a quorum to do business. (Article 3, Section 10.)

"With the consent of two-thirds" each House may expel a member. (Article 3, Section 11.)

Vacancies in certain offices during the session are to be filled by the Governor, with the advice and consent "of two-thirds of the Senate present." (Article 4, Section 12.)

To pass a bill over the Governor's veto requires a vote in the House in which it originated "of two-thirds of the members present" and must be "approved by two-thirds of the members" of the other house.

To pass over the Governor's veto an item of the appropriation bill requires the approval of "two-thirds of the members present of each House." (Article 4, Section 14.)

Notaries are to be appointed with the advice and consent of "two-thirds of the Senate." (Article 4, Section 26.)

It requires a vote of "two-thirds of each House of the Legislature to grant release from taxes" (Article 8, Section 10); and the Legislature may by "two-thirds vote," authorize the payment of taxes

in certain cases at the office of Comptroller. (Article 8, Section 11.)

Judges are removed by the Governor in certain cases on the address "of two-thirds of each House of the Legislature." (Article 8, Section 11.)

"Four-fifths of the House" in which a bill is pending may suspend the rule requiring bills to be read on three several days. (Article 3, Section 32.)

"A vote of two-thirds of all the members elected to each House" is necessary to attach the emergency clause (Article 3, Section 39); to subject farm products to taxes (Article 8, Section 19); and to propose constitutional amendments (Article 17, Section 1).

It will be observed while the phrases "two-thirds of each House" and "two-thirds of the Senate" occur several times in the Constitution in three cases only is a vote of two-thirds of all the members elected to each House required. (Article 3, Section 39; Article 8, Section 19, and Article 17, Section 1.)

I conclude, therefore, that when the framers of the Constitution intended to require a vote of two-thirds of all the members elected to the Legislature the requirement was expressly stated in plain language and that the requirement of a two-thirds vote of the Senate, or a two-thirds vote of each House, merely means a two-thirds vote of the members present, there being a quorum.

Replying specifically to your question, therefore, I am of the opinion that, a quorum being present, a two-thirds vote of the members present will comply with the requirements of Article 9, Section 1, Subdivision 2.

Yours truly,

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#### CONSTITUTIONAL LAW—TAXATION.

The Legislature may levy the State tax at a rate to be computed and ascertained upon a rule prescribed by the act and create a board with power to make the necessary calculation.

AUSTIN, TEXAS, March 14, 1905.

*Hon. Chas. Soward and Y. W. Holmes, of Committee on Revenue and Taxation, House of Representatives.*

Gentlemen: I have examined the draft of proposed bill to be entitled "An Act to provide for a board to calculate the ad valorem rate of taxes for State purposes each year and to prescribe the duties of such board."

I beg to report that I find no constitutional objection to this proposed measure.

Some days ago I advised you that I believed House Bill 531 to be objectionable on the ground that it was proposed by that bill to delegate discretionary powers to the board and to authorize the board to ascertain the rate and make the levy. The proposed bill submitted now confers no discretion upon the board but imposes upon the board the duty of making an arithmetical calculation merely and the tax levy under the bill is to be made by the Legislature itself. In other words the bill leaves merely the rate of tax to

be ascertained by the designated board by a mathematical calculation upon the rule prescribed by law.

In *Cooley on Taxation*, page 100, it is said:

“There is a difference between making the law and giving effect to the law; the one is legislation, and the other administration. We conceive that the Legislature must, in every instance, prescribe the rule under which taxation must be laid; it must originate the authority under which, after due proceedings, the tax gatherer demands the contribution; but it need not describe all the details of action, or even fix with precision the sum to be raised, or all the particulars of its expenditure. If the rule is prescribed which, in its administration, works out the result, that is sufficient, but to refer the making of the rule to another authority, would be in excess of the legislative power.”

In the case of *Savings and Loan Society vs. Austin*, 46 Cal., 415, the Supreme Court of California, in discussing a similar provision in the statutes of that case said:

“We do not understand it to be seriously contended that if the Legislature had authorized the board on ascertaining the total value of the taxable property in the State, in the manner prescribed by law, and also the amount of the appropriations for the fiscal year, to determine and fix the rate of taxation necessary to produce the requisite amount to meet the appropriations, that this would have been liable to any constitutional objection. The value of the taxable property and the adequate amount of the appropriations having been ascertained, the rate of taxation requisite to produce the given amount would have been merely a matter of arithmetical computation, involving no exercise of discretion.”

In the opinion in this case, the court quoted, with approval, from the opinion of the Supreme Court of Illinois in the *People vs. Reynolds*, 5 Gilman, 12, in which case it was said: “We see, then, that while the Legislature may not divest itself of its proper functions, or delegate its general legislative authority, it may still authorize others to do those things which it might properly yet can not understandingly or advantageously do itself.”

In the case of *Field vs. Clark*, 143 U. S., 649, there was under consideration an act of Congress, which provided that so often as the President shall be satisfied that the government of any country producing and exporting certain named commodities imposes duties upon the agricultural or other products of the United States, which, in view of the free introduction into the United States of the commodities named, he may deem to be reciprocally unequal and unreasonable, “he shall have the power and it shall be his duty to suspend” the provisions of the act relating to the free introduction of such commodities “for such time as he shall deem just,” and during such suspension duties shall be levied as prescribed by the act.

It was contended that the act was unconstitutional as delegating to the President both legislative and treaty-making powers. The court held that it was not unconstitutional. I quote from the opinion at pages 692-693.

“Congress, itself, prescribed in advance the duties to be levied

while the suspension lasted. Nothing involving the expediency or the just operation of such legislation was left to the determination of the President. \* \* \* When he ascertained the fact that duties and exactions reciprocally unequal and unreasonable were imposed upon the agricultural or other products of the United States by a country producing and exporting sugar, molasses, coffee, tea or hides, it became his duty to issue a proclamation declaring the suspension as to that country, which Congress had determined should occur. He had no discretion in the premises, except in respect to the duration of the suspension so ordered. But that related only to the enforcement of the policy established by Congress. *As the suspension was absolutely required when the president ascertained the existence of a particular fact*, it can not be said that in ascertaining that fact and in issuing his proclamation, in obedience to the legislative will, he exercised the function of making laws. Legislative power was exercised when Congress declared the suspension should take effect upon the named contingency. What the President was required to do was simply in execution of the act of Congress. It was not the making of law. He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect."

The court quoted from Locke's appeal (72 Penn. St., 491-498) as follows: "The Legislature can not delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which can not be known to the law-making power, and must, therefore, be a subject of inquiry and determination outside the halls of legislation."

I, therefore, conclude, as I have above stated, that the proposed bill, by which the Legislature will itself declare the law, levy the tax and order its assessment and collection, leaving merely the rate of tax to be ascertained by a mathematical computation upon a rule prescribed by the act, and imposing the duty of ascertaining the rate upon the board named, leaving nothing to their discretion, is unobjectionable upon constitutional grounds.

Without undertaking to express any opinion upon the policy of the proposed legislation, since that does not come within my province, I do take the liberty of calling attention to the following matters, which I think important to be considered:

1. The tax rolls transmitted to the Comptroller by the tax assessor as required by existing laws are completed rolls; that is to say, the various taxes have been calculated and carried out upon the rolls. Inasmuch as under the proposed bill the assessor can not calculate the State ad valorem until the board has acted, it will be impossible for him to comply with the bill under existing law in that matter, unless it is designed that in addition to the triplicate tax rolls required to be made by Article 5127, the assessor shall make a fourth copy, to be sent to the board before he runs out the tax upon the three copies required by Article 5127.

2. The tax rate, when ascertained, should be certified to the tax

assessor, instead of the collector, in order that it may be assessed by the assessor upon the tax rolls.

3. The quotient of the division required to be made by Section 3 must, in the nature of things, contain a decimal of possibly six or eight or more places. The calculation upon the tax rolls of such a rate of tax will be an arduous undertaking.

4. Section 3 concludes: "The quotient shall be the number of cents on the \$100 valuation to be levied and collected for the current year for State purposes \* \* \*." I think the bill should, in terms, plainly levy the tax. I suggest that Section 3 should conclude with a provision substantially as follows:

"And there shall be levied and collected for the year 1905, and annually thereafter, and there hereby is levied and ordered assessed and collected for the year 1905, and annually thereafter, an ad valorem tax on all real property situated and on all property owned in the State on the first day of January in each and every year, and on all property sent out of the State prior to the first day of January for the purpose of evading the payment of taxes thereon and afterwards returned to the State, except so much thereof as may be exempted by the Constitution and laws of this State, or the United States, a tax of and at the rate of the number of cents and fractional part of a cent, to be ascertained each year by the calculation hereinbefore prescribed, on the \$100 cash value thereof, estimated in lawful currency of the United States, which cash value shall be estimated in the manner prescribed by law."

I return herewith your draft of proposed bill.

Very truly yours,

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#### COMMISSIONERS COURTS—STATUTES CONSTRUED.

Articles 858 and 859 do not authorize the creation of a special fund to pay specified claims to the exclusion of others of the same class.

AUSTIN, TEXAS, March 14, 1905.

*Hon. H. P. Brelsford, House of Representatives, Capitol.*

Dear Sir: This department is in receipt of yours of this date, in which, on behalf of the county treasurer and commissioners court of Eastland County, you make the following statement:

(1) The jury fund of Eastland County is some \$10,000 in arrears by reason of registered indebtedness.

(2) There is a surplus in the 2nd class (Road and Bridge Fund), and in the 3rd class, or General Fund.

(3) The commissioners court of said county has, by order duly entered on minutes, established a 4th class emergency jury fund; has directed that the surplus from 2nd and 3rd class funds be transferred to said 4th class fund, and has directed the county treasurer of Eastland County to register all jury script hereafter issued against said 4th class emergency fund and to pay said script out of said 4th class fund until exhausted.



You then ask whether, in the opinion of the Attorney General, upon the foregoing facts, the commissioners court can legally create this special jury fund made up out of the surplus from funds of the 2nd and 3rd class and direct that jury script hereafter issued be registered against and paid out of this fund.

The necessary effect of such proceeding would be to make two classes of claims against the 1st class, or jury fund, to-wit, script heretofore registered, to be paid out of the first class or jury fund proper, and jury script hereafter registered to be paid out of this special jury fund.

Necessarily this would be a discrimination between the two classes of jury script, there being, as you state, a large deficiency in the jury fund proper, and would in our opinion violate, not only the express provisions of Article 856, but the general purpose of Articles 852-857. All jury fees are a claim of the first class, and must be registered as such in the order in which they are presented. (Article 855.) And when registered shall be paid in the order in which they are registered.

The authority given the commissioners court by Article 858 and 859 to transfer funds and to create other classes of funds, I do not think can be used for the purpose, or with the effect of creating a special fund to pay specified claims of a certain class to the exclusion of other claims of the same class, thus effecting a discrimination in the payment of claims of the same class without regard to their order of registration.

If the commissioners court had no legal authority to make the orders referred to the treasurer would not be protected in complying with them in violation of his duty as expressly prescribed in Articles 855, 856.

I return the letter of Mr. Jones.

Yours truly,

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#### PUBLIC EDUCATION—SCHOOL TRUSTEES—SCHOLASTICS.

The trustees of an independent school district are not authorized to admit to free tuition children within the scholastic age who are not residents of the district and have not been transferred to the district.

AUSTIN, TEXAS, March 14, 1905.

*Hon. R. B. Cousins, State Superintendent of Public Instruction,  
Capitol.*

Dear Sir: I beg that you will pardon my delay in replying to your query based upon the letter to your department from Mr. Frank W. Hill. The pressure of other matters have been so great that I have been unable to reply until now.

The question propounded is, has the board of trustees of the Austin Public Schools the power to admit children of non-residents, who are taxpayers in the city of Austin, to free tuition in the Austin public schools. I have found but three provisions of the school laws upon the subject.

Article 33-b provides: "Every child in this State of scholastic age shall be permitted to attend the public free schools of the district, or independent school district, in which it resides at the time it applies for admission \* \* \*."

Article 3982 provides: "Any child lawfully enrolled in any district, or independent district, may be transferred to the enrollment of any other district, or independent district, in the same county \* \* \* at any time before the apportionment of the school fund by the county superintendent or county judge of any scholastic year, but not afterwards; \* \* \* provided, no transfers shall be made after the trustees have employed a teacher."

Article 3960 provides: "The trustees of schools shall have power to admit pupils over and under scholastic age, either in or out of the district, on such terms as they may deem proper and just \* \* \*."

Without discussing the purpose of Article 3982, since it is not required by the case, I think that these provisions sufficiently show that the board of trustees of an independent school district, or of a city, like Austin, constituting a separate school district, have not the discretion to admit to free tuition in the public schools children within the scholastic age, who are not residents of the district and who have not been transferred, as provided in Section 3982.

It will be noted that the power to make such rules as the board of trustees deem proper and just relating to the admission of children over and under the scholastic age is expressly granted, and an express provision is made for the transfer of children within the scholastic age, and I think, therefore, that the conclusion is inevitable that as to children within the scholastic age, it was intended by the Legislature that the board of trustees should not have the discretion to admit them to free tuition, unless they are either residents of the district, or have been transferred, as provided in Section 3982.

I return herewith the letter of Mr. Hill.

Very truly yours,

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#### CONSTRUCTION OF LAWS—ELECTION LAW—NOMINATIONS.

Political party. Manner of making primary nominations under election law of 1903. Organization of political party.

AUSTIN, TEXAS, March 15, 1905.

*Mr. E. R. Cheesborough, Galveston, Texas.*

Dear Sir: I have your letter of the 13th inst., in which you ask the following questions:

1. Can the executive committee of a regularly organized party provide for a mass meeting of the members of that party at one point in the city for the purpose of making party nominations, and can the nominations so made at such mass meeting be placed upon the official ballot with all of the rights and privileges accorded party nominations?

2. What is meant by the term "Primary Convention"?

3. In holding a primary convention is it necessary that a convention or meeting should be held in each voting precinct of the city?

I understand your questions to be propounded with reference to the approaching election to be held in the city of Galveston for municipal offices.

1st. In Section 84 of the Terrell election law it is provided: "Nominations of party candidates for offices to be filled in any city or town shall be made not less than twenty days prior to the city or town election at which they are to be chosen in such manner as the party executive committee of such city or town shall direct, and if made by primary election, all the laws applying to county primary elections shall apply to them; provided, any political party may permit or order the holding of any primary convention at such hour such party may deem advisable on said day."

Section 91 provides: "The places of holding primary elections and primary conventions by a political party in the various precincts of the city shall not be within one hundred yards of the place at which such elections are conducted by a different political party. When the chairman of executive committees of different parties can not agree on the places where precinct primaries or conventions shall be held such places in each precinct shall be designated by the county judge who shall cause public notice to be given thereof at once in some newspaper of the county. Such primary elections when held shall be in every election precinct as fixed by the commissioners court.

Section 15 of the act contains the provision: "Every ward in every incorporated city, town or village shall constitute an election precinct unless there shall have been cast in said ward at the last general city or town election held therein more than 750 votes \* \* \* and Section 2 of Article 6 of the Constitution provides that "all electors shall vote in the election precinct of their residence."

Primary conventions, equally with primary elections, are "elections" within the meaning of the election law, and I am of the opinion that, in view of the constitutional provision, and the provision in Section 15 of the act above quoted, it is necessary that primary conventions, equally with primary elections, must be held in each voting precinct and not by the holding of one mass meeting at a single place in the city.

It will be noted that in Section 91, above quoted, these nominating elections are denominated "precinct primaries or conventions."

2. By the term "primary convention" I understand to be meant precinct or ward conventions conducted according to usual Democratic principles, held for the purpose of selecting delegates to a general convention just as under the act required to be done in the case of primary elections or conventions held to nominate candidates for city offices, that is, there will be a convention held in each ward which will organize, as conventions are organized, to elect delegates who will go instructed or uninstructed to a general convention to be held in the city by which general convention nominations will be made of candidates for the offices to be filled. The general convention by which nominations will be made is required,

it will be noted, to be held not less than twenty days prior to the city election at which the officers are to be chosen. (Section 84.)

It will be noted that whether there shall be nominations for offices, either by primary elections or conventions, is committed to the decision of the party executive committee of the city. Whether there is now an existing political organization in Galveston having a city executive committee I do not know, though probably there is not. If it is desired to organize such a committee, I think it should be done by calling the general mass meeting in each voting precinct wherein all of the political faith of the party proposed to be organized may participate. In each precinct there may, or not, be a perfected local organization, but there should be selected one or more persons as members from that precinct of the city executive committee which thereafter will organize, and I think will be authorized under Section 84 to direct the holding of either primary election or primary conventions as provided by the act.

Though not directly solicited by your letter, I will add that the Terrell election law does not require that there must be nominations for city offices, either by primary election or convention. If any political party—by which I understand is meant, not only one of the existing national parties, but any definite and distinct organization of persons for the purpose of influencing the policy of the government, municipal, State or National—nominates candidates, then there is required to be a separate official ballot for each party making nominations, and the name of no candidate can appear upon an official ballot except upon the ballot of the party by which he was nominated. If, however, no nominations are made by any political party, then, as I understand the law, there need only to be a single official ballot upon which will appear the names of all candidates for the respective offices printed alphabetically.

3. As I have above indicated, it is my opinion that primary elections or primary conventions, if held, must be held in each of the several voting precincts in the city. There can not be one general mass meeting in which all of the voters of the city of the political party conducting the meeting may participate.

If I have not sufficiently replied to your queries please let me know what I have not made clear.

Yours truly,

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#### PHARMACIST LAW.

A physician who conducts a pharmacy, if not himself a qualified pharmacist, must have employed in his business a qualified pharmacist to fill prescriptions.

AUSTIN, TEXAS, March 16, 1905.

*Dr. A. F. Newberry, Hallettsville, Texas.*

Dear Sir: We have your favor of the 14th inst. asking if a physician who is the proprietor of a pharmacy can lawfully fill his own prescriptions.

We understand you to mean in a case where the physician is not a registered pharmacist.

Article 3762 of the Revised Statutes provides, "It shall be unlawful for any person, unless a qualified pharmacist within the meaning of this law, to open or conduct any pharmacy or store for compounding medicines, or for any one not a qualified pharmacist to prepare physicians' prescriptions, or compound medicines except under the direct supervision of a qualified pharmacist as hereinafter provided."

Article 3771 contains the provision "that the provisions of this law shall not prevent any person from engaging in the business herein described as proprietors or owners thereof; provided, such proprietor or owner shall have employed in his business some qualified pharmacist to fill prescriptions and compound drugs.

Article 3776 provides "nothing in this title shall be construed to apply to any practitioner of medicines who does not keep open shop for compounding, dispensing, and selling medicine \* \* \*."

We understand the intent of the law to be that no other than a qualified pharmacist may prepare physician's prescriptions, or compound medicines, except that a physician "who does not keep open shop for compounding, dispensing and selling medicines" is not within the prohibition of the law. A physician who does conduct a pharmacy or store for compounding medicines is not, as we read the law exempt from the provision that if not himself a qualified pharmacist, he must have employed in his business some qualified pharmacist to fill prescriptions and compound drugs.

We have no copy of the law on this subject for distribution. You can doubtless have access to a copy of the Revised Statutes of 1895 in the office of an attorney at law, or you will undoubtedly find a copy of the statutes in the county clerk's office.

We are not familiar with the provisions of the bill which you say is now pending in the House on this subject. If there is such a bill, by addressing your Representative in the House or the Senate from your district, doubtless you can procure a copy of it.

Yours truly,

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PUBLIC LAND—DETACHED LAND—VACANCY—ACTUAL  
SETTLER.

AUSTIN, TEXAS, March 15, 1905.

*Hon. J. J. Terrell, Commissioner of the General Land Office, Austin, Texas.*

Dear Sir: We are in receipt of yours of the 25th ult., which is here copied:

"Herewith I hand you blue-print copy of surveyor's certified sketch on file in this office showing thereon land surveyed under the Act of February 23, 1900, for W. S. Tomey, G. M. D. Grigsby and Adolph Goldmann in Harris County, and surrounding surveys for your consideration, supplemented by the following facts, as shown by the records of this office, said surrounding surveys being patented.

"Survey No. 14 containing 116 3-10 acres, made for W. S. Tomey,

was approved May 24, 1904, and sold as detached land for cash July 21, 1904, and patented August 8, 1904, S. F. 5858, under provisions of Sections 5 and 6 of the Act of 1900, at which time the adjoining survey of 400 acres on the east of same made for Adolph Goldmann had not been developed, in fact, the sketches submitted by the surveyor indicated there was no such vacancy. On November 17, 1904, this department approved Survey No. 30, containing 400 acres, made for Adolph Goldmann, and advised the applicant of such fact, stating that the land was *not detached* and was subject to sale on condition of settlement and deferred payment. On December 16, 1904, surveys 32 and 33, made for Adolph Goldmann, containing 82 and 128 acres, respectively, were approved, said surveys also being classified as not detached by this office. On December 19, 1904, Mr. Goldmann filed his application to purchase survey No. 30, containing 400 acres, as an actual settler and same was awarded to him accordingly. On January 17, 1905, he purchased surveys 32 and 33, containing 82 and 128 acres, respectively, as additional land. Subsequently the sale of survey No. 32, 82 acres, S. F. 6465, was canceled and the survey disapproved on account of further investigation by this department showing that no vacancy existed for same. Mr. Goldmann, prior to the purchase of these tracts, insisted upon being permitted to purchase same for cash without conditions of settlement. Survey No. 33, containing 128 acres, S. F. 6466, sold Mr. Goldmann as additional land, adjoins survey No. 24, 66 acres, surveyed for G. M. D. Grigsby, S. F. 5856, said survey No. 24, G. M. D. Grigsby being now unsold. Survey No. 24 as made for said Grigsby, S. F. 5856, was approved May 4, 1904, and no application to purchase same having been filed within the sixty days from date of approval of same, same was placed on the market subject to sale under the Act of April 19, 1901 by listing with the county clerk of Harris County. This survey is unsold according to the records here.

"Since the rendition of the decision by the Supreme Court in the McGrady case, Mr. Goldman has paid out his purchases and requests that patents issue on same without proof of three years' occupancy. For your information and consideration I hand you a copy of Colonel Hall's letter under date of the 15th inst., touching this matter. Upon the construction placed on Sections 5 and 6 of the Act of February 23, 1900, by the Supreme Court in the McGrady case, I would thank you for your opinion:

"1st. Were the lands purchased by Mr. Goldmann detached and subject to purchase without settlement and for cash?

"2nd. If detached, Harris County being east of the 97th meridian, Mr. Goldmann having applied for same on condition of settlement, is he estopped now from seeking patent without completing his three years' occupancy by paying cash for same.

"3rd. Would I be authorized under the law to patent the Goldmann purchases in the event you would construe these surveys were detached at the time applications to purchase were filed?"

Eliminating the W. S. Tomey survey of 116 3-10 acres entirely from the case, as the effect of the decision in McGrady vs. Terrell, it appears that at the date of Goldmann's application to purchase

400 acres, this tract appeared from the map and records in the General Land Office to be part of a tract of vacant and unappropriated lands made up as follows, viz.: Survey No. 30, 400 acres; No. 32, 82 acres; No. 33, 128 acres, and No. 24, 66 acres, in the aggregate 676 acres.

Clearly, if the vacancy contained more than 640 acres at the time Goldmann made his application to buy the 400 acres, he was not entitled to buy except as an actual settler. He insisted upon his right to buy without actual settlement, which, I infer, was refused by the Land Commissioner, whereupon he bought as an actual settler. What effect did it have upon this sale that it was afterwards determined that Survey No. 32, 82 acres, was not in fact public land, and that, therefore, the entire vacancy at the time of Goldmann's application to buy the 400 acres was less than 640 acres. The case of *Thomas vs. Wolfe*, 16 C. C. A., 22, is direct authority for holding that if the case was reversed, that is, if at the time Goldmann made his application survey 32 (82 acres) was not shown to be public land, and the vacancy to be, therefore, less than 640 acres, and the Commissioner, so treating it, had accepted Goldmann's application to buy without settlement, the subsequent discovery that the 82 acres was public land would not have affected the sale. Why should not the converse of this proposition, which is presented here, be true?

The court says:

"Certainly if, by the means adopted by the State to ascertain and show the locations and surroundings of its lands, a section is made to appear to be detached and isolated, and the purchaser, in good faith, acts upon such showing, it can not be assumed that the Legislature intended so unjust a result as that upon a subsequent discovery that an error was committed in the mapping and location of the lands and the adjacent surveys, the sale is to be treated as unlawful."

The legality of the action of the Commissioner is made to depend upon the facts as they appear from the maps and records of the General Land Office at the time of the sale, and not upon such facts as may be subsequently developed. It seems to me to be a plain deduction from the rule laid down in *Thomas vs. Wolfe* that Goldmann's rights must be determined from the facts as to the size of the vacancy as shown by the maps and records of the General Land Office at the time of his application. It appears that at the time Goldmann made his application to purchase the 400 acres, there was pending his application previously made to have his 82 acres surveyed as vacant land and that he shortly afterwards purchased the same, the survey and field notes having been filed in the Land Office and approved before Goldmann made application to buy the 400 acres.

If the 400 acres had in fact been part of a tract of less than 640 acres detached from other public lands at the date of Goldmann's application, being east of the 97th meridian, Goldmann had the option of buying either for cash and without actual settlement or on credit as an actual settler. If in such case, under a mistaken view of the facts or the law, the right to buy without actual settlement

was denied by the Commissioner, he might have made an application to buy for cash without settlement, and if rejected, stood upon his application and title and right thereunder, or he might, by writ of mandamus from the Supreme Court compel the Comptroller to accept his application. Choosing rather to accept the Commissioner's view and to file an application to purchase as an actual settler and on a credit, as he had a right to do in either case; and whether the Commissioner was right or wrong, has he a right now to call upon the Commissioner to change the terms of the sale from one to an actual settler on a credit to one without actual settlement for cash? I think not. It is not a question of a purchaser being compelled to comply with conditions imposed upon him by the Commissioner, but not required by law, and voluntarily assumed by him, as in the *State vs. Opperman*, 74 Texas Rep., 136. In consideration of the assumption of the obligations of actual settlement the purchaser gets the advantage of a sale on a credit of forty years with interest at 3 per cent, terms exceedingly liberal and advantageous to him, and as he had a right to buy either with or without actual settlement (if the Commissioner was mistaken as suggested), we think he must stand by his election, notwithstanding the fact that prior to the purchase he insisted on his right to buy for cash, and without actual settlement, but filed no application except to buy as an actual settler. This view, if correct, is decisive of Goldsmith's right now to patent upon the tract of 128 acres also. What is said in the first part of this opinion, if correct, is decisive of his right now to patent for the 400 acres.

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#### MUNICIPAL CORPORATIONS—BONDS.

- A city can not issue bonds for the purpose of constructing a standpipe and laying water mains when the intention is that the city shall not operate a water works system, but shall contribute the standpipe, water mains and use of its streets to a private corporation which will establish and operate the system.
- A city can not embark in a private enterprise with individuals for profit.

AUSTIN, TEXAS, March 17, 1905.

*Hon. J. W. M. Hughes, Mayor, Whitesboro, Texas.*

Dear Sir: Replying to your inquiry in regard to the proposed issue of bonds of the city of Whitesboro, for waterworks purposes, we beg to say that for bonds to be approved by this department, it is necessary that the record submitted must show on its face, as must the bonds, that they are issued for a purpose authorized by law. Of course, when bonds have been issued and disposed of, the proceeds of the sale can not be lawfully used for any other purpose than that for which the bonds were issued.

This department's connection with the bonds ceases upon its approval of them, and it is not its duty to look to the disposition of the funds or to any contract made with reference thereto. While, though we would be glad to advise you, as requested, as to the authority of the city council to enter into the contract proposed,



yet the terms of the contract are not sufficiently stated to enable us to do more than reply generally to your question.

It would seem from your statement that, though the bonds will purport to be issued for the construction of a waterworks system, and the election will be held upon that proposition, it is not contemplated that the city shall do more than construct a standpipe and lay water mains, which of themselves could hardly be contended to constitute a waterworks system. The real intent, as we read your letter, appears to be to enter into a partnership arrangement with a private corporation, which will contribute a pumping station and the water supply, the city to contribute a standpipe, water mains and the use of its streets and to share in the fruits of the system, which will be operated by the private corporation.

I doubt if the city council is authorized to so use the proceeds of the sale of bonds issued for the construction of waterworks, for that can not fairly be understood to mean anything short of the construction of a system of waterworks capable of being operated by the city.

That a city can not embark in a private enterprise with individuals for profit, under cover of exercising its municipal authority for the accomplishment of a private purpose, is well settled, and it occurs to me that this, in effect, is what is purposed to be done.

Whether or not the proposed contract would also be objectionable on the ground that it would disable the city from at any time operating its waterworks under its control and ownership, when deemed necessary to the public good, can not be determined from the facts submitted.

I suggest that you refer your city attorney to the following cases, which will enable him to determine whether or not the proposed contract can be made: Williams vs. Davidson, 43 Texas, 34, 36, 37; Brenham vs. Water Co., 67 Texas, 554, 555, 560; Nalle vs. City of Austin, 21 S. W. Rep., 379, 380.

Very truly yours,

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#### FEES—WITNESSES.

Out-county witnesses not entitled to compensation for attendance upon grand jury unless they have given bond for appearance or been recognized.

AUSTIN, TEXAS, March 17, 1905.

*Hon. E. B. Perkins, Dallas, Texas.*

Dear Sir: We are in receipt of yours of the 15th relative to fees of out-county witnesses before the grand jury.

In reply thereto we beg leave to say, that up to the year 1897 the provision of the law regulating fees of witnesses was contained in Article 1061b, Willson's Code of Criminal Procedure. This article provides as follows:

“That any witness who may have been recognized, or attached and *given bond* for his appearance before any *court* out of the county

of his residence to give testimony in a felony case, and who shall appear in compliance with the obligation of such *recognizance and bond* shall be allowed his actual traveling expenses," etc.

Under this statute out-county witnesses were not allowed any compensation for their attendance upon a grand jury. To correct this defect the Legislature of 1897 passed an amendment, and Section 5 of said amendment reads as follows:

"Witnesses shall receive from the State for attendance upon district courts, magistrates sitting as examining courts, and grand juries in counties other than their residence, in obedience to subpoenas issued under the provisions of this act, such compensation as is now received by *witnesses attending under attachment*."

The construction of this law by this department was to the effect that under its provisions a witness would not be allowed compensation for attending upon a grand jury by reason of the fact that the law says he shall receive such compensation as is now received by a witness attending "under attachment," and under attachment, as it existed at that time, witnesses were not allowed any fees for attending upon the grand jury.

The Legislature of 1903 (see page 229) amended Article 1061b, and the amendment reads as follows:

"Any witness who may have been recognized, subpoenaed, or attached *and given bond* for his appearance before any court, or before any grand jury out of the county of his residence, to give testimony in a felony case, and who shall appear in compliance with the obligation of such *recognizance or bond*, shall be allowed his actual traveling expenses, not exceeding 3<sup>1</sup>/<sub>2</sub> cents per mile going to and returning from the court or grand jury by the nearest practicable conveyance, and \$1 per day for each day he may be necessarily absent from home as a witness in such case."

This is the law as it now exists prescribing the compensation of out-county witnesses for their attendance upon a grand jury, and under its provisions you are advised that witnesses will not be allowed any compensation for such attendance unless they have entered into a *bond or recognizance*, and the approval of their account by the judge must show that they have given such bond or recognizance.

We enclose you herewith documents as requested.

Yours truly,

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PUBLIC LANDS—LEASES AND LESSEES—STATUTES  
CONSTRUED.

1. Under Article 4218r a lease for ten years of agricultural and watered land, if not void ab initio, is without force after five years.
2. Chapter 125, Act 1901, does not validate or enlarge the term of a lease of such lands made for longer than five years. Lessee under a lease of such lands for 10 years may release after expiration of five years.

AUSTIN, TEXAS, March 17, 1905.

Hon. J. J. Terrell, Commissioner General Land Office, Austin, Texas.

Dear Sir: We are in receipt of yours of 17th ultimo, which is as follows:

“Article 4218r, Act of 1895, Chapter 48, provides that land containing permanent water should be leased for longer than five years. Article 4218s, Chapter 129, Act of 1897, provides that lands leased in Brewster County shall not be sold during the *term* of the lease, and this provision should apply to lands theretofore leased as well as those hereafter leased in that county.

“Section 4, Chapter 125, Act of 1901, says its provisions for the sale of leased land should apply to leases theretofore made, as well as hereafter made, etc.

“Section 5 of the last named act says lands leased in Brewster County shall not be sold during the *term* of the lease, etc. It further provides that a new lease made to one with a preference shall run from the expiration of the old lease. This Section 5 also prohibits the Commissioner from renewing any lease before its expiration as shown *on the face* of the *original contract*.

“On January 2, 1896, a lease was granted to R. L. Nevill, in Brewster County for ten years. Some of the land was classed as agricultural and some as watered and some as dry grazing. For the purpose of this, it is admitted the land classified as watered contained permanent water. The lease is still in good standing on the records of this office, the tenth rental having been paid, though recently some purchase applications were accepted for some of the watered land on the idea the lease on the watered land terminated at end of five years. Also Mr. Nevill has applied for a new lease on the watered land not sold. Since the above action, this department has of its own motion looked more carefully into the status of this lease under the law and there is so much doubt on the question that it desires to submit to you the following questions, and would thank you to make any other suggestions as may occur to you as pertinent:

“1. Under the Acts of 1897 and 1901 is this lease on the watered and agricultural land valid for its full term of ten years?

“2. If not, can a new lease be granted to Mr. Nevill now on the watered and agricultural land not in demand for purchase, and, if so, would it have to be dated back to the end of the first five years, and rebate allowed, or could the new lease be dated from present time?

“3. If Mr. Nevill is prohibited from taking a new lease at all on account of this one having expired according to the face of the contract, can the land be leased to another?”

Answering your questions seriatim, you are advised:

1. Under the Acts of 1897 and 1901 this lease on watered and agricultural lands is not valid for the full term of ten years.

2. A new lease can be granted now to Mr. Nevill on the watered and agricultural land not in demand for purchase, and such lease should be dated from the time of its execution and not back to the end of the five years.

3. Mr. Nevill is not prohibited from taking a new lease on the agricultural and watered land on account of this one not having expired according to the face of the contract.

As to your first question, under the law in force when this lease is made (Act 1895, Article 4318r, R. S.), the Commissioner was not authorized to lease land classified as agricultural or containing per-

manent water thereon for a longer term than five years. As he gets his power and authority to lease at all from the statute, he could not go beyond the limitation imposed upon the exercise of the power by the Legislature. It might be seriously questioned whether this lease as to the agricultural and watered lands embraced therein was not void ab initio. If not, I think it could not be held good, except to the extent for which the Commissioner had the power to lease. The question as to whether it was void ab initio is not before us, and is not material to the inquiry you make, inasmuch as the five years have expired.

There is nothing in the provisions of subsequent acts in my opinion that enlarge the lease beyond the five years, or in any way validates the unauthorized act of the Commissioner in making a lease of agricultural or watered lands for a longer term.

Section 5 of the Acts of 1901, which provides that lands leased in the absolute lease district shall not be sold during the *term* of the lease does not affect this question. The *term* of this lease as to the agricultural and watered land expired at the end of five years, at least, if not void ab initio. To hold otherwise is to utterly disregard the limitations upon the power of the Commissioner to lease.

You call attention, particularly, in your letter to the provisions of Section 5 of this Act, that "the Commissioner is hereby prohibited from renewing any lease before its expiration, *as shown on the face of the lease contract.*" This language must be construed with reference to its evident purpose. It has been the habit of the Land Commissioner, under his construction of previous laws, to renew lease contracts before their expiration by executing new leases, with the effect of keeping the land under perpetual lease. The provision above quoted was intended to prohibit this and to give express statutory emphasis to the doctrine announced by the Supreme Court in *Kentner vs. Rogan*.

It would be a most violent and unwarranted presumption that the Legislature intended thereby to declare a lease good and valid for the term shown on the face of the original contract, if, in fact, the face of the original contract showed a lease for a longer term than authorized by law. It clearly was never in the mind of the Legislature to do so.

If we are correct in the answer to your first question, this lease as to the agricultural and watered land terminated, at least, at the end of five years, and must be construed, so far as this opinion is concerned, as though it had been made for five years.

Assuming this to be correct, there can be no question of a release to Mr. Neville under the thirty days' preference right, given him by Section 5 of the Act of 1901. This provision presupposed a new lease, or a release, as it is called, executed not more than ninety days from the expiration of the old. This lease, as to agricultural lands, expired January 2, 1901. I do not think a lease now to Nevill would come within the meaning or intention of the "release" under the thirty days' preference right referred to in Section 5, Act of 1901. The preference right in this case never, in fact, attached.

It may be that nobody but the State can set up the invalidity of

the contract that Nevill would be estopped to do so, but that seems immaterial in any view of the questions as presented.

We beg to refer to the opinion of the Supreme Court in *Kitchens vs. Terrell*, 96 T. R., 527. The statute in authorizing a lease of agricultural and watered land for a term of five years or less, must be construed as prohibiting a lease for a longer term, and this opinion, we think, is decisive as to the status of this lease.

Very truly yours,

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#### LOCAL OPTION LAW—C. O. D. SHIPMENTS.

Discussion of place of sale in C. O. D. liquor shipments.

AUSTIN, TEXAS, March 18, 1905.

*Hon. Walter L. Morris, County Attorney, Albany, Texas.*

Dear Sir: Yours of the 7th came to hand several days ago, but it has been impossible for me to give your inquiry attention at an earlier date.

From the statement submitted in your letter, I assume the following as the facts upon which you base your inquiry:

A liquor house in the State of Texas sends his agent into a prohibition territory with samples to solicit orders for whisky. The agent takes orders from divers persons, having those persons sign the orders in writing, sends them to his principal who is doing business at a place in Texas where the sale of liquor is legal, his principal fills the orders, packs the goods, and sends them C. O. D. to the parties giving the orders in the local option territory.

You desire to know if this is a violation of the law.

Under a similar statement of facts the Court of Criminal Appeals of this State has held that it was not a violation of the law. See *Freshman vs. State*, 38 S. W. R., page 1007.

The weight of authorities hold that if goods are ordered, to be shipped from one point to a buyer at another C. O. D. by a common carrier, the sale is considered as completed at the point of shipment.

It is also generally held that where a person living or doing business in one locality sends his agent into another locality to solicit orders for goods, and the agent there takes orders and sends them to his principal's place of business, and the latter fills the orders, without any special arrangements as to the manner and place of delivery, delivers them to a carrier in his own locality, to be transported at the expense of the purchaser, the place of sale is in the locality where the agent's principal does business.

In some cases, however, the rule is that the sale is made at the place where the agent takes the order, if the agent's action is final and binding upon the principal; but otherwise, if the order is to be subject to the principal's approval before it is filled.

See *Black on Intoxicating Liquors*, Paragraphs 267-269.

*Parsons on Contracts*, Paragraph 525.

*Klein vs. Baker*, 99 Mass., page 253.

*Hopkins vs. Partridge*, 71 Texas, page 606.

Slaughter vs. Moore, 17 Civil Appeals, page 233.

Bruce vs. State, 38 Criminal Appeals, page 53.

If a party within a local option territory gives an order to a party outside of a local option territory for intoxicating liquors, to be sent by express C. O. D., the purchaser paying the express charges, it is not a sale within the inhibited territory. *Wethered vs. State*, 60 S. W., page 876.

In order for an agent soliciting orders for his principal in a local option territory to be guilty of violating the law, he must act as the agent in the sale in the local option territory, and it is also necessary, in accordance with the terms of the sale, that it should be consummated in the local option territory. The place of sale is to be determined by the actual delivery and parting by the seller with the property in the thing sold. Whenever this occurs the sale is complete. See *Sinclair vs. State*, 77 S. W. Rep., 621; *James vs. State*, 78 S. W. Rep., 957; *Davidson vs. State*, 73 S. W. Rep., 808; *Treadaway vs. State*, 66 S. W. Rep., 574.

I also call your attention to the recent case of *American Express Co. vs. Coffin*, decided by the Supreme Court of the United States, 25 Supreme Court Reporter (West Publishing Company), page 182.

Trusting the above will furnish you such information as you desire, I am,

Very truly yours,

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#### CONSTITUTIONAL LAW—PUBLIC PRINTING AND STATIONERY—CONSTRUCTION OF LAWS.

All stationery and printing, except proclamations, printing done at Deaf and Dumb Asylum and that for judicial department, must be furnished and done under contract made by Board of Public Printing.

AUSTIN, TEXAS, March 20, 1905.

*Hon. J. R. Curl, Chairman Board of Public Printing, Austin, Texas.*

Dear Sir: In response to your request that I should advise the Board of Public Printing as to whether the stationery and printing of the departments of government shall be furnished and done by the public printer, I have to say—that Section 21 of Article 16 of the Constitution is as follows:

“All stationery and printing, except proclamations and such printing as may be done at the Deaf & Dumb Asylum, paper and fuel used in the Legislative and other departments of the government, except the judicial department, shall be furnished and the printing and binding of the laws, journals and department reports, and all other printing and binding, and the repairing and furnishing the halls and rooms used for the meeting of the Legislature and its committees, shall be performed under contract to be given to the lowest responsible bidder, below such maximum price and under such regulations as shall be prescribed by law. No member or officer of any department of government shall be in any way interested in such contract, and all such contracts shall be subject to the approval of the Governor, Secretary of State and Comptroller.”

Under this Section of the Constitution the Legislature has created a Board of Public Printing, charged with the duty of contracting

with some suitable person or persons to print and bind the laws and journals of the Senate and House of Representatives, and to do such other printing and binding, and to furnish such stationery as may be required by law, or may be needed by any department of the State government, or by either House of the Legislature, not to include such work as may be done at the Deaf & Dumb Asylum, nor such stationery, printing and binding as may be needed by the judicial department.

It will be noted that the departments excepted in the statutes are those mentioned in the Constitution, viz.: The Deaf & Dumb Asylum, and the Judicial Department.

These contracts are let after advertisement asking for written proposals for the "public printing and binding, or for stationery of the several departments, as the case may be."

Article 4236, Revised Statutes, says: "It shall be the duty of the printing board to award the contracts to the lowest and best responsible bidder whose bid may be below the maximum rates fixed by the Statute, and that such bill shall be approved by the Governor and Comptroller of Public Accounts."

Article 4238, Revised Statutes, requires the contracts to be in writing and secured by a bond with two or more good and sufficient sureties to be approved by the printing board, in such sum as *they* shall prescribe, and made payable to the State—these contracts and bonds also to be approved by the Governor and Comptroller and filed in the office of Secretary of State.

My opinion is that all stationery and printing, except proclamations and such printing as may be done at the Deaf & Dumb Asylum, and for the judicial department, shall be furnished and done by some person or persons, under a contract or contracts made with the Board of Public Printing as provided in the statutes above referred to, and that no department of the State government, except the two departments mentioned, has the right to contract for or purchase the stationery, or have the printing done for that department, or for any of the officers or employes thereof.

This conclusion is not only from the reading and letter of the Constitution and statutes, but having in view what the Constitution and law intend—that these supplies for the department of government, and the printing to be done for the public, shall be for the lowest and best price, to be ascertained by advertisements for bids, and by competition in the open market. The law also says and intends that the body—the printing board—shall be and is charged with the duty and responsibility of making these contracts in the *manner and upon the conditions set forth in the statutes*, with power to secure the faithful performance of those contracts by good and sufficient bonds. This power is not delegated by the Legislature to any other board or department of government.

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#### CONSTRUCTION OF LAWS—SIXTEEN HOUR LAW.

**Quaere:** . If the sixteen-hour law, chapter 31, page 43, General Laws 1903, prohibits requiring or permitting an employe to continue on duty after working sixteen consecutive hours.

AUSTIN, TEXAS, March 24, 1905.

*Hon. Roger Byrne, House of Representatives, Capitol.*

Dear Sir: I beg that you will pardon the delay in replying to your letter of the 22nd inst., in regard to the sixteen hour law, but since its receipt I have been almost constantly in attendance upon the hearing now going on before the Railroad Commission.

The sixteen hour law, which is Chapter 31 of the General Laws of the Twenty-eighth Legislature (page 43) provides, in Section 1, as follows:

"It shall be unlawful for any corporation or receiver operating a line of railroad, in whole or in part, in the State of Texas, or any officer, agent or representative of such corporation or receiver to require or permit any conductor, engineer, fireman, brakeman, train dispatcher, telegraph operator or any train man, who has worked in his respective capacity for sixteen consecutive hours, to again go on duty or perform any work for such railroad until he has had at least eight hours rest; provided, that this provision shall not apply in case of casualty upon such road; provided, this section shall not apply to employees of sleeping car companies."

Section 2 imposes a penalty for violation of the provisions of this Section 1. Section 3 recites the emergency to be the fact "that there is now no law in this State prohibiting corporations or receivers operating railroads in the State of Texas from requiring their employees to work longer than sixteen consecutive hours without a period of rest."

The caption of the bill is: "An act to prohibit any corporation \* \* \* from requiring or permitting any conductor \* \* \* or any train man who has worked in his respective capacity for sixteen consecutive hours, except in case of casualty to again go on duty or perform any work until he has had at least eight hours rest \* \* \*," and this language is followed, as you will notice, in Section 1 of the act.

From a careful reading of the act and my recollection of the debate in the Legislature at the time of its passage. I have no doubt but that its purpose and intent was to prohibit the employment of any of the employees named for more than sixteen consecutive hours, as well as to provide that no employee who has worked that length of time and had been relieved from duty shall be allowed to again go on duty without eight hours rest. In other words, that it was intended both to place a limitation upon the number of consecutive hours an employee may work without rest and to insure at least eight hours rest to an employee who has completed that period of service.

But the statute being penal in its nature, it is at least doubtful if it would be so construed by our courts.

In Bishop on Statutory Crimes, Section 230, the rule of interpretation is stated as follows:

"Whenever the thing done is not within the mischief evidently intended by the statute, though it is within its words, the doer is not punishable; while, on the other hand, one may defend himself by showing, if he can, that either the main part of the enactment or some exceptive clause thereof is so unguardedly worded as to open



an escape for him through the letter, his act being still a complete violation of its spirit."

Conceding the intent of the law to be, as I have no doubt it is, to prevent the working of any employee named for more than sixteen consecutive hours, as well as to prevent a man being required or permitted to again go on duty after sixteen consecutive hours of service without eight hours rest, there seems to me some ground for the contention that the working of one of those employees for more than sixteen consecutive hours is not prohibited by the letter of the law.

If the act had prohibited the requiring or permitting of any of the employees named who has worked for sixteen consecutive hours "to continue on duty or perform any work until he has had at least eight hours rest," the letter of the law would then clearly prohibit the working of an employee for more than sixteen consecutive hours. But "to again go on duty" does not mean, I think, "to continue on duty." "To again go on duty" presupposes that the employee has previously been relieved from duty. "Or perform any work," as used in this connection, would seem to be merely a variance of the general idea expressed, which is that an employee who has worked for sixteen consecutive hours and been relieved from duty shall not be required or permitted to do any work, *whether within the line of his regular duties or not*, until he has had at least eight hours rest.

Bearing in mind the rule of interpretation to which I have referred, the construction of the act is not free from doubt. That is to say, it might be held by the courts that the letter of the law does not—though the spirit does—prohibit the keeping of any of the employees named on duty for more than sixteen consecutive hours.

Very truly yours,

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#### SCHOOL DISTRICTS—INDEPENDENT—COMMON.

Trustees of school districts shall not create a deficiency debt against the district. School fund of one year can not be used to pay off the debts of another year.

Trustees of independent school districts in towns and villages are vested with powers, rights and duties in regard to maintaining free schools, including powers and manner of taxation for free school purposes as are now conferred by the laws of this State upon council or board of aldermen of incorporated cities and towns.

AUSTIN, TEXAS, March 25, 1905.

Hon. R. B. Cousins, State Superintendent of Public Instruction,  
Capitol.

Dear Sir: We are in receipt of yours of the 21st inst. You propound the following query:

"Have common and independent school districts, which levy a local tax, the right under the law to create deficiency debts in the employment of teachers, or for any other purpose, without issuing bonds."

Article 3950, Sayles' Civil Statutes, provides that trustees of dis-

tricts, in making contracts with teachers, shall not create a deficiency debt against the district.

A conflict of opinion between two of the Courts of Civil Appeals of this State made it necessary for the question you propound, so far as it relates to common school districts, to be certified to the Supreme Court of this State for decision. In answer to the question the Supreme Court held that the school fund of one year could not be used to pay off the debts of another year.

Collier vs. Peacock, 54 S. W. Rep., page 1025.

While Article 3959, from a casual reading, would appear to apply to contracts for teachers' salaries alone, the Supreme Court of this State has held that it applies with equal force to contracts for the purchase of school furniture, etc.

Stephenson vs. Union Seating Company, 62 S. W. Rep., 128.

Andrews vs. Curtis, 2 Texas Appeals, 878.

Trustees are not authorized to contract any debt which would cause a deficiency in the school fund of the district. They are authorized to expend the sum set apart to the district, but are not empowered to contract a debt against the funds of future years.

See Peacock case, cited above, 78 Ill., 874.

The fact that the district is a taxing district would not affect the above rule, and we believe a proper construction of the law is that in no event can a common school district create a deficiency debt for any purpose.

In so far as independent school districts are concerned, Article 4000, Sayles' Civil Statutes, vests in trustees of free schools in towns and villages all the powers, rights and duties in regard to the establishment and maintaining of free schools, including the powers and manner of taxation for free school purposes, that are now conferred by the laws of this State upon the council or board of aldermen of incorporated cities and towns, and Article 4010 vests the same powers in the trustees of free schools in incorporated cities and towns.

Article 11, Section 5, of the Constitution provides that no debt shall ever be created by any city unless, at the same time, provision be made to assess and collect annually a sufficient sum to pay the interest thereon and create a sinking fund of at least 2 per cent.

The Supreme Court of this State in construing this provision, said that it was intended as a restraint upon the power of municipal corporations to contract that class of pecuniary liabilities which were not intended to be satisfied out of current revenues of the year, or other funds within their control lawfully applicable thereto, and which would, therefore, at the date of the contract, be an unprovided for liability.

In defining the meaning of the word "debt" the court said: "An obligation binding upon the city to pay for a matter relating to ordinary expenses, such payment being, in the contemplation of the parties, not intended to be made out of current funds of the year in which the expenditure is made, or any other funds on hand lawfully applicable thereto, would be a debt within the meaning of the Constitution."

McNeil vs. The City of Waco, 89 Texas, 84.

Terrell vs. Dessaint, 71 Texas, 770.

Dyer vs. Brenham, 65 Texas, 526.

In the case of the city of Taylor vs. Jester, the Supreme Court held that if it appears that the parties to the contract intended that the same should be paid out of current revenue for the year, and there is nothing to indicate that they did not act in good faith, with reasonable ground to believe that the current revenue would be sufficient for that purpose, it is such a contract, though not paid off during the year for which it is made, remains a valid debt against the city, which it may and should discharge out of the revenue for future years in excess of current expenses.

78 S. W. Rep., 1062.

Corpus Christi vs. Woessner, 58 Texas, 462.

We, therefore, conclude that any debt contracted by an independent school district which was not within the lawful and reasonable contemplation of the parties to be satisfied out of current revenues for the year, or out of some other fund within the immediate control of the corporation, is invalid and in violation of the Constitution of the State, unless, at the same time it is contracted, provisions be made to assess and collect annually a sufficient sum to pay the interest thereon and create a sinking fund of at least 2 per cent thereon.

The school district in question had no authority to borrow the money referred to, unless the trustees thereof reasonably contemplated that it should be satisfied out of current revenue for the year, or out of some fund then within their immediate control. Neither have they the authority to borrow money unless they reasonably contemplate that the debt created thereby will be satisfied out of the current revenues for the year, or out of some fund then within their immediate control. They have no authority to contract a debt to be paid in the future, or to execute any evidence of debt payable in the future. The debt must be payable at the time the contract is made.

Very truly yours,

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CONSTITUTIONAL LAW—PUBLIC EDUCATION—COUNTY  
SUPERINTENDENT.

An act denying the voters of a city the privilege of voting for county superintendent of public instruction of the county is unconstitutional.

AUSTIN, TEXAS, March 30, 1905.

*Hon. S. W. T. Lanham, Governor of Texas, Capitol.*

Dear Sir: I have duly considered House Bill No. 77, entitled "An Act to allow the qualified electors of Travis County, residing outside of the city of Austin, to vote for county superintendent of public instruction." I beg leave to report that, in my opinion, this law is unconstitutional, in that it provides that only the qualified electors of Travis County, residing outside of the corporate limits of the city of Austin, shall be entitled to vote for any candidate for county superintendent of public instruction of said county.

Section 2 of Article 6 of the Constitution provides that every male person, subject to certain exemptions, who shall have attained the age of 21 years, and who shall be a citizen of the United States, and who shall have resided in this State one year next preceding an election and the last six months within the district in which he offers to vote, shall be deemed a qualified elector.

The office of county superintendent of public instruction is one not relating to any particular district or precinct of a county, but affects and extends to and is operative throughout the whole county, and electors of a county who are otherwise qualified to vote, have the constitutional right to vote for the candidate for such an office; and the law under consideration, which in terms in effect denies to electors residing within the corporate limits of the city of Austin the right to vote for county superintendent of public instruction is, in my opinion, violative of Section 2, Article 6, of the Constitution.

I return herewith H. B. No. 77 for your consideration.

Yours respectfully,

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CONSTITUTIONAL LAW—COUNTIES—CONSTRUCTION OF LAWS.

An act creating a new county out of an existing county is a general law, and not a local or special law.

AUSTIN, TEXAS, March 31, 1905.

*Hon. W. R. McClellan, House of Representatives, Capitol.*

Dear Sir: Replying to your inquiry, I beg to advise you that a bill to create a new county out of an existing county, or a number of counties in this State, is a general law within the meaning of our Constitution and not a local or special law.

In the case of *Clarke et al. vs. Reeves County*, 61 S. W. Rep., 981, the Court of Civil Appeals for the Second Judicial District had under consideration an act of the Legislature disorganizing the county of Loving and attaching it to Reeves County for judicial and other purposes, authorizing the levy and collection of taxes in Loving County for certain purposes, etc. It was contended that the act was a local or special law.

The court said:

"We have concluded that the act in question, while it seems to refer to and affect only two counties in the State, yet it deals with the political division of the State and with the taxes and revenues of the State, and affects more or less the judicial organization of the State and the State school fund, and incidentally the public school lands of the State and many other subjects which might be enumerated, affecting more or less the interests of the people of the State generally; and where the act operates upon subjects in which the people at large are interested, it is, within the meaning of our Constitution, a general and not a local or special law."

The Supreme Court denied an application for writ of error in this case.

Yours truly,

## MISDEMEANOR—COMMITMENT—NEW TRIAL.

No commitment should be issued until trial has terminated; trial does not terminate until there is a final judgment; no final judgment until motion for new trial has been acted upon.

Mistrial or reversal of case on appeal revives obligation of sureties on bail bond; bail bond has not served its purpose until defendant is fined and placed in jail. Sureties on bail bond in misdemeanor case are liable until defendant is in actual custody of sheriff under final judgment of court.

AUSTIN, TEXAS, April 8, 1905.

*W. M. Shirley, Esq., McKinney, Texas.*

Dear Sir: We are in receipt of yours of the 6th inst. You desire to know whether or not you should issue a commitment or certified copy of the judgment against a defendant who has been convicted of a misdemeanor while motion for a new trial is pending.

You are advised that a commitment nor certified copy of the judgment in case of conviction imposing confinement in jail should not be issued until the trial has finally terminated, and the trial does not terminate until there is a final judgment, and there is no final judgment until the motion for the new trial has been acted upon.

See *Mayes vs. State*, 13 App., 97.

*Hill vs. State*, 41 Texas, 255.

*Gibson vs. State*, 3 App., 437.

The bail bond of the defendant binds him to appear from day to day and term to term until discharged by the court. (See Article 311, Code Criminal Procedure.)

A mistrial or a reversal of a case on appeal revives the obligation of the sureties on the bail bond.

See *Wells vs. State*, 21 App., 594.

*Ex Parte Guffey*, 8 App., 409.

A bail bond in a misdemeanor case has not served its purpose until the defendant has been fined and placed in jail.

*Johnson vs. The State*, 32 App., 353.

*Pecod vs. State*, 16 App., 648.

*Caine vs. State*, 15 App., 41.

You should bear in mind that the provisions regulating the trial of defendants charged with misdemeanors are not the same as those which regulate the trial of defendant in a felony. Article 635 provides that if a defendant in a felony case is on bail, he should before the trial commences, be placed in the custody of the sheriff and his bail be considered as discharged.

Article 635, Code Criminal Procedure.

*Charlton vs. The State*, 7 Texas Ct. Rep., 993.

*Fossett vs. The State*, 4 Texas Ct. Rep., 547.

There is no such procedure in reference to defendants charged with misdemeanor, and they do not go into the custody of the sheriff until there is a final judgment of conviction, and the sureties on the bail bond are liable for the presence of the defendant until he goes into the actual custody of the sheriff under the final judgment of the court.

In reply to your last question, will say that the statutes regulat-

ing the fees in misdemeanor criminal cases in the county court does not contain the item of 25 cents for taxing cost and copy.

Yours very truly,

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CONSTITUTIONAL LAW—MUNICIPAL CORPORATIONS—  
PUBLIC UTILITY CORPORATIONS.

Legislature may delegate to a municipal corporation the power to regulate rates and fares to be charged by local public utility corporations.

AUSTIN, TEXAS, April 13, 1905.

*Hon. W. A. Hanger, Senate Chamber, Capitol.*

Dear Sir: Replying to your letter in which you say that it is proposed to incorporate in the charter of the city of Fort Worth a provision giving the city council power to fix rates to be charged by the public utility corporations of said city, including gas, light and street car companies, and asking if, in my opinion, such a provision would be violative of Section 23 of Article 12 of the Constitution, I beg to say that in my opinion it would not be in violation of this provision of the Constitution.

I am of the opinion that it is competent for the Legislature to delegate to the city of Fort Worth the power to regulate rates and fares to be charged by the gas, light and street railway companies within its jurisdiction. The power of regulation, however, shall be declared to be subject to these limitations:

1st. That there is reasonable need on the part of the public, considering the nature and extent of the services of lower rates and better terms than those existing.

2nd. That the rates and terms fixed by the ordinance of the council are not clearly unreasonable in view of all the conditions.

I refer you on this question to the 28th volume, American and English Encyclopedia of Law, pages 160 et seq.

Yours very truly,

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CONSTITUTIONAL LAW—CONFEDERATE WOMAN'S  
HOME.

An act to create a Confederate Womans' Home held violative of Section 51 of Article 3 of Constitution.

AUSTIN, TEXAS, April 15, 1905.

*Hon. S. W. T. Lanham, Governor, Capitol.*

Dear Sir: We have carefully examined H. B. No. 387, "An Act to create and establish a Confederate Woman's Home," etc., which is herewith returned.

We are constrained to advise you that, in the opinion of the Attorney General's Department, this bill is in conflict with Section 51, Article 3, of the Constitution. This is made entirely clear, in our

opinion, by reference to the original Section 51 as incorporated in the Constitution of 1876 in connection with the amendment adopted December 22, 1894, and the one adopted December 1, 1898.

The original Section 51 of Article 3 is as follows:

“The Legislature shall have no power to make any grant, or authorize the making of any grant, of public money to any individual, association of individuals, municipal or other corporation whatsoever; provided, that this shall not be so construed as to prevent the grant of aid in case of public calamity.”

Afterwards when it was proposed to establish the Home for Indigent Confederate Soldiers and Sailors, it was found necessary to adopt the amendment of 1894. Still later when it was desired to further provide a pension for indigent and disabled Confederate soldiers and sailors and their widows in indigent circumstances, it was found necessary to adopt the amendment of December 1, 1898.

It will be noticed that the amendment of 1894 authorized the Legislature “to grant aid to the establishment and maintenance of a home for indigent or disabled Confederate *soldiers or sailors.*”

The amendment of 1898 added the additional provision authorizing the Legislature to grant aid to indigent and disabled Confederate soldiers and sailors, *and their widows in indigent circumstances;* provided that the same should not exceed \$8 per month. This clearly refers to the *pensions* which were afterwards provided for by the Legislature under the authority of this amendment.

This Section 51, Article 3 of the Constitution expressly authorizes the granting of *pensions* to indigent Confederate soldiers and sailors *and their widows*, and also expressly authorizes the Legislature to grant aid to the establishment and maintenance of home for said *soldiers and sailors.*

These provisions are exceptions to the general inhibition that, “The Legislature has no power to make any grant, or authorize the making of any grant, of public money to any individual, association of individuals, municipal or other corporations whatsoever.”

It will be seen that there is not only no express authority for the grant of aid to the establishment and maintenance of a home for the *widows* of Confederate soldiers, but there is, by clear implication, a denial of such authority.

In the opinion of this department the bill is unconstitutional for the reasons stated.

Yours truly,

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#### TAXATION.

The lien for State and county taxes is not prior to the lien for city taxes.

AUSTIN, TEXAS, April 22, 1905.

*Messrs. Wheeler & Clough, Galveston, Texas.*

Gentlemen: Your letter of the 17th inst. was duly received and referred to me for reply, but owing to the congestion of matters I have been unable to answer until now.

I am unable to find any support in our laws, or in the decisions for your contention that the claim for taxes due the State and the county of Galveston, has priority over the claim for taxes due the city of Galveston. Section 15 of Article 8 of the Constitution is: "The annual assessment made upon landed property shall be a special lien thereon, and all property, both real and personal, belonging to any delinquent taxpayer shall be liable to seizure and sale for the payment of all taxes and penalties due by such delinquent, under such regulations as the Legislature may provide."

This constitutional provision makes no distinction between taxes due the State and the counties, and cities of the State, nor can I find that the Legislature has ever attempted to create a preference lien for State and county taxes over the lien for city taxes. On the contrary, as I understand Sections 55, 56, and 58 of the Charter of Galveston, the legislative intent is clearly expressed, that there shall be no such preference.

I find no discussion of the question in our courts, but in the case of *Mayer vs. Lee*, 12 Lea (Tenn.), 454, the precise question was before the court, which declined to assent to the proposition that taxes due the State and county carried a lien superior to the lien for the city taxes, and should be paid before any portion of the fund was applied to the city taxes.

In the case of *Justice vs. City of Logansport*, 101 Ind., 326, the court used this language: "The power to levy taxes is an attribute of sovereignty. Sovereign power resides in the State but the power to exercise the sovereign power of taxation may be delegated to a municipal corporation. In exercising this sovereign power, the corporation invested with it is exercising a power of the State, and the taxes levied by it as an instrument of the government, are, in legal effect, levied by the State. The State acts through one of its governmental subdivisions and is the source of power. Whether the taxes are levied by a county or city, they are taxes levied upon the people by the State, acting through its chosen representatives."

See also the case of *Kellogg vs. City of New Orleans*, 31 La. Ann., 473.

Yours truly,

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#### CONSTITUTIONAL LAW—RAILROADS—RAILROAD COMMISSION.

1. An act authorizing the Railroad Commission to require a railroad to construct switches to private industries held unconstitutional.
2. Legislature can require connection between railroad's which do not intersect when public interest requires it.

AUSTIN, TEXAS, April 22, 1905.

*Hon. S. W. T. Lanham, Governor.*

Dear Sir: We return herewith H. B. No. 399, referred to the Attorney General with request for our opinion as to whether any of the provisions thereof are in conflict with the Constitution. Section 1 of the bill requires railroad companies in this State, under such



rules and regulations as may be prescribed by the Railroad Commission of Texas, to construct switches or spur tracks into private industries located on or adjacent to their lines of railway, sufficient and necessary to handle the business of such industry. This provision would authorize the Railroad Commission to compel railroad companies to build spur tracks to private industries, for the accommodation and use of such private industries only, and without regard to the necessity therefor for the public use, and Section 4 authorizes the condemnation of private property for such purpose. It is a fundamental principle of constitutional law with regard to railroads that they are "public highways." (Constitution, Article 10, Section 2.) It is by virtue of this essential fact, of the public use for which they are constructed, the railroad companies are authorized to condemn private property for their necessary use.

It is settled law that such companies will not be allowed to exercise this right of eminent domain for the condemnation of private property for the purpose of a railroad for private use. *Kyle vs. T. & N. O. R. R. Co.*, Texas Court of Appeals, reported in L. R. A., with extensive notes citing many authorities; *Chattanooga Terminal Railway Co. vs. Felton*, 69 Fed. Rep.; *Weedenfold vs. Sugar Run R. R. Co.*, 48 Fed. Rep., 16-619; *Chicago and Eastern Ill., R. R. Co. vs. Wilton*, 116 Ill., 449; *Skeil vs. German Coal Co.*, 118 Ill., 427.

In the very late case of *Borden vs. Irrigation Company*, decided by our Supreme Court, March 23, 1905, and reported in 12 Court Reporter, 440, it is said: "We are not inclined to accept that liberal definition of the phrase "public use" adopted by some authorities, which implies it means more than the public welfare or good, and under which almost any kind of extensive business which promotes the prosperity and comfort of the country might be aided by the power of eminent domain \* \* \*. We agree that property is taken for public use as intended by Constitution, only, when there results *to the public* some definite right or use in the business or undertaking to which the property is devoted."

It can hardly be doubted that the construction of spur tracks to private industries referred to in Section 1 of this bill is not such a public use as would authorize the condemnation of private property therefor, under the power of eminent domain conferred upon railroad companies. There is substantial uniformity in the authorities upon this proposition, both text-writers and decided cases.

If the construction of the spur tracks and switches "to private industries" required by the bill, is not such a public use or purpose, as would authorize the condemnation of private property therefor, we think it necessarily follows that railroad companies could not be required to construct such spur tracks and switches. It is only in their capacities of common carriers, constructing and operating public highways for the use of the public, that railroad companies are brought under the control of the Legislature and of the Railroad Commission, as an agency authorized by the Constitution. A similar question was decided in the case of *R. R. Com. vs. St. L. S. W. Ry. Co.*, decided by the Court of Civil Appeals for the Third District, and reported in 80 S. W. Rep., 102. By an act of the Twenty-

eighth Legislature (Chapter 65) railroad companies were required to construct sidings and spur tracks sufficient to handle the business tendered such railroad, when ordered by the Railroad Commission. Under the provisions of this act the Railroad Commission ordered the St. L. S. W. R. R. Co. to construct a spur track from its road to the mill of the Angelina Lumber Co., "a private industry." The Commission was enjoined from enforcing this order by the district court, which judgment was, on appeal, affirmed. It is true that the Court of Civil Appeals held that the act in question did not authorize the order made by the Commission, the spur track being for the use of the Angelina Lumber Co., and not the public, and the same view was taken by the Supreme Court in refusing a writ of error. (80 S. W. Rep., 1141.) Still, from the reasoning, especially in the opinion of the Court of Civil Appeals, there can be no question that if the act in question had authorized the order made by the Commission, it would have been held to be beyond the power of the Legislature.

You are advised that in our opinion, Section 1 of the act can not be enforced as a valid exercise of legislative power, nor can Section 4, in so far as it authorizes the taking of private property for the purposes specified in Section 1.

As to Section 2 of this act, in our opinion it is not subject to any constitutional objection. We think that it is within the power of the Legislature to require connections between railroads which do not in fact touch or intersect each other when the public interest and convenience of traffic requires such connection. (N. Y. L. & W. R. R. Co. vs. Erie Ry. Co., 31 App., Div. N. Y., 375; Philadelphia & Erie Ry. Co. vs. Catawissa Ry. Co., 53 Pa., 59.)

Doubtless the courts would interfere to prevent an unreasonable exercise of this power by the Railroad Commission.

The other provisions of the bill need not be particularly noticed. If we are correct in this opinion, so far, there is no settled rule of construction that would enable us to advise you with certainty as to whether the objectionable features of the bill here pointed out would invalidate the whole act, or only the specific provisions referred to, but in my opinion this would not result. The purposes of Section 1 are so distinct from those of Section 2 that we think the unconstitutionality of the former does not invalidate the entire act.

Yours truly,

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#### LOCAL OPTION.

Not in violation of law to give whisky away in local option territory; but may be used as a circumstance on question of sale, etc.  
Question of sale and delivery discussed.

AUSTIN, TEXAS, April 25, 1905.

*Hon. W. R. Jones, Carthage, Texas.*

Dear Sir: Yours of the 22nd inst. has been duly received. You desire to know if it is a violation of the local option law for a party

to take samples on the streets or in some house in a local option territory and give some away for the purpose of securing orders for whisky.

You are respectfully advised that it is not an offense to give away intoxicating liquors in a prohibition territory, regardless of the purpose for which it is given away, except in those instances to which I will call your attention in response to the second inquiry contained in your letter. The only offense, except that which will be mentioned later, prescribed by law, so far as the sale of intoxicating liquors in a prohibition locality is concerned, is a sale of said liquors. (See *Holley against the State*, 15 App.)

The purpose for which intoxicating liquors is given away in a local option territory might be introduced in evidence as a circumstance on the question of sale. In determining whether a party is guilty of selling intoxicating liquors within a prohibited territory in violation of the law, two things should be kept in mind: First, was the sale completed within the local option territory? Second, that the principles governing the sale of personal property apply to the sale of intoxicating liquors in a prohibition territory in violation of the law. This being the case, the principles governing the sales of personal property should be steadily kept in mind in passing upon the question as to whether or not a sale of intoxicating liquors has been made within a prohibition territory. I refer you to the following authorities as announcing the principles underlying the sales of personal property, viz.:

- Williams vs. Drummond Tob. Co.*, 17 Texas Civ. App., 635.
- Sealy vs. Williams*, 20 Texas Civ. App., 409.
- Sanger vs. Thompson*, 44 S. W. Rep., 408.
- Labee vs. Lusk*, 11 Texas Civ. App., 493.
- Downey vs. Taylor*, 47 S. W. Rep., 531.
- American and Eng. Enc. of Law*, 2nd Ed., Vol. 24, 1051.
- Hopkins vs. Partridge*, 71 Texas, 606.
- Benjamin on Sales*, page 674.

The primary object in determining whether or not a sale has been completed within a local option territory is a question of delivery; and in determining this, it frequently becomes important to localize the sale in order to determine whether the transaction must be regarded as taking place in a locality where it would be lawful, or in a locality where it would be illegal. The weight of authorities hold that if goods are ordered to be shipped from one point to a buyer at another C. O. D. by a common carrier, the sale is considered as completed at the point of shipment. It is also generally held that where a person living or doing business in one locality, sends his agent into another locality to solicit orders for goods, and the agent there takes orders and sends them to his principal's place of business, and the latter fills the orders, and without any special arrangement as to the manner and place of delivery, delivers them to a carrier in his own locality to be transported at the expense of the purchaser, the place of sale is in the locality where the agent's principal does business. In some cases, however, the rule is that that sale is made at the place where the agent takes the order, if the agent's

action is final and binding on the principal; but, otherwise, if the order is to be subject to the principal's approval before it is filled.

Black on Intoxicating Liquors, Paragraphs 267 and 269.

Bruce vs. State, 36 Apps.

Upon sales of specific goods in the possession of the vendor the contract is completed when the buyer and seller agree; the property in the goods then passes to the buyer, and the risk of loss by accident, or from any other cause than the fault or negligence of the seller, is cast upon the buyer as an incident of ownership, though actual possession may not pass and he may not be entitled to it until he pays the price or performs some other like stipulation.

Parsons on Contracts, page 525.

Klein vs. Baker, 90 Mass., 253.

The courts of this State have followed that line of authority which held that where goods are ordered C. O. D. the place of delivery is where the goods are delivered to the carrier for transportation. I will cite you some authorities upon which, in my opinion, the courts of this State have based the above rule.

Ozark, Arkansas, was a local option town. Davidson, living there, sent a written order by mail to Carl & Toby, liquor dealers, in Little Rock, Arkansas, which was not within local option territory, for a gallon of whisky by express C. O. D. The purchaser (Davidson) pay express and expense of sending money back. The defendant was acquitted and the State appealed. The court held that the sale was in Little Rock, saying: "It was in Little Rock that Davidson's order, transmitted through the mail, reached the defendant, and it was there that they consented to fill his order."

State vs. Carl, 51 Am. Rep., 565.

Pilgreen vs. State, 71 Ala., 368.

A party residing in Dodridge County, West Virginia, sent a postal card through the mail to a liquor dealer doing business in Wood County, West Virginia, directing the package to be sent to him C. O. D. The order was filled, the liquor packed and delivered to an express agent in Wood County, with instructions to ship same C. O. D. to the party in Dodridge County, which was done. The court held that the sale was made in Wood County.

State vs. Flanagan, 22 L. R. A., 430.

Receipts by merchants in one locality of an order from their agents in another locality, followed by the filling of the order and delivery to a carrier for transportation, will make the place of sale the seller's residence, and it is immaterial that he undertook to pay the freight. Where the contract is silent on the subject, and there is nothing in the transaction indicating a different intention, and a manufacturer residing in one city receives through an agent residing in another city an order for goods from a customer there, and fills the order by delivery to the common carrier, the sale is complete and the title passes at the place of shipment.

Finch vs. Manfield, 97 Mass., 69.

Sarbooker vs. State, 56 Am. Rep., 624.

A traveling agent for a licensed liquor dealer in Erie, Pennsylvania, solicited and received orders for whisky in Mercer County, Pennsylvania. The orders were transmitted to his employer in Erie

and by him the whisky was shipped by freight or express, consigned to the respective parties from whom the orders were received. The agent was indicted and convicted in Mercer County for selling liquors. It was held that he was improperly convicted, as Erie, and not Mercer County, was the place where his sales were made.

Garbrecht vs. Commonwealth, 96 Penn., 449.

Benjamin on Sales, Paragraphs 180 and 514.

A sale is not consummated at the place where bargain is made and the price paid, but at the place where delivery is made to the carrier. Kinney & Werner were liquor dealers in the city of Atlanta, Georgia, and Dunn was their agent and traveling salesman. He went to Douglass County, Georgia, where local option was in force, taking with him a case of samples, and while there solicited from Ward, the sheriff, an order. The court held that the sale was made in the city of Atlanta, Georgia, and that Dunn was improperly convicted for a sale in Douglass County.

Dunn vs. State of Georgia, 3 L. R. A., 199.

Pearson was the owner of a retail liquor store in Memphis, Mississippi, and drummed business in Panola County, Mississippi, which was a prohibition county. He received orders for goods in that county and payment for the same, but the goods were shipped by carrier from Memphis and consigned to the express company to the parties ordering the same. The court held that the sales were complete upon the delivery to the carrier, and the fact that the orders were taken in a county where the sale was prohibited by law, and that the payment for the same was received there, did not make the salesman taking the orders and receiving the payment guilty of selling.

Pearson vs. State of Miss., 4 L. R. A., 835.

If a party within a local option territory gives an order to a party outside of a local option territory for intoxicating liquors, to be sent by express C. O. D., the purchaser paying the express charges, it is not a sale within the inhibited territory.

Weathered vs. State, 60 S. W. Rep., 876.

Bruce vs. State, 36 App., 53.

If there is no special contract between the parties, but a mere order by the purchaser to ship goods C. O. D., the sale is made at the point of delivery to the common carrier.

Freshman vs. State, 38 S. W. Rep., 1007.

The Legislature can not change the rule of law with reference to what constitutes a sale or fix the locus of a sale.

Davidson vs. State, 73 S. W. Rep., 800.

Sinclair vs. State, 77 S. W. Rep., 621.

In order for an agent soliciting orders for his principal in a local option territory to be guilty, he must act as the agent in the sale, and it is also necessary in accordance with the terms of the sale that it should be consummated within the local option territory. The place of sale is to be determined by the actual delivery and parting by the seller with the property in the thing sold. Wherever this occurs the sale is consummated.

Sinclair vs. State, 77 S. W. Rep., 621.

Parker vs. State, 85 S. W. Rep., 1155.

Taggart vs. State, 85 S. W. Rep., 1155.

Sedgwick vs. State, 85 S. W. Rep., 813.

I also call your attention to the recent case of Keller vs. State, Company vs. Coffin, decided by the Supreme Court of the United States.

25 Sup. Rep. (West Pub. Co. Ed.), page 182.

Your second inquiry is whether or not it is a violation of the law for a whisky drummer to take an order for whisky from a minor.

Where local option has been put into operation, it constitutes the exclusive system for regulation or manner of liquor selling in the given locality, and has the effect to suspend and abrogate during its continuance all laws and provisions of law which are inconsistent with such local option law, as well as those laws which prescribe penalties for the violation of liquor selling. This has been the rule in Texas since the Robertson case, 5 Texas Criminal Appeals, 155.

Black on Intoxicating Liquors, Secs. 90, 104.

It was held in the case of Atkins vs. State, 9 Texas Court Reporter, page 756, that a conviction for selling liquor to a minor without the written consent of the parent or guardian is not authorized when the sale is made in a local option district *for whisky on prescriptions*.

A sale of whisky to a minor in a prohibition territory would be an offense as the sale to any other party would be an offense, unless it was sold on prescription. It is a violation of the law to give intoxicating liquors to a minor in a local option territory.

Stephens vs. State, 85 S. W. Rep., 797.

I also call your attention to the recent case of Keller vs. State, appealed from Hill County, opinion rendered April 12, 1905, which is the most exhaustive opinion on the local option which has ever been rendered in the State discussing the authorities of all the States on the question of sales, as well as the decisions of the Supreme Court of the United States.

This decision reaffirms the rules laid down in the decisions cited above.

Yours truly,

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#### CITIES—TAXATION—ANNEXATION OF TERRITORY.

Territory annexed after January first of a year is not subject to taxation for that year.

AUSTIN, TEXAS, April 28, 1905.

Mr. A. H. Hefner, Mayor, Greenville, Texas.

Dear Sir: Your letter to this department of the 27th instant has been referred to me for reply.

You say that on the 10th day of this month certain territory adjoining the city of Greenville was by ordinance of the city council of Greenville received as a part of the city. You ask if the property so annexed to Greenville can be assessed for city taxes for the current year. Beg to advise you that it is the opinion of this department that it can not.

I have found but one case in Texas upon the point, which is the case of the city of Austin vs. Butler, reported in 40th S. W. Rep. on page 340. As you will see from the report in that case the limits of the city of Austin were extended on May 1, 1891, by act of the Legislature. Butler, on the first day of January, 1891, was a resident of the city of Austin and owned certain real property not then within the city limits of Austin but brought within the city by the Act of May, 1891. The assessment for the city taxes for 1891, and the levy of taxes for 1891, were made after the extension of the city limits. Butler's property was assessed for 1891 taxes and this suit resulted. The trial court, after finding the facts as we have briefly stated them, concluded as follows:

"From which fact I conclude as a matter of law that said property, not being situated in the limits of the city of Austin on January 1, 1891, was not subject to taxation by plaintiff for said year, and that plaintiff should take nothing by this suit."

The Court of Civil Appeals for the Third Judicial District affirmed the judgment, and the Supreme Court denied application for writ of error.

This case is, I think, decisive of the question. Indeed, in your case, I think the provisions of the statute are clear. The charter under which the city of Austin was operating at that time provided that all property not exempt from taxes should be subject to taxation by the city against the person who owned the same on the first day of January of each year, and the attorneys for appellant contended, but unsuccessfully, that it was not required that the property should be within the city limits on January 1st of the year for which it was assessed; but Article 501 of the Revised Statutes, which is a part of the charter of your city, does, as I read it, require that the property, to be subject to taxation, shall be within the city limits on the first day of January of the year for which it is assessed, and Article 574, providing for the extension of the limits of the city, declares that when the city council by ordinance has received the inhabitants of the adjacent territory as a part of the city, "from thenceforth the territory so received shall be a part of said city."

I, therefore, advise you that the property annexed in April of this year is not subject to taxation by the city of Greenville for the current year.

Yours very truly,

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#### PUBLIC LANDS—CONSTRUCTION OF LAWS.

Under Article 4176, R. S. 1895, a legal location is not affected by its omission from official maps of the county, nor by issuance of patent upon a subsequent and inferior location.

AUSTIN, TEXAS, May 4, 1905.

*Hon. J. J. Terrell, Commissioner of the General Land Office, Austin, Texas.*

Dear Sir: We are in receipt of yours of the 3rd inst., which is as follows:

“In 1866 a bounty warrant and field notes in the name of John Lewis for 480 acres in Hardin County were returned to and filed in this office. The survey was platted on the map, but was for some cause now unknown omitted from subsequent maps and apparently lost sight of until within the last year or two, when the omission was discovered and the survey again placed on the map. The claim is considered by this department valid in every respect, and patent could be issued thereon so far as its regularity is concerned. However, subsequent to its location there were other locations made in the same territory and patented; it is also partly on what is known as the Maria Xemines title grant, about which there is considerable confusion as to its location. After stating that it is now and has been since the establishment of this department, so far as I am advised, the uniform custom of this office to never knowingly issue one patent to individual land upon another tract of patented individual land, I will ask you to advise me whether or not I shall now issue a patent on the said John Lewis survey. The little rough sketch enclosed will show you the relative position of the surveys.”

Replying to this inquiry, you are advised that it seems to us that the duty of the Land Commissioner and the rights of the parties in this case are settled by Article 4176, Revised Statutes. If the John Lewis bounty warrant was a valid claim for the land, if it was located and surveyed in conformity with the provisions of the statute upon unappropriated public domain, the field notes properly returned, and everything else done regularly and in accordance with the provisions of the statute to fix the right of the holder of the warrant to the particular tract of land surveyed for it, and if such rights have not been since forfeited in any way, we think that upon the application of the person entitled and payment of all fees, he will be entitled to a patent. We do not think that a subsequent and inferior location upon all or any part of the land covered by the superior location made for the Lewis bounty warrant, would deprive the owner of the Lewis of this right, nor would the issuance of a patent upon such subsequent and inferior location have that effect. The validity of the Lewis location and survey would depend of course upon whether the land covered by it was vacant and unappropriated land. Your letter leaves some doubt upon this point, as appears from what you say with regard to the Maria Xemines titled grant. You refer in your letter to a sketch enclosed and explanatory thereof, which, however, was not enclosed. We hope that you will find that the advice here given with regard to this particular matter will not run counter to any well-established rule of your department. You say that this Lewis claim is considered by your department as valid in every respect and that patent could be issued therein so far as its regularity is concerned. In such case we hardly think that it could be deprived of its right under Article 4176 by the subsequent and necessarily illegal issuance of the patent upon an inferior location.

Yours truly,



## PUBLIC EDUCATION—SCHOLASTICS.

A married woman, though under the age of seventeen, is not entitled to be enrolled by the census trustee, or to attend the public schools.

AUSTIN, TEXAS, May 4, 1905.

*Mr. C. C. Walsh, Van Alstyne, Texas.*

Dear Sir: We have your letter of the 2nd inst., in which you say that in taking the scholastic census of the Van Alstyne independent school district, a Mrs. Roysden gave for enrollment the name of her daughter, aged 16, who is a married woman living with her husband. You ask if this daughter is entitled to be enrolled and to attend school.

We beg to advise you that in our opinion she is not entitled either to be enrolled by the census trustee or to attend school in the district. Article 3965, it is true, requires the census trustee to take the census of all the children that will be over eight and under seventeen years of age on the first day of the following September and who are residents in the district on the first day of May. In enumerating the children he is required to call upon the parent, guardian or person having control of any such children for the necessary information.

Article 3933b provides that every child in this State of scholastic age shall be permitted to attend the public free schools of the district in which it resides at the time it applies for admission, but Article 2974 is as follows:

“Every female under the age of twenty-one years who has married in accordance with the laws of this State shall, from and after the time of such marriage, be deemed to be of full age, and shall have all the rights and privileges to which she would have been entitled had she been at the time of her marriage of full age.”

We are of the opinion that a married woman, though sixteen years of age, is not a child within the scholastic age within the meaning of the statute, and that she is neither to be enrolled by the census trustee nor entitled to attend the schools of the district.

Yours truly,

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OFFICES AND OFFICERS—BOARD OF MEDICAL EXAMINERS  
—PRACTICE OF MEDICINE.

Members of Board of Medical Examiners hold office until the qualification of their successors.

AUSTIN, TEXAS, May 5, 1905.

*Dr. J. T. Wilson, President of the Board of Medical Examiners of Texas, Austin, Texas.*

Dear Sir: Replying to your inquiry of this date, I beg leave to advise you that the present Board of Medical Examiners hold their offices for two years, or until their successors have been appointed and qualified. Although the two years may expire on the 10th day of May, 1905, yet the terms of office of the Board do not

expire until the appointment and qualification of their successors, and the several members of the Board remain in office until that time, and the Board is a legal board composed of the present members until that time.

The law requires the Governor to appoint members of the Board on the 10th day of May following his inauguration, to hold their offices, as above stated, two years, or until their successors have been appointed and qualified.

Therefore, although the Governor may make appointment of your successors on the 10th day of the present month, yet the persons appointed would not constitute the Board until they severally qualified by taking the oath of office before the county judge of the county in which they shall respectively reside

In the matter of State examination now being held, I beg leave to advise you that the present Board can continue those examinations until the appointment and qualification of their successors, as above stated, and their sessions may be held after the 10th day of this month and continue until the qualification of their successors.

Yours very truly,

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#### COUNTIES—COUNTY TREASURER—COUNTY WARRANTS.

County warrants must be registered before they can be paid even if county is on a cash basis.

AUSTIN, TEXAS, May 6, 1905.

*Messrs. R. J. Pool and Ealy J. Moses, Burnet, Texas.*

Gentlemen: This department is in receipt of Mr. Pool's letter of the 3rd inst., asking if the county treasurer is required by Article 851 to register county warrants before paying them when the county is on a cash basis, and a letter from Mr. Moses of the 4th instant, asking the same question.

I, therefore, make this joint reply to your inquiries.

Article 851 is as follows:

"The county treasurer of each county shall keep a well-bound book in which he shall register all claims against his county, when presented to him for registration, and no claim, or any part thereof, against the county shall be paid by such county treasurer, nor shall the same or any part thereof be received by any officer in payment of any indebtedness to the county until it has been duly registered in accordance with the provisions of this title."

Article 852 provides for the classification of claims; Article 853-875 for the manner of their registration, and Article 856 directs the treasurer to pay off all claims in each class in the order in which they are registered.

I understand that Article 851 makes it the duty of the county treasurer to register all claims against the county without regard to whether or not the county is on a cash basis.

A warrant issued by order of the commissioners court is but evidence of the claim allowed by the court. (*Ashe vs. Harris Co.*,

56 T. R., 52.) In this case the court said the county warrant issues as evidence of the fact that a claim has been allowed by the commissioners court, and a warrant authorizes the treasurer to make payment only when it has been registered by him, and then only in the order of its registration according to its class; and in *San Patricio County vs. McClane*, 44 Texas, 397, the court held that registration of a county warrant is a prerequisite to its payment.

The purpose of Article 851, I take it, is not merely to fix the order of payment of claims against the county, but to preserve a record of all claims presented to the county treasurer for payment and paid by him.

I understand Article 851 to require that all county warrants shall be registered before they are paid, whether the county is on a cash basis or not.

Yours truly,

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#### PUBLIC LANDS.

In sale as an entirety and without reservation of a tract of which a portion is occupied by a railroad for right of way, under Article 4423, R. S., no abatement can be made in purchase price because of the easement.

AUSTIN, TEXAS, May 16, 1905.

*Hon. J. J. Terrell, Commissioner of the General Land Office, Austin, Texas.*

Dear Sir: We are in receipt of yours of the 15th inst. which is as follows:

“By reference to Article 4423 of the Revised Statutes of 1895, it will be noted that the State authorizes railways to construct its line of right of way across the public lands of this State. At 8 T. C. R., page 19, *T. C. Ry. Co. vs. Bowman*, it was held by the Court of Civil Appeals that purchasers of public lands of this State, over which railways had built their right of way, could recover of railways for lands so appropriated by said right of way, but the Supreme Court in this same case, at 9 T. C. R., page 482, reversed this opinion and rendered same in favor of the railway company, holding, in effect, that the State had the right to donate this quantity of land to such railway for such purpose. It has been the practice of this department to require purchasers of the public lands of this State to pay for full amount bought, inclusive of such amount covered by the line of railway right of way, before patent would issue. However, the correctness of this practice is doubtful to my mind, notwithstanding the general law governing the sale of public lands of this State makes no provision for any deduction for amount of land so actually covered by such railway right of way, so far as I am advised.

“I would, therefore, thank you to advise me if I should, under a reasonable interpretation of Article 4423, Revised Statutes of 1895, and the decision of the Supreme Court above referred to, continue

the practice as above stated, or make proper reduction for amount so covered by right of way."

We assume that in the cases about which you desire to be advised, the land has been sold as an entire tract containing a specified number of acres, without reference in the contract of sale, to the fact that a portion of the tract is, at the time of sale, occupied by a railroad for its right of way; which easement has been taken under the provisions of Article 4423, Revised Statutes. The right of way thus taken and acquired by a railroad company is only an easement, which may be to the extent of 200 feet in width (Article 4425, Revised Statutes), leaving the fee in the State at the time of the sale. This fee passed to the purchaser by the contract of sale. The purchaser, as the owner of the fee, has the right to the dominion and control of the property, subject only to the use for which the easement was granted by the State.

Muhle vs. Ry. Company, 86 T. R., 450.

Cappa vs. R. R. Company, 21 C. C. A., 84.

As said by the Supreme Court in *Railway vs. Bowman*, 9 Texas Court Rep., 484, 485: "The right granted to any company is only to the use of a narrow strip of land, of which the fee is not acquired by the railroad company, but remains in the State subject to its disposal."

When a tract of land thus encumbered is sold by the State without any reservation in the contract of sale, I do not think that the Commissioner would be authorized to make any deduction from the price, when the purchaser applies for a patent, on account of the existence of the easement in the railroad company. We think your practice in this regard, as stated in your letter, is correct.

Yours truly,

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#### CITIZENSHIP.

A party under the age of twenty-one, who has been sentenced to the reformatory, is not entitled to vote until his citizenship has been restored.

A party can not be sentenced to reformatory for less grade of offense than felony.

AUSTIN, TEXAS, May 17, 1905.

*Mr. R. T. Brown, Attorney, Henderson, Texas.*

Dear Sir: I am in receipt of yours of the 11th instant in which you ask whether or not a person under the age of 21 years who has been tried, convicted and sentenced to a term in the Reformatory and served his full term out without being pardoned, will be deprived of his rights of citizenship in regard to voting, etc.

Article 6, Section 1 of the Constitution provides that the following persons shall not be allowed to vote in this State, to-wit:

\* \* \* "(4) All persons convicted of any *felony*, subject to such exceptions as the Legislature may make."

Acting under the power granted by the above article of the Con-

stitution, the Legislature of 1903, in what is known as the Terrell election law, provided as follows:

\* \* \* "All persons convicted of any felony, *except those restored to full citizenship and right of suffrage or pardon*, shall not be entitled to vote in this State. The right of citizenship, referred to in your letter, all depends upon the party being a qualified elector. If he is not a qualified elector he is not entitled to vote, to sit on the jury, etc. The provisions of the Constitution and the law, are, that persons convicted of any *felony* are not entitled to vote in this State unless they have been restored to full citizenship and right of suffrage, or have been pardoned.

As to the right of testifying, Article 768, Section 3, Code of Criminal Procedure, provides that the following persons are not competent to testify in criminal actions, viz.:

\* \* \* "(3) All persons who have been or may be convicted of a felony in this State, or in any other jurisdiction, unless such conviction has been legally set aside, or unless the convict has been legally pardoned for the crime of which he was convicted."

You will see that this provision relating to the competency of a witness is also based upon the fact that the party has been convicted of a *felony*. So the question reverts to the proposition as to what is a felony under the laws of this State.

Article 55, Penal Code, provides that every offense which is punishable by death, or by imprisonment in the penitentiary, either absolutely, or as an alternative, is a *felony*. The courts of this State, in passing upon this article, have construed it to mean that it is the capacity of an offense to be punished by confinement in the penitentiary, and not that such punishment of necessity follows conviction that distinguishes a felony from a misdemeanor. The court has held that a public offense which *may* (not *must*) be punished by confinement in the penitentiary, is a felony although, under the statute, persons convicted thereof *may be* confined or imprisoned in the county jail.

If by the terms of the statute, the jury is at liberty to inflict some milder punishment than death, or imprisonment in the penitentiary, this discretion does not prevent the offense from being a felony.

See Pitner vs. State, 23 App., 366.

Campbell vs. State, 22 App., 262.

Ward vs. White, 86 Texas, 170.

Article 2951, Sayles' Civil Statutes, provides as follows:

"In said house of correction and Reformatory shall be confined all convicts heretofore transferred thereto, or heretofore provided by law to be transferred from the penitentiary of this State, and all male persons under sixteen years of age, who shall thereafter be convicted of a felony in any part of this State, whose term of confinement shall not exceed five years."

You will see from this provision that no person can be confined in the House of Correction and Reformatory of this State unless he shall have been convicted of a felony. Under the Constitution and laws above cited, if he has been convicted of a felony he is not entitled to the rights of citizenship, unless he shall have been pardoned. Therefore, my conclusion is that persons who have been con-

victed \* \* \* and sentenced to the House of Correction and Reformatory have been convicted of a felony, within the meaning of the law, and hence are deprived of their rights of citizenship until they are pardoned.

Yours truly,

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STATUTES CONSTRUED—TAXATION.

Construction of act effective August 13, 1905, levying ad valorem taxes.

AUSTIN, TEXAS, May 17, 1905.

*Hon. J. W. Stephens, Comptroller, Capitol.*

Dear Sir: I have your letter of this date in which you ask if under the provisions of House Bill No. 3, passed at the First Called Session of the Twenty-ninth Legislature, providing for the levy and collection of annual ad valorem tax for general revenue purposes, tax rolls, made up and approved prior to August 1, 1905, with that tax extended at the rate prescribed by Section 1 of the Act will be valid.

The act is a ninety-day law and will become operative on August 13, 1905. The act, of course, speaks from the date upon which it takes effect.

Section 2 of the act is as follows:

“All tax rolls for the year 1905 upon which State ad valorem tax rate for general purposes has been calculated and extended at the rate prescribed in Section 1 of this act before this act takes effect, and whether said rolls were returned to the county board of equalization on, before or after August 1, 1905, and whether such rolls were examined, corrected and approved by said board before or after this act takes effect, are hereby validated, and all such rolls shall have the same force and effect and in every respect be as valid as would be had this act been in force at the time said rolls were made and returned to said board of equalization, and said rolls had been returned to said board on or before August 1, 1905, and all tax collectors are required to collect said tax at the rate provided by Section 1 of this act.”

I, therefore, advise you that all tax rolls for the year 1905, on which the State ad valorem tax for the revenue purposes for 1905 is extended at the rate of 20 cents on the \$100, will be valid tax rolls, whether made up before or after August 1, 1905, and whether approved before or after the act takes effect.

Replying to your second question, I advise you that you should, therefore, instruct the tax assessors of the several counties of the State to calculate and extend upon their tax rolls the State ad valorem tax for general revenue purposes for 1905 at the rate prescribed by Section 1 of the act, viz.: 20 cents on the \$100 valuation.

Section 3 of the act requires the correction of any tax rolls upon which the State ad valorem tax for general revenue purposes for 1905 is calculated at a rate other than fixed by the act; and Section 4 makes it unlawful for the Comptroller to give any assessor an

order for the amount due him for assessing the State taxes until the Comptroller shall have received one copy of each of the assessor's rolls duly approved, upon which said tax is calculated, in conformity with the provisions of the act.

Section 4 expressly provides that no tax assessor shall be paid any compensation whatever for making the corrections required by Section 3.

I suggest that in issuing your instructions to the tax assessors, you should also call their attention to the provisions of Sections 3 and 4 of the act.

I return herewith the copy of the act which you enclosed.

Yours very truly,

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### CONSTRUCTION OF STATUTES—AUDITOR LAW.

Provisions of auditor law mandatory and compensation of auditor can not be changed by commissioners' court, even with consent of auditor.

AUSTIN, TEXAS, May 17, 1905.

*Mr. M. S. Ujffy, County Commissioner of Galveston County, Galveston, Texas.*

Dear Sir: The answer to your letter of the 13th inst., is that what is known as the "auditor's bill," enacted by the recent session of the Legislature, is mandatory and the commissioners court of the counties to which it applies have no discretion and will have to observe the same in the administration of county affairs. Sections 1, 2, 12, 14 and 15 of the act are as follows:

"Section 1. That in any county of this State having therein a city with a population of twenty-five thousand and over, according to the last United States census, there shall be appointed an auditor of accounts and finances, the title of said office to be county auditor, who shall hold his office for a term of two years, and until his successor is appointed and qualified; and who shall receive an annual salary of \$2400, to be paid out of the general fund of the county upon the order of the commissioners court.

"Sec. 2. Immediately upon the passage of this act, the county judge shall convene a special meeting of the judges of the county and district courts, or courts having jurisdiction in the county, who shall jointly appoint the auditor, a majority vote ruling."

This action shall then be reported by the county judge to the commissioners court in regular or special session, which shall have said appointment entered upon the minutes of said court.

"Sec. 12. All warrants on the county treasurer, except warrants for jury services, must be countersigned by the county auditor, who shall keep a register of all warrants issued by the judges or clerks on the county treasury and their dates of payment by the treasurer; in order that he may do so, the clerks of the county and district courts, or the judges thereof, who are authorized to issue any warrants on the county treasury, shall, on forms prepared by the county auditor, daily furnish to the auditor an itemized report, specifying warrants that have been issued, their numbers, their

several amounts, the names of persons to whom payable, and for what purpose."

"Sec. 14. All deposits that are made in the county treasury shall be upon deposit warrant issued by the county clerk in triplicate; said warrants shall authorize the treasurer to receive the amounts named, for what purpose, and to which fund the same shall be applied. The treasurer shall retain the original; the duplicate shall be signed and returned to the clerk for the county auditor, and the triplicate signed and returned to the depositor. The auditor shall then enter same upon the books, charging the amounts to the county treasurer and crediting the party depositing the same. *The Treasurer shall not under any circumstances receive any money in any other manner than that named herein.*

"Sec. 15. All claims, bills and accounts against the county must be filed in ample time for the auditor to examine and approve the same before the commissioners court, and *no claim, bill or account shall be allowed or paid until same shall have been examined and approved by the county auditor.*

"It shall be the duty of the county auditor to examine same and stamp his approval thereon if deemed necessary. All such amounts must be verified by affidavit touching the correctness of same before some person authorized to administer oaths, and the auditor is hereby authorized to administer oaths."

It admits of no question from the whole act, and especially from the several sections and provisions thereof, above quoted, that the Legislature intended to create and has created an office, the occupant of which is invested with important powers to be exercised by him in the administration of certain county governments—in some cases acting alone and in others acting with other officers.

It will be noted that all warrants on the treasurer, except warrants for jury service, must be countersigned by the county auditor. Also, that the treasurer shall not under any circumstances receive any money for deposit until the auditor shall have first entered upon his books the deposit warrants charging the amounts to the county treasurer and crediting the party depositing the same. Also that the commissioners court shall not allow or pay any claims, bill or account until the same has been examined and approved by the county auditor.

Other citations might be made from the Act, showing that the Legislature has withdrawn from county officers certain powers heretofore exercised by them and conferred the same on the auditor, besides giving the auditor original powers not before conferred on any county officer.

As to the compensation of the auditor, which is an annual salary of \$2400, the commissioners court can not change or modify this, even with the consent of the auditor. The amount is fixed by the act at \$2400 per year. The Legislature, which is sovereign, has said that he shall receive that amount. The commissioners court has no right to make any arrangements with the auditor for less than \$2400 a year. He could, of course, after he receives his salary, donate it or a portion thereof to the county or to any person he desires, but any appointment upon such a condition or that he should re-



ceive less than the amount fixed by the act would not be lawful. It is not for the commissioners court of any county whenever it concludes that a State law is unwise or unnecessary to declare such law inoperative and of no effect in that county.

Respectfully,

DEAF AND DUMB ASYLUM—APPROPRIATIONS—STATUTES  
CONSTRUED.

Act September 6, 1901, providing for care of the blind and deaf and appropriation of Twenty-ninth Legislature therefor construed.

AUSTIN, TEXAS, May 25, 1905.

*Messrs. I. P. Lochridge and B. F. McNulty, Texas School for the Deaf, Austin, Texas.*

Gentlemen: Your letter of the 19th inst. came to hand during my absence from the city, and therefore reply has been delayed.

You call attention to the act of the First Called Session of the Twenty-seventh Legislature, approved September 6, 1901, providing for the maintenance, care and education of children who are deaf, dumb and blind, and to the appropriation of \$3000 annually for the care, maintenance and education of such children, contained in the appropriation bill passed at the First Called Session of the Twenty-ninth Legislature, and ask the following questions:

(1) Will the language employed in the item of appropriation take from the superintendent and board of trustees of the Deaf and Dumb Asylum the power and authority conferred on them by the Act of September 6, 1901?

(2) Notwithstanding the Act of September 6, 1901, will the superintendent of the State Lunatic Asylum have the exclusive control and disposition of the money so appropriated?

The Act of September 6, 1901, is as follows:

“Be it enacted by the Legislature of the State of Texas:

“Section 1. That the superintendent of the Deaf and Dumb Asylum is hereby authorized and directed to make such provisions as he may deem necessary for the maintenance, care and education of all children in the State who are deaf, dumb and blind.

“Sec. 2. That application for the maintenance, care and education of all such children shall be made by the parent and guardian of such child or children to the Superintendent of the Deaf and Dumb Asylum under such rules as may be prescribed by law; provided, such children shall be placed in a reputable school established for the purpose herein mentioned.

“Sec. 3. That the sum of \$3000, or so much thereof as may be necessary, be hereby appropriated per annum for the next two years out of any moneys not otherwise appropriated for the purpose of carrying into effect the provisions of this act, said amount to be paid out upon the approval of the superintendent and board of trustees of the Deaf and Dumb Asylum.”

Section 4 contains the emergency clause.

The item referred to in the appropriation bill passed by the Twenty-ninth Legislature, is as follows:

“For care, maintenance and education of the blind deaf,  
to be expended under the direction of the superinten-  
dent of the State Lunatic Asylum.....\$ 3,000 00  
“For the year ending August 31, 1906, and for the year  
ending August 31, 1907..... 3,000 00”

The provisions of Sections 1 and 2 of the Act of 1901 are general and continuing in their effects and have never been repealed by the Legislature, nor is there anything contained in the item in the appropriation bill referred to inconsistent with these provisions. There is, however, conflict between the item in the appropriation bill and Section 3 of the Act of 1901, regarding the disposition of the amount appropriated for the care, maintenance and education of such children. I have concluded that the third section of the Act of 1901 is, in effect, amended by the item in the appropriation bill to read as follows:

“That there is hereby appropriated the sum of \$3000 for the year ending August 31, 1906, and \$3000 for the year ending August 31, 1907, for the care, maintenance and education of such children, said amounts to be expended under the direction of the Superintendent of the State Lunatic Asylum.”

I, therefore, reply to your first inquiry that the power and authority conferred and the duties imposed upon the superintendent of the Deaf and Dumb Asylum by Sections 1 and 2 of the Act of September 6, 1901, are unaffected by the item contained in the appropriation bill.

To your second question I reply that the appropriation of \$3000 annually for the next two years is to be expended under the direction of the superintendent of the State Lunatic Asylum. I understand the meaning of the term “to be expended under the direction of the Superintendent of the State Lunatic Asylum” to mean that he shall direct how much appropriation shall be expended each year, when it shall be expended, and for what purpose. In other words, the discretion and power existing in the superintendent and board of trustees of the Deaf and Dumb Asylum under the Act of September 6, 1901, with respect to the appropriation made by that act, is for the ensuing two years vested in the superintendent of the State Lunatic Asylum, with respect to the appropriations made by the appropriation bill passed by the last Legislature.

Yours truly,

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#### INDEPENDENT SCHOOL DISTRICTS—SCHOOL TRUSTEES— ELECTIONS.

An election for trustees of an independent school district may be legally held by the qualified voters on the day fixed by law therefor, notwithstanding the failure or refusal of the trustees to order the election.

AUSTIN, TEXAS, May 31, 1905.

*Mr. E. T. Page, Red Water, Texas.*

Dear Sir: From your letter of the 26th inst. I understand the facts to be as follows:

The board of trustees of the Red Water Independent School District failed to order and give notice of an election to be held on the first Saturday in May of this year for the election of three school trustees of the district. Nevertheless, the voters of the district assembled at some place within the district and held an election, at which thirty-eight votes were cast for three candidates, none of whom were members of the old board. Those voters of the district who were opposed to the election of the three candidates did not participate in the election. I understand that the old board of trustees, of which you are secretary, and the three parties who were voted for at that election, joined in requesting the opinion of this department upon the validity of the election, and it is upon this understanding that I reply.

I am of the opinion that if the election was in all other respects fairly and regularly held, it was not void upon the ground solely that the board of trustees failed to order and give notice of the election.

I quote from the 15th volume of *Cyclopedia of Law and Procedure*, page 320:

"The time and place of holding regular elections are generally prescribed by public laws, and when this is so the rule is that an omission to give the prescribed statutory notice will not vitiate the election held at the time and place appointed by law. In such cases the provision for notice is construed as directory and not mandatory. The time and place being appointed by law, the electors are bound to take notice of the same, and, therefore, derive notice from the statute itself, in as much as they are presumed to know the law. The purpose of the prescribed notice is to give greater publicity to the election, but the authority to hold it comes directly from the statute; if it were otherwise, any public election might be defeated by the ignorance, carelessness or design of the officers whose duty it is to give the notice. \* \* \* The vital and essential question in all the cases is whether the want of statutory notice has resulted in depriving a sufficient number of the electors of the opportunity to exercise their franchise to change the result of the election."

And in volume 10 of the *American and English Encyclopedia of Law*, pages 625, it is stated that:

"When the time and place of an election are fixed by the law itself, all the voters must take notice of it, and if an election is held it is not invalid because no further notice was given, nor proclamation made, however many voters may have failed to attend."

To the same effect see *Cooley on Const. Lim.*, page 603 of the 6th edition, page 909 of the 7th edition; and *Mechem on Pub. Officers*, Sec. 153.

The law fixes the *time* for holding elections for trustees of independent school districts, and directs the board of trustees to appoint the person to hold the election, and to designate the place where the polls shall be opened.

But Section 33 of the Terrell election law expressly provides for the failure of the proper authority to appoint a presiding judge

of election and authorizes the voters to make the appointment in such case.

Therefore, as the law fixes the time for holding the election, and provides for the appointment by the voters of the officer to conduct it, but does not designate the place where it shall be held, there remains but one question to be determined:

Dos the failure of the board of trustees to obey the direction of the statute and designate such a place invalidate an election held in all other respects in conformity with law? I conclude that it does not.

In the case of *Scarborough vs. Eubank*, 53 S. W. Rep., 523, the Supreme Court of Texas said:

"The important question in every election is that the will of the voters shall be fairly expressed, correctly declared and legally enforced. Compared to this, the question as to the manner and time of ordering an election is of trivial moment."

In *Ex Parte Segars*, 32 Texas Crim. App., 552, places were designated for holding the election, but in one ward the election was held on another street two blocks away. It not being shown that any voter was deprived of his vote by the change, or that it was due to any fraudulent or improper motive, or that the change was not known to and concurred in by all the voters, the court held it was not such an irregularity as should invalidate the election.

In *Ex Parte Mayes*, 44 S. W. Rep., 83, Oakwood was designated as the place for holding the election, but no particular place in the town was indicated. As there was no evidence that the failure to designate a particular house in the town where the election should be carried on had resulted in depriving any voter of his right to vote, the court refused to hold the election invalid on this ground. In *May vs. State*, 63 S. W. Rep., 132, the commissioners court failed to designate any place in one precinct as the voting place. The election was held at the school house where all elections were usually held. The court said:

If it is shown that such place was the usual voting place in said district, and was so used by the voters, no other place being designated by the commissioners court, an election held at said place would be a legal election."

The court discussed a number of cases on the point, and concluded:

"These cases proceed on the theory that the voters are the final arbiters in such matters, and if no place has been named and by common consent some particular place is used, and all have a fair opportunity of depositing their ballots, no voter being deceived by the location or change of the voting place, the election will be held valid."

These cases dealt with special elections—neither time nor place being designated by law—and it is well settled that a stricter rule applies to such elections than to regular elections provided for by general law.

In Justice Henry's dissenting opinion in the case of *Davis vs. State*, 12 S. W. Rep., at page 964, he said:

"A failure of the commissioners court to regard each ward as a

lawful and separate precinct, or to appoint a place in each for voting or to appoint officers, to hold the election in each, can not operate to disfranchise the voters, as they, no doubt, may assemble at a proper place in their ward, choose their officers, and, acting with proper publicity, hold a lawful election."

I conclude from the authorities and cases referred to that:

(1) As the uniform trustee law fixes the time for holding the election, and Section 33 of the Terrell election law authorizes the voters to appoint a presiding officer, the omission of the board of trustees to order the election, appoint a presiding officer and give notice of the time, will not vitiate the election held on the day fixed by law. The electors derive notice of the time of election from the law itself; and,

(2) Though the law does not fix the place for holding the election, the omission of the board of trustees to designate such place will not invalidate the election if it was held with proper publicity at the place where elections in the district were usually held, or at any other proper place of which the voters generally had knowledge, so that all had a fair opportunity of depositing their ballots and no one was misled or deceived by the location of the voting place.

This must be so, since were it otherwise it would follow that any public election might be defeated by the ignorance, carelessness or design of the officers whose duty it is to order an election and give notice of it, and the officers upon whom is cast that duty might perpetuate themselves in office by the simple expedient of refusing or neglecting to order an election or failing to make a proper order.

I infer from your letter that the fact that the election would be held and the place where it would be held were generally known to all of the voters of the district, and that those who failed to vote did so because they did not desire to vote, and not because of ignorance or uncertainty as to the time, place or purpose of the election. I presume that the voters assembled, elected a presiding officer, and that the election was in all other respects held in substantial conformity to law. This being so, I am of the opinion that the election was a valid election and that the three candidates elected are entitled to qualify and act as the trustees of your school district.

Replying specifically to the questions you have asked, I will say:

(1) The election was not void by reason of the failure of the board of trustees to order it or to give notice of it, if it was regularly held with proper publicity at a proper place in the district, of which the voters in the district generally had knowledge. The election is not affected by the fact that some of those qualified to vote refused to participate in the election, if they were not prevented from participating by the failure of the board of trustees to designate the place where the election should be held. The law charges them with notice of the time and purpose of the election, and if the election was attendant with sufficient publicity to give them knowledge in fact of the place where the election would be held, then their failure to vote is immaterial.

(2) The old board of trustees are not, however, authorized by law to determine this question. It is their duty to canvass the re-

turns and declare the result. They are authorized to determine whether the papers transmitted to them are genuine election returns, signed by the duly appointed officers of the election, but this is the only question which the board of trustees have any right to pass upon. If the election returns are signed by the proper officers, then the further duties of the board of trustees are purely ministerial, involving, simply, determining the number of votes received by each candidate and issuing certificates of election to those who were elected. They are governed by the returns, and if these returns are in due form, they have not the power to go behind them to inquire into the regularity of the election. (See the concluding paragraph of Section 3 of the uniform trustee law. See also page 379, 15 Cyc. of Law and Proc.)

(3) When the board of trustees have performed this duty of declaring the result of election, the three trustees whom they will find to have been elected at that election are entitled to certificates of election, and after having qualified as provided by Section 5 of the uniform trustee law, will enter upon the discharge of their duties and constitute, together with the four members of the old board whose terms have not expired, the board of trustees of the Red Water Independent School District. Their acts will be valid.

I think they will be *de jure* officers, but if not, they will certainly be *de facto* officers and the acts of a *de facto* officer are valid as regards the public and third persons, and can not be questioned collaterally.

I trust that I have sufficiently answered your inquiries. If I have not, let me know upon what point you desire further advice.

We have received a letter from Mr. J. H. McWhirter asking substantially the same questions as asked by you. I have referred him to this letter to you, and will thank you to show it to him, as it will, I think, give him the information he desires.

Yours truly,

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#### ELECTION LAW—RESIDENCE.

Where a party removed from one county to another, or from one State to another, with the intention of returning, or without the intention of changing his residence, his intention will control.

AUSTIN, TEXAS, June 7, 1905.

*Hon. John S. Patterson, Moody, Texas.*

Dear Sir: We are in receipt of yours of 6th instant in which you state that in September, 1904, one C. L. Clay bought an interest in the Briggs Sanitarium in Oak Cliff, paying therefor about \$10,000, and that his family moved there, taking with them a car-load of household and kitchen furniture, which was used by his family in Oak Cliff; that he rented his home in Moody by the month, refusing to rent it for a year; also storing away in some of the rooms part of the furniture not needed in Dallas. You state that he said that if his new venture was pleasant and profitable, he would remain there, and if not, he would return to Moody; that he

remained in Dallas from September, 1904, to April, 1905, when he returned to Moody, and you desire to know if he is entitled to vote at an election to be held on the 12th day of June, 1905, in the city of Moody. You also ask if a voter should go to another county under circumstances similar to the facts stated above and there pay his poll tax, or obtain an exemption certificate for the year 1904, and then return to Moody, would he be entitled to vote after having lived there for six months.

Beg leave to advise you that the word "residence" in so far as it relates to the qualification of voters, is an elastic word and must be construed in accordance with the object and intent of the statute in which it occurs. A "resident" of a place is one whose place of abode is there and who has no present intention of removing therefrom. It is one who dwells in that place for some continuance of time for business or other purposes although his domicile may be elsewhere.

In the case of Schaffer vs. Gilbert, 73 Md., 66, the court in defining "residence," as used in a constitutional provision prescribing the qualifications of electors, said:

"It does not mean one's permanent place of abode where he intends to live all his days, or for an indefinite or unlimited time; nor does it mean one's residence for a temporary purpose with the intention of returning to his former residence when that purpose shall have been accomplished. But means, as we understand it, one's actual home, in the sense of having no other home, whether he intends to reside there permanently or for a definite or indefinite length of time."

Residence is lost by leaving the place where one has acquired a permanent home and moving to another place without a *present* intention of returning, and is gained by remaining in such new place. Whether a party's removal constitutes a change of residence depends upon the party's intention in making such removal.

In the case of Swaney vs. Hutchings, 13 Neb., 268, the court said:

"The test of residence when a party removes from one county to another seems to be, did he remove from his former residence with the intention of abandoning the same? If a party in pursuance of that intention, actually went beyond the borders of the county, he will be a non-resident of that county, and upon going into another county, with the *intention* of residing there, he will become a resident thereof."

This question of residence is not to be determined by the length of time that a person may remain in a particular place. For example, a man may go into a place and take up his abode there with the intention of remaining, and if so, he becomes a resident there, although he may afterwards change his mind and within a short time remove. Where a person actually removed from one county to another with an intention of remaining in the county to which he removed for an indefinite time, such county becomes his residence, notwithstanding, he may have a floating intention to return to his old residence at some future time.

Matter of Weed, 120 California, 634.

State vs. Mennick, 15 Iowa, 126.

Boucicault vs. Wood, 2 Bliss. (U. S.), 39.

Applying the above rules to the statement of facts contained in your letter, you are respectfully advised that if the parties referred to moved from your county to another county with an intention of residing in the county to which they removed, whether for a definite or an indefinite length of time, they became residents of the county to which they removed and lost their residence in your county. It depends upon the intention of the parties.

You also propound the following question:

"If a man should go to a distant State with a sick wife under the advice of a physician, and there remain for eight, or ten months, not keeping house, and afterwards return to Texas, less than twelve months ago, can he vote upon his statement that it was never his intention to change his place of residence."

This also involves the question of intent. In the case of Bennett vs. Watson, 21 New York, Appeals, 410, the court said:

"Where a person went abroad for a special purpose, namely: the recovery of his son's health and his intention was to remain abroad until that purpose was accomplished, it was held that he was no longer a resident of his domicile." We believe that the rule here laid down is too strict when applied to the term "residence" as contained in the Terrell election law, and are inclined to the opinion that the rule laid down by the Supreme Court of Illinois and New Jersey is more in harmony with the intent of the Legislature in the enactment of our election law, which is as follows:

"A temporary sojourn within a State for either pleasure or business, accompanied by an intention to return to the State of one's former habitation, does not constitute a residence. A man's legal residence is not changed when he leaves it for temporary purposes and transient objects, meaning to return when those purposes are answered, and those objects attained."

See Pells vs. Snell, 130 Ill., 379.

Cadweller vs. Howell, 8 N. J., 138.

Yours truly,

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#### OFFICERS—COUNTY TREASURER.

A woman is eligible to the office of county treasurer. No provision in the Constitution or statutes that a county treasurer shall be a qualified elector.

AUSTIN, TEXAS, June 13, 1905.

*Hon. Geo. Willrich, La Grange, Texas.*

Dear Sir: We are in receipt of yours of 12th in which you ask if a woman (a feme sole) is eligible to the office of county treasurer of this State.

Where no limitations are prescribed, the right to hold office under our political system is an implied attribute of citizenship.

The basis of the principle of eligibility to office is the absolute liberty of the electors and the appointing authorities to choose and appoint any person who is not made ineligible by the Constitution.



Eligibility to office, therefore, belongs, not exclusively or specially to electors enjoying the right of suffrage, but belongs equally to all persons whomsoever not excluded by the Constitution of the State.

The Constitution of 1869, Article 3, Section 14 contains the provision that "No person shall be eligible to any office, State, county or municipal who is not a registered voter of this State." This provision was omitted in the Constitution of 1876, and the omission of this article in our present Constitution is not without significance. If the Constitution of the State does not prohibit a woman (a female) from holding office in this State, she is eligible to hold office.

The statute of Missouri, Article 886, contains the provision that "there shall be elected a school director who is a citizen of the United States, a resident taxpayer and qualified voter in the district." Under this provision of the statute it was held that a woman could not hold the office of school director because she was not a qualified voter under the Constitution of Missouri. See *State Ex Rel vs. McSpaden*, 137 Missouri, page 628.

The Constitution of Oregon contains the provision that "No person shall be elected or appointed to a county office who shall not be an elector of the county." Under this provision the Supreme Court of that State held that a woman was not eligible to the office of county superintendent. See *State Ex Rel vs. Stephens*, 28 Oregon, 464.

Neither our present Constitution nor our statutes contain any such provision as those mentioned above. In the case of the *State Ex Rel Crow v. Hostetter*, the question involved was, whether or not Mrs. Wheeler, a woman, was ineligible to hold the office of county clerk. The provision of the Constitution under consideration was as follows:

"No person shall be elected or appointed to office in this State, civil or military, who is not a citizen of the United States, and who shall not have resided in this State one year next preceding his election or appointment."

The court held that there was no provision expressly requiring the clerk of the county court to be a male. The statute of that State, in reference to county clerks, provided that they should be citizens of the United States above the age of 21 years, and should have resided within the State one year, and within the county three months. There being nothing either in the Constitution or the statute prohibiting females from holding the office of county clerk, the Supreme Court of Missouri held that Mrs. Wheeler was eligible to hold that office. See 39 S. W. Rep., p. 270.

The Supreme Court of Ohio in the case of *Warwick vs. State*, held that a woman was incapable of holding the office of county clerk because the State Constitution provided that no person should be elected or appointed to any office unless he was a qualified elector. See 25 Ohio State Reports, page 21.

The Supreme Court of Iowa held that a woman was eligible to hold the office of county superintendent because there was no constitutional inhibition upon the right of a woman to hold that office. See *Huff vs. Cooke*, 14 Iowa, page 639.

The Supreme Court of this State in the case of *Steusoff vs. State*,

held that a person was not ineligible to the office of tax assessor on account of not being a qualified voter, and in deciding the case, they said: "When a Constitution has been framed which contains no provision defining in terms who shall be eligible to office, there is strength in the argument that the intention was to confide the selection to the untrammelled will of the elector." See 10 Texas, page 428.

A careful reading of the Constitution of this State will show that there are only two offices created by the Constitution which the Constitution requires shall be filled by qualified electors, viz.: Senators and Representatives. As to all other offices in this State, it simply provides that they shall be elected by the qualified voters.

The constitutional provision relating directly to the office of county treasurer is as follows: "The Legislature shall prescribe the duties, and provide for the election by the qualified voters of each county in this State, a county treasurer." See Article 16, Section 44.

The only disqualifications prescribed by the Constitution are contained in Article 16, Sections 2, 4, and 5, in neither of which is there a provision that only qualified electors shall hold office in this State. Article 919, Sayles' Civil Statutes, following the Constitution of the State, in reference to the election of the county treasurer, provides as follows: "There shall be elected in each county by the qualified voters thereof a county treasurer." Neither in the statute nor in the Constitution is there a provision that a county treasurer shall be a qualified elector.

The power to choose officers is committed to adults, and to some offices the power to choose is still further restricted. There is also prescribed certain qualifications for and certain restrictions upon those who may be chosen to fill office in this State. Thus, one who gives or accepts a challenge to fight a duel, or who knowingly carries a challenge is ineligible to any office; one who bribes an elector to procure his election may not hold the office to which he was elected; an essential to the holding of the office of district judge is residence in the district for which the officer was elected. To be a member of the Legislature, one must at the time of his election be a qualified voter of and resident in the county for which he is chosen. None of these qualifications prescribed by the Constitution may be disregarded. They are restrictions self-imposed by the people upon their unlimited freedom of choice. The statute provides as does the Constitution, that the county treasurer shall be elected by the qualified electors of the county, but neither provides that the person elected shall be a qualified elector. There is no express disqualification of females, and there being no provision, either of the Constitution or of the statute, which would prohibit a female from holding the office of county treasurer, you are respectfully advised that he is eligible to said office.

Yours truly,

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#### SCHOOL LAND—SALE OF.

Sales of school land made by an agent appointed by commissioners court are void.

County can not convey school land in payment of services of attorney in recovering same.

AUSTIN, TEXAS, June 20, 1905.

*Mr. W. F. Wood, County Commissioner, Martin's Mill, Texas.*

Dear Sir: We are in receipt of yours of the 14th inst., in which you state that some years ago the commissioners court of your county appointed an agent to sell the Van Zandt County school land, and that said agent sold said land. You state that you understand the sales of this character made by an agent are void, and you desire to know if the county can employ counsel to recover the land and pay them a part of what they recover.

You are correct in your opinion that sales of school land made by agents appointed by the commissioners court are void.

See Pulliam vs. Runnels County, 79 Texas, 363.

Logan vs. Stephens County, 81 S. W. Rep., 199, and 83 S. W. Rep., 365.

Tomlinson vs. Hopkins County, 57 Texas, 572.

Board vs. Webb County, 64 S. W. Rep., 486.

Llano County vs. Knowles, 26 S. W. Rep., 549.

You are further advised that the county has no power to convey part of said school land in payment for services of an attorney in recovering same.

See Dallas County vs. Globe Land & Cattle Co., 66 S. W. Rep., 294.

In the case last above cited Dallas County had conveyed to Brown a part of her school land for services in locating and surveying same. The court in deciding the case said:

"Undoubtedly Brown had a just claim against the county for the value of his services in subdividing the land \* \* \*, but this was a claim against the county proper and not against the trustee of its school land \* \* \*. It was the duty of the county under the law to discharge the debt from its general revenue."

Should your county see proper to employ counsel to recover this land, the fee will have to be paid out of the general revenue of the county, and the party will not be entitled to receive a part of the land for his services.

Yours truly,

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#### INDEPENDENT SCHOOL DISTRICTS—ANNEXATION OF TERRITORY—ELECTION LAW.

An attempt, pending incorporation, to annex part of the territory proposed to be incorporated is void.

The manner prescribed by the statute for giving notice of an election is not mandatory.

*Arp Independent School District.*

*Overton Independent School District.*

AUSTIN, TEXAS, July 5, 1905.

*Hon. R. B. Cousins, Superintendent of Public Instruction, Capitol.*

Dear Sir: You have presented to us this statement of facts:

On April 18, 1905, the county judge of Smith County ordered an

election to be held on May 13, 1905, upon the proposed incorporation of the Arp Independent School District. The election resulted in favor of the incorporation, and on the 15th day of May, the county judge made the entry required by law, declaring the district incorporated.

On the 22nd of April, four days after said election was ordered, the board of trustees of the Overton Independent School District passed a resolution annexing certain territory adjoining the district, a part of the territory which it was attempted to annex lying within the boundaries of the proposed Arp Independent School District.

You ask what effect the annexation proceedings had upon the pending proceedings to incorporate the Arp Independent School District.

We advise you that the validity of the incorporation of the Arp Independent School district is unaffected by the annexation proceedings. If the election held was a legal election, the Arp Independent School District is incorporated *within the boundaries set forth in the petition* for the election, and the annexation proceedings are void as far as they affect any of the territory within the Arp Independent School District.

The petition presented to the county judge conferred upon him jurisdiction of the subject matter which was not divested, or in any manner affected, by the act of the Overton Independent School District done while the Arp proceedings were pending.

While we can not find that this question has been before our courts, we think it is settled by the following cases:

The People vs. Morrow, 181 Ill., 315.

Taylor vs. City of Fort Wayne, 47 Ind., 274.

Ind. District Sheldon vs. Sioux City, 51 Iowa, 658.

We have examined the papers submitted and conclude that the Arp Independent School District is legally incorporated within the boundaries set forth in the petition for incorporation, provided that sufficient notice of the election was given.

Mr. A. W. Orr makes affidavit that "he posted *the order* for the election on the incorporation of the Arp Independent School District thirty days before said election on May 13, 1905." The statute (Article 582) directs that notice shall be given for "ten days, by posting advertisement at three public places." Accompanying the record is an affidavit signed by C. C. Eaton, and six others, that the election "was given sufficient notoriety to bring the time and place of holding said election into the personal knowledge of every voter of the proposed independent district." This would indicate that notices were not posted, or perhaps that only one was posted.

If the fact is that the election "was given sufficient notoriety" to give actual notice of the time, place and purpose of the election to all those within the district who were entitled to vote thereat, the election was a legal election and is valid, notwithstanding that notices were not posted in compliance with Article 582.

"The rule established by an almost unbroken current of authorities is that the particular form and manner pointed out by the statute for giving notice is not essential, and where the great body

of electors have actual notice of the time and place of holding an election, and of the questions submitted, this is sufficient.

“The vital and essential question in all cases is, whether the want of statutory notice has resulted in depriving sufficient of the electors of the opportunity to exercise their franchise to change the result of the election.” *State vs. Doherty*, 16 Wash., 382, and cases cited.

This is a question of fact which we can not undertake to determine with the data before us.

We return all papers submitted.

Yours truly,

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STATUTES COSTRUED—TAX ASSESSOR—FEES OF  
OFFICE—GALVESTON COUNTY.

Tax assessor of Galveston county not entitled to extra compensation for making separate tax rolls as required by chapter 127, act of April 19, 1901.

AUSTIN, TEXAS, July 6, 1905.

*Judge Lewis Fisher, Galveston, Texas.*

Dear Sir: I am in receipt of yours of the 26th ult., in which you state that the tax assessor of Galveston County claims to be entitled to additional compensation for extra services rendered in assessing taxes and rendering tax rolls for Galveston County for the years 1901 and 1902, and that this additional compensation is claimed for services rendered under the Act of the Twenty-seventh Legislature requiring separate and distinct assessment rolls for the property within the city of Galveston and the property in Galveston County beyond the city. You ask for an opinion as to whether or not he is entitled to this extra compensation, and if it may be paid out of the funds collected by the State and county tax collector as contemplated by said act.

It is a general rule of law that the rendition of services of a public officer is deemed to be gratuitous unless a compensation therefor is fixed by the statute. Unless, therefore, compensation is by law attached to the office, none can be recovered.

See Thorp on Public Officers, Section 446.

Meechem on Public Officers, Section 856.

Unless the statute expressly provides fees by way of compensation for the particular services rendered by an officer, the courts have no power to fix a reasonable compensation for such services performed, as they would have in actions between man and man for services rendered in the absence of a contract fixing the compensation.

Where the law allows no fees, the court has no power to do so.

See *State vs. Moore*, 57 Texas, 320.

*Wharton vs. Ahldag*, 84 Texas, 15.

Applying these principles of law, unless compensation for the extra services performed is provided for by the statutes, the tax assessor of Galveston County is not entitled to any. The act in

question, as stated in your letter, provides that the assessor of taxes for the county of Galveston shall assess all persons and property within the corporate limits of the city of Galveston, separately from those in other portions of said county, and provides further that the tax collector shall pay over to the city treasurer of the city of Galveston all money collected by him except such amounts as are allowed by law for assessing and collecting same. The fees of the tax assessor as compensation for his services in assessing State and county taxes, preparing his rolls, etc., are provided for under the Act of the Twenty-fifth Legislature, 1897 (Special Session), page 8. The first portion of this section regulates the fees of the assessor, and the latter portion provides that the commissioners court may allow to the assessor of taxes such sums of money, to be paid monthly from the county treasury, as may be necessary to pay for clerical work, taking assessments and making out the tax rolls of the county, such sums to be so allowed to be deducted from the amount allowed to the assessor as compensation, upon the completion of the tax rolls, the limit to the amount to be allowed for clerical hire being the amount the tax assessor is entitled to receive for assessing the county taxes.

Section 10 of this act provides that the maximum amount which may be allowed the tax assessor in counties containing a city of over 25,000 inhabitants is \$2500 per annum, and in addition thereto one-fourth of the excess. Under the provisions of this act, the tax assessor of Galveston County is entitled to receive the following fees, and no more, viz.:

For assessing the State and county taxes on the first \$2000 or less, 5 cents for each \$100 of property assessed.

On all sums in excess of \$2000 and less than \$5000, 2 1-4 cents on each \$100.

On all sums in excess of \$5000, 17 cents on each \$100.

One-half of the above fees to be paid by the State and one-half by the county.

For assessing the poll tax, 5 cents for each poll which shall be paid by the State.

The fees received for above not to exceed \$2500 per annum, and one-fourth of the excess after paying the compensation of deputies or assistants, under Section 12 of the act.

Under this section he is entitled to such deputies and assistants as may be necessary for the efficient performance of the duties of his office, to be paid each a sum not to exceed \$1200 for the first and \$900 each for the others, the total amount to be paid the assistants not to exceed an amount equal to the amount the assessor is entitled to for assessing the county taxes under Section 8. After the tax assessor receives the \$2500 per annum and pays the compensation of his deputies, he is entitled to retain one-fourth of the excess.

The Act of 1901 not having provided any extra compensation for the tax assessor of Galveston County for the extra labor to be performed, he is not entitled to any.

Yours truly,

STATE BOARD OF EDUCATION—PERMANENT SCHOOL  
FUND—MUNICIPAL BONDS.

Bonds purchased as an investment for permanent school funds are valid obligations for the full amount of principal and interest notwithstanding they were purchased by the State Board of Education from the county issuing them for less than par and accrued interest.

AUSTIN, TEXAS, July 6, 1905.

*Hon. S. W. T. Lanham, President, State Board of Education, Capitol.*

Sir: You have submitted for my opinion the following questions:

If the State Board of Education purchases from Dallas County, as an investment for the Permanent School Fund, bonds of said county, paying therefor less than par and accrued interest, could the county successfully deny the validity of the bonds, or assert any defense against them upon that ground?

I am of the opinion that the county could do neither the one nor the other; but the bonds will be valid for the full amount of the principal thereof, with interest at the rate mentioned therein, by force of Article 3894, Revised Statutes, as amended (Act 1901, page 312), which is:

"In all cases where the proceeds of the sales of any bonds have been received by the proper officers of the county or incorporated city or independent school district or by the party acting for it in negotiating the sale thereof, such county or incorporated city or independent school district shall thereafter be estopped from denying the validity of such bonds so issued, and the same shall be held to be valid and binding obligations of the county or incorporated city or independent school district for the amount of bonds sued on and the interest thereon, at the rate mentioned therein, deducting such amounts, if any, as have been previously paid thereon."

Article 3894 of the Revised Statutes of 1895 is Section 4 of the Act of May 20, 1893, which was a re-enactment of Section 3 of the Act of March 24, 1895, which reads:

"In all cases where the proceeds of the sales of any bonds have been received by the proper officers of the county, or by a party acting for it in negotiating the sale thereof, such county shall be thereafter estopped from denying the validity of such bonds so issued, and the same shall be held to be valid and binding obligations of the county, and in any action upon such bonds or coupons thereto, judgment shall be rendered against the county for such amount of the bonds sued on and interest thereon at the rate mentioned therein, deducting such amounts, if any, as have been previously paid thereon."

Section 3 of the Act of 1885 was construed by our Supreme Court in the case of *Nolan County vs. State*, 83 Texas, 182-200. Of the bonds involved in that case, one issue aggregating \$8755 was found to have been valid, when issued, to the amount of \$6280, the issue exceeding by the difference the statutory limitation and to that extent being void. \$20,000 of a second issue were wholly in excess of the statutory limitation when issued, and consequently void.

The Permanent School Fund held four of the bonds of the first

issue (which were partially invalid when issued) and five of the second issue (which were wholly void when issued).

The court held this section constitutional and construed it to validate to their full amount the bonds purchased for the Permanent School Fund which were invalid merely for the want of legislative authority to issue them. The Legislature had the power at the time the bonds were issued, to authorize the county to issue the full amount of the first series and to give bonds of the second series held by the school fund.

The Legislature has power to authorize counties to sell their bonds at a discount, and, in my opinion, Article 3894 operates to validate a sale of such bonds at a discount when made to the State Board of Education as an investment for the Permanent School Fund. The provision that the bonds shall be held to be valid "for the amount of the bonds sued on and the interest thereon, at the rate mentioned therein" clearly shows, I think, that the Legislature intended to validate bonds legally issued but illegally sold as well as bonds illegally issued.

In the Nolan County case the court said:

"The object of the provision was to protect the school fund, and we see no reason why it was not intended to validate any county bonds held by the State for the benefit of its public schools, whether purchased directly from the county or from intermediate holders."

For the same reason, I think, the language: "in all cases where the proceeds of the sales of any bonds have been received by the proper officers of the county," etc., applies as well to bonds purchased by the State Board of Education subsequently to the passage of the Act of 1901 as to those previously purchased and then held by the Board.

Yours truly,

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#### COUNTY JUDGE—COMMISSIONERS COURT—QUORUM.

County judge and two commissioners constitute a quorum of the commissioners court, and where a county judge has tendered his resignation he may vote in the selection of his successor, and perform other duties until successor is appointed and qualified.

AUSTIN, TEXAS, July 7, 1905.

*Mr. George T. Todd, Jefferson, Texas.*

Dear Sir: We are in receipt of yours of the 5th inst., in which you state that the county judge of your county has given notice of resignation at the August term of the commissioners court of your county, and you submit three questions to this department for an opinion, the first of which is as follows:

"What number of commissioners will constitute a quorum to elect his successor?"

You are respectfully advised that three members of the court (commissioners) constitute a quorum for the transaction of any business, except that of levying a county tax. This means that two members and the county judge shall constitute a quorum, or all



the commissioners without the county judge shall constitute a quorum. *West vs. Burke*, 60 Texas, 52.

You also submit the following inquiries:

“What will be the result if four commissioners have to be present and a tie vote occurs?” And, “Can the retiring county judge claim or exercise any right to vote as to his successor?”

These questions involve a very important principle of law, which, however, has been passed upon by the courts of this State, and of other States in the Union, as well as the courts of the United States. The question is, when does the retiring county judge cease to perform the duties of that office. If his office becomes vacant at the time his resignation is filed, of course, he has no authority to vote on the appointment of his successor. If his office does not become vacant until his resignation is acted upon, and the commissioners court acts upon same before the appointment of his successor, in that event he would have no right to vote on the appointment of his successor. If, however, his office does not become vacant until his successor qualifies, he has the right to vote on the appointment of his successor.

The Supreme Court of Kansas in the case of *State vs. Clayton*, held that the resignation of a public office does not take effect until acceptance or something equivalent. The court said:

“The public have the right to command the services of any citizen in any official position which they may designate, and he may not, after entering upon the duties of the position, abandon them at his option.”

Some authorities of this country seem to recognize the absolute right of an office holder to resign his office and hold that the resignation is complete without acceptance. This rule has been laid down by the Supreme Court of California, Nevada, Alabama and Iowa. The Supreme Court of North Carolina, in the case of *Hoke vs. Henderson*, 25 Amer. Dec., 677, said:

“An officer may certainly resign, but without acceptance his resignation is nothing, and he remains in office. It is not true that an office is held at the will of either party. It is held at the will of both. The public has a right to the services of all the citizens, and every man is obliged upon a general principle, after entering upon his office, to discharge the duties of it while he continues in office, and he can not lay it down until the public, or those to whom the charge is confided, are satisfied and the officer is discharged.”

Article 16, Section 17 of the Constitution of this State provides as follows:

“All officers within this State shall continue to perform the duties of their offices until their successors shall be duly qualified.”

“Where the law expressly provides, as it does in this State, that an officer shall continue to hold his office until his successor is chosen and qualified, he will, notwithstanding the acceptance of his resignation, continue in office and be charged with all its duties and responsibilities until his successor is chosen and qualified.” See *Meechem on Public Officers*, Paragraph 416.

The Supreme Court of the United States in the case of *Badger vs. U. S.*, 93 U. S., page 599, held that in those States where the

Constitution provided that officers should hold their offices until their successors should be qualified, that in order for a resignation to become perfect, two things must occur, namely: appointment of a successor and his qualification.

The Supreme Court of the United States, in the case of *U. S. vs. Edwards*, 103 U. S., 471, in construing a provision of the Constitution of the State of Michigan, which provides that officers should hold their offices until their successors should be elected and qualified, held that resignation of an office in that State did not become effective until the successor of the officer who resigned had duly qualified, and that the officer tendering the resignation continued to perform the duties of the office until that time. In this case the question is elaborately discussed, and the decision of the different States, as well as the common law rule, examined.

See *Thompson vs. United States*, 103 U. S., 480.

*State vs. Assessors*, 53 N. J. L., 160.

*Reiter vs. State*, 51 Ohio State, 78.

The Supreme Court of this State in the case of *Erastus Jones vs. City of Jefferson*, held that officer whose resignation has been tendered to the proper authority and accepted, continues in office and is not released from its duties and responsibilities until his successor is appointed or chosen and qualified. See 66 Texas, 576. This decision was followed in the case of *McGee vs. Dickey*, 4 Civ. App., 104.

You are, therefore, respectfully advised that, notwithstanding the county judge of your county has tendered his resignation as county judge, under the law, he continues in office and is not released from its duties and responsibilities until his successor is appointed and qualified. Therefore, he and two of the commissioners constitute a quorum of the commissioners' court for the purpose of appointing his successor and he has a right to vote on the appointment of his successor.

Yours truly,

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#### TAXATION—COMMON SCHOOL DISTRICT—ROLLING STOCK.

The rolling stock of a railroad is not subject to a tax voted by a common school district of a county in which its principal office is not situated.

Note:—Whether, if its principal office is situated in a common school district, any part of its rolling stock is there taxable was not considered.

AUSTIN, TEXAS, July 10, 1905.

*Hon. R. K. Stewart, Tax Collector, Jacksboro, Texas.*

Dear Sir: In reply to your favor of the 7th inst.:

The commissioners court of Jack County is authorized to levy and collect all general county taxes upon Jack County's apportionment of the rolling stock of the Chicago, Rock Island & Gulf Railway Company, but the court is not authorized to impose upon the rolling stock

of the railway a special school tax voted in a common school district of the county.

Article X, Section 4, of our Constitution declares: "The rolling stock and all other movable property belonging to any railroad company or corporation in this State shall be considered personal property. \* \* \*"

In Cooley on Taxation, the rule is stated thus: "The proper place for the taxation of a corporation in respect to its personality is the place of its principal office unless some other rule is prescribed by statute" (page 673), and in regard to the rolling stock of railroad corporations: "The rolling stock and other personalty of the company should be assessed at the place of its home office unless some other provision is made by law, (page 697).

Article 5068 of the Revised Statutes of 1895, is: "All property, real and personal, except such as is required to be assessed otherwise, shall be listed and assessed in the county where it is situated, and all personal property subject to taxation and temporarily removed from the State or county, shall be listed, and assessed in the county of the residence of the owner thereof, or in the county where the principal office of such owner is situated."

If it were not otherwise provided by law, the rolling stock of the Chicago, Rock Island & Gulf Railway Company, being personalty, would be "situated" in Tarrant County, where is its principal office, and would be taxable only there. Ferris vs. Kimble, 75 Texas, 479.

It is only by force of Article 5083 that Jack County can subject to taxation any part of the rolling stock of the corporation.

Article 5082 requires every railroad corporation in this State to deliver to the assessor of each county and incorporated city or town "into or through which any part of their road may run or in which they own or are in possession of real estate" or list specifying, among other things: "All personal property of whatsoever kind or character, except the rolling stock belonging to the company or in their possession, in each respective county, listing and describing the said personal property in the same manner as is now required of citizens of this State. (Subdivision 3.)

By Article 5083 it is made the duty of the railroad company to deliver to the assessor of the county in which its principal office is situated, a sworn statement setting forth "the true and full value of the rolling stock of said railroad, together with the names of all the counties through which it runs, and the number of miles of road bed in each of said counties."

After the assessment has been reviewed by the Board of Equalization of the county, said board is required to certify the final valuation to the Comptroller whose duty it is "to apportion the amount of the valuation among said counties in proportion to the distance such road may run through any such county," after which the Comptroller "shall certify such apportionment to the assessor of such counties, and the same shall constitute a part of the tax assets of such county, and the assessor of each of said counties shall list and enter the same upon the rolls for taxation, as other personal property situated in said county."

It is your duty to list and enter upon the tax rolls of Jack County

its apportionment of the amount of the valuation of the rolling stock of the Chicago, Rock Island & Gulf Railway, and such apportionment is, as I have said, subject to all general county taxes levied by the commissioners court, just as though it were in fact personal property situated in said county.

The statute does not subject the rolling stock to special district school taxes, nor provide any method by which the apportionment to Jack County shall, in turn, be apportioned among the various school districts of the county.

The special tax voted in a common school district must be levied by the commissioners court upon all property subject to taxation which is "situated" within the district.

The rolling stock of the Chicago, Rock Island & Gulf Ry. Co. is not in fact situated in Jack County. For the purposes of taxation, Jack County's proportion of this property, which is not situated in the county, constitutes a part of the "tax assets" of the county and is taxable as other personal property which is situated within the county.

It is tax assets of the *county*—not of all or any of the common school districts of the county.

Even if Jack County's proportion of the rolling stock of the railroad should, under Article 5083, be regarded as situated in Jack County, its situs is not fixed in any one common school district more than another, and no provision being made for its apportionment among the various common school districts of the county, I conclude that the Legislature intended that no such apportionment should be made.

To your second question: "Has your office or any member of it, any right to advise that any tax assets of a county be eliminated or exempted from taxation for a legal tax in said county?"

I answer, "No." Nor has that, to my knowledge, ever been done.

Though no part of my official duty to do so, I do, my predecessor also did, frequently advise county officers upon matters arising in the discharge of their official duties. For example, the matter as presented by you is not one with respect to which I have any official duty to perform, but I thought it a proper courtesy to you, as a public officer, to give you my opinion, since you have solicited it, in a matter which comes within the sphere of your official duties. It is, however, but my construction of the law and carries only such weight as you conclude to give to it.

I return herewith the correspondence which you enclosed me.

Yours truly,

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#### STATUTES CONSTRUED—AUDITOR LAW—SCHOOL FUNDS OF COUNTY.

Auditor law construed with respect to accounting for disbursement of school funds.

AUSTIN, TEXAS, July 11, 1905.

*Hon. W. N. Wiggins, County Auditor, San Antonio, Texas.*

Dear Sir: I have your letter of the 7th inst., asking my opinion upon the following questions:

“1. Do not the duties of county auditor extend to all school funds disbursed through county treasurers, whether it be from amounts received through the State apportionment or local district taxation?”

The county treasurer is treasurer of the Available School Fund, and of the Permanent School Fund of his county. (Article 3935.)

The county's Permanent School Fund is invested by the commissioners court. (Article 3891f.) The county's apportionment of the State Available School Fund is collected and received by the county treasurer (Article 3924a and 3926b), and is apportioned by the county superintendent among all common school districts of the county, and he also apportions the income from the county school funds to all the school districts of the county, including independent school districts. (Article 3934.)

The county treasurer is required to keep a separate account with each school district showing the amount apportioned to each and the amount paid to each, and he is prohibited from paying out any part of the school fund without the approval of the county superintendent. (Article 3935d.)

Special school taxes collected in common school districts are paid by the county tax collector to the county treasurer who is required to credit each district with the amount belonging to it and pay out the same as other school moneys. (Article 3945.)

The money belonging to a common school district is paid out by the county treasurer upon proper warrants. (Articles 3962, 3986, 3991.)

The county treasurer must annually report to the commissioners court the receipts and disbursements of the school funds. (Article 3936.)

It is the duty of the county auditor, under what is known as the county auditor law, to exercise a general supervision over, and to examine all the books, records, accounts, reports and vouchers of the county treasurer (Section 6); to see that all balances to the credit of the various funds are actually on hand in cash, and to see that no fund is invested in a manner unauthorized by law. (Section 7); to keep an account with the county treasurer, and to require the treasurer to render statements to him, and he (the auditor) must keep books showing all transactions of the county, and its receipts and disbursements (Section 9); his reports to the commissioners court must show, among other things, the condition of each and every account on the books. (Section 11.)

All warrants on the county treasurer, except for jury service, must be countersigned by the auditor (Section 12), and the county treasurer shall not, under any circumstances, receive any money in any other manner than that specified in Section 14.

It is very clear, and I so advise you, that the duty of the county auditor is the same with respect to school funds of the county, of whatever nature and from whatsoever source, as to other funds of the county.

“2. If so, would not Section 12 require all district school warrants, including those for salaries of teachers, to be countersigned by the county auditor?”

Yes, the county treasurer shall in no case pay out any part of the school fund without the approval of the county superintendent. (Article 3935d.) Teachers' salaries are paid by check upon the county treasurer signed by a majority of the trustees, and approved by the county superintendent. (Article 3962.)

Rent of a leased school house is paid by the county treasurer upon warrant of the trustees, (Article 3991). Funds for the construction of buildings, purchase of furniture, etc., are drawn from the treasury upon warrants issued by the county superintendent upon accounts approved by the trustees. (Articles 3986, 3987.)

Section 12 of the act provides that: "All warrants on the county treasurer, except warrants for jury service, must be signed by the county auditor." This provision is mandatory.

"3. Would not Section 8 authorize the said auditor to prescribe the forms of said warrants and vouchers upon which same are issued?"

Yes. This section authorizes the auditor to adopt and enforce such regulations, not inconsistent with the Constitution and laws, as he may deem essential to the proper and speedy collection, checking and accounting of the revenues and other funds of the county.

"4. Would Sections 16 and 17 require all supplies for improvements of school houses and other expenses to be advertised for by the auditor, or does the school law give full power to the trustees of each district in all these matters?"

Section 20 of the act is: "The provisions of this act are cumulative and where conflicting with any existing law, this act is to be in force. Where the provisions of this act provide for like duties of the ones now required by the county clerk this act is to prevail, and to such extent only is the county clerk relieved of his duties. All other laws and parts of laws in conflict with this act are hereby repealed."

Under Article 3984, et seq., the trustees are authorized to contract for the building or repairing of school houses or the purchase of furniture, after the county superintendent is satisfied of the necessity of the expenditure and has made an appropriation therefor.

Section 17 of the act provides that the auditor "shall not audit or approve any claims against the county unless the same has been contracted or provided by law, nor any account for the purchase of supplies or material for the use of said county or any of its officers, unless, in addition to other requirements of law, there is attached thereto a requisition signed by the officer ordering same and approved by the county judge. \* \* \* Supplies of every kind, road and bridge material, or any other material, for the use of department or institutions, must be purchased on competitive bids, the contract to be awarded to the party, who in the judgment of the commissioners court has submitted the lowest and best bid \* \* \*"

It is the duty of the auditor to advertise for bids "for such supplies and material according to specifications giving in detail what is needed." The section concludes with the proviso "that in case of emergency, purchases not in excess of \$50 may be made in requisi-

tion to be approved by the commissioners court, without advertising for competitive bids."

I am of the opinion that this section operates to prohibit the expenditure of any money out of any fund of the county and for any purpose—except that in case of emergency the prohibition does not extend to a purchase not in excess of \$50—except upon competitive bids, "the contract to be awarded to the party, who in the judgment of the commissioners court, has submitted the lowest and best bid;" that the authority was conferred upon district school trustees by Article 3984 is in conflict with and consequently is repealed by Section 17 of the act, and that contracts for the construction or repair or furnishing of district school buildings must be governed by the provisions of this section.

5. In reply to your fifth question, I know of no law authorizing the payment to the census trustee of a greater compensation than that fixed by Article 3971 of the Revised Statutes.

Yours very truly,

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CONVICT—PENITENTIARY BOARD—FINANCIAL AGENT.

Respective powers of, in the hiring of convicts.

AUSTIN, TEXAS, July 15, 1905.

*Mr. John L. Wortham, Financial Agent, State Penitentiaries, Huntsville, Texas.*

Dear Sir: Article 3654, Revised Statutes, confers upon the Penitentiary Board the general management and control of the State Penitentiaries, and of all convicts sentenced to said penitentiaries whether within or without the walls thereof.

Also authorizes said Board to employ the excess of convicts at labor outside the walls either under the contract system or State account system, under such regulations, conditions and restrictions as it may deem best for the welfare of the State and the convicts.

Article 3659 confers upon the Board of Penitentiaries power and authority to issue such orders and prescribe such rules and regulations for the government of the penitentiaries, not inconsistent with law, as they may deem proper.

On page 23 of the printed rules, etc., prescribed and issued by said Board, there appears the following:

"Sec. 2. No convicts shall be hired out, or sent to outside camps, except with the consent of the Penitentiary Board or Superintendent."

Chapter 7 of Title 79 of the Revised Statutes, entitled "Financial Agent," contains a number of articles upon the powers and duties of that officer, and Article 3709 of said chapter is as follows:

"He shall, in conjunction with the Superintendent of Penitentiaries, under such regulations as the Penitentiary Board may prescribe, make all contracts for the hire of convict labor, either outside or inside the walls of the penitentiaries or on share-farms, should convicts be worked under the contract system."

The rules of the Penitentiary Board, Chapter 7, entitled "Financial Agent," page 48 of printed rules, Article 3709, says:

"He shall, in conjunction with the Superintendent of Penitentiaries, under such regulations as the Penitentiary Board may prescribe, make all contracts for the hire of convict labor, either outside or inside the walls of the penitentiaries, or on share-farms, should convicts be worked under the contract system."

From the foregoing, I advise you:

First, that the financial agent, in conjunction with the Superintendent, has the right to make and enter into contracts for the hire of convict labor, either outside or inside the walls of the penitentiaries, but that all such contracts, before becoming effective or binding upon the State or the other contracting party, has to be approved by the Penitentiary Board.

You ask my opinion upon the following question:

"In this discharge of my duties, as financial agent of the State Penitentiaries, can I be required by the vote of a majority of the members of the Penitentiary Board to execute a contract for the hire of convicts upon terms and conditions which I do not approve and which I believe to be detrimental to the best interests of the State?"

As before stated, the power and discretion of the Board is not to be invoked or put in execution by instructing a particular contract to be made or executed by the financial agent, but its authority is of an appellate nature or character, and, therefore, you would not be required to execute a contract which said Board in the first instance ordered to be executed, and which was made by them for your execution.

The law plainly provides that these contracts shall be made by yourself, acting in conjunction with the Superintendent, and then, and not until then, does the Board act. Its power, however, is absolute, and it can either approve or refuse to approve the contract submitted for its consideration.

Yours truly,

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#### LOCAL OPTION—C. O. D. SHIPMENT OF WHISKY.

Packages and parcels placed with express companies, railroad companies, or other common carrier, for transportation into prohibition territory, must be marked in conspicuous place "Intoxicating Liquors."

AUSTIN, TEXAS, July 17, 1905.

*Hon. W. M. Futch, Henderson, Texas.*

Dear Sir: We are in receipt of yours of the 15th inst., referring to House Bill No. 367, regulating the shipment of intoxicating liquors into prohibition territories, in which you ask if it applies to all express packages of whisky or intoxicating liquors, or whether it applies only to packages sent C. O. D.

You are respectfully advised that it refers to all packages of intoxicating liquors, whether sent by express prepaid, C. O. D. or by freight. The statute provides that each and every person who shall place or have placed *any package or parcel of whatsoever*



*nature, containing any intoxicating liquor, with any express company, railroad company or other common carrier for shipment or transportation to any point in any county, justice precinct, etc., where the sale of intoxicating liquors has been prohibited \* \* \* shall place in a conspicuous place on such package or parcel the name of the consignor and the words "intoxicating liquor" in plain letters.*

Section 2 of the act provides that when any express company, railroad company, or other common carrier within this State, shall receive any package of whatsoever nature, whether from a point within or without this State for transportation to any point within any county, justice precinct \* \* \* where the sale of intoxicating liquors has been prohibited \* \* \* such express company, railroad company or other common carrier shall forthwith transport such intoxicating liquors to the place of designation and there shall be entered in a book to be kept for that purpose the names of the consignor and consignee, and the exact time of the arrival of such package or parcel at the place of destination.

You also ask if the act means seven days, exclusive of the day of arrival.

You are respectfully advised that the law provides that if such package or parcel be not called for and taken away by the consignee, it shall be the duty of such express company, railroad company or other common carrier to start such package or parcel in transit back to the consignor thereof *within* seven days *from* the time of its arrival at the place of its destination.

You will notice that the wording of the statute is that the package shall be started back within seven days from the time of its arrival. The general rule is that where the computation of time is to be made from and after an act done, the date of the act is to be excluded and the last day of the period included.

See American and English Encyclopedia of Law, "Time."

Lubbock vs. Cook, 48 Texas, 96.

Smith vs. Dickey, 74 Texas, 61.

Watkins vs. Willis, 58 Texas, 521.

You are respectfully advised that the day on which the package reaches its destination should be excluded from the computation and the seventh day thereafter included. If a package arrives on the 16th day of a month, it should be started back by the express company, railroad company or other common carrier on the 23rd of the month, the sixteenth day being excluded and the seventh day thereafter included in the computation.

Yours truly,

#### PUBLIC LANDS—SPANISH LAND GRANTS—FIELD NOTES.

Compliance with act of 1901 as to filing of field notes in General Land Office as established by judgments in such suits.

AUSTIN, TEXAS, July 20, 1905.

Hon. J. J. Terrell, Commissioner, General Land Office, Austin, Texas.

Dear Sir: We are in receipt of yours of the 10th inst., which is as follows:

“On May 8, 1905, this department advised Hon. James B. Wells, of Brownsville, Texas, that it was doubtful as to whether or not he had complied with the provisions of the special act of the Legislature, approved September 3, 1901, in order to secure patents upon certain surveys—Spanish grants—in Nueces County, advising him that the Act of 1901 contemplated two different classes of suits, one by the claimant under Section 6 for the purpose of an original confirmation, and another under Section 7 for the purpose of fixing boundaries under already conferred grants.

“Section 6 of said act provides for the return to this office of field notes by the county surveyor of the county in which the land is situated, and Section 10 of said act provides the time in which they must be returned, and provides further that if same are not returned within the prescribed time that all rights of the claimant acquired by virtue of said judgment shall forfeit.

“Certified copies of final judgments in all claims referred to were filed in this office within six months from the date of same. \* \* \* Final judgments covering Joaquin Lopez de Herrera, Marino Lopez de Herrera and Gregorio Farias, April 15, 1904; Blas Marias Falcon, Antonio Gutierrez, Jose Antonio Ynojosa, April 17, 1904, \* \* \* but field notes made by the county surveyor and properly authenticated as the law directs were not returned and filed in this office until the 9th of March, 1905. However, all of the judgments referred to describe the land they purport to cover by metes and bounds.

“After writing the above letter to Judge Wells, he, through Messrs. Rogan & Simmons of this city makes the contention that there is nothing in the position taken by this department raising the question of non-compliance with the law by the non-return of field notes within the prescribed time as above stated, they contending that the law has been fully complied with in that the judgments themselves contain the field notes upon which patents would have to issue. To use their language, they say: ‘The law does not require a useless and meaningless thing to be done; that the evident purpose of filing field notes was to enable the Commissioner to issue a patent described by metes and bounds.’

“Under the above statement I would thank you to advise me if I should treat the description in said judgments by metes and bounds as a compliance with the provisions of said special act relating to the return of field notes and issue patents when the law has been complied with in other respects, or should I refuse to issue patents on account of non-return and filing in this office of field notes made by the county surveyor of the county in which the land is situated within six months from the date of such final judgments?”

So far as concerns judgments rendered in suits brought simply to establish boundaries under Section 7 of the act referred to, we do not think the requirements of Section 10 as to filing field notes in the General Land Office apply.

Section 8 provides that in such cases patents shall issue to the claimants “for the land embraced within the metes and bounds described in the judgment.” Section 10, I think, refers to suits

brought under the provisions of Section 6. Where the judgment in cases brought under this section fully and specifically defines the boundaries of the land, field notes of a surveyor could not do more nor less than follow the field notes of such judgment, and in such case it would seem that field notes of the county surveyor would not be necessary. In these cases, however, you say that regular field notes by the county surveyor have been filed in the General Land Office, but not within the six months required by the act. In our opinion, the failure to file field notes of the county surveyor within the six months would not in any case operate, ipso facto, a forfeiture of all rights under the judgment, but would only be grounds for such forfeiture which would have to be declared in a suit for that purpose by the State. (*G., H. & S. A. Ry. Co. vs. State*, 81 T. R., 595, 596.) I think it is further the law that where the failure to do an act within a certain time is made by statute a ground of forfeiture, if it is in fact done before suit instituted to declare the forfeiture, though not within the required time, this bars the forfeiture. This is, I think, the general principle governing such cases.

You are, therefore, advised that if these suits were brought under Section 7 to establish boundaries, and not title, it would be proper now to issue patents as provided in Section 8 for the land "embraced in the metes and bounds described in the judgment." If the suits were brought to establish title, under Section 6, field notes having been filed in the General Land Office, though not within the six months, it would be proper now to issue patents upon these field notes, if correct, no suit having been brought by the State to declare the forfeiture of the failure to file within the required time. Field notes having been in fact filed in each case, it is not necessary to determine whether it would be proper to issue patents upon the field notes in the judgment in the suits brought under Section 6, when in fact no field notes have been filed at all.

Yours truly,

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CITY COUNCIL—BOARD OF TRUSTEES—SCHOOL BUILDINGS—MUNICIPAL BONDS.

The city council, and not the board of trustees, must contract for construction of school buildings and expend the proceeds of the sale of bonds issued for that purpose by the city.

AUSTIN, TEXAS, July 20, 1905.

*Hon. R. L. Stennis, County Judge, Weatherford, Texas.*

Dear Sir: In reply to your favor of the 19th inst., I beg to say that it is the opinion of this department that contracts for the construction of school buildings are to be made by the city council, and that the proceeds of the sale of bonds issued for such purposes are to be expended by the city council and not by the board of trustees.

Section 6 of the uniform trustee law (Act of 1900) does place the public free schools of a city, which has assumed control of its

schools, under the control of the board of trustees, and this section gives them "exclusive power to manage and govern said schools," and confers upon them title to all school property, but at the same time it clearly states what funds shall be disbursed and expended by the board of trustees. The special tax voted for the support and maintenance of the schools when levied and collected by the city council "shall be placed at the disposal of the said school board by paying over monthly to the treasurer of said board the amount collected for the support of the schools of such district, to be used for the support and maintenance of the public free schools of such independent district."

The fact that the Legislature has expressly entrusted the expenditure of this fund to the board of trustees would indicate that it was not intended that the board of trustees of independent school district should be empowered to expend the proceeds of the sale of bonds issued for the construction of school buildings, but that such fund shall be expended by the city council just as is the case with respect to the proceeds of the sale of bonds issued for the construction of other public buildings. This is quite consistent with the first part of Section 6 of the trustee law. When the city council shall have constructed a school building, the title to and control of the property vests in the school board, but in the absence of any provision of law to the contrary, we conclude, as stated, that it is for the city council to construct the necessary school buildings for the city and disburse the proceeds of the sale of bonds issued for such purposes. The city council is not authorized to relieve itself of the duty of seeing to the proper appropriation of the funds derived from the sale of bonds issued by the city and which are obligations of the city.

I understand that the board of trustees are authorized to furnish school buildings out of the special maintenance tax levied by the city council and paid over to the treasurer of the board when collected. See Article 3920a as amended (Acts 1899, page 329; page 392 Supplement Sayles' Civil Statutes.)

Yours truly,

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#### LOCAL OPTION—ELECTIONS.

The status of precincts which were dry prior to county local option election which resulted in favor of local option, will not be affected by a vote of the county two years afterwards abrogating the local option law.

AUSTIN, TEXAS, July 21, 1905.

*Mr. E. F. Brown, Sherman, Texas.*

Dear Sir: We are in receipt of yours of the 20th inst., and in reply thereto will state that the result of the prohibition election to be held in Grayson County on the 29th day of July will not affect the status of those precincts which have adopted local option prior to the adoption thereof by the county some years ago, and each of those precincts will remain dry until an election is held in each of

them to determine whether or not the sale of intoxicating liquors shall be prohibited therein.

See *Ex Parte Fields*, 86 S. W. Rep., 1022.

*Ex Parte Elliott*, 72 S. W. Rep., 837.

*Ex Parte Hyman*, 78 S. W. Rep., 349.

Yours truly,

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BONDS—SINKING FUND—CITY OF PARIS CHARTER—STATUTES CONSTRUED.

1. Article 918a is not satisfied by provision for a two per cent sinking fund for a forty-year bond.
2. A bond issue must be based upon the latest approved tax rolls.
3. Bonds taken up with the sinking fund of another series are not paid, but become an investment of the fund from which the money came.

*City of Paris Bonds.*

AUSTIN, TEXAS, August 1, 1905.

*Hon. Edgar Wright, City Attorney, Paris, Texas.*

Dear Sir: I beg that you will pardon my delay in reporting to you upon the record submitted in regard to the proposed issues of bonds by your city. The matter has not been overlooked, but I have delayed my reply in the hope that you or I might find some decisions upon the points discussed when you were here, which would authorize the Attorney General to approve the record. I am sorry to advise you that I find the following objections:

1. The provision for a 2 per cent sinking fund for the forty-year bonds is not sufficient. Provision must be made for a sinking fund sufficient to pay the bonds at maturity, which on a forty-year bond will require annually 2 1-2 per cent of the amount of the issue.

I have carefully considered your letter of the 28th ult., but I am unable to adopt your construction of Sections 60 and 79 of the charter of your city. These are:

“Section 60. The city council may also levy, assess and collect taxes necessary to pay the interest and provide a sinking fund to satisfy any indebtedness heretofore legally made and undertaken; \* \* \* and no debt shall ever be created by said city unless at the same time provision is made to assess and collect annually a sufficient sum to pay the interest thereon and create a sinking fund of *at least 2 per centum thereon.*”

“Section 79. All bonds shall specify for what purpose they are issued, and shall be invalid if sold for less than their par value, and when any bonds are issued by the city a fund shall be provided to pay the interest and create a sinking fund to *redeem* said bonds \* \* \*.”

It is the opinion of this department that these sections must be read together, and that, so read, the mandate of the Legislature is that:

When any bonds are issued by the city, provision shall at the same time be made to assess and collect annually a sufficient sum to

pay the interest thereon and create a sinking fund sufficient to redeem the bonds at maturity, such sinking fund to be at least 2 per centum thereon annually.

In no other way can any effect be given to Section 79. We can not disregard this section, but must ascertain from the language used what was the legislative intent, and, if not in contravention of any constitutional provision, it must be given effect equally with Section 60, or any other section of the charter. Indeed, it is not without force that Section 60 (which substantially repeats the constitutional provision), deals generally with the creation of debts by the city, while Section 79 is a *special provision* applicable to the bonds authorized to be issued by Sections 77 and 78 immediately preceding.

The constitutional provisions on this subject are found in Sections 5 and 7 of Article XI. The one is:

“No debt shall ever be created by any city unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon and create a sinking fund of at least 2 per cent thereon.”

The other is:

“But no debt for any purpose shall ever be incurred in any manner by any city or county unless provision is made at the time of creating the same, for levying and collecting a sufficient tax to pay the interest thereon and provide at least 2 per cent as a sinking fund.”

I would not hesitate, if it were necessary, to express the opinion that these provisions of the Constitution were designed to prevent counties and cities from incurring debts beyond the possibility of payment and to insure the discharge of such indebtedness as should lawfully be created, and, therefore, require the accumulation *in fact*—not merely *in form*—of a sinking fund for that purpose. I am not willing to believe that the convention, in adopting, or the people in ratifying these provisions, intended that they should be so construed as to authorize the issuance of a bond running ten years, for example, for which there is made the “provision” of a 2 per cent sinking fund.

It is, however, unnecessary to go so far in the present case; for if the Constitution is satisfied by provision for a 2 per cent sinking fund, regardless of the term of the bonds, yet clearly it does not prohibit the Legislature from requiring a *provision* which will in fact provide. The most that can be said is that the Constitution has fixed the *minimum* sinking fund which shall authorize the erection of a debt by a county or city.

Article 918a of the Revised Statutes (Section 1 of the Act of April 29th, 1893), requires provision to be made “for the levy and collection of a tax annually of sufficient amount with which to pay the annual interest and a sinking fund *with which to pay* such bonded indebtedness at maturity.”

I think it plain that this requires that the sinking fund which, to authorize the creation of a debt, the Constitution requires to be *at least 2 per cent*—shall, for bonds, be such a per cent annually as will provide a fund sufficient to pay the debt at maturity. It

was so considered, I think, by the Supreme Court in *Bassett vs. El Paso*, 88 Texas, at page 175 (last paragraph on the page).

It has been so construed, I think, by every Attorney General since the Act of 1893 became effective. I know that for the six years past (under Attorney Generals Smith and Bell) that construction was placed upon the act, and Attorney General Davidson unqualifiedly approves and concurs in that construction.

If the charter of the city of Paris contained any provision in conflict with Articles 918a, the provision of the charter would, of course, control. But I find no such conflict.

Section 79 requires provision to be made for "a sinking fund *to redeem said bonds.*" Article 918a requires provision for "a sinking fund with which *to pay such bonded indebtedness at maturity.*" In Section 79 the expression used is "to redeem" in Section 60 it is "to satisfy," and in Article 918a, "to pay." All mean the same thing, and, of course, the city is not required to provide "to redeem" or "to satisfy" or "to pay" them before their maturity.

The Supreme Court in the *Mitchell County* case (91 Texas, 391), did suggest a different construction of a statutory provision quite similar to Section 79 of your charter. But the point *decided* by the court was that by the act discussed the Legislature had made the provision required by and so had complied with Section 7 of Article XI of the Constitution. The reasoning by which Justice Brown justified the conclusion of the court, though instructive, and perhaps indicative of the disposition of the court upon the question, is not the decision of the court. The Supreme Court in the *Basset* case (88 Texas)—Justices Gaines, Brown and Beeman composed the court then—understood the Act of 1893 (Article 918a) to require more than a 2 per cent sinking fund. It was dictum there, and Justice Brown's conclusion that the legislative enactment he was discussing was satisfied by a 2 per cent sinking fund is also dictum.

There is no real difference between the provision discussed by Justice Brown and either Section 79 of your charter or Article 918a. If the city of Paris is authorized by its charter to issue a forty-year bond upon providing a 2 per cent sinking fund, then every county in the State, every city in the State and every independent school district could lawfully issue bonds to that amount upon which annual interest and a 2 per cent sinking fund could be made out of the authorized tax, notwithstanding that some of these bonds may not run exceeding twenty years and none of them longer than forty years, which would inevitably mean default in payment of part of the bonds. It is, I imagine, Utopian to expect the interest which may be earned by the sinking fund to even equal the loss to that fund from uncollected taxes, let alone that it will sufficiently supplement a 2 per cent sinking fund to discharge a twenty, thirty or even a forty-year bond at maturity.

I say this merely in reply to your suggestion; not that we have any doubts of your construction of these expressions of the legislative will. I doubt if the Legislature ever passed a law—either general or special—authorizing the issuance of bonds without incorporating in it a provision substantially similar to Section 79 of

your charter. Until the Supreme Court shall hold—in a case where the question is presented for decision—that these numerous acts mean nothing, that the law is the same as if none of them had ever been enacted, it is undoubtedly the duty of the Attorney General to give effect to these provisions as he does, and as his predecessors did construe it.

Accordingly, we must require that for the proposed bonds provision must be made for the collection by taxation of a sum sufficient to pay annual interest and a 2 1-2 per cent sinking fund on the forty-year bonds. For the fifty-year bonds a 2 per cent sinking fund is enough. And it follows that a sufficient provision must first be made for the outstanding bonds to determine how much of the city's taxing power is available for additional bonds.

2. In determining the sufficiency of the provision made for outstanding as well as for new bonds proposed, we can look only to the latest approved tax rolls of the city for the amount of its taxable values. This, we think, is settled by the case of the Citizens Bank vs. The City of Terrell, 78 Texas, 450, and Nolan County vs. The State, 83 Texas, 195.

The ordinance of July 11, 1905, must be amended. As your charter directs that taxes shall be levied in July, I think the ordinance should not be repealed, but only amended, so as to reappropriate the 55 cents available for bonds. It might be advisable to base your calculations upon your 1905 rolls, if assessments have been equalized, so that this can safely be done. Upon the increased 1905 assessments, a smaller tax will be required for the outstanding bonds than if calculated on last year's rolls.

I am unable, from the statement furnished, to determine what rate of tax is required for the outstanding bonds since the amount originally issued is not shown. For sinking fund on the forty-year bonds there must be provided one-fortieth (or 2 1-2 per cent) of the amount originally issued; on twenty-year bonds, one-twentieth (or 5 per cent), etc.

Of course, if the taxes are based on the 1905 rolls we can not approve any of the bonds in advance of the final approval of the rolls.

3. It was not proper to consolidate the sinking funds belonging to "Funding Bonds, First Series," "City Debt Bonds" and "City Prison and Fire Department Bonds" in order to discharge with the consolidated fund the \$2000 of funding bonds and \$3000 city prison bonds, as was attempted by ordinance of July 10th. (See Sections 2 and 3 of Act of 1899; pages 118-119, Supplement to Sayles' Civil Statutes.) Those bonds, paid for with money in their own sinking fund, the council had power to cancel. Those bonds paid for with money for a sinking fund accumulated for another issue are not "paid" or "canceled," but belong as an investment to the fund from whence the money came (*Morrill vs. Smith County*, 89 Texas, 555, and must be considered and provided for as a part of the subsisting indebtedness of the city.

4. The proposition for the issuance of the "Refunding Bond, Series A," as submitted to the voters, does not authorize the proposed issue. I understand the rule to be that: "Where an election is a condition precedent, the proposition submitted to and approved



by the vote of the people is the only one upon which the officers of the municipality can act." Simonton on Municipal Bonds, Sec. 67, at page 82.)

There can be no doubt that an election is a condition precedent to the issuance of these bonds. Section 77 of your charter authorizes the issuance of funding or refunding bonds; Section 78 authorizes the issuance of other bonds; Sections 79 to 85 relate to the manner and form of issuing bonds; Section 84 is:

"Before the issuance of bonds, *other than* improvement district bonds, the same shall be submitted to a vote of the property holders of the city \* \* \*"

It is desired to issue \$13,000 of bonds to refund a *like amount* of bonds out of three different issues of bonds, of which, at the time of the election, there were outstanding bonds aggregating \$18,000. But the proposition was not so submitted. The purpose for which the \$13,000 was proposed to be issued was stated thus:

For the purpose of refunding, at 4 1-2 per cent interest, outstanding bonds of the city now bearing 6 per cent interest, the said bonds to be refunded being, respectively, as follows:

"\$7000 city prison and fire department bonds \* \* \*

"\$7000 city debt bonds \* \* \* and

"\$4000 funding bonds, First Series \* \* \*"

I have endeavored to satisfy myself that the submission will authorize the issuance of these bonds, but I am unable to do so. There must be another election on the proposition.

5. It is proposed to issue \$8500 of bonds to retire and discharge the floating indebtedness of the city. The treasurer's statement shows outstanding warrants and scrip aggregating \$8448.31. The Comptroller will not register refunding bonds until the scrip or warrants refunded are presented to him for cancellation, and then he will register bonds only to the amount of the scrip and warrants canceled.

6. Section 20 of your charter requires the yeas and nays to be taken upon the passage of all ordinances or resolutions and entered upon the journal of its proceedings. The journal is, of course, the best evidence of this and not the secretary's certificate. The transcript should contain, therefore, not merely a copy of the ordinance or resolution, but it should show all that the journal shows in regard to its passage, that is to say, the moving of its adoption and the vote by which it was adopted.

7. The secretary's certificate to each ordinance and resolution should recite that it was approved by the mayor, giving date of approval, or that it was placed in the office of the city secretary (giving date), and that the mayor neglected to approve the same, or to return it to the city council with his objections thereto for a longer period than three days after said date. (Section 32 of the charter.)

8. What purports to be, in the transcript, the book and page of record of an ordinance is, I understand you to say, but the reference to the book and page of the journal where the caption of the ordinance is recorded, the ordinance itself being recorded in a separate book. The secretary should make a transcript from the

journal of whatever is shown as to the passage of the ordinance and copy the ordinance from the ordinance book, and his certificates should be made accordingly.

The bond ordinances will need to be repealed and new ones passed on account of reapportionment of the taxes.

The record, when again submitted, should, to be complete, contain copy of the repealed ordinances and the ordinance by which repealed, as well as of the new ones. When you come to pass the new bond ordinances the tax levy will have been amended, and, therefore, I take the liberty of suggesting the sixth section of the ordinance should read as follows:

"Section 6. It is further ordained that to pay the interest on said bonds and create a sinking fund sufficient to discharge them at maturity, a tax of.....cents on each \$100 valuation of all taxable property in said city of Paris shall be annually levied on said property, and annually assessed and collected until said bonds and interest are paid; that to pay the interest and create the necessary sinking fund for the current year there is hereby specially appropriated and set aside the tax of.....cents, levied for said purpose for the current year by this council by ordinance passed on....., and said tax shall be assessed and collected and so applied; and each year thereafter while said bonds are outstanding, in due time, form and manner, and at the same time that other city taxes are levied, assessed and collected, said tax of.....cents shall be levied, assessed and collected and applied to the purposes named."

10. The statement of indebtedness needs revision, since some of the bonds there shown have been paid.

I return herewith record submitted.

Yours truly,

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#### LOCAL OPTION—SALE OF UNO, ETC.

AUSTIN, TEXAS, August 19, 1905.

*Hon. E. J. Darden, Llano, Texas.*

Dear Sir: We are in receipt of yours of the 17th asking for an opinion of this department as to whether or not it is a violation of the local option law to sell "Uno."

Beg leave to advise you that this is a question of fact to be determined by the jury. The law makes it an offense to sell intoxicating liquors in a prohibition territory. As to what constitutes intoxicating liquors is a question to be determined by the jury upon the evidence submitted. The courts have held that the courts can take judicial knowledge of the fact that whisky is intoxicating liquor, and also that lager beer is intoxicating liquor, but as to all other intoxicants the question must be determined upon the facts submitted.

I refer you to the following cases which will give you the rules laid down by the Court of Criminal Appeals in reference to the matter.

Harris vs. State, 86 S. W. Rep., 763.

Scales vs. State, 83 S. W. Rep., 380.

Gray vs. State, 83 S. W. Rep., 828.

In the latter case you will find a general discussion of the question as to what constitutes intoxicating liquors. See also:

Mayne vs. State, 86 S. W. Rep., 329.

Porter vs. State, 86 S. W. Rep., 1014.

Davis vs. State, 36 App., 393.

Decker vs. State, 39 App., 20.

Kempt vs. State, 38 S. W. Rep., 987.

Barnes vs. State, 44 S. W. Rep., 491.

In the last cited cases the defendant was charged with selling such decoctions as "Frosty," "Ino," "Preston's Tulu," etc., and you will find applications of the rules of law discussed therein.

Yours truly,

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### MUNICIPAL CORPORATIONS.

Corporate limits of a city or town can not be extended or reduced without an election.

AUSTIN, TEXAS, August 19, 1905.

*Hon. T. P. Stillwell, Mayor, Lone Oak, Texas.*

Dear Sir: We are in receipt of yours of the 17th, in which you ask if the corporate limits of a town, incorporated under the general law, can be either extended or cut down by the city council without an election held in which all of the voters affected by it shall vote.

You are respectfully advised that this can not be done. Article 384, Sayles' Civil Statutes, provides that the bounds and limits of a municipality shall be and remain the same as fixed and defined by the provisions of the act of incorporation, unless said limits of said corporation may be extended by adding additional territory to the same in the manner provided in Article 574.

Article 574 provides how the limits of an incorporated city or town may be extended, which is as follows:

"Whenever a majority of the inhabitants qualified to vote for members of the State Legislature of any territory adjoining the limits of any city to the extent of one-half mile in width, shall vote in favor of becoming a part of said city, and any three of them may make affidavit to the fact, to be filed before the mayor who shall certify the same to the city council of said city, and the city council may, by ordinance, receive them as a part of said city."

The Supreme Court of this State has held, in construing the above Article, that the voters interested may express their preference on the subject by any method of voting satisfactory to them and to the city council, and when it is shown by proper affidavit that a majority favored annexation the city council is authorized to receive the territory into the city limits. See *Graham vs. City of Greenville*, 67 Texas, 62.

*City of East Dallas vs. State*, 73 Texas, 370.

McCrary vs. City of Comanche, 34 S. W. Rep., 679.

Article 575 provides how the territory of an incorporated city or town may be diminished. The provision is, that when fifty qualified voters within the limits of said incorporated city or town, sign and present a petition to the mayor praying that such territory, setting the same out by metes and bounds, be declared no longer a part of such city or town, it shall be the duty of the mayor thereof to order an election within thirty days thereafter, to be holden at the different voting precincts of said town. If a majority of the legal voters of said town voting at such election, cast their votes in favor of discontinuing said territory as a part of the city, the mayor of said city shall declare such territory no longer a part of said city.

Under this article, if any portion of the territory within the limits of an incorporated city or town desires to be declared no longer a part of such town, there must be a petition presented to the mayor signed by fifty qualified voters of the territory, and the mayor shall order an election, and at said election, all of the qualified voters of said town shall vote, and if a majority of the qualified voters of the territory, and the mayor shall order an election, and at said election, all of the qualified voters of said town should vote, and if a majority of the qualified voters of said town vote that the territory be longer a part of the town, the mayor shall so declare. See the State vs. Eidson, 76 Texas, 302; Ewing vs. State, 81 Texas, 172; Matthews vs. State, 82 Texas, 577.

Yours truly,

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#### CONVICT—JAIL SENTENCE.

Commissioners court has no authority to allow a prisoner a credit for any sum on his fine and cost while he is serving out a jail penalty. The fact that a prisoner performs manual labor during his term of imprisonment does not preclude the subsequent enforcement of the fine and cost.

Neither the Commissioners court, nor the judge who tries the case, has the authority to remit fines and forfeitures, or commute punishments in any way.

AUSTIN, TEXAS, August 19, 1905.

*Hon. H. L. Robb, Trinity, Texas.*

Dear Sir: We are in receipt of yours of the 15th inst., in which you ask if the commissioners court has the authority to remit the jail sentence imposed upon a defendant under a judgment of the court, and as to whether or not said court has the authority to allow a prisoner a credit of any sum for labor on this fine and cost while he was thus serving a jail sentence.

You are respectfully advised as to the latter question, that they have no authority to allow a prisoner a credit for any sum on his fine and cost while he was serving out a jail penalty.

Article 857 of the Code of Criminal Procedure provides that when a judgment of a court is, that the defendant be imprisoned in jail the sheriff shall execute the same by imprisoning the defendant for the length of time required by the judgment.

The Court of Criminal Appeals in the case of *Ex Parte Dockery*, 38 Texas Crim. App., 293, held that where a defendant was sentenced to pay a fine and cost, and also as a part of his punishment, to imprisonment for one year, the fact that he served his time of imprisonment during which he performed manual labor did not entitle him to a discharge from, nor preclude the subsequent enforcement of the fine and cost.

In reply to your other question you are respectfully advised that neither the commissioners court nor the judge who tries the case, has any authority to remit fines or forfeitures, or to commute punishments in any way.

As was said in case of *Luckey vs. State*, 14 Texas, page 400: After conviction and assessment of fine by jury, the court has no power to remit the punishment imposed. This is the exercise of the pardoning power which appertains exclusively to the Executive.

I also call your attention to the case of *Ex Parte Mann*, 39 Appeals, 491; *Ex Parte Dies*, 28 Texas, 535.

Yours truly,

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#### TAXES—ROAD AND BRIDGE.

Where commissioners court of a county levies a tax of 15 cents on all property within county for road and bridge purposes, and a city within county afterwards incorporates, said city is not entitled, out of the levy by the commissioners court, to 15 cents tax collected upon property within said city limits; but may levy an additional 15-cent tax for the improvement of streets and roads within its limits.

The commissioners court has no authority to turn over any part of funds accumulated from taxpayers within city; and after incorporation of the city the county has no authority to work roads, streets and alleys in city.

AUSTIN, TEXAS, August 19, 1905.

*Hon. J. G. Griner, Del Rio, Texas.*

Dear Sir: We are in receipt of yours of the 16th, in which you state that your county at the February term of court of this year, levied a tax of 15 cents for road and bridge purposes, and that since the levy of said tax the city of Del Rio, in said county, incorporated under the General Laws of said State, and you desire to know, first, if the city, having taken full charge and control of the streets, alleys and bridges, is entitled out of this levy by the commissioners court, to 15 cents on the \$100 valuation levied and collected within the territory covered by the lines of said city.

Foster & Grinnan of your city have heretofore been advised by this department that the city of Del Rio has the authority to levy and collect this tax for this year, notwithstanding, it incorporated since the 1st day of January. The levy made by the commissioners court was the levy of a county tax for road and bridge purposes and must be paid by every citizen of the county, notwithstanding he may be an inhabitant of an incorporated city or town. The fact that this tax is also paid by the inhabitants of incorporated towns of the county does not create the right of the incorporated town to have set apart to it its pro rata share of this 15 cent tax. This tax having been levied by the county authorities, must be collected by

the county authorities and must be paid into the road and bridge fund of the county, and is subject only to claims against this fund against the county.

You also ask if you have the authority, the city being without funds, to turn over and deliver to said city its pro rata share of this 15 cent road and bridge tax.

As you have been advised above, the city has no share of this 15 cents tax, and the commissioners court has no authority to turn over to the city authorities any share of the fund accumulated under this 15 cent tax.

You also ask, assuming that you haven't the authority to deliver to them the said tax, if the commissioners court has the right to continue to keep the streets and alleys up to and including the period when said city will be in possession of said funds to take up said work.

As you have been advised above, the city will never have the authority to come into possession of any of the fund raised by virtue of the 15 cent tax levied by the county.

After the incorporation of the city the county has no authority to work the roads, streets and alleys in said city. This has been positively determined by the Supreme Court of this State. See *State vs. Jones*, 18 Texas, 874; *Norwood vs. Gonzales County*, 79 Texas, 222.

Yours truly,

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#### PUBLIC WEIGHERS.

Public weighers have not the exclusive right to weigh produce. Private weighers may weigh same and charge therefor—When.

AUSTIN, TEXAS, August 21, 1905.

*Hon. I. B. Lane, County Attorney, Cooper, Texas.*

Dear Sir: We are in receipt of yours of the 16th asking for an opinion of this department on the law regulating the appointment, election and duties of public weighers, in which you ask if the Act of the Twenty-ninth Legislature applies to precincts, or where public weighers are elected, and in which you submit the statement that a precinct in your county has a duly elected public weigher who weighs cotton at one cotton yard, and you desire to know if it will be a violation of the law for a private weigher, not an elected or appointed public weigher, to occupy another cotton yard and weigh cotton for the public without compensation.

Will say in the first place that I do not see that the question of compensation would in any way affect the matter.

The first act providing for the appointment of public weighers was passed in 1879 (*Gammel's Laws*, Vol. 8, page 1416). It provided that the Governor should appoint five public weighers in the city of Galveston, and one or more, not exceeding three, in the cities of Houston, Sherman, Dallas, Austin, Waco and such other cities as in his judgment may be expedient.

Section 7 of this act provides as follows: "It shall not be lawful for any person, other than a regularly appointed weigher or his

deputy, to weigh any cotton, wool, etc., sold or offered for sale in a city having a public weigher duly qualified." A violation of this section was made a misdemeanor.

Section 8 of this act provides as follows: "It shall not be lawful for any factor, commission merchant, or any other person or persons, to employ any other than a regularly appointed and qualified public weigher or his deputy, to weigh any cotton, wool, etc., offered for sale in any city having a public weigher."

This section contains the further provisions that any owner of produce shipped to any factor or commission merchant, may by written instructions authorize said factor or commission merchant to have said produce weighed by a private weigher.

Section 10 of this act provides as follows: "Nothing in this act shall be construed to prevent any person from weighing his cotton, wool, etc., in person without being compelled to call upon a public weigher to weigh the same."

This act was amended by the Act of 1883 (Gammel's Laws, Vol. 9, page 389) which purports to amend Sections 1, 2 and 9 only, leaving Sections 7, 8, and 10 as enacted by the Legislature of 1879.

The amendment to Section 1 contains the following provision: "In all *cities and towns*, and *railroad stations* which receive annually less than 100,000 bales of cotton, the county commissioners court \* \* \* should the commissioners court deem the same necessary to protect the *seller*, may order an election, etc., for one or more public weighers."

And also contains the following provisions: "Provided nothing herein contained shall be construed so as to prevent any other person from weighing cotton, wool, etc., when requested to do so by the owner or owners thereof."

Section 7, making it unlawful for any person other than a public weigher to weigh cotton, and Section 8, making it unlawful for a factor or commission merchant to employ any other than a public weigher to weigh cotton, wool, etc., except upon the written request of the owner, and Section 10, which provided that it should not be unlawful for any person to weigh his own cotton, wool, etc., were not amended nor repealed by the Act of 1883, but the additional provision was engrafted into the amendment of Section 1, that it should not be unlawful for any other person than a public weigher to weigh cotton when requested to do so by the owner.

The Supreme Court, in passing upon the Act of 1879, said: "It was the intention of the 7th and 8th sections of the Act of 1879 to prohibit factors and commission merchants, or other persons, except the *owners of the produce* from having it weighed by any but a public weigher. It was intended to allow the owner to have it weighed by a private weigher, but for that purpose \* \* \* he must give written authority to his factor, commission merchant or agent, and this would justify the latter in making the employment and save him and the private weigher from the penalties of the *two sections*."

In passing upon the amendment of 1883, the court said: "It certainly does not interfere with the right of the owner of produce to have it weighed by private persons."

I call your attention to the provisions of Section 1, as amended by the Act of 1883, to the effect that if the commissioners court deem it necessary to protect the *seller* an election may be ordered to elect public weighers. As was said by the Supreme Court, "the object of the statute was to protect the *owners of produce* from the fraudulent conduct of their factors and agents in rendering a false account of the weights of produce shipped to them. By allowing the owners to select private weighers it permitted them to waive their rights in this respect."

The court held in this case that under the Act of 1879 and the amendment thereto of 1883, parties could not be prevented from acting as private weighers, notwithstanding they might usurp some of the powers of public weighers. If they could be so prevented the owners of produce would be deprived of the privileges intended to be secured to them under the two acts. (Watts vs. State, 61 Texas, 187.)

The Court of Civil Appeals, in passing upon the amendment of 1883, held that it removed the restrictions apparently placed upon the power of the owner over his own property and makes it lawful for private weighers to weigh his produce at his request. It reiterates the fact that the object of the statute is to protect the *owner of produce* from the fraudulent conduct of his factor or commission merchant. The Court held in this case that if parties purchased cotton from the owner agreeing to pay therefor a certain price upon receipt of the weights could have tickets addressed to a private weigher requesting him to weigh cotton for his account, and the vendors of the cotton carries it to the private weigher, presenting the purchaser's ticket and the private weigher weigh the cotton, it would be a weighing upon the request of the owners thereof and no liability would be incurred. (See Martin vs. Johnson, 11 Civil Appeals, 628.)

The law stayed thus until the revision of the Statutes in 1895, at which time Article 4313, which was Section 7 of the Act of 1879, was stricken out. See Senate Journal 1895, page 482.

After the revision the Court of Civil Appeals in the case of Smith vs. Wilson, 18 Civil Appeals, 24, held in construing the Acts of 1879 and 1883, and the revision of 1895 together, that a private weigher might weigh cotton at the oral request of the owner thereof, and that a written request was only necessary when the weighing was done by private weighers for the factors or commission merchants, or for persons to whom produce had been shipped by the owner, and that the amendment of 1883 was clearly intended to give private weighers the right to prosecute their business and weigh cotton at the request of the owners. An injunction on the application of a public weigher to restrain a private weigher from prosecuting his business was refused in this case. This was the status of the statutes and decisions until 1899, at which time the entire law relating to public weighers was amended. (Acts Twenty-sixth Legislature, page 264.)

The Acts of 1883 authorized the election of public weighers in cities, towns and railroad stations.

The Act of 1899 authorized their election in justice precincts,

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Section 7 of the Act of 1879 (Article 4313, Revised Statutes of 1879) making it unlawful for any other than a public weigher to weigh cotton, wool, etc., which was repealed in the revision of 1895, was not re-enacted by the Act of 1899. Article 4313, Revised Statutes of 1895, was amended by striking therefrom the provision allowing a factor, commission merchant, etc., to have cotton weighed by private weighers on the written request of the owner.

Article 4316, Revised Statutes of 1895, was amended by adding a proviso that private weighers in places where there are no public weighers should be required to make bond and take oath as was required of public weighers. In all other respects, in so far as the question before us is concerned, the Act of 1899 is substantially the same as Title 90, Revised Statutes of 1895.

The Act of 1883, contained a provision that nothing there should prevent any other person (than a public weigher) from weighing cotton, wool, etc., when requested to do so by the owner thereof. This provision was omitted in the revision of 1895 and in the amendment of 1899.

One of the Courts of Civil Appeals, in passing upon the Act of 1899, held that the statute was intended to do away with private weights for other persons in places where there was a public weigher, except by the owner in person, and that the act intended to reach all classes who buy and sell the articles in places where there is a public weigher and is not confined alone to transactions in which factors and commission merchants are engaged. (Davidson vs. Saddler, 57 S. W. Rep., 54.)

Judge Fisher, who rendered the opinion, did not discuss the matter, nor give any reason for this holding, but simply adopted the conclusion of law of the lower court.

I do not believe this is a proper construction of the statute. In fact, the courts have since held otherwise. In the case of Whitfield vs. Terrell Compress Co., 62 S. W. Rep., 116, a rehearing was denied, and a writ of error was denied by the Supreme Court, which to all intents and purposes, makes the decision a decision of the Supreme Court. The court held in this case that the statute does not prevent ginners or warehousemen from weighing the cotton of their customers, or farmers offering produce for sale from having it weighed by the purchaser or any other person who may be willing to weigh it. This decision was followed by the Court of Civil Appeals in the case of Galt vs. Holder, 75 S. W. Rep., 568.

Section 8 of the Act of 1879 was not amended in the Act of 1899 in so far as it names persons forbidden from weighing produce (that is, factors, commission merchants, etc.). Laws prior to 1899 had provided for weighing upon the written request of the owner, but that act is a repeal of all previous laws and does not contain any provision for weighing upon the instructions or at the request of the owner, but, it is provided that nothing in the act shall prevent any person from weighing his own cotton. The act provides that it shall not be lawful for any factor, commission merchant, "or other person or persons" to employ any other than a public weigher or his deputy to weigh cotton. There is no provision of this act, nor in any other act since 1879, which makes it unlawful for

any person, except a factor, commission merchant "or any other person or persons" to employ a private weigher to weigh cotton; and to properly construe the act, it becomes necessary to determine the meaning of the words therein "factor, commission merchant, or other person or persons."

A factor is defined to be an agent employed to sell goods or merchandise consigned or delivered to him by or for his principal for a compensation, commonly called factorage or commission; and agent for the sale of goods in his possession or consigned to him. See Bouvier's Law Dictionary, "Factor."

A commission merchant, as this term is used, is commonly synonymous with the legal term "Factor" and means one who receives goods, chattels or merchandise for sale or exchange or for disposition and who is to receive compensation for his services to be paid by the owner or derive from the sale of the goods.

Now the question arises, what do the words "other person or persons" following the words "factor, commission merchant" mean?

The general rule is that a general word which follows particular and specific words of the same nature as itself, takes its meaning from them, and is presumed to be restricted to the same genus as as those words; or, in other words, as comprehending only things of the same kind as those designated by them (See Endlich on Interpretation of Statutes, Section 405). When general words follow particular ones, the rule is to construe the general words as applicable to the persons *eiusdem generis*. This rule which is sometimes called Lord Tenderden's Rule, has been stated, as to the word "other" thus: "Where a statute or other document enumerates several classes of persons or things, and immediately following and classed with such enumeration the clause embraces other persons or things, and the word "other" will generally be read as 'other such like' so that persons or things therein comprised may be real as *eiusdem generis*, and not of a quality superior to or different to those specifically enumerated. (See 17 Am. & Eng. Enc. of Law, page 278.)

In construing the words "other person or persons" under consideration under the Act of 1879, as amended in 1883, the Court of Civil Appeals of this State in the case of *Smith v. Wilson*, cited above, said: "A written request was only necessary when the weighing was done by private weighers for 'factors, commission merchants, or other person or persons' to whom produce had been shipped by the owners."

The court thus held that the words "other person or persons" following the words "factors, commission merchants" meant persons acting as agents and receiving produce on consignment just as factors and commission merchants.

The words "other person or persons" do not include the owners of the produce or the persons who buy the produce from the owners. They only relate to transactions of factors, commission merchants, and other persons acting as agents for the owners in the same manner as factors and commission merchants act as the agents of the owners. The farmer or raiser of produce who brings the same to market and sells it can either weigh the produce himself or let

the buyer weigh it for him, or have it weighed for him, and in so doing, neither the buyer or seller, nor the person who does the weighing, whether he be a public weigher or not, incurs any penalty or violates the law in any respect.

The Act of 1903 (28th Legislature, page 216) and the Act of 1905 (29th Legislature, 117) each provides that private weighers, in place where no public weighers are appointed or elected, shall enter into a bond in the sum of \$2500. These provisions, however, do not affect private weighers who weigh produce in places where there are public weighers.

I crave your indulgence for the length of this communication, but we have had many inquiries of late in reference to the matter and I have taken the pains to trace the history of this legislation and examine all the decisions on the subject in order to arrive at the intent of the Legislature in the enactments.

Yours truly,

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#### RAILROADS—MAINTAINING CLOSETS, ETC.

Railroads only required to erect and maintain closets at passenger stations where they have depots.

AUSTIN, TEXAS, August 31, 1905.

*Hon. C. M. Kay, Palestine, Texas.*

Dear Sir: We are in receipt of yours of the 30th asking for the construction of this department of Chapter 133 of the 29th Legislature.

The purpose of this act, as stated in the caption, is to compel railroad and railway companies to erect and maintain water closets or privies at *passenger stations*, to regulate the same, etc.

Section 1 of the act provides that each railroad and railway corporation, shall hereafter be required to construct, maintain and keep in a reasonably clean and sanitary condition, suitable and separate water closets, or privies, for both male and female persons at each *passenger station* on its line of railway, either within its passenger depot or in connection therewith, or within a reasonable and convenient distance therefrom at such station.

Section 2 provides that said railroads and railway corporations are required to keep said water closets, and depot grounds adjacent thereto, well lighted at such hours in the night time as its passengers and patrons at such stations may have occasion to be at the same, etc.

It is very evident from the provisions of the two sections referred to above that it was not the intention of the Legislature to compel railroads to erect and maintain water closets or privies at passenger stations, other than those at which they maintain a depot.

In providing where such water closets should be situated, the Legislature said that they should be situated either within the passenger depot, or in connection with the passenger depot, or within a reasonable and convenient distance from the passenger depot at such station; and in Section 2 the Legislature enacted that said water closets and depot grounds adjacent thereto should

be kept well lighted, thus making very clear that they did not intend that railroads should be compelled to erect and maintain these closets except at passenger stations where they have depots.

Aside from this construction and taking the legal meaning of the term "passenger stations," the only conclusion which can be reached, following the decisions of the courts, is that the legislative intent was that railroads should not be compelled to maintain water closets or privies at those stations on the road where they did not maintain a depot and sell tickets.

It is a matter of common knowledge that a flag station is not a regular stopping place for passenger trains, and it is also a matter of common knowledge that when a "passenger station" is spoken of, a depot is meant.

In the case of *Louisville & N. R. R. Co. v. Commonwealth of Kentucky*, the Court of Appeals in that State held that "depot" and "passenger station" were synonymomus terms. See 33 S. W. Rep., 939.

The word "station" as applied to railroad companies, has been construed to mean a regular stopping place of a railway train where it receives and leaves passengers. See *Ricker v. Portland & B. F. R. R. Co.*, 38 Atl., 338.

"Station" as used in a statute forbidding a railway company abandoning a station without the consent of the Railroad Commission does not include a mere platform at which certain daily trains stop to take or leave passengers, but at which no office or agent is kept and tickets sold. See *State v. New Haven & N. H. Co.*, 41 Conn., 134.

A "passenger station" means nothing less than a place at which passenger tickets are ordinarily sold, as used in a statute providing that no railroad corporation shall eject any person from its cars for non-payment of fare, except at some passenger station. See *Baldwin v. Grand Trunk Ry.*, 15 Atl., 411.

You are advised that it is the opinion of this department that the term "passenger station" as used in Chapter 133 of the Acts of the 29th Legislature, construed in connection with the evil intended to be remedied, means a station on a line of railway where a depot is maintained and where tickets are sold, and does not include within its terms flag stations along said line of railway where no depot is maintained and tickets are not sold. The act being penal in its nature must be strictly construed and not be construed as to include within its terms things which do not come clearly within the words used.

Yours truly,

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COMMISSIONERS COURT.

Must make quarterly statement at each regular term, and publish and post same.

AUSTIN, TEXAS, September 7, 1905.

*Hon. J. S. Woods, County Attorney, Kaufman, Texas.*

Dear Sir: We are in receipt of yours in which you ask if article

276 of the Penal Code has been repealed in whole or in part, either directly or by implication.

You are respectfully advised that it has not. It contains the penal provision of a law passed in 1873 (Gammel's Laws, Vol. 7, p. 455) which provides as follows:

"The county courts of the several counties shall make regularly and quarterly tabular statements of the expenditures, assets and indebtedness of their respective counties, specifying the names of creditors and items of indebtedness with their respective dates of accrual, and also the names of persons to whom moneys may have been paid; and shall cause said statements to be published on the 1st day of July and 31st day of December of each year; that on the 1st day of July shall be made by posting up at the door of the court house of the county, a copy of said statement for two months; and that on the 31st day of December once in a newspaper published in a county having the largest circulation the same; and should there be no newspaper published in the county, then four copies of said statement shall be posted at different public places in the county and also one copy shall be posted at the court house door one month.

The above is Section 1 of the Act of 1873.

Article 276 contains Section 2 of this Act, with various amendments thereto which have been passed since the enactment of the original section.

As it appears in White's Penal Code, it is Article 259 of the R. S. of 1879 (Penal Code) with the amendment of April 13th, 1891.

Article 276 is complete within itself, and notwithstanding Section 1 of the Act of 1873 has not been brought forward, either in the Revised Statutes of 1879 or the Revised Statutes of 1895, section 2, which is embraced in article 276 of the Penal Code, is so complete in itself as to require the commissioners court to make the report required thereunder.

The construction of this department of this article is:

1. It is the duty of the commissioners court to make a quarterly statement at each regular term of the court, specifying therein the names of the creditors, the items of indebtedness with their respective dates of accrual, and also the names of persons to whom moneys have been paid with the amounts paid each during the quarter.
2. This report should include the three months from January 1st to March 31st, inclusive, and so on for each quarter in the year.
3. At the first regular term in each year, it is the duty of the court, in addition to the report mentioned in paragraph 1 of this letter, to make or cause to be made an exhibit for the fiscal year ending the second Monday in February, showing the aggregate receipts and disbursements for each fund for each quarter of the fiscal year, and this exhibit must be published as required by the act. This report should be for the preceding year by quarterly statements and not for the quarter only. This report should be published in some newspaper published in the county immediately after the first regular term in each calendar year.
4. At the third regular meeting of the court it should make the

report mentioned in paragraph 1 of this letter, and, in addition thereto, make an exhibit showing the aggregate receipts and disbursements of each fund for each quarter and cause said exhibit to be posted at the court house door, and at, at least three other public places in the county.

The reports required of the commissioners court for the second and fourth regular meeting of said court are not required to be published or posted, but only required to be filed and recorded in the minutes of the Commissioners Court.

The purpose of this law is to inform the tax payers of the financial condition of the county, and all the reports herein mentioned should be recorded in the minutes of said court, as a part of the records of said county.

Yours truly,

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PUBLIC WEIGHER.

Vacancy in office to be filled by commissioners court.

AUSTIN, TEXAS, September 11, 1905.

*Judge Ewing Boyd, Cooper, Texas.*

Dear Sir: We are in receipt of yours of 8th instant, in which you ask the following questions:

1. "Can the Commissioners Court appoint a public weigher to fill a vacancy caused by the resignation of the elected weigher?"
2. "If the court cannot fill such vacancy by appointment, can a private person take the oath and give a bond as required by the amendment of the 29th Legislature?"
3. "If the vacancy cannot be filled by appointment, can more than one person qualify and weigh produce in such precinct?"

The statute providing for the appointment and election of public weighers, Acts of 26th Legislature, page 264, provides that the Commissioners Court of any county, when petitioned to do so by a majority of the qualified voters of any precinct in their county, praying for the appointment or election of public weighers for said precinct, shall appoint or order to be elected at the next general election, one or more suitable persons for public weigher of said precinct. The act further provides that all weighers shall hold their office for the term of two years and until their successors are appointed or elected, as the case may be. Under this act, the appointing power is given to the Commissioners Court until the next general election after the appointment is made, at which time a public weigher should be elected. We assume from your letter that the public weigher in question was one elected by the people at the last general election and now desires to tender his resignation as public weigher. This he has the right to do. Any public officer may resign at pleasure without the consent of the power which appointed him, with the exception that he must continue to perform the duties of the office until his successor is appointed or elected and qualified. See Throop on Public Officers, Paragraph 410; *Edwards vs. U. S.*, 103 U. S., 471.

Where the statute is silent on the subject, a resignation must be made through the appointing power, or if the office is elective, to the power authorized to call an election to fill the vacancy. The public weigher in question should tender his resignation to the commissioners court, and if his resignation is unqualified and unconditional, his office will become vacant on the acceptance thereof by the Commissioners Court.

Article 1541, Sayles Civil Statutes, in prescribing what officers may be appointed by the commissioners court in case of vacancy in office, does not mention public weighers. Neither do the Acts of the 29th Legislature, nor any other act regulating the powers and duties of public weighers prescribe who shall have the power of appointing in case of a vacancy in the office. The general rule is, however, that a power to elect or appoint to office, includes a power to fill vacancy therein. See Throop on Public Officers, section 436; *People v. Campbell*, 2 Cal., 135; *People v. Fitch*, 1 Cal., 519.

You are therefore, respectfully advised that a public weigher should tender his resignation to the commissioners court and said court has the authority to make an appointment to fill the vacancy.

In regard to the question of private persons weighing cotton and other produce, where there is a public weigher, will state that I gave a full opinion on this matter to the county attorney of your county some time ago. If you will confer with him I am sure he will show same to you.

You also ask if the public weigher would forfeit his office as trustee of the school by qualifying as public weigher, either under appointment or by tendering his bond and oath.

You are respectfully advised that he would not. The office of school trustee is not such a civil office of emolument as comes within the inhibition of the provisions of the Constitution, that no person shall hold two civil offices of emolument at the same time.

You also ask if it would be legal for a public weigher to represent a cotton firm in buying cotton in the same town.

You are respectfully advised that this would not be legal, it being in direct contravention of the statute.

Yours truly,

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OFFICES AND OFFICERS—POSTAGE, STATIONERY, ETC.—  
STATUTES CONSTRUED.

1. Authority of commissioners court to supply county officers with postage, stationery, etc.
2. Construction of certain provisions of auditor law.

AUSTIN, TEXAS, September 12, 1905.

*Hon. W. N. Wiggins, County Auditor, San Antonio, Texas.*

Dear Sir: I have carefully considered the question presented in your letter of the 9th inst. and reply as follows:

1. Your first question is: "It appears that no provision is made for some of the county officers, such as the tax collector, the county

attorney and the constables; not even offices, office furniture, books or stationery. The custom has been in this county to allow such things, including postage, to these as well as all other officers. Is there any law or authority for same?"

In the 18th Section of Article 5 of the Constitution, it is provided that the county commissioners court "shall exercise such powers and jurisdiction over all county business as is conferred by the Constitution and the laws of the State, or as may be hereafter described."

Construing this provision of the Constitution, Chief Justice Gaines, for the court, in the case of Mills County vs. Lampasas County, 90 Texas, 606, said:

"In our opinion, it is not true, as counsel for appellant county insists in his elaborate written argument, that the Constitution confers upon the commissioners court any general authority over the county business, but it merely gives them *such special* powers and jurisdiction over all county business, as is conferred by the Constitution itself and the laws of the State, or as might be thereafter prescribed. (Article 5, Section 18.) We had occasion to construe this question in the case of Bland vs. Orr, ante p. 492 (396 S. W. Rep. p. 558), and reached the conclusion that such courts could exercise *only* such powers as the Constitution itself, or the Legislature had *specifically* conferred upon them."

I take it that such courts had also such implied powers as are "incidental and necessary" to the execution of the expressed powers and the performance of the duties enjoined upon them (7 Amer. & Eng. Ency. of Law, pages 989, 991), but none other. They have *not* the "general control over the finances of a county, such as is ordinarily conferred upon the directors of a private corporation." Bland vs. Orr, 90 Texas, 496.

Unless the court is expressly, or by necessary implication, authorized to make the provision referred to for the officers named, I am of the opinion that it has not the authority to do so.

#### *As to Offices and Office Furniture.*

Under Article 918 of the Revised Statutes, it is the duty of the commissioners court to provide offices for the county officers named in Article 921, namely, the county judge, sheriff, clerks of the district and county courts, county treasurer, assessor of taxes and collector of taxes, county surveyor and county attorney! Reynolds vs. Tarrant County, 78 Texas, 291.

Justices of the peace and constables are not "county officers" within the meaning of that term as used in Article 918, and are not entitled to have a room supplied at the expense of the county. Reynolds vs. Tarrant County, supra.

But though the court is required to provide offices for all of the officers named in Article 821, only the county judge, the clerks of the district and county courts, the sheriff and the county treasurer, are entitled to have their offices furnished at the expense of the county. (Article 2475.) I have found no statute which expressly, or by implication, authorizes the court to supply any officer not



named in Article 2475 his necessary office furniture at the expense of the county.

Article 2475 of the Revised Statutes of 1895 is Article 2411 of Revised Statutes of 1879, as amended by Act of 1885. The basis of Article 2411 of Revised Statutes of 1879 was Chapter CLXIV of the Acts of 1876, an act entitled, "An Act to fix and regulate the fees of all officers of the State of Texas, and the several counties thereof."

Section 6, fixing the fees of the county judge, concludes:

"There shall be allowed to the county judge such books, stationery and office furniture as may be necessary for him in the discharge of the duties of his office and the same shall be paid for out of the county treasury on the order of the county commissioners court."

A similar provision was made for the district clerk (Section 8) and county clerk (Section 9), but none for the county attorney (Section 7), sheriff (Section 11), justices of the peace (Section 12), constables (Section 13), county treasurer (Section 15), surveyor (Section 16), hide and animal inspectors (Section 17), or notaries public (Section 18).

It is evident that the Legislature intended the allowance to the county judge, district clerk, and county clerk as a perquisite, in addition to the prescribed fees, and equally that the Legislature did not intend that any other county officer should receive such an allowance.

By Article 2411 of the Revised Statutes of 1879, sheriffs and county treasurers were likewise allowed such "office furniture as may be necessary for their offices," and by the Act of 1885, Article 2411 was amended to make a like provision for justices of the peace.

I do not find that the Legislature has authorized a similar provision for the assessor and collector of taxes, county attorney or county surveyor, or constable, and, therefore, conclude that the commissioners court is without authority to make it.

#### *As to Books and Stationery.*

It follows from what I have said that the commissioners court is not authorized to furnish books and stationery to any county officer for whom the Legislature has not provided such an allowance.

It is the duty of the court to allow such books and stationery "as may be necessary for their offices" to the county judge, district clerk, county clerk, sheriff, county treasurer and justices of the peace (Article 2475), to the assessor, (Article 5109), and to the auditor (Section 5 of county auditor law). Under Article 4075 the court must furnish to the county surveyor "the necessary books of record pertaining thereto."

I have not undertaken to collate all of the statutory provisions requiring the court to supply the officers of the county with all or any part of the books and stationery, or either, needed by them in the discharge of their duties.

Besides the general provisions referred to, there are doubtless specific provisions upon particular subjects, for example, the court is required by the election law to furnish certain supplies to desig-

nated officers. It is the duty of the auditor to determine in each case, as it arises, if the proposed expenditure is authorized by law. My opinion is that an expenditure for books, stationery, or either, for a county officer is proper only if authorized expressly by law, or if the authority is necessarily to be implied from some duty imposed, or power conferred upon the courts.

*As to Postage.*

When one is elected or appointed to and accepts a public office, he assumes and must perform all of the duties which the law attaches to that office. If the law allows an inadequate compensation—and I do not use “compensation” as synonymous with “salary,” but as including the sum intended for the officers’ personal services, and also any allowance intended for clerk hire, stationery, expenses, etc.—or none at all, the services must none the less be performed. Relief must be had through the legislative and not the judicial department.” *Hallman vs. Campbell*, 57 Texas, 54. L

The general rule in the United States is “that the rendition of the services of a public officer is to be deemed gratuitous, unless a compensation therefor is fixed by statute.” *Throop on Public Officers*, Section 446.

Section 44 of Article 3 of the Constitution, provides: “The Legislature shall provide by law for the compensation of all the officers servants, agents and public contractors not provided for in this Constitution.” “A failure of the Legislature to exercise the powers thus conferred can not clothe the courts with it.” *State vs. Moore*, 57 Texas, 320; see also, *Wharton County vs. Ahldeg*, 84 Texas, 15. The “duties, perquisites and fees of office” of the county clerk, for example, shall be prescribed by the Legislature.” Section 20, Article 5 of the Constitution.

Therefore, I am of the opinion that unless there can be found a statute entitling a county officer to an allowance for the expenses which he incurs in discharging the duties imposed upon him by law, it must be presumed that the Legislature intended that his statutory fees should constitute his entire compensation therefor. Merely because it is expedient, or even necessary, to an efficient discharge of these duties, a county officer would not, I am convinced, be entitled to an allowance for clerk hire, in the absence of legislative provision therefor. There is no difference in principle between an allowance for clerk hire and one for postage stamps.

I have already advised you that I do not understand the word “stationery” as used in Article 2475 and in Section 5 of the county auditor law, to include “postage.” A “stationer” is defined by Webster as “one who sells paper, pens, quills, ink, stamps, pencils, blank books and other articles used in writing,” and “stationery,” as “the articles usually sold by stationers, as paper, pens, inks, quills, blank books,” etc., This definition of stationery was approved in the case of *Harris County vs. Clark & Courts*, 14 Texas Civil Appeals, page 58. I do not understand the definition to include postage stamps.

Some stationers do, I presume, sell postage stamps. So do drug-

gists, but they are not, I imagine, for that reason to be classed as "drugs."

If you will refer to the appropriation bills passed by the Fifteenth Legislature (which enacted the fee bill of 1876), the Sixteenth Legislature (which adopted the Revised Statutes of 1879), the Nineteenth Legislature (which amended Article 2411 of R. S. 1879), the Twenty-fourth Legislature (which adopted the Revised Statutes of 1895), and the Twenty-ninth Legislature (which passed the county auditor's law), you will find that those Legislatures made provision for postage for the various departments of government, either by a specific appropriation therefor, or by an appropriation for stationery and postage.

Subdivision g of Section 37 of the school law of 1893 (page 192 of General Laws, 1893), after fixing the salary of the county judge who serves as ex-officio county superintendent of public instruction, provided that "ten per cent on the salary thus allowed shall be added for postage, stationery and printing expenses connected with the administration of the school law."

This is no longer the law, but I refer to it as showing that the Legislature understands postage to be something different from stationery and not included within the meaning of that word.

Also, as no similar provision was made for the county superintendent and as the provision for the ex-officio county superintendent has been repealed (Section 10, Chapter 5, Special Session of 1897; Section 44, Chapter 124, Regular Session, 1905), the Legislature manifestly intended that the county superintendent should not be entitled to an allowance for any of these purposes, and that the county judge, as ex-officio county superintendent, should no longer receive the allowance made by the Act of 1893.

I find, therefore, no express authority to the court to allow postage to county officers, nor do I find any duty imposed or power conferred upon the court to the execution or performance of which it is so necessary to allow postage to the county officers, as such, as that the authority to do so may be implied.

It may frequently occur that the court, in the discharge of *its own duties*, may need to use postage. For example, county bonds must be submitted to the Attorney General for his examination and approval. The county may send them by mail or express, and clearly the postage in the one case or the express charges in the other would be a proper charge against the county. But I am convinced that this implied power is restricted to the necessities of the court *as a court*, in discharging its duties, or performing its powers.

Take, for example, the case of the county clerk. He is required to perform numerous duties, in the discharge of some of which he needs to use the mails. He must make certain reports to the Attorney General, to the Department of Public Health, and Vital Statistics, etc. But I can find no duty imposed upon *the commissioners court* in such matters. Consequently, the postage is not necessary to the discharge of any duty resting upon the court, but is required by the clerk to enable him to perform a duty personal to himself. The Legislature having made no allowance to the clerk for postage, other than his prescribed fees, the commissioners court can not do

so. It would be equivalent to allowing him a compensation in excess of that provided by law. The court clearly can not do this.

If it should be held that the commissioners court has the implied power (for no express power exists) to allow, in its discretion, to the tax collector, for example, stamps for the delivery through the mails of five hundred tax notices, then if the collector should elect to deliver the notices throughout the county by a messenger, it would follow that the court, in its discretion could pay the wages of the messenger and his expenses for conveyance, etc. I am sure that no commissioners court in Texas would hesitate in declining to authorize or pay for such services.

2. Your second question is: "Is the commissioners court authorized to compensate the committee appointed by the county judge under Article 4931 to examine animals reported to be diseased?"

I think not, Article 4934 provides for compensation to the owner of the animals condemned and to the sheriff or constable killing, burning or burying same, but as I find no provision for compensation to the committee, I conclude they are not entitled to any. ✓

3. You ask "what an autopsy is in the meaning of the law." Autopsy is defined in 4 Cyc., 1075, as: "The dissection of a dead body for the purpose of inquiring into the cause of death." I quote from *Sudduth vs. Travelers' Insurance Company*, 106 Federal Reporter, 823: "Autopsy" is defined to be an examination of the dead body by dissection. 'Dissection' is the cutting apart of a dead body, or the cutting of it into pieces."

4. I have no doubt of the authority of the court to remove dead animals from the county roads and to pay the expenses necessarily incurred in so doing.

5. The reports required by Article 840, Revised Statutes, 1895, must be made to the commissioners court and after being entered on the financial ledger "shall be filed in the county clerk's office. The Article is quite plain and I find nothing in the county auditor law changing these provisions of the article. Section 6 of the county auditor law requires the auditor to examine and report on these reports. The auditor "shall relieve the county clerk of keeping the financial ledger." (Section 9.) ✓

6. Section 15 of the county auditor law requires that "all claims, bills and accounts against the county must be filed in ample time for the auditor to examine and approve same before the meeting of the commissioners court." The section does not require the claim to be filed with the auditor. They should be presented to the commissioners court by filing them with the county clerk, who is ex-officio clerk of that court. I do not find that the auditor has anything to do with the claim, bills, etc., after they have been paid by the court.

7. Section 15 concludes:

"If deemed necessary all such accounts must be verified by affidavit touching the correctness of same before some person authorized to administer oaths, and the auditor is hereby authorized to issue oaths."

The auditor is therefore authorized to administer all oaths which any officer "authorized to administer oaths" can administer.

I note that you will send a copy of this law to each of the other auditors. I hope you will do so.

I return herewith clipping you sent me.

Yours truly,

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### ELECTIONS—VOTERS—CITY POLL TAX.

Persons not entitled to vote in city election unless city poll tax has been paid prior to February 1st.

Article 617c—Who is entitled to vote thereunder.

Resident property taxpayer—What is.

AUSTIN, TEXAS, September 20, 1905.

*Messrs. S. A. Lindsey, County Judge, and R. R. Dorough, City Attorney, Tyler, Texas.*

Gentlemen: We are in receipt of your communication making inquiries as to the qualification of voters in the election soon to be held in your city, to determine whether or not the incorporation shall be abolished. You desire to know, first, if a person who has paid his poll tax (State and county) but who has failed to pay his city poll tax, is entitled to vote, being otherwise qualified.

You are respectfully advised that he is not. Before a party is entitled to vote, he must have paid, prior to the first day of February, 1905, every poll tax to which he is subject under the Constitution and laws of the State, or the ordinances of any city or town, and a failure to pay a city poll tax within the time prescribed by law is as much a disqualification of a voter as the failure to pay the State and county poll tax within said time.

You also ask for a construction of Article 617c prescribing the qualification of voters in elections of the character named. The article provides that all persons who are legally qualified voters of the State and county in which such election is ordered, and are resident property taxpayers in the city or town where such election is to be held, as shown by the last assessment rolls of such city or town, shall be entitled to vote at such election. Article 3942 contains the same provision as to qualification of voters in elections in common school districts, relating to tax matters, and Article 3943 provides that if any person is challenged as a voter in elections of this character, he may make oath that he is a qualified voter and that he is a resident property taxpayer, and be entitled to vote. The provisions of Article 3943, however, are not continued in Article 617c, or any other article regulating the qualification of voters in elections held for determining whether or not an incorporation of a city shall be abolished. The Legislature has the authority to prescribe any qualification of voters not prescribed by the Constitution, and we take it that the qualifications prescribed in Article 617c are not in conflict with, or prohibited by the Constitution of this State. The qualification is that the party must be a resident property taxpayer in the city, as shown by the last assessment roll of said city. And unless a party's name appears on the last approved assessment roll

of the city as a property taxpayer of the city, he is not entitled to vote, although he might be otherwise qualified. The words "As shown by the last assessment roll of such city" should be construed to mean the "last approved assessment roll," and if the assessment roll for the year 1905 has not been approved, the assessment roll last approved; that is, for the year 1904, should be the guide of the election officers in determining as to whether or not a party is entitled to vote.

While, under Article 3942, the Court of Civil Appeals held that it was not the intention of the Legislature to restrict the right to vote to those only whose names appear on the last assessment rolls of the county, this construction was given to the Article by virtue of the provisions of Article 3943, which provided that if a voter was challenged and made oath that he was a resident-property taxpayer he should be entitled to vote. There is no such provision as to the qualification prescribed in Article 617c, and consequently, a party is not entitled to vote, although he is a property taxpayer of the city, unless his name appears upon the last approved assessment rolls of the city.

You also ask if the words "property taxpayers" mean property which has been rendered, or does a person have to pay the tax assessed against him before he is entitled to vote.

The provision is that it must appear from the last assessment roll of the city that he is a property taxpayer, and if his name appears on a roll as a property taxpayer, it is not necessary, and the election judges would have no authority to inquire as to whether or not the tax had been paid. A property taxpayer, within the meaning of the act, is one who owns property within the limits of the city, as shown by the assessment roll, and it is not necessary that the tax assessed against him shall have been paid.

See *Hendrick vs. Culberson*, 56 S. W. Rep., 616.

*Hillman vs. Faison*, 57 S. W. Rep., 920.

Yours truly,

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#### PURE FOOD LAW—INSPECTION TAX.

Inspection tax must be paid into State Treasury, and paid out only on warrant of Comptroller.  
Tags must be purchased from State contractor.

AUSTIN, TEXAS, September 22, 1905.

*Dr. John A. Craig, College Station, Texas.*

Dear Sir: Mr. Pittock has presented to this department for an opinion the provision of Chapter 108, Acts of the Twenty-ninth Legislature, relating to handling of the funds received under said Chapter.

Section 5 provides that the amount of inspection tax and penalties received by said director shall be paid into the State Treasury, and that so much of the inspection tax and penalties collected under the act shall be paid by the State Treasurer to the Treasurer of the Texas Agricultural and Mechanical College as the director of the

Texas Agricultural Experiment Station may show by his bill has been expended in performing duties required by this act.

The question presented to us, is, whether or not you would have the authority to expend any part of this inspection tax prior to its payment into the Treasury, rendering an account of same, and paying the balance above expenditures into the Treasury.

After a careful examination of the matter, we have reached the conclusion that this can not be done, but that you will be required to pay the full amount into the Treasury and keep an account of the amount expended in performing the duties required by the act, which will be paid to you by the State Treasurer upon the warrant of the Comptroller.

This will require the Commissioner and also the State Treasurer to open another account with the Texas Agricultural and Mechanical College.

The amount received under this act constituted a special fund to be expended only in performing duties required by the act. All moneys received under the act should be paid into the State Treasury to the credit of this special fund. The director of the State Agricultural Experiment Station must show by his bill the amount which has been expended in performing the duties required by the act, which amount will be paid to him by the State Treasurer upon the warrant or certificate of the Comptroller.

As to the amount already expended, will state that it is our opinion that you will be required to pay into the State Treasury the full amount collected since the law went into effect and secure his receipt for the same, and at the time this is done, present to the Comptroller an itemized statement of the amount which has been expended under the act, on which statement the Comptroller will be authorized to issue you warrant to cover this amount, which will be immediately paid back to you under the warrant. This will have to be done in order for the Comptroller and State Treasurer to open the account with the Texas Agricultural and Mechanical College in proper and in legal shape.

The question has also been presented to this department as to whether or not you will be required to purchase tags already printed, and if not, as to whether or not you will be required to purchase the blank tags from the parties who have contracted with the State to furnish stationery. As to the first portion of this inquiry, you are advised that it is our opinion that it is not obligatory upon you to purchase these tags already printed. You may purchase blank tags and use stamps as you have heretofore done. We believe, however, that the law will require that you purchase your blank tags from the party who is under contract with the State to furnish stationery to all of its departments, tags being articles ordinarily sold by stationers, and would, therefore, come within the meaning of the term "stationery," such as the law requires shall be furnished to all the departments of the State by persons with whom the State has made contract.

We have furnished the Comptroller and State Treasurer a copy of this letter.

Yours truly,

STATUTES CONSTRUED—TAXATION—DELINQUENT  
TAXES.

Construction of Section 6, Chapter 130, Acts 1905, prescribing compensation of contractor for collecting delinquent taxes.

AUSTIN, TEXAS, September 22, 1905.

*Hon. J. W. Stephens, Comptroller of Public Accounts, Capitol.*

Dear Sir: I have examined the contract proposed to be made between the commissioners court of Travis County of the one part, and D. B. Gracy, of the other, for the collection of delinquent taxes in Travis County, in which contract it is desired that the State Comptroller shall join.

I am of the opinion that the compensation contemplated to be allowed to the contractor for the services provided for in the contract exceeds that authorized by Section 6 of Chapter 130 of the General Laws of the Twenty-ninth Legislature.

In the first section of the proposed contract, the State of Texas and Travis County "obligate themselves to pay to the said D. B. Gracy 25 per cent of all State and county taxes, penalties and interest actually collected or caused to be collected by him and pay (paid) to the collector of taxes of Travis County, Texas," and it is agreed that Gracy "shall be entitled to and shall receive his commission of 25 per cent (of the amounts) collected or caused to be collected by him in any and all cases where a suit or suits are instituted or not."

Section 6 of the act authorizes the commissioners court to contract with some person to enforce the collection of delinquent taxes, or to make up the list referred to in the preceding sections of the act and to enforce collection of taxes thereon. The court may, I take it, contract with one person to perform both of these services. The Comptroller is authorized to join in such a contract.

The contractor's compensation must be "a per cent of the taxes, penalty and interest actually collected and paid to the collector of taxes."

The compensation "shall not exceed ten per cent, *except* in case of *absolute necessity* to employ an attorney to push the filing and prosecution of tax suits, and to pay for report of an abstract company as to the owner of property assessed as unknown or unrendered, and as to the holder of any liens against the same, *in which case* fifteen per cent additional may be allowed."

The section makes it the duty of the county attorney of the county (when there is one) "to actively *assist* the person with whom the contract is made, by filing and pushing to a speedy conclusion *all necessary suits* for the collection of delinquent taxes under any contract."

Should the county attorney fail or refuse "to prosecute *such suits*, he shall not be entitled to any fees from *such suits*." The concluding provision of the section is:

"Where any district or county attorney fails or refuses to bring *these suits* when requested to do so by the commissioners court, or by the person having a contract herein provided for, *then* the contractor shall be authorized to *employ some other* attorney to file



*these suits* in the name of the State, in the same manner provided by law now to enforce the collection of delinquent taxes."

It is clear that the contractor, for a compensation of not exceeding ten per cent, must enforce collection of the taxes by suit, when necessary, through the county attorney. The injunction upon the county attorney to "assist" the contractor by filing and prosecuting "all necessary suits," shows that the Legislature intended that the contractor should, when necessary institute suit for the taxes, for a compensation of not exceeding ten per cent of the taxes actually collected.

It is only when the county attorney upon request, "fails or refuses to bring *these suits*"—that is, "*all necessary suits* for the collection of delinquent taxes under any contract"—that the contractor "shall be authorized to employ some other attorney to bring *these suits*."

Therefore, a necessity can not arise for the employment of an attorney "to push the filing and prosecution of tax suits" unless the county attorney, when requested to do so, "fails or refuses to bring these suits." The commissioners court in making a contract for the collection of these taxes, is not authorized to assume that the county attorney will disregard his duty and refuse, when requested to do so, to institute and prosecute "all necessary suits."

I am, therefore, of the opinion that the contractor, for a compensation of *not exceeding* 10 per cent, must undertake to enforce collection of the taxes and to institute and prosecute, through the county attorney, all necessary suits for the collection of such taxes.

If, in performing such a contract, the contractor requests the county attorney to institute "these suits" and that officer fails or refuses to do so, then if the commissioners court finds "an absolute necessity" to exist for the employment of "an attorney to push the filing and prosecution of tax suits, and to pay for report of an abstract company," etc., the court may make a further contract to pay the contractor fifteen per cent additional upon the taxes collected as a result of suits instituted by the attorney employed by the contractor. But, as I understand the law, even under such a contract, the contractor's compensation can not exceed 10 per cent except upon taxes collected as a result of a *suit* filed by the attorney employed by him. That is, though he may, under such a contract, have employed an attorney to institute "all necessary suits," the contractor could not receive exceeding 10 per cent of taxes thereafter paid *before suit*.

Therefore, I can not advise you to join in the proposed contract, which, together with the other papers submitted in connection therewith, I return herewith.

Yours very truly,

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#### CONSTRUCTION OF LAWS—JURY COMMISSIONERS AND JURIES—SPECIAL VENIRES.

Construction of chapter 14, page 17, General Laws 1905, in regard to selecting special venire in capital cases.

AUSTIN, TEXAS, September 22, 1905.

*Hon. J. M. Ralston, District Attorney, Bryan, Texas.*

Dear Sir: We are in receipt of yours of the 21st asking for a construction of Chapter 14 of the Acts of the Twenty-ninth Legislature relating to the method of selecting special venires in capital cases.

You state that the law was not in effect at the last term of the court, and you desire to know how to proceed to select a special venire in a capital case to be tried at this term of the court.

The provision of the act is, that the jury commissioners shall select one man from every one hundred of population in the county, or a greater or less number as directed by the court, and these shall constitute a special venire list from which shall be drawn the names of those who shall answer summons to the special venire facias after the petit jurors for the term have been drawn on any venire one time during such term.

only one capital case to be tried during the term, or if there were enough of the petit jurors drawn for the term to try all capital cases during the term without any juror being required to answer summons to more than one special venire facias. If these circumstances exist the special venire in the capital case should be drawn as it has heretofore been drawn—from the jury for the term, the law contemplating that each of the petit jurors for the term may be required to answer summons to one special venire facias during the term, and that after each juror has answered to one summons, the list selected by the jury commissioners shall be used in forming the special venire for any other capital case tried during the term. If, however, there is more than one capital case to be tried, or if there is a sufficient number of capital cases to be tried to require each petit juror for the term to answer to more than one special venire facias, the question arises as to how the men shall be secured to answer special venire in the other cases.

The law not being in effect at the time the jury commissioners at the last term of the court selected the jury for this term, of course they were not required to select the special venire list as provided for under the act.

Under these circumstances it is our opinion that the court should proceed under Article 648 of the Code of Criminal Procedure as though no jurors had been selected by the jury commissioners, or as though there had not been a sufficient number selected to make the number required for the special venire case to be tried after the jury for the term has been exhausted as above set out.

Under this Article the court would have the authority to order the sheriff to summon a sufficient number of good and intelligent citizens from the body of the county to make up the number required by the special venire.

It is a well settled rule under the old law, which in our judgment, has not been altogether repealed by this law, that when the jury commissioners have failed to select enough persons for the jury service for the term or for the week the court is authorized to order the requisite number to be summoned from the body of the county.

Smith vs. State, 21 App., 277.

Thompson vs. State, 44 S. W. Rep., 837

Castro vs. State, 46 S. W. Rep., 239.

It was also a well settled principle, and is now, that if a special venire has been exhausted the court can order talesmen from the body of the county.

See Sanches vs. State, 39 App., 389.

Weatherby vs. State, 29 App., 278.

Article 3150 of Sayles' Civil Statutes provides that if from any cause the jury commissioners should not be appointed at the time prescribed, or should fail to select jurors as is required, the court shall forthwith proceed to supply a sufficient number of jurors for the term, and may, when it is deemed necessary, appoint commissioners for that purpose. The court has power to have a venire summoned through the sheriff when the jury commissioners have not been appointed.

See Smith vs. Bates, 28 S. W., 64.

You are, therefore, respectfully advised that it is our construction of the act, under the circumstances submitted in your letter, that after each juror for the term has answered one special venire facias, and there are other capital cases to be tried, the court should order the sheriff to summon from the body of the county such a number of men as in his judgment may be deemed necessary, which men shall constitute the special venire list from which the venire in the respective cases shall be selected as provided for in Article 647a, Chapter 14 of the Twenty-ninth Legislature.

Should the court deem it expedient to do so, he would have the authority under Article 3150, Sayles' Civil Statutes, to appoint jury commissioners to select this list instead of requiring the sheriff to do the selecting and summoning. This, we think, however, is within his discretion.

Yours truly,

#### STATUTES CONSTRUED—AUDITOR LAW.

Commissioners court can not make a contract for which bids are required, by accepting, after the auditor law became effective, a bid received before.

AUSTIN, TEXAS, September 23, 1905.

*Hon. John M. Murch, County Auditor, Galveston, Texas.*

Dear Sir: I understand the question submitted by you to be:

(a) Is the commissioners court authorized, under Section 17 of the county auditor law, to award a contract upon a bid received *before*, but not accepted until *after*, that law became effective?

(b) Is the question affected by the fact that the matter culminating in a contract, was referred to the county judge with power to act *before* the law became effective, the judge, however, not having acted in the matter until after the law was in force?

I answer both questions in the negative.

Section 17 of the county auditor law requires certain contracts to be awarded by the commissioners court, upon competitive bids, to

the party who, in the judgment of the court, has submitted the lowest and best bid. Such contracts are not authorized to be made in another manner than that prescribed by this section.

Though the court received bids before the law took effect, and though the matter had been referred to the county judge with power to act, the court not having accepted any bid and the county judge not having acted *before* the county auditor law became operative, the court in making contracts coming under Section 17 of that law, must be governed by its provisions.

When the law took effect, there was no contract, nor any obligation upon the county. Therefore, in undertaking *now* to make such a contract, the court must look to the existing law to ascertain its powers and duties.

Yours truly,

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#### RAILROADS—RIGHT OF WAY—SCHOOL LANDS.

A railroad company is entitled to free right of way over lands surveyed and patented to another railroad company, by donation from the State, the last named company having sold and conveyed such lands to an individual.

Such railroad company not entitled to free right of way over alternate school sections which have been sold and conveyed to private parties.

AUSTIN, TEXAS, September 28, 1905.

*Hon. W. B. Powell, Jasper, Texas.*

Dear Sir: I am in receipt of your letter of the 22nd instant, and while the questions asked by you are perhaps not strictly such as I am required by law to answer officially, nevertheless, as they are propounded by you, I take pleasure in complying with your request.

You quote Article 4423, Revised Statutes of 1895, as follows:

“Every such corporation (railroad) shall have the right of way for its line of road through and over any lands belonging to this State, and to use any earth, timber, stone or other material upon any such land necessary to the construction and operation of its road through or over said land.”

You also quote Article 4474 of said Revised Statutes, as follows:

“The right of way is hereby reserved to any railroad companies incorporated by the laws of this State, or that may hereafter be so incorporated, to the extent of 100 feet on each side of said road, or roads that cross over, or extend through any lands granted, or that may be hereafter granted to any railroad company by the Legislature, with the right to take from the lands so granted such stone, timber, and earth, as such road may need in the construction of its line of road.”

Then you say:

“Construing the above provisions together, I shall be much obliged if you will advise me whether or not, in your opinion, a railroad company would be entitled to free right of way over lands surveyed and patented to another railroad company, by donation from the State, the last named company having sold and conveyed such lands

to a private individual; and also whether or not such railroad company would be entitled to free right of way over the alternate school sections located and surveyed at the same time, but since purchased by a private individual from the State? In other words, do the provisions of the statute follow and apply to either of the classes of lands above mentioned, after it has passed into the hands of private parties?"

I answer your first question affirmatively, and your second question negatively.

In other words, Article 4474 should, in my opinion, be construed as in effect incorporating in and upon all grants of land made by the State after this statute took effect, and during its life, to any and all railroad companies incorporated by the laws of this State, a restriction or limitation in favor of any and all other railroad companies incorporated or to be incorporated, by the laws of this State, thereby permitting and authorizing them to designate and occupy as a right of way over and across such land, a strip 200 feet in width; and this right, I think, follows the land and exists in favor of such other railroad company, or companies, even after the railroad company, to which the land was originally granted by the Legislature, has sold the land to a private individual.

But the right of a railroad company under said Article 4423 to a right of way over lands belonging to this State does not follow the land, but exists and may be exercised by a railroad company so incorporated by the laws of this State only so long as the land is owned by the State, and the right ceases and terminates upon direct sale of such land by the State to a private individual.

Hoping that this will serve to give you my views on the question presented by you, I am,

Truly yours,

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#### COMMISSIONERS COURT.

It is the duty of the commissioners court to provide suitable offices for county officials at the expense of the county. Said officers are public officers, and it is the duty of the commissioners court to provide necessary fuel to keep them comfortable in winter.

AUSTIN, TEXAS, October 14, 1905.

*Mr. W. F. Ross, Commissioner, Pecan Gap, Texas.*

Dear Sir: We are in receipt of yours of the 11th inst., in which you desire to know whether or not the county has to buy the county officer's coal and wood for their different offices.

You are respectfully advised that Article 819 provides that it shall be the duty of the county commissioners court of each county \* \* \* to provide a county court house \* \* \* for the county, and offices for the county officers at such county site, and keep same in good repair.

Article 500, Penal Code, defines court houses and other buildings held for public use by any department or branch of government, State, county or municipal, to be a public building. The officers

therein, while provided specifically for the various officers are, generally speaking, public offices; and in providing a court house it is also the duty of the commissioners court to keep same comfortable in the winter time, not specially for the officers domiciled therein, but also for the use of the public who may have business to transact there.

Article 2475, Revised Statutes, among other things, provides that "suitable offices" shall also be provided by the commissioners court for said officers "at the expense" of the county.

It is the opinion of this department that the word "suitable" embraces the word "comfortable" as well as the term "commodious," and that it is the duty of the commissioners court to provide the necessary fuel to keep such offices as the law requires them to provide for the use of the county officers, comfortable.

Yours very truly,

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DELINQUENT TAXES—COUNTY ATTORNEY.

Compensation of county attorney for collection of delinquent taxes.

AUSTIN, TEXAS, October 18, 1905.

*Mr. M. S. Ujffly, Galveston, Texas.*

Dear Sir: A reply to your letter of the 11th instant has been unavoidably delayed because of the injunction suits involving the constitutionality of what is known as the Love bill, which has just been disposed of.

Chapter 103 of the Acts of 1897, page 132, provides for the collection of delinquent taxes. This act will be found in Sayles' Texas Civil Statutes, as Article 5232a to 5232p.

Without discussing the act at any length, it provides for the compilation of a delinquent tax record showing the lands and lots on which taxes are delinquent.

It is the duty of the county attorney to represent the State and county in all suits against delinquent taxpayers, provided for by this act. After the suit has been instituted, and before judgment, the delinquent "may pay the amount of the tax, interest, penalties and all accrued costs to the county collector during the pendency of such suit." In such case, the county attorney's compensation is \$2 for the first tract and \$1 each additional tract embraced in such suit. If the suit proceeds to judgment, then the county attorney's compensation is \$3 for the first tract, in one suit, and \$1 for each additional tract, if more than one tract is embraced in the same suit. If the commissioners court direct the county attorney to enforce the collection of taxes delinquent upon an assessment of personal property only, then, I think that under Article 297 of the Revised Statutes, the county attorney would be entitled, as compensation for the collection of such taxes as he may collect by suit, whether or not the suit proceeds to final judgment, to ten per cent upon the first one thousand dollars collected in any one case, and five per cent on all sums over one thousand dollars.

The county attorney's compensation for the collection of taxes, is therefore, as follows:

1. If a suit is filed upon delinquent tax record and the suit proceeds to judgment, he will receive \$3, if there is but one tract embraced in the suit, or, if there is more than one tract, then \$3 for the first and \$1 for each additional tract, to be taxed as costs in the suit.

See Article 5232i.

2. If after suit is filed, and before judgment, the delinquent pays the amount of the tax, interest, penalties, and all accrued costs, the county attorney will receive \$2 if there is but one tract embraced in the suit, or, if more than one, then \$2 for the first and \$1 for each additional tract. As above stated, this applies only to suits for the enforcement of taxes upon real estate under the provisions of Article 5232a et seq., above referred to. For the collection of such taxes without suit, the county attorney is entitled to no compensation whatever.

3. For the collection by suit of taxes delinquent upon an assessment of personal property only, the county attorney is entitled to ten per cent of the first one thousand dollars collected in any one case and five per cent on all sums in excess thereof, whether the taxes are collected during the pendency of the suit and before judgment, or after judgment. But he is not entitled to any compensation for the collection of these taxes if collected without suit.

Yours truly,

#### FEES—FEE BILL—TRANSCRIBING INDEXES.

For transcribing, comparing and certifying indexes to civil minutes and execution dockets of district court, the clerk is entitled to compensation at the rate of 15 cents per 100 words. Such compensation must be included in estimating the clerk's maximum and excess fees under the act of June 16, 1897 (Chap. 5, p. 5, First Called Session).

AUSTIN, TEXAS, October 19, 1905.

*Hon. James P. Hart, District Clerk, Austin, Texas.*

Dear Sir: I understand the facts and the questions which you have presented to this department to be these:

The commissioners court of Travis County, finding the indexes to the civil minutes and execution dockets of the district courts to be in a defaced, worn and dilapidated condition, directed you, as district clerk of the county, to transcribe them, which you did. You "made out and presented to said commissioners court accounts for said service in so transcribing said indexes," (I am quoting from your letter), "at the rate of 15 cents per one hundred words, as provided in Article 4593, Revised Statutes, 1895," which accounts were approved and paid.

You desire to know:

1. If you were entitled to compensation for this service at the rate of 15 cents per one hundred words; and
2. Must this compensation be included in estimating your maxi-

imum fees under the Act of June 16, 1897 (Chapter 5, page 5, First Called Session of the Twenty-fifth Legislature).

You are entitled to be compensated at the rate of 15 cents per one hundred words, but *not* under Article 4593. This article fixes the compensation for the service required of the *county clerk* by Article 4590. (See Act of April 18, 1879, Chapter 99 p. 105, Acts Sixteenth Legislature.)

The Act of March 12, 1901, Chapter 21, p. 24, Acts Twenty-seventh Legislature, provided that for "transcribing, comparing and verifying record books of his office" the district clerk should receive 15 cents for each one hundred words.

Section 3 of this act is: "But nothing in this act shall be construed as repealing the maximum fixed by existing law upon the total compensation allowed to district clerks."

Therefore, I advise you that you were entitled to be compensated for the service rendered at the rate of 15 cents per one hundred words and that this compensation must be included in estimating your maximum fees under the Act of June 16, 1897 (Chapter 5, p. 5, First Called Session, Twenty-fifth Legislature).

I have not overlooked the fact that the caption of the Act of 1901 is: "An act to regulate and define the fees of the clerks of the district courts of the State of Texas in *civil cases*," but I understand that to mean no more than that the Legislature gave notice—which is the sole purpose of a caption—that it intended by the act to fix the fees of the district clerks for certain services not required of them in the execution of the criminal laws of the State.

Transcribing record books, issuing licenses to attorneys at law, filing and recording declarations of intention to become citizens, and issuing certificates of naturalization (for which services the clerk's compensation was fixed by this act) are, as your attorneys suggest, not "civil cases" or services rendered in "civil cases," if by "civil cases" is meant suits between two or more persons in the ordinary course of law. To argue that it does mean this, however, is but to contend that the provisions of the act fixing fees for these services are inoperative because not embraced within the purpose of the act as declared by its caption.

I do not think such a construction would be adopted by our courts. But if the act of 1901 does not allow the clerk compensation for the services required of him by Article 4589 at the rate of 15 cents per one hundred words, then he is entitled to but 10 cents per one hundred words under Article 2453, Revised Statutes, 1895.

In either event this compensation is "official fees within the meaning of the fee bill" for which you are required to account (*Tarrant County vs. Butler*, 10 Texas Court Reporter, p. 164). Construing Article 2495c of Sayles' Civil Statutes (which is Section 10 of the Act of June 16, 1897), the Supreme Court, in the case of *Ellis County vs. Thompson*, 95 Texas, at page 29, said:

"The phrase 'fees of all kinds' embraces every kind of compensation allowed by law to a clerk of the county court unless excepted by some provision of the statute \* \* \*. The exemptions are so definite, that, by implication, all fees not mentioned in the exceptions



are excluded therefrom and thereby included within the requirements of the act."

Section 15 of the act authorizes the commissioners court to allow the district clerk compensation for ex-officio services "not to be included in estimating the maximum provided for" in the act, but it is too clear for argument that the court can not allow the district clerk compensation for a service for which the Legislature has not provided that he shall be paid, nor can it pay him more or require him to accept less, than the fee fixed by the Legislature for a designated service. The clerk's fee for the service required of him by Article 4589, which was 4285 in the Revised Statutes of 1879, was fixed at 10 cents per one hundred words by Article 2389 of the Revised Statutes of 1879, as amended by the Act of April 14, 1879 (Chapter 81, p. 90, Acts of the Sixteenth Legislature), and remained unchanged (see Act of May 11, 1893, Chapter 115, p. 170, Acts Twenty-third Legislature; Article 2453, Revised Statutes, 1895; Act June 16, 1897, Chapter 5, p. 5, Special Session Twenty-fifth Legislature) until increased to 15 cents per one hundred words by the Act of March 12, 1901.

Your attorneys call attention to Article 2453 of the Revised Statutes of 1895, which is:

"The clerk of the district court shall receive in addition to the fees herein allowed, for the care and preservation of the records of his office, keeping the necessary indexes and other labor of the like class, to be paid out of the county treasury on the order of the commissioners court, such sum as said commissioners court shall determine."

This is Article 2392 of the Revised Statutes of 1879, as amended by the Act of April 14, 1879, the same act by which the clerk's fees for "*transcribing, comparing and verifying* record books of his office" was fixed at 10 cents per one hundred words.

It is obvious that in allowing the clerk such compensation as the commissioners court shall determine for "*the care and preservation of the records of his office*" and "*keeping the necessary indexes*" the Legislature intended to provide compensation for a different service than that of *transcribing* records" which have become "defaced, worn or in any condition *endangering their preservation* in a safe and legible form," which service was first required of the district clerk by Article 4285 of the Revised Statutes of 1879, adopted by the same Legislature which passed the Act of April 14, 1879.

The length of this letter is not due to any doubt of the correct construction of the Act of March 12, 1901, but, in view of the insistence with which your attorneys seek to support a different construction, I thought it proper to discuss the several propositions which they have asserted.

I return herewith the opinions of Messrs. Walton & Kemp.

Yours truly,

## HABEAS CORPUS—PEACE BOND.

AUSTIN, TEXAS, October 25, 1905.

*Hon. Sam C. Lowrey, County Attorney, La Grange, Texas.*

Dear Sir: We are in receipt of yours of the 23rd instant in which you state:

1. Under Articles 114 and 115 a party is placed under bond to keep the peace.
2. Can the accused refuse to give the peace bond and appeal to the county court?
3. If appeal to the county court is proper, must the accused give an appeal bond in double the amount of peace bond required?
4. If the accused could not appeal to the county court, can he apply for a writ of habeas corpus?

You are respectfully advised that Title 3, Chapter 3, Code of Criminal Procedure, relates to proceedings before magistrates for the purpose of preventing offenses; that the term "magistrate" includes a justice of the peace, sitting as a magistrate, county and district judges, or of the judges of the higher courts.

The remedy for the prevention of offenses, if the magistrate be satisfied that there is a just reason to apprehend that the offense was intended to be committed, or that the threat was seriously made, is, that he shall make an order that the accused enter into bond in such sum as may in his discretion require, conditioned that he will not permit such offense, and that he will keep the peace toward the person threatened or about to be injured, and toward all other for one year from the date of such bond.

If the defendant had the right of appeal from such decision he could thereby defeat the purpose and intention of the law, and, pending the appeal, commit the offense sought to be prevented.

It is, therefore, our opinion that if the magistrate enters a judgment as provided in Article 115, Code of Criminal Procedure, that no appeal can be taken from such judgment, and that a writ of habeas corpus is the proper remedy, should the defendant feel that he is unjustly restrained of his liberty.

Yours truly,

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SCHOOL LAND—SALE AND AWARD—VACATION OF OFFICE.

Under new school land law (1905), sale dates from date of successful applicant's bid; has 90 days from date of award in which to settle on land so awarded, and thirty days after settlement in which to file affidavit that he has so settled upon said land. A person holding the office of sheriff of one county, and who has been awarded land in another county, if he makes settlement in said other county, will have to vacate his office as sheriff.

AUSTIN, TEXAS, November 2, 1905.

*Mr. Henry Mills, Sheriff and Tax Collector, El Dorado, Texas.*

Dear Sir: We have your letter of October 25th in which you say: "I have been awarded four sections of school land in an adjoining

county, and I received notice of my awards about September 28th, and my award will date September 2nd. I am sheriff and tax collector of this county and want to hold the office as long as possible. Now please tell me, under the existing facts, how long I can hold my office and make my settlement on the land. Can I make my settlement and then wait thirty days more to make affidavit to the fact of my settlement? And does the 90 days in which to make settlement mean from the date of award or from date of notice of award? And after the full time expires from me to go on my land, can I hold my office any longer?"

In reply I beg to say:

1. Section 4 of Acts of the Twenty-ninth Legislature, page 162, governing the sale of public school lands, provides:

"All sales shall date from the day the successful applicant's application was filed in the Land Office. The applicant shall have 90 days from the date of the acceptance of his application within which to actually settle upon the land so purchased and he shall, within thirty days after the expiration of such 90 days given within which to make settlement, file in the Land Office his affidavit that he has in good faith actually in person settled upon the land purchased by him."

You will therefore have 90 days from date of award in which to actually settle upon the land so purchased by you, and an additional thirty days after the expiration of said 90 days, or in other words, 120 days from the date of the award within which to make the affidavit so required by law.

2. Section 14 of Article 16 of the Constitution of Texas, provides:

"All civil officers shall reside within the State and all district or county officers within their district or counties, and shall keep their offices at such places as may be required by law; a failure to comply with this condition shall vacate the office so held."

Consequently, such settlement upon lands so purchased by you lying within another county from that in which you hold office, will vacate that office.

We regret that press of urgent business in the courts has prevented an earlier reply.

Yours truly,

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#### PUBLIC EDUCATION—SCHOLASTICS—RESIDENCE.

A child may have a residence in a school district entitling it to free tuition, notwithstanding its father is domiciled elsewhere.

AUSTIN, TEXAS, November 4, 1905.

*Hon. R. B. Cousins, State Superintendent Public Instruction, Capitol.*

Dear Sir: You have requested our advice upon the question presented to your department by Mr. J. E. Longmoor, a member of the Board of Trustees of the city of Rockdale Public School. Mr. Longmoor's letter is as follows:

"I have carefully read, and with much interest, your ruling in the New Braunfels case, which was appealed to you, and find it both apt and applicable to cases here. The only point which is not clear to my mind, is to determine the *bona fide* place of residence of children applying for free tuition. We are confronted with problems in this connection rather hard to solve. To illustrate, we have a case where a non-resident father entrusted the care of his daughter to a married resident sister, but who executed no formal surrender of legal control of the child. Another where a non-resident father *verbally gave* a son and daughter to a married resident relative. We have been much criticised for holding that the residence of the parents, parent or guardian, is the residence of the child, and that unless proper legal evidence is offered showing that a "bona fide" resident has legal control we do not admit the child free, nor do we accept simple verbal assurances.

"Query: Are we protected by law in so holding? Has our board any power to determine who are *bona fide* residents or not?"

Section 95 of the school laws of 1905 provides that: "Every child in this State of scholastic age shall be permitted to attend the public free schools of the district or independent district *in which it resides* at the time it applies for admission, notwithstanding that it may have been enumerated elsewhere, or may have attended school elsewhere part of the year \* \* \*."

I am of the opinion that the Legislature did not intend to require that a child of scholastic age must attend the schools of the district in which is its legal domicile in the technical meaning of that term, but that a child may have a residence in a school district within the meaning of Section 95, notwithstanding that its father is domiciled elsewhere.

"Domicile," in its legal meaning, is the actual or constructive presence of a person in a given place coupled with the intention to remain there permanently, and as a minor can not exercise an independent intent in such a matter, a minor can have no domicile other than that of its parent or guardian. In Section 95, which prescribes who are entitled to free tuition, as also in Section 56 which provides for the enumeration of children, it will be noted that the right of the child to attend school under the one section and the duty to enumerate and render a child under the other, is made to depend upon the residence of the child. I think the language of these sections, and particularly of Section 56, is inconsistent with the idea that the Legislature intended, when speaking of the residence of a child in a school district, to mean the domicile of the child's parent or guardian. It may frequently happen that the poverty of the parents of a child, or other controlling conditions, makes it absolutely necessary that a home for the child be found in a place different from that of its parents' residence. In such a case, to hold that a minor can not have a residence within the meaning of the school laws other than that of his parents, would, in many cases, deprive the minor of all benefits of the public schools. As said in the Waukesha School District case, hereinafter referred to, "such a construction of the law would be against its beneficent spirit,

and should not prevail unless the language is so clear that no other can be given to it."

In the case of *Yale vs. West Middle School District*, 59 Conn., 489, 13 L. R. A., 161, the facts were as follows:

The parents of a minor girl placed her, at the age of 6, with the plaintiff whose wife was the child's aunt, upon the arrangement that the child should live with Mr. and Mrs. Yale so long as they should live, or, until she should by marriage or otherwise make a home for herself. The child was never formally adopted by Mr. and Mrs. Yale, but at the time of the suit she had lived with them about eight years, the last two or three within the district. They had entire actual control over her, cared for her in all respects as though she were their own child. The intent of the child's parents and of Mr. and Mrs. Yale was that she should remain permanently with Mr. and Mrs. Yale. The parents of the child were not and had never been residents of the State. The court held that the child was a resident of the school district in the ordinary and popular meaning of the word, and entitled to free tuition there.

In the case of *the State, Ex Rel. School District No. 1 of Waukesha vs. Thayer*, State Superintendent, 74 Wis., 48, the facts were as follows: "A married woman whose husband had deserted her, by occupation a school teacher, living wherever she could find employment, provided suitable homes for her minor children wherever she was able to do so. For one of them, a boy, she procured a home with a resident of Waukesha. At that time the mother resided in Milwaukee. From her testimony it appeared that she had not sent the child to Waukesha for the purpose of attending the schools of the district but that that was merely incidental of his going there; that other considerations induced her to select Waukesha for his residence and home. The district contended that the boy was sent to Waukesha not for the purpose of making a home for him there, but for the sole purpose of attending the school in the district. Upon this disputed question of fact, the State Superintendent found in favor of the claim of the mother.

The court declined to adopt the contention of the counsel for the school district, that the child's right to free tuition was dependent upon the domicile of its mother, but held that his home actually being within the district he was a resident of the district within the meaning of the school law, stating the rule to be, however, that "such children only are entitled to free tuition as are actually residing in the district for other, as a main purpose, that to participate in the advantages which the school affords."

The case of *School District No. 1 in Milton vs. Bragdon*, 22 New Hampshire, 507, declares the rule, when the residence is not a bona fide residence. The facts were these:

The father of two minor boys, upon removing from District No. 1 to take up his residence in a neighboring district, left his boys with his sister who was a resident of District No. 1. The evidence tended to prove that in the first instance, it was expected that the boys should take care of their aunt's cattle and of their father's cattle which he had left at his former barn in the district, and do such other service for their aunt as boys of their age could do, and go to school when

there was one. After the wintering season for cattle was passed the evidence tended to prove that the boys continued at their aunt's house upon an agreement that they should go to school and render her such services as they could. After the school commenced in the district objection was made to these boys attending the school, and their father at his sister request, bound the boys to her for two years by indenture in which their father covenanted for their faithful service and his sister covenanted to send them to school, teach them the farming trade and board them. The district contended and offered evidence to prove that the agreement and indenture were collusive and fraudulent as to the district, the substantial purpose being to enable the boys to attend the school in District No. 1. The verdict of the jury was in favor of the school district.

The court said, "The statute provides that no person shall have the right to send to or receive any benefit from any school in a district in which he is not a resident, without the consent of such district, and if the jury was satisfied, as we think they must have been under the instructions given, that the indentures were made for the purpose of giving the boys an ostensible and not a substantial residence in the district, and for the purpose of evading the statute, the residence could give them no right to attend the school.

No rule can be announced elastic enough to decide every case which could arise, nor are the facts sufficiently stated to enable us to advise if the children in the present case are actual bona fide residents of the Rockdale District. This is a question for the board of trustees to determine from all of facts and circumstances of each case.

If the children have merely an ostensible and not a substantial residence in the district, if they were sent to Rockdale for the sole purpose, or even for the main purpose, of participating in the advantages of the public schools of Rockdale, they are not entitled to free tuition.

But if they were sent to reside in Rockdale in good faith in order to give them suitable homes, with the intention on the part of the father, and of the persons in whose care he placed them, that the children should reside there permanently; if the educational advantages of a residence in Rockdale were merely incidental to their going there, and other considerations induced the father, in good faith, to select that place as their home, I think the children are residents of Rockdale within the meaning of the school law, and entitled to free tuition there, notwithstanding that the domicile of the father is elsewhere.

Yours very truly,

#### OCCUPATION TAX—DISCOUNTING OR SHAVING PAPER.

Tax of \$50 required of every person, firm or association of persons engaged in discounting or shaving paper, or engaged in business as money broker.

AUSTIN, TEXAS, November 6, 1905.

*Hon. W. M. Bartlett, County Attorney, Quanah, Texas.*

Dear Sir: We are in receipt of your letter of 31st ult., in which

you ask for a construction of Article 5049, Subdivision 47 of the Revised Statutes.

You state that a person in your county has been loaning money for other persons out of the State for the last three or four years, that he keeps and maintains an office for that purpose and represents several different individuals charging commissions for making the loans for them, and also makes loans for himself on his own account; that all the notes are payable in Quanah and secured by property situated in that county, and that the party refuses to pay any tax whatever upon the grounds that he represents an individual and not a corporation or firm or association of persons.

You desire to know whether or not he is subject to an occupation tax under Article 5049, Subdivision 47, Revised Statutes, and whether or not said notes are liable or not for taxes.

We, in reply, say that Subdivision 47 of Article 5049 does not appear to refer to persons loaning money on his own account or for individuals. Cases of such character being covered by Subdivision 50 of Article 5049, which provides as follows:

“From every person, firm or association of persons engaged in discounting or shaving paper, or engaged in business as money brokers \* \* \* an annual tax of \$50.”

It is therefore our opinion that the person herein referred to is liable for the tax as fixed by Subdivision 50 of Article 5049, Revised Statutes.

Trentham vs. Moore, 76 S. W. Rep., 906.

You are further advised that the notes in controversy are liable for taxes in that county.

Ferris vs. Kimball, 75 Texas, 476.

Jesse French, etc. vs. City of Dallas, 61 S. W. Rep., 905.

Bristol vs. Washington County, 177 U. S., 133.

Yours truly,

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#### CONSTRUCTION OF LAWS—COUNTY AUDITOR LAW— OFFICER.

The assistant auditor provided for by Section 18, Chapter —, page —, General Laws 1905, is an officer, but the act provides no compensation for his services. The commissioners court is authorized to pay for the clerical help appointed under Section 5 of the act. A clerk appointed under Section 5 can not act as assistant auditor.

AUSTIN, TEXAS, November 7, 1905.

*Hon. W. N. Wiggins, County Auditor of Bexar County, San Antonio, Texas.*

Dear Sir: Some weeks since you wrote this department stating that you had a regular assistant at a salary of \$100 per month, paid out of the general fund of your county, as in case of your own salary, and asking whether such payment of your assistant's salary was authorized and whether the commissioner's court had the right to pay for the "clerical help" to the auditor.

So much of the answer as related to the above requests was as follows:

“Section 18 of the act authorizes the auditor to ‘at any time appoint an assistant to act in his stead and who may discharge the duties of auditor during his absence or unavoidable detention; said appointment to be made with the consent of the county judge who shall require said assistant to take the usual oath of office for faithful performance of duty.’ This section creates an office, but the act makes no provision for the compensation to the officer (the ‘assistant’) and he, therefore, is not entitled to receive any compensation from the county.”

“Section 44 of Article 3 of the Constitution, provides: ‘The Legislature shall provide by law for the compensation of all the officers, servants, agents, and public contractors not provided for in this Constitution \* \* \*.’”

“If a public officer is created but no compensation is fixed by the creating act, it is to be inferred that no compensation is intended and that the officer undertakes to serve in such office gratis. The court has no power in such cases to extend the statute so as to allow compensation, even though the failure to provide compensation is clearly an oversight, unless special power to do so has been conferred upon it. (23 American & English Encyclopedia of Law, p. 390.)”

“Neither is any provision made for compensation to the ‘clerical help’ authorized to be appointed under Section 5. That section is as follows:

“ ‘The auditor shall, at the expense of the county, provide himself with all necessary ledgers, books, records, blanks and stationery, and shall have the power to appoint additional clerical help when needed, with the consent of the county judge or of the commissioners court.’”

“I think it is clear that the ‘clerical help’ provided for are ‘servants’ within the meaning of that term, as used in Section 44 of Article 3 of the Constitution. The Legislature having failed to provide for any compensation to these clerks, the commissioners court can not pay them for their services.”

Further consideration has confirmed my conclusion that Section 18 of the auditor’s act creates an office, and that no provision being made for compensation to the officer, he, therefore is entitled to receive compensation from the county.

I have, however, hesitated very much as to a holding or the proper construction of Section 5 of said act as to the pay for “clerical help.”

The question as to whether or not “clerical help” referred to is within the definition of the word “servants,” as used in the Constitution, is one of some uncertainty. On the one hand, it might be claimed that the term “servants,” as therein used, meant only those servants employed in the State’s service as contra-distinguished from those in the service of the county, or those governmental employments, both State and county, for a permanent and fixed period; and on the other hand, that the term is used in its ordinary signification and applies to all persons who should serve both or either governments in any capacity in and about governmental business or affairs, when the Legislature does not fix, or (in case of counties) does not authorize the commissioners court to fix the compensation for such service, none could be allowed.



It appears to me, however, that a proper construction of said Section 5, taken in connection with the whole of said act, and its purposes and objects, does authorize the payment by the commissioners court for "clerical help" in the auditor's office. That section is as follows:

"The auditor shall, at the expense of the county, provide himself with all necessary ledgers, books, records, blanks and stationery, and shall also have the power to appoint additional clerical help when needed, with the consent of the county judge or of the commissioners court."

Here we find a single provision, and every part thereof relating to the expense of the office of county auditor; the first part thereof speaks of records, books, stationery, etc., which are, in express terms, to be purchased "*at the expense of the county*"; and the second part thereof, to "clerical help" for the office.

In Louis Southerland's Statutory Construction, Vol. 2, Sec. 348, it is said:

"The application of words of a single provision may be enlarged or restrained to bring the operation of the act within the intention of the Legislature when violence will not be done by such interpretation to the language of the statute. The propriety and necessity of thus construing words are most obvious and imperative when the purpose is to harmonize one part of the act with another in accord with its general intent. The statute itself furnishes the best means of its own exposition; and if the intent of the act can be clearly ascertained from a reading of its provisions, and all its parts may be brought into harmony therewith that intent will prevail without resort to other aids of construction."

Again, the same author, in Section 347, treating of the rules of construction of statutes to ascertain the intent of the Legislature, says:

"When the intention can be collected from the statute, words may be modified, altered or *supplied* so as to obviate any repugnancy or inconsistency with such intention."

It is reasonably certain that the Legislature, by said Section 5, had in view one general purpose, viz.: The providing for the ways and means of maintaining the auditor's office in addition to the salary of the auditor (that being otherwise provided by this act), and intended by the language used in said section, that it should be "at the expense of the county." The intent is not only shown by the nature of the section, but also by the words "at the expense of the county," appearing in the first part of the section.

My opinion is that the proper construction of this section is, that the words "at the expense of the county" was not only to relate to ledgers, books, blanks and stationery for the auditor's office, but also to "clerical help" for that office.

This view is confirmed by finding, that in this section, express authority is given for the employment of such clerical help, and if the words, "at the expense of the county" had no application thereto, the power of employment therein granted would be without meaning or effect.

I note that in your letter, you say in substance that you construe

the auditor's act to mean that you, as auditor will have the right, with the consent of the county judge, to designate one of your clerks to be your assistant who shall act as auditor in your absence, and you ask if you are right in that construction of the law.

If, by the use of the word "clerks," you refer to those who may be employed, and paid, under Section 5 under the term "clerical help," I answer your inquiry in the negative. Such clerks can perform only purely clerical duties, and can in no instance exercise any of the powers conferred by said act upon the auditor.

Therefore, I advise you:

1. That the commissioners court has no authority to provide for or pay the salary of an assistant auditor appointed under Section 18 of said act.

2. That the commissioners court has authority to pay for the clerical help as provided for in Section 5 of the act. To this extent, my former ruling is modified.

3. The clerk, or clerks, employed under said Section 5 have no authority to discharge the duties of auditor or assistant auditor as provided in Section 18 of said act.

Yours very respectfully,

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#### OCCUPATION TAX—COTTON BUYER.

Cotton buyer engaged exclusively in that business not liable for occupation tax.

Subdivision 38, Article 5049, levied an occupation tax on cotton, wool and hide buyers, but was held to be unconstitutional.

AUSTIN, TEXAS, November 9, 1905.

*Hon. Lon Jones, County Attorney, Brady, Texas.*

Dear Sir: We are in receipt of yours of the third instant. You desire to know whether or not cotton buyers engaged exclusively in that business are subject to an occupation tax.

You are respectfully advised that they are not liable for an occupation tax. Subdivision 38, Article 5049, Revised Statutes, levied an occupation tax against cotton, wool and hide buyers, but that subdivision was held to be unconstitutional.

*Poteet vs. State, 53 S. W. Rep., 869.*

*Rainey vs. State, 53 S. W. Rep., 882.*

The Legislature has not passed any subsequent act levying an occupation tax on cotton buyers.

Yours truly,

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#### CONSTRUCTION OF LAWS—PRIVATE CORPORATIONS— GUARANTEE AND SURETY COMPANIES.

A corporation formed under Subdivision 37 of Article 642, as amended, must publish and file the statements therein required, but is not required to make the deposit therein provided for unless it desires to do a guarantee or surety business, in which event it must comply with Chapter 165, General Laws 1897.

AUSTIN, TEXAS, November 11, 1905.

*Hon. W. J. Clay, Commissioner, Capitol.*

Dear Sir: In reply to your letter of the 9th inst., I beg to advise you that it is the opinion of this department that all corporations formed under Subdivision 37 of Article 642 of the Revised Statutes of 1895, as amended (Acts 1903), are required to make publication and file with the Commissioner of Agriculture, Insurance, Statistics and History, the statement prescribed in this section.

A corporation organized under this subdivision, however, is not required to make the deposit with the State Treasurer provided for in this Subdivision 37, unless it desires to qualify itself to do a guarantee or surety business. In the latter event, the deposit must be made and the corporation must comply with Chapter 165 of the General Laws of the Twenty-fifth Legislature (1897), before it will be entitled to receive from the Commissioner of Agriculture, Insurance, Statistics and History a certificate authorizing it to transact such business.

A corporation organized under this subdivision for the purpose of acting "as trustee, assignee, executor, administrator, guardian or receiver, when designated by any person, corporation or court so to do, and to do a general fiduciary and deposit business," is not, I take it, a guarantee or fidelity company, or company engaged in "the business of suretyship," and accordingly such a corporation is not required to comply with Chapter 165 of the Acts of 1897, or to make the deposit with the State Treasurer. Such a corporation, however, must file with the Commissioner and publish the statement of its condition and pay the filing fee to the Commissioner, since the proviso is "that *each* corporation organized under this section shall publish in some newspaper," etc.

Yours truly,

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STATE UNIVERSITY—REPAIR OF BUILDINGS—BOARD OF REGENTS.

Board of regents clothed with authority to make necessary repairs to auditorium roof, the same to be paid out of appropriation for maintenance of institution. Intention of Legislature to give broad discretion to board of regents. Not applicable to other State institutions having no available fund.

AUSTIN, TEXAS, November 11, 1905.

*Hon. John W. Stephens, Comptroller of Public Accounts, Capitol.*

Dear Sir: We have your letter of the 8th inst., enclosing a communication to you from President D. F. Houston, of the University of Texas, of date November 7, 1905, relating to your authority to issue warrant in payment for certain repairs upon one of the buildings of the University of Texas.

The first paragraph of President Houston's letter is as follows:

"The University auditor, Mr. Winn, reports to me that the warrant clerk has declined to issue warrant on the enclosed voucher for the sum of \$1181.37 due Mr. J. O. Buaas, of Austin, for repairing the auditorium roof, on the ground that the provisions of the clos-

ing paragraphs of the appropriation bill, relating to the employment of architects and agreements with contractors were not complied with. The amount in question is to be paid out of the available University funds, and I respectfully submit that it does not come within the scope of the provisions indicated, and that, therefore, the warrant could be issued."

The questions thus presented are:

1. Had the Board of Regents of the State University authority for repairing the auditorium roof; and,

2. Are said repairs within the operation of the restrictions set forth in the General Appropriation Act of 1905 relative to the employment of an architect, contractor, etc.

Section 10, Article 7, of the Constitution of Texas provides as follows:

"The Legislature shall, as soon as practicable, establish, organize and provide for the maintenance, support and direction of a University of the first class, to be located by a vote of the people of this State and styled 'The University of Texas,' for the promotion of literature and the arts and sciences, including an agricultural and mechanical department."

We are not aware that the meaning of the word "maintenance" in the above quoted section of the Constitution has been judicially determined.

But the word "maintenance," as used in Article 8, Section 9 of the Constitution, wherein it is provided that "the Legislature may pass local laws for the maintenance of public roads and highways without the local notice required for special or local laws," was construed by one of the Courts of Civil Appeals in the case of *Smith vs. Grayson County*, 18 Texas Civil Appeals, 156.

The court, referring to the last quoted constitutional provision, said:

"It is insisted, however, that this clause of the Constitution limits the purpose for which local laws may be passed to the *maintenance* of roads already constructed and would not authorize the passage of a statute creating a road system. We do not think the word 'maintenance,' as used in this section of the Constitution, was intended to be used in this restricted sense. By the use of the words '*maintenance of public roads and highways*' the framers of the Constitution had reference to maintaining a system of public roads and highways which would include all the necessary powers to provide and keep up a system of highways."

We have no doubt that the constitutional provision first above quoted, providing for the "maintenance, support and direction of a University of the first class," contemplated the erection and repair, as needed, of all buildings reasonably necessary to fully carry out that beneficent and grand design.

Pursuant to said constitutional requirements, the Legislature of Texas has seen fit to provide in Revised Statutes, Article 3843, that "the government of the University shall be vested in a board of eight Regents, selected from different portions of the State, who shall be nominated by the Governor, and appointed by and with the advice and consent of the Senate."

It can hardly be doubted that it was the intention of the legislative branch of the State government to clothe said Board of Regents with a broad discretion in determining what is necessary in the way of buildings for the University; hence, the propriety and advisability of making repairs thereto, of a given kind, such as repairs to the roof of the auditorium, is a matter coming peculiarly within the province of the Board of Regents to determine, and especially so in view of the fact that the cost of such repairs or improvements is to be paid out of the *available University fund*, and not out of the general fund.

Immediately following the above quoted provision for the establishment of a university, Section 11 of Article 7 of the Constitution provides:

“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 sales of same, heretofore made, or hereafter to be made, and all grants, donations and appropriations that may hereafter be made by the State of Texas, or from any other source, shall constitute and become a permanent University fund \* \* \*.”

There was thus set apart an extensive trust fund to enable the Legislature to carry into effect the above quoted requirements, providing for the “maintenance, support and direction of a University of the first class,” and this fund can be used for *no other purpose whatever*.

Recognizing the right of the University to the fund thus created, and also recognizing the fact that, under existing laws the Board of Regents was already invested with wide discretion and authority, the General Appropriation Act of 1905 provides, in broad and general terms, and without one single specification or limitation as to details, that the portion of said trust fund available during the years ending August 31, 1906, and August 31, 1907, respectively, may be used during these years “for the maintenance, support and direction of the University of Texas, including repairs, extensions, improvements and buildings.”

It will be noted that the Legislature which made this appropriation acted subsequent to the rendition of the opinion in *Smith vs. Grayson County*, supra, which decision construed the word “maintenance” in such broad terms as to include, by analogy, repairs to a University building; yet that Legislature, as though not content to leave for judicial construction alone the words “maintenance, support and direction,” found in the constitutional provision for the University, took care to itself construe, in the very language of this appropriation act, and in harmony with the decision mentioned, those constitutional terms as including “repairs, extensions, improvements and buildings.”

Consequently, the legislative intent that a portion of the available University fund, so appropriated by this act, may be used in repairing the auditorium roof, is manifest.

When we come to the consideration of the second question, we

find an appropriation out of the general fund to be used for the "maintenance, support and direction" of the University, this appropriation being made in lump sums of \$81,250 for the first year, and \$61,250 for the second year; but the paragraph making this appropriation does not specifically mention buildings or repairs.

Indeed, an appropriation out of the general revenue to be used for erecting or repairing University buildings would be beyond the scope of Legislative authority, in view of that portion of Section 14 of Article 7 of the Constitution, which provides that "No tax shall be levied and no money appropriated out of the general revenue \* \* \* for the establishment and erection of the buildings of the University of Texas."

We further find that all the appropriations made by this act for the maintenance, support and operation of other State institutions are to be paid out of the general revenues, and that, as to each of those institutions, this act, in every paragraph making an appropriation therefor, sets forth numerous specifications and details concerning the character and amount of expenditures to be so made.

As to nearly every one of such other institutions, provision is made for new buildings, or improvements, or repairs, or machinery, or equipments; while, in several instances, two or more such items are included.

Following all these appropriations, we find the restrictions above referred to, among which are the requirements that all buildings for the erection and equipment of which appropriations are made under this act, and all improvements and repairing of any public building, shall be erected and made under the direction, management and supervision of a competent architect, to be appointed by the board of managers of the institution for which said improvement is made, and that all architects so employed shall give bond, etc.; that the work shall be done by contract, etc.; that all appropriations made under said act for the erection of new buildings and improvement of old buildings, and equipment of same, or to purchase machinery may be withheld by the Governor, *if in his opinion the condition of the treasury will not warrant the expenditure of any such sum or sums*; that no surplus shall be diverted from any *account to any other account*; and that the money appropriated, or so much as may be necessary, shall be applied to the payment of *each item* for which the appropriation is respectively made, and nothing else.

Some of these provisions and restrictions can not reasonably be held to apply to appropriations of the available University fund. For instance, the provision that the money appropriated, or so much thereof as may be necessary for that purpose, shall be applied to the payment of "each item" for which the appropriation is made, and nothing else, seems plainly intended to apply alone to the itemized appropriations out of the general fund, and not to the appropriation of the available University fund, the latter appropriation *not being itemized*. So, as to transferring funds from one account to another; the appropriations for the University not being subdivided into specifically enumerated accounts, as are appropriations made by this act for various other State institutions.

Again, the provisions that the Governor may withhold appropriations made by this act for the erection of new buildings, and improvements of old buildings, and equipments of same, or to purchase machinery, if in his opinion the condition of the treasury will not warrant such expenditure, seems to have been intended to meet conditions and exigencies as they may arise, dependent upon and growing out of the amount of revenues which may be in the treasury at a given time to the credit of the general fund, which amount, as the Legislature well knew, varies greatly from time to time, and which the Legislature must have foreseen, will, in the two years covered by this appropriation act, depend to a greater or less extent upon the success or failure of various statutes enacted at the same session of the Legislature and designed to produce extensive revenues, a large portion of which, when collected, will go into the general fund.

The evident reason for this provision of the appropriation act, which seeks to confer such discretion and authority upon the Governor, do not and can not apply to appropriations to be paid out of the University fund, since, as we have seen, that fund can not effect or be affected by the condition of the general fund.

And, in view of the far-reaching discretion and authority which, as we have seen, have been conferred upon the Board of Regents, and, inasmuch as some of the restrictions above set forth do not apply to the available University fund, and all of said restrictions seem to be intended to apply solely to the same class or character of appropriations, we conclude that none of said restrictions were intended by the Legislature to apply to expenditures out of that particular fund.

A literal application of only that portion of this appropriation act which prescribes said restrictions would lead to the conclusion that no warrant could legally be issued in payment for such repairs, except when made in compliance with the provisions relative to the employment of an architect, etc.; and in that view of the matter you would not, in this instance, be authorized to issue the requested warrant.

But Section 3 of the general provisions, found in the final title of our Revised Statutes, as interpreted by the courts, requires that the provisions of all statute laws of this State "shall be liberally construed with a view to effect their objects and to promote justice"; and upon consideration of this appropriation act *as a whole*, in the light of constitutional provisions applicable thereto, and searching diligently for the controlling intention of the Legislature as expressed in the act itself, we think it reasonably clear that the above-mentioned restrictions upon the application and expenditure of appropriated funds do not apply to expenditures of the character under consideration, such as cost of repairs to the auditorium roof when made under the direction of said Board of Regents, and to be paid out of the available University fund, and not out of the general revenues.

We, therefore, respectfully advise you that, in our opinion, a warrant should be issued by you in this instance to cover the cost of said repairs. But nothing herein should be construed as holding or intimating that any and all of the restrictions set forth in said

appropriation act do not apply to any and all construction, improvements, repairs and equipment made or to be made under the direction and authority of any board of control of any other State institution in cases wherein such institution is wholly dependent upon the general revenues of the State for maintenance and support, and the bill of expense is to be paid out of appropriations made by the Legislature for that specific purpose out of the general fund.

Yours truly,

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CONSTRUCTION OF LAWS—STENOGRAPHERS' LAW—FEES.

Stenographer is not entitled to per diem during recess of court.

AUSTIN, TEXAS, November 18, 1905.

*Judge K. H. Faulkner, Granbury, Texas.*

Dear Sir: We are in receipt of yours of 15th in which you state that there has been presented to the commissioners court of your county a bill for stenographers' fees in the sum of \$150 for thirty days' work at \$5 per diem.

You state that court opened on October 9th and closed November 11th, and between these two dates there was more than one recess of from one to three days, when the judge of the court was absent and the stenographer also.

You desire a construction of this department of the provisions of the act of the Twenty-ninth Legislature which provides that the official stenographer shall receive as per diem compensation the sum of \$5 "for each and every day he shall be in attendance upon the court."

A decision of the question turns upon the meaning of the words "in attendance upon the court." There is no decision of this State construing words of this nature.

The statute regulating the pay of jurors in civil cases, Article 3232, provides that "they shall receive two dollars for each day, and for each fraction of a day they may serve, or attend, as such jurors."

The statute of California, in prescribing the compensation of jurors, contains the following provision:

"Grand and trial jurors shall receive two dollars per day for attendance upon the courts of record." The Supreme Court of California in construing this provision held that the juror was entitled to pay only for the days in which they were actually in attendance upon the court, and that the per diem provided by the statute is not intended to be in the nature of a salary for the time, but merely as a compensation for the time during which he was in actual attendance upon the court.

The court said: "After he had been drawn as a juror he may be excused from attendance for a definite period. In such cases he is not in attendance upon the court during the time for which he is excused, neither is he in attendance upon the court during any period that he is excused therefrom with the opportunity to engage in ordinary avocations any more than if he had been relieved



of attendance at his own request, or because the court may have taken an adjournment for its convenience." (See *Mason vs. Culbert*, 108 California, 247; *Jacobs vs. Elliott*, 104 California, 318.)

We think the above is a proper construction of Section 8 of Chapter 112 of the Acts of the Twenty-ninth Legislature, and so construing it you are respectfully advised that if the court is in session from day to day, ready at all times to transact business and the official stenographer is present, because of the uncertainty of the time at which he may be needed to attend upon the court and perform his duties therein, he is entitled to have his per diem for each day he so attends, notwithstanding no business may be transacted in the court; but, if the court takes a recess for a definite time, or adjourns for a definite time, the stenographer is not entitled to his per diem during the recess or adjournment, notwithstanding he may be ready and willing to attend upon the court should it be in session.

You understand, of course, that if the court opens on any day, and the stenographer is present at the opening, ready to perform his official duties, he is entitled to his per diem for that day, notwithstanding no labor may be performed by him.

He would be entitled to his per diem for such day should the court meet and adjourn or take a recess to a future date, but he would not be entitled to his per diem for the dates during which the court was at recess or had adjourned.

Yours truly,

#### TAXES—INDEPENDENT SCHOOL DISTRICTS.

Board of trustees may provide for collection of taxes of districts by county tax collector. Unless so provided collector of independent school districts will collect same.

AUSTIN, TEXAS, November 18, 1905.

*Mr. J. W. Williamson, Tax Collector, Karnes City, Texas.*

Dear Sir: Yours of the 9th inst. came to hand in due time, and we regret that we have not been able to give it our attention earlier.

The first question you ask is whether or not the sheriff or county tax collector can under the law collect the independent school district taxes, in connection with the State and county taxes. We assume that the sheriff of your county is also tax collector.

The Act of the Twenty-ninth Legislature, Chapter 124, Section 165, which is a re-enactment of Act of Twenty-sixth Legislature, page 918 (Supplement Sayles' Civil Statutes, page 410), provides that when a majority of the board of trustees of an independent school district prefer to have the taxes of their districts assessed and collected by the county assessor and collector, same shall be assessed and collected by said county officers and turned over to the treasurer of the independent school district for which said taxes have been collected.

Unless an order has been passed by a majority of the Board of Trustees of your independent school district and entered upon the minutes, it is the duty of the collector of the independent school

district to collect the taxes, but if the majority of the Board of Trustees passed an order and had the same entered upon the minutes, to the effect that they prefer to have the taxes of the district assessed and collected by the county assessor and collector, it is the duty of the county assessor to assess and the county collector to collect the independent school district taxes.

You also ask for how many years the back taxes of independent school districts can be collected, where the tax has not been reported delinquent, except to the extent of the tax collector making out his delinquent list, which list has not been published each year.

You are respectfully advised that under the Act of the Twenty-fifth Legislature, page 132, Section 11, any school district has the right to enforce the collection of delinquent taxes due it in the same manner and to the same extent as counties have the right to enforce the collection of delinquent taxes.

The Board of Trustees has the authority to require of the tax collector that he make a list of all lands and lots delinquent since the first day of January, 1885, which list when made shall be approved, published, etc., in the same manner as the delinquent tax records of the county. Under provisions of Chapter 103, Act Twenty-fifth Legislature, page 132, it is the duty of the county attorney to represent the school district in a suit to collect delinquent taxes. See Act Twenty-ninth Legislature, Chapter 124, Section 166.

The provisions as to costs provided for in the Act of the Twenty-fifth Legislature, page 132, would apply to suits brought by independent school districts for foreclosure of the lien for taxes due said district.

You also ask whether if the sheriff or tax collector has the power to collect the school tax in connection with the State and county taxes, a taxpayer would have the right to pay State and county taxes without paying the school tax, you are respectfully advised that it is our opinion that he would have the right to do so. You understand that the assessment of the independent school district and the roll of the independent school district should and must be separate and distinct from his assessment roll, and the county tax collector would have no right to simply add the independent school district tax to the State and county taxes on the county rolls.

Rolls must be separate and distinct, and being separate and distinct, we believe a party owing taxes, State, county and school, would have the right to pay State and county taxes notwithstanding his school tax may not be paid.

Yours truly,

#### TAXATION—SCHOOL TAX—ROLLING STOCK.

Rolling stock of a railroad company is not subject to a special tax voted in a common school district of a county through which it runs, its principal office not being maintained in said district.

AUSTIN, TEXAS, November 21, 1905.

*Hon. R. B. Cousins, State Superintendent of Public Instruction, Capitol.*

Dear Sir: You have requested our advice upon the question

presented to your department by Mr. Charles B. White, tax assessor of Fannin County. I quote from Mr. White's letter:

"I, as the assessor of Fannin County, have assessed the several railroads running through said county in the various taxing school district, with the roadbed and rolling stock of said railroads, making my assessment as follows: The roadbed valuation per mile as agreed upon by the board of equalization and the rolling stock per mile as valued and furnished me by the Comptroller.

"Now, the above-named railroad authorities contend that the rolling stock of said companies can not be assessed in or by school districts."

Under Article 5122, I think that properly a tax assessor should apply to the Comptroller for advice in such matters, but as this is a matter in which your department is interested, I gladly give you our views upon the subject.

The commissioners court of Fannin County is authorized to levy and collect all *general* county taxes upon Fannin County's apportionment of the rolling stock of the various railroad companies running through the county, but the court is not authorized to impose upon the rolling stock of such railways a *special school* tax, voted in a common school district of the county. Section 4 of Article 10 of our constitution declares: "The rolling stock and all other movable property belonging to any railroad company or corporation in this State shall be considered *personal property*. \* \* \*"

In Cooley on Taxation the rule is stated thus:

"The proper place for the taxation of a corporation in respect to its personalty is the place of its principal office, unless some other place is prescribed by statute" (page 673), and in regard to the rolling stock of railroad corporations: "The rolling stock and other personalty of the company should be assessed at the place of its home office, unless some other provision is made by law." (Page 697.)

Article 5068 of the Revised Statutes of 1895, is "All property, real and personal, *except such as is required to be assessed otherwise*, shall be listed and assessed in the county where it is situated and all personal property subject to taxation and temporarily removed from the State or county shall be listed and assessed in the county of the residence of the owner thereof, or in the county where the principal office of the owner is situated." If it were not otherwise provided by law, the rolling stock of each of these several railroads, being personalty, would be "situated" in the county where its principal office is. (Ferris vs. Kimbell, 75 Texas, 479.)

It is only by force of Article 5083 that Fannin County can subject to taxation any part of the rolling stock of these corporations.

Article 5082 requires every railroad corporation in this State to deliver to the assessor of each county or incorporated city or town "into or through which any part of their road may run, or in which they own, or are in possession of rolling stock," a list specifying among other things: "All personal property of whatsoever kind or character, *except the rolling stock* belonging to the company or in their possession. \* \* \*"  
(Subdivision 3.)

By article 5083 it is made the duty of the railroad company "to

deliver to the assessor of the county in which its principal office is situated a sworn statement setting forth the true and full value of the rolling stock of said railroad company, with the names of all the counties through which it runs and the number of miles of roadbed in each of said counties." After the assessment has been reviewed by the board of equalization of the county, said board is required to certify the final valuation to the Comptroller whose duty it is to apportion the amount of such valuation among the said counties in proportion to the distance such road may run through any such county, after which the Comptroller "shall certify such apportionment to the assessors of such counties and the same shall constitute part of the tax assets of such county, and the assessor of each of said counties shall list and enter the same upon the rolls for taxation as other personal property situated in said county."

It is the duty of the assessor of Fannin County to list and enter upon the tax rolls of the county its apportionment of the amount of the valuation of the rolling stock of the several railroad companies running through the county, and such apportionment is, as I construe the statutes, subject to all *general* county taxes levied by the commissioners court, just as though it were in fact personal property situated in the county.

The statute does not subject the rolling stock to special district school taxes, nor provide any method by which the apportionment to Fannin County shall in turn be apportioned among the various school districts of the county.

The special tax voted in a common school district must be levied by the commissioners court upon all property subject to taxation which is "situated" within the district. The rolling stock of none of the railroads running through Fannin County is "situated" in Fannin County, in fact. For the purpose of taxation Fannin County's proportion of this property which is not situated in the county, constitutes a part of the *tax assets* of the county, and is as taxable as other personal property which is situated within the county.

Even if Fannin County's proportion of the rolling stock of these railroads should, under Article 5083, be regarded as "situated" in the county, its "situs" is not fixed in one common school district more than another, and no provision being made for its apportionment among these several school districts of the county, I conclude that the Legislature intended that no such apportionment should be made.

I return herewith Mr. White's letter.

Yours truly,

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#### PUBLIC EDUCATION—SCHOOL FUNDS.

Proceeds of lease of county's school lands was permanent fund before, but is available fund since the amendment of Section 6 of Article 7 of Constitution.

AUSTIN, TEXAS, November 21, 1905.

Hon. R. B. Cousins, State Superintendent Public Instruction, Capitol.

Dear Sir: You have asked advice of this department upon the

question presented you by the Board of Trustees of the city of Austin Public Schools. The facts, as stated in the letter of Mr. Z. T. Fullmore, President of the Board of Trustees, are these:

"1. In 1881 the commissioners court of Travis County leased for a term of years the four leagues of land theretofore granted to the county for educational purposes—for a term of years.

"2. The court, in 1882 adopted the policy of purchasing the county's bonds with the proceeds of the lease, and after purchasing \$7000 of county bonds, this policy was abandoned, and the whole of the proceeds of the lease, being available school fund, was thereafter annually appropriated and used in the maintenance of the schools of the county.

"3. In 1897 or 1898, these bonds were taken up by the county and the proceeds turned into the county treasury.

"4. In 1898, this being the proceeds of lease money \$4000 of it was appropriated for the maintenance of the schools in the county, the Hon. J. M. Carlisle then being superintendent of public instruction.

"5. The remaining \$3000 was left in the county treasury and has ever since remained there on deposit, uninvested, and therefore yielding no income.

"6. Subsequent administrations having ruled that this money was a part of the permanent fund, the commissioners court has held it in the treasury."

The question presented is, is this \$3000 a part of Travis County permanent school fund, or is it available fund.

I am of the opinion that the revenue derived from lease of these lands prior to September 25, 1883, was part of the permanent school fund of the county. From another source I learn that the rental under this lease was at the rate of \$1200 per annum, and I assume the \$3000 balance represents the amount collected under this lease, prior to September 25, 1883. If so it is permanent fund and should be invested by the county commissioners court of Travis County, in accordance with law. Only the interest derived from an investment of this money is available fund.

By the Act of April 3, 1879 (Chapter 135, page 150. General Laws Sixteenth Legislature) it is provided that

"The *proceeds of any leasing or renting of lands heretofore granted by the State of Texas, to the several counties for educational purposes and the proceeds arising from any sale of timber on said lands, or any part thereof shall be applied exclusively to the purposes of public education in said counties respectively, and shall be invested in like manner as the Constitution and laws require of proceeds of sales of said lands, and it shall be unlawful for the commissioners court of any county to apply said proceeds, or any part thereof to any other purpose or to loan the same, or to invest the same, except as above required.*"

The manifest purpose of this act was to constitute the proceeds of a lease of such lands a part of the county's permanent school fund. It was to be "invested in like manner as the Constitution and laws required of proceeds of sales of said lands." That is, the corpus of the fund should be preserved and only the interest from a legal

investment thereof expended for the maintenance of the schools of the county, since Article 6 of Section 7 of the Constitution, as originally adopted, after prescribing how the proceeds of sales of such lands should be invested, authorized "only the interest thereon to be used and expended annually."

The meaning of this act is plain, but if there should be any doubt of the Legislative intent, that doubt is removed by the Act of February 7, 1864 (Chapter 35, page 72, General Laws, Special Session Eighteenth Legislature) which amended the Act of 1879. The sole purpose of the amendment was to direct that the proceeds of leasing or renting county school lands shall be appropriated "in the same manner as is provided by law for the appropriation of the interest on bonds purchased with the proceeds of the sales of such lands." Under the Act of 1879, it was to be "invested in like manner as \* \* \* proceeds of sales of said lands;" under the act of 1884 it was to be "appropriated \* \* \* in the same manner as \* \* \* the interest on bonds purchased with the proceeds of the sales of such lands."

Therefore, while the Act of 1879 was in force the proceeds of a lease or rental of the school lands of Travis County was *permanent fund*, unless the act was in contravention of the constitutional provision on the subject. I am convinced that it was not.

Section 6 of Article 7 of the Constitution, as originally adopted and as was in force when the Act of 1879 was passed, provided that, "All land heretofore or hereinafter granted to the several counties of this State for education, or schools, are of right the property of said counties, respectively, to which they were granted, and the title thereto is vested in said counties, and no adverse possession or limitation shall ever be available against the title of any county. Each county may sell or dispose of its lands in whole or in part in manner to be provided by the commissioners court of the county. \* \* \* Said lands 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 State of Texas, or of the United States, and only the interest thereon to be used and expended annually."

I think it may well be argued that by force of this constitutional provision, alone, the proceeds of the lease of such lands was permanent fund, and that the Act of 1879 was no more than the legislative construction of the constitutional provisions.

As I read the case of Fall County vs. DeLaney, 73 Texas, 463, this section did not make it the duty of the county to sell its school lands, but contemplated that the county should have the power to derive revenue from the lands by lease. That being so, if it had been intended that a revenue should be available fund, it is not likely that the section would have been adopted with the provision that, "Only the interest thereon," that is, the interest on the investment of the proceeds of the sale of lands, "should be used and expended annually."

It would seem that one purpose of the amendment of this section of 1883 was to change the disposition of the proceeds of leasing such lands. Before amendment the section concluded, "And only the interest thereon to be used and expended annually." After amendment

it read: "The interest thereon and *other revenue*, except the principal, shall be available fund." The omission of the word "only" and the insertion of the words "other revenue" are significant.

In the Falls County case, above referred to, the Supreme Court understood the words "other revenue," to contemplate a revenue to be derived from the lease of the lands.

But it is not necessary to go so far. If the Constitution of 1876 did not make lease money a part of the permanent fund neither did it make it available fund. I am of the opinion that the Act of 1879, if not declaratory of the constitutional provision then in force, was not in conflict with it.

As I have said, Section 6 of Article 7, was amended in 1883, the amendment having been declared adopted on September 25, 1883. By force of this section, as amended, I take it the revenue thereafter derived from a lease of Travis County's school lands was available funds.

If, as I have assumed the fact to be, this \$3000 was collected prior to September 25, 1883, it became upon collection part of the permanent fund of Travis County. Its character has never been changed by law and of course, is unaffected by any act or omission of the commissioners court of Travis County with respect thereto.

Yours truly,

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#### TAX SALE—REDEMPTION OF LAND UNDER.

Under act of 1905 land may be redeemed after being sold to State, within twelve months after judgment, by paying amount of taxes, penalty, interest, etc., but in order to redeem land sold prior to time act of 1905 took effect, double the amount of taxes for which sale was made, together with all costs, penalty and interest, shall be paid.

AUSTIN, TEXAS, November 30, 1905.

*Hon. C. A. Graham, Hillsboro, Texas.*

Dear Sir: We regret that we have not been able to reply to yours of 22nd instant at an earlier date.

You desire to know that if under Act of the Twenty-ninth Legislature, page 223, you would have the right to redeem land which had been heretofore sold for taxes, by paying the amount of taxes, penalty and interest from date of judgment, and all costs, or whether, in order to redeem you will be required to pay double the amount of taxes for which the sale was made, together with all costs, penalty and interest now required by law.

Beg leave to advise you that the Act of the Twenty-ninth Legislature has different notice terms from those heretofore passed providing for the redemption of land which had been sold to the State, and which had not been redeemed within the time required by law. The Act of 1899, page 63, contains the following provision:

"That at any time within twelve months from the *taking effect of this act* redemption may be made upon the payment of the amount of taxes, penalty and interest for which the judgment has been rendered, with 6 per cent interest thereon from date of judgment and all costs adjudged against the land."

It is very clear that under the provisions of this act a party would have the right to redeem within twelve months from the date of the taking effect of the act, by simply paying the amount of taxes, penalty, interest, etc.

The act of 1905 contains this provision: "At any time within twelve months *from date of such sale* redemption may be made upon the payment of the amount of taxes, penalty and interest," etc.

This provision contains the express stipulation that in order for a party to be allowed to redeem by merely paying the amount of taxes, penalty, interest, etc., the redemption must be made within twelve months *from the date of the sale*.

The provision of the act allowing redemption to be made of land which has been heretofore sold to the State, provides that the owner shall have the right to redeem the same within two years after the passage of this act. The provision quoted above is a proviso to that portion of the act which provides that in order to redeem within two years from the date of the sale, double the amount of taxes for which the same was sold, together with costs, penalty, etc., should be paid.

You are therefore respectfully advised, that in order to redeem land which has been sold to the State prior to the enactment of the act of the Twenty-ninth Legislature, double the amount of taxes for which the sale was made, together with all costs, penalty and interest shall be paid.

As per your request, I return herewith the documents.

Yours truly,

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#### RAILROADS.

Are required to keep an agent on duty at night at all stations having telegraphic communication with the dispatcher where passenger trains are required by law to stop, and bulletin the time of the arrival of said trains.

AUSTIN, TEXAS, December 1, 1905.

*Hon. L. J. Storey, Chairman Railroad Commission, Austin, Texas.*

Dear Sir: We are in receipt of yours of the 5th ult., reply to which has been unavoidably delayed on account of great pressure of public duties in this department.

You enclose a petition from the citizens of Mount Vernon, Texas, asking that the St. L. S. W. Ry. Co., of Texas, be required to keep a night telegraph operator at that station, in order that delayed passenger trains, arriving there at night, may be properly bulletined.

You ask the following questions:

"Is the railroad company required to keep a night telegraph operator at Mount Vernon?"

"Having opened a telegraph station at Mount Vernon, and employed a day operator, can they be required by the Railroad Commission of Texas, to keep open a night office and have a night operator?"

"Or, in other words, is the rule made by the railroad company that they will keep a telegraph operator at that station only for day



work, and no operator at night, such a reasonable rule that they can not be required to keep a night operator?"

You are respectfully advised that Article 4494a, as amended by the Acts of the Twenty-eighth Legislature, First Called Session, page 21, provides that railroads in this State are required to employ competent train dispatchers, whose duty it shall be to keep all agents at stations having telegraph offices in or near them, informed of the movement of passenger trains, thirty minutes prior to the time such passenger trains are due, according to the schedules published at said stations.

Article 4580, Subdivision 2, of the Acts of the Twenty-eighth Legislature, page 183, requires passenger trains to stop at all county seat stations.

Article 4560c, as amended by the Acts of the Twenty-eighth Legislature, page 163, requires that agents shall keep waiting rooms lighted and heated, and to ascertain from the dispatcher the time of the arrival of said passenger trains, and bulletin same thirty minutes before said passenger trains are due, etc.

In view of the foregoing provisions you are respectfully advised, that Mount Vernon being a county seat station, and having a telegraph office, passenger trains must be stopped at that place, and the railroad company is required to keep its depot open, lighted, heated, and the time of the expected arrival of said trains bulletined, as required by law.

Railroads operating passenger trains, both day and night, are required to keep the public informed in regard to the time of arrival of its passenger trains at all stations having a telegraph office where its trains are required by law, or order of the Railroad Commission to stop for passengers.

It, therefore, necessarily follows that they are required to keep an agent on duty at night as well as day, who is competent to ascertain from the dispatcher the time of the expected arrival of said trains, and post same in accordance with the requirements of law.

The fact that the railroad company in this case has never heretofore maintained a night telegraph office at Mount Vernon, is no legal excuse that will justify their failure to do so in the future.

Yours very truly,

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#### SHERIFF—APPOINTMENT OF GUARDS.

Sheriffs may, with the consent of commissioners court, or, in case of emergency, of the county judge, employ guards for safekeeping of prisoners.

Not authorized to pay for jailer or turnkey in name of "guard." Authority exists in sheriffs to employ guards at expense of county.

AUSTIN, TEXAS, December 2, 1905.

*Mr. George S. Matthews, Sheriff, Austin, Texas.*

Dear Sir: We are in receipt of your letter of 23rd in which you ask the following questions:

"Have I, as sheriff, subject to the approval of the commissioners

court of Travis County, or the county judge of Travis County, the right to employ a guard for the purpose of guarding the prisoners in the county jail of said county and for the security of said jail?"

Article 4898, Revised Statutes of 1895, provides as follows:

"Whenever in any county it may become necessary to employ guards for the safe keeping of prisoners and the security of jails, the sheriff may, with the approval of the commissioners court or in cases of emergency with the approval of the county judge, employ such number of guards as may be necessary and his account therefor duly itemized and sworn to shall be allowed by said commissioners court and paid out of the county treasury."

This article is a grant of power to the sheriff, acting in conjunction with the commissioners court or the county judge, and being a grant of power it must be strictly construed. The employment of guards for the safe keeping of prisoners and the security of jails must depend upon the necessity of such employment, which necessity must be passed upon by the sheriff in conjunction with the commissioners court, or, in cases of emergency, by the sheriff in conjunction with the county judge. The sheriff would have no authority to employ guards without the consent and approval of the commissioners court secured and entered of record prior to the employment, or, in case there is an emergency for said employment, with the consent of the county judge, prior to the employment.

It is within the discretion of the commissioners court to allow compensation to the sheriff for employing jail guards in cases of emergency, without going to the commissioners court therefore the sheriff may get the permission of the county judge to employ guards, but this can be done only in cases of emergency. In other cases the matter is left entirely with the commissioners court. In no case would the sheriff have the discretion of acting alone upon the responsibility of the commissioners court.

See Waller County vs. McDade, 3 App. C. C., Sec. 110.

Fayette vs. Faires, 44 Texas, 514.

Colorado County vs. Beeche, 44 Texas, 447.

When it is determined by the commissioners court, or in cases of emergency, by the county judge, that it is necessary to employ guards for the safe keeping of prisoners and the security of jails, the authority exists in the sheriff to employ the guards at the expense of the county.

You refer to an opinion heretofore given by this department to Hon. John W. Hornsby, in reference to this matter. The opinion to which you refer was given in answer to the following questions:

"Is there any law authorizing the payment of sheriffs for the services of jailers?"

This question was answered in the negative and in passing upon the question it is probable that the reasoning was carried too far so as to mislead the county judge and possibly the commissioners court.

There is no law which would authorize the commissioners court to pay the sheriff for the services of a jailer; even though said jailer might be called by the name of "guard."

Article 49 of the Code of Criminal Procedure provides as follows:

"Each sheriff is the keeper of the jail of his county and respon-

sible for the safe keeping of all prisoners committed to his custody.”

Article 52 of the Code of Criminal Procedure provides as follows:

“The sheriff may appoint a jailer to take care of the jail and supply the wants of those therein confined, and the person so appointed is responsible for the safety of prisoners, and liable to punishment as provided by law for negligently or wilfully permitting a rescue or escape, but the sheriff shall at all times exercise a supervision and control over the jail.”

It is apparent that a reasonable construction of the above articles in connection with Article 4898 of the Revised Statutes of 1895, shows that there is a distinction clearly drawn between the sheriff, the guard and the jailer, who is to supply the wants of the prisoners, and the latter part of Article 1098 of the Code of Criminal Procedure plainly states that no allowance shall be made for the jailer.

It is a matter of common knowledge that in the larger counties of this State where there are prisoners constantly in the county jail the sheriff in person can not supply the wants of those therein confined, and the person appointed by the sheriff to supply the wants, and to have general supervision over, and control of the jail, is denominated the jailer, or turnkey. Where such a person is required at the jail the sheriff is not the jailer, but is at all times the keeper of the jail of his county.

In the case of *Gordon vs. State*, 2 Court Appeals, 157, the court draws the distinction between the sheriff as keeper of the jail, and the jailer or turnkey, in the following language:

“This supervision and control would make it incumbent upon him to do or cause to be done at least all that is required of the jailer, by the article above quoted, viz.: to take charge of the jail and supply the wants of the prisoners therein confined.”

Article 1098 is as follows:

“The sheriff shall be allowed for each guard necessarily employed in the safe keeping of prisoners \$1.50 for each day, but there shall not be any allowance made for the board of such guard, nor shall any allowance be made for the jailer or turnkeys.”

You will see from this article that the guard is employed *in the safe keeping* of the prisoners, and whether *necessarily* employed is to be determined by the commissioners court or in cases of emergency by the county judge.

It, therefore, very clearly appears that the commissioners court would not be authorized to pay for a jailer or turnkey in the name of “guard”; but, if the sheriff has appointed a jailer and the commissioners court determines that in addition to the jailer there is necessity for the employment of guards, for the safe keeping of the prisoners and the security of the jail, the sheriff has the authority to employ such a number of guards as may be necessary with a prior approval of the commissioners court, or in cases of emergency, with the prior approval of the county judge.

When guards are thus employed they are entitled to the sum of \$1.50 per day to be paid out of the county treasury, upon the order of the commissioners.

Yours very truly,

## TEXT BOOK LAW—EXEMPTIONS.

Any city having a population of 10,000 at time said act went into effect, or has since said act took effect become a city of 10,000 inhabitants, is exempt from the operations of said act, but may adopt books selected under said act.

AUSTIN, TEXAS, December, 4, 1905.

*Hon. R. B. Cousins, State Superintendent of Public Instruction, Capitol.*

Dear Sir: We are in receipt of yours enclosing communication from Senator W. A. Hanger, in which he asks for a ruling of your department as to whether or not a city which did not have 10,000 inhabitants at the time of the enactment of the uniform text book law, but which now has 10,000 inhabitants, is exempt from the operation of said law under the provisions of Section 11 of the same.

You are respectfully advised that Section 11 of the Act of 1903, known as the "uniform text book law," is in part as follows:

"The provisions of this act shall not apply to any city in this State having a population in excess of ten thousand, but any city may adopt the books selected under this act \* \* \*"

Section 10 provides that the books adopted by the board under the provisions of this act shall be introduced and used as text books to the exclusion of others in the public free schools of this State for a period covering five scholastic years beginning September 1, 1903, or as soon thereafter as practicable *subject to the exceptions contained in this act.*

By virtue of the provisions of this act the Legislature has undertaken to exercise control over certain books to be used in public schools within this State for a period of five scholastic years, except those situated in cities having a population in excess of 10,000. Public schools of the latter class are not controlled in the selection of text books by law, but enjoy a privileged exemption and immunity in this respect not granted to schools otherwise situated.

In making such an exception, the purpose or intention of the Legislature is not disclosed by the language of the act. In construing language, the rule is that statutes are to be understood primarily according to their grammatical sense unless it is apparent that the author meant something different.

Sutherland on Constitutional Construction, Section 258.

The word "having" in the sentence "having a population in excess of 10,000," etc., being a present participle, alludes to and means present time, that is, in either of the five scholastic years embraced in said act. *Bryson vs. Davidson*, 5 N. C., 143.

Article 3960, Revised Statutes, provides that the scholastic year shall commence on the 1st day of September of each year and end on the 31st day of August thereafter. New schools are organized in each scholastic year and it depends upon the locality of the school whether or not it comes within the provisions of this act. All schools organized in the scholastic year of 1903 outside of the cities having a population in excess of 10,000 are subject to its provisions. All schools organized for that year within cities above referred to, had the right to exercise their own discretion, and under the terms of

Section 11 of said act, the same conditions prevail in each succeeding year. Therefore, in the scholastic year 1905, all public schools located in cities with a population in excess of 10,000 are exempted from its provisions and have the right under the law to exercise their own discretion as to whether or not they will continue the use of the books formerly adopted.

It is, therefore, my opinion that if the Legislature had intended that the exceptions of Section 11 should only apply to cities having a population in excess of 10,000 at the time the act went into effect, they would have so expressed it, in terms to that effect, for example, "the provisions of this Act shall not apply to cities not having a population in excess of 10,000," or "the provisions of this act shall not apply to cities having a population in excess of 10,000 at the time this act takes effect."

Inasmuch as no such limitations are expressed, we must construe the language as it is commonly understood and therefore hold that the schools situated in all cities in this State having a population in excess of 10,000 may exercise their own discretion, as authorized by law.

Yours truly,

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#### TAXES—CHATTEL MORTGAGE—PRIOR LIEN.

Where a party has given a mortgage on all horses, mules, etc., to secure a debt to mortgagees, the mortgage being duly recorded, and mortgagor has rendered same for taxation, but refuses to pay taxes thereon, and if while mortgage is on record and unsatisfied, tax collector levies on and sells same, he does so subject to mortgage lien. Lien begins when levy is made.

AUSTIN, TEXAS, December 4, 1905.

*Mr. J. R. Bond, Tax Collector, Kaufman, Texas.*

Dear Sir: Yours of the 28th came to hand in due time, and we regret that the business of this department has been such that we have not been able to give it our attention earlier.

You state that in November, 1904, some parties gave a chattel mortgage to secure a debt on all horses, mules and on all implements which were to be used in raising the crop; and, also on the crop.

You state that the mortgagor rendered all of this property for taxes in January, 1904, the chattel mortgage not having been executed until November, 1904.

You state that the taxes have not been paid on this property, or any of same, and that the mortgagor refuses to pay said taxes. You desire to know if it is legal to levy upon and sell as much of this mortgaged property as would be sufficient to pay the taxes, and who has the prior lien.

Your attention is directed to Article 8, Section 15 of the Constitution of this State, which reads as follows:

"The annual assessment made upon landed property shall be a special lien thereon, and all property, both real and personal, belonging to any delinquent taxpayers shall be liable to seizure and

sale for the payment of all taxes and penalties due by said delinquent, and such property may be sold for the payment of taxes and penalties due by such delinquent under such regulations as the Legislature may provide."

Carrying out the intention of the framers of the Constitution the Legislature of this State has provided that all taxes upon real property shall be a lien upon such property until the same shall be paid, And should the assessor fail to assess any real estate for any one or more years the lien shall be good for every year that he shall fail to assess for, and he may, in listing property for taxes any year thereafter, assess all of the back taxes due thereon according to the provisions of this title. See Article 5086, Revised Statutes of 1895.

Following the provisions of the Constitution still further, the Legislature which convened in 1897 passed what is known as the Colquitt act, the provisions of which go into detail as to the methods and manner of foreclosure of the constitutional lien upon land which is delinquent for taxes.

Ample provision has been made, both by the Constitution and laws of this State, for the creation and enforcement of liens upon real estate for taxes due thereon, but there is no provision in the Constitution nor in the statutes creating any lien upon personal property for taxes, except that contained in Article 5176a, Revised Statutes, which provides as follows:

"In all cases where a taxpayer makes an assignment of his property for the payment of his debts, or where his property is levied upon by his creditors by writs of attachment or otherwise, or where the estate of the decedent is, or becomes insolvent, and the taxes assessed against such person or party, or against any of his estate, remains unpaid in part or in full, the amount of such unpaid taxes shall be a *first lien upon all such property.*"

While Article 5176 provides that all real or personal property held or owned by any person in this State shall be liable for all State and county taxes due by the owner thereof, including taxes on real estate, personal property, and poll tax, and that the collector of taxes shall levy upon any personal or real property to be found in his county to satisfy all delinquent taxes, any law to the contrary, notwithstanding these provisions do not in any manner contravene the chattel mortgage act when tested by the authorities. Tax liens are not created by implication, and the provisions last above quoted are intended simply to deny the right of the delinquent to claim exemptions under the constitutional laws of this State.

It makes all of the delinquent's property liable for his taxes, but, as a matter of course, in doing so it only makes liable such property as he really owns, and when the collector levies on and sells property he can not sell any greater interest in the property than is owned by the person against whom he is making such levy.

The general rule is that taxes are not a lien upon property unless expressly made so, and when liens are expressly created they can not be enlarged by construction. If, therefore, the statute in terms makes the tax a lien on one species of property, it will not by intendment be extended to any other species. See Cooley on Taxation, Vol. 2, page 865; Meriwether vs. Garrett, 102 U. S., 472.

There being no provision in our Constitution or in our statutes creating a lien generally upon personal property, there is no lien by law, and, therefore, a mortgage duly executed and registered according to law creates a lien upon the property, and if while said mortgage is on record and unsatisfied the tax collector levies upon the mortgaged property and sells the same, he sells it subject to the mortgage lien. The tax lien begins when and not until the tax collector makes the levy. Except in cases of assignment, attachment, death, etc., as above set out.

Except as above mentioned, there is no provision of the Constitution nor of the statutes relating to liens upon property for taxes. The lien mentioned in Article 5175a arises immediately upon the happening of the contingencies therein stated and ceases upon the payment of the taxes and has reference to personal property as well as real estate. The enactment of this particular statute excludes the idea that any other lien exists on personal property for a delinquent's taxes. The doctrine of tax liens is stated by Mr. Desty in his valuable work on Taxation, Vol. 2, Sec. 128, as follows:

"A lien for taxes is of statutory creation, and attaches on the property of the taxpayer at the time prescribed by the statute conferring it. When it attaches it continues until the tax is paid. It attaches on real estate from the time specified in the statute, but it does not attach on the personal property until the levy, and is lost by the neglect to levy."

The same author says that tax liens must be strictly construed and that there is a wide difference between liens created by statute and liens created by levy. And further, "the tax is not a lien unless it is expressly made so by the law or ordinance which imposes it." See Volume 2, page 743.

In the case of *Binkert vs. Wabash Ry. Co.*, 998 Ill., 216, the court in discussing a question similar to this, said:

"If it had been the intention of the Legislature to create a specific charge upon every article of personal property to the extent of the taxes assessed on its valuation, as it has on each tract of land, some provision certainly would have been made by which the extent of the charge could be definitely ascertained so as to prevent hardships and fraud upon innocent purchasers. And since this has not been done, in the absence of any express provisions to that effect, we must hold that it was not the intention of the Legislature to create any such charge."

The Supreme Court of the same State held in the case above referred to, that while the right to raise revenue by taxation is necessarily inherent in every government, yet, in a constitutional government like ours, this right is regulated by law, and can only be exercised in the matter and for the purposes specified in the Constitution and in the statutes of the State.

Property seized for taxes will be taken subject to any prior lien existing in favor of individuals. A sale of mortgaged chattels to satisfy general taxes due from the mortgagor has been held not to give to the purchaser title free from the lien of the mortgagee.

Cooley on Taxation, Vol. 2, page 853.

Woody vs. Jones, 113 N. C., 253.

A specific lien upon personalty does not yield to a subsequent claim for taxes on the same property, where no specific lien has been required for such claim by warrant or other process.

Wise vs. Wise County, 153 N. Y., 507.

In the absence of statute no lien exists on personalty for taxes, unless by some execution process, and a mortgagee of goods who took possession of them before they had been seized for taxes, and who sold them for the satisfaction of his demand, was held entitled to the proceeds as against the tax collector.

Marsh vs. Bird, 22 Federal Reporter, 180.

Jeffrey vs. Anderson, 66 Iowa, 718.

While the State has no general lien upon personal property, the tax collector may levy upon any property found in the possession of any delinquent and sell the same according to law for the taxes and costs due by such delinquent, subject, of course, to all prior valid liens.

Tax collectors are not compelled to levy upon mortgaged property but they may do so if they see proper, considering all of the facts in each particular case, and should do so if there is a reasonable chance of making the taxes without involving himself in fruitless litigation.

You understand, of course, that any conveyance made for the purpose of hindering, delaying or defrauding tax collectors would be absolutely null and void, and should not be regarded by the tax collectors in performing their duties in relation to the collection of taxes.

I crave your indulgence for the length of this communication, but trust that it is not longer than its importance deserves.

Yours truly,

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#### OFFICES AND OFFICERS—BOARD OF REGENTS OF UNIVERSITY OF TEXAS.

A person holding the office of city attorney may at the same time be a member of the board of regents of the University. The latter office is not an office of emolument.

AUSTIN, TEXAS, December 4, 1905.

*Hon. S. W. T. Lanham, Governor, Capitol.*

Dear Sir: Complying with your request that I should advise you whether or not a person holding the office of city attorney of a city incorporated under a special charter is eligible to appointment as a member of the Board of Regents of the University of Texas, I beg to say that in my opinion there is no prohibition, constitutional or statutory, against such an appointment.

Section 40 of Article 16 of the Constitution is:

“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.”



I call attention to the fact that under Article 3844 of the Revised Statutes, members of the Board of Regents hold their offices for eight years, and it would seem, therefore, that if this is a "civil office" within the meaning of this constitutional provision the term thereof conflicts with section 30 of Article 16 of the Constitution, which provides that the duration of all offices not fixed by the Constitution shall never exceed two years.

Waiving this point, however, and assuming that the Board of Regents of the University of Texas are public officers, I am of the opinion that these are not civil officers of *emolument*.

Article 3866 of the Revised Statutes is:

"The reasonable expenses incurred by the Board of Regents and visitation *in the discharge of their duties* shall be paid from the available University fund."

The word "emolument" is thus defined: "Profit arising from office or employment, that which is received as compensation for services, or which is annexed to the possession of office as salaries, fees and perquisites."

10 American & English Encyclopedia of Law, 1204.

In Throop on Public Offices, it is said, at page 428 (Section 441), defining salary and emoluments:

"The term salary, of itself imports a *compensation for personal services*, and not the repayment of moneys expended in the discharge of the duties of the office."

As I construe Article 3856, the members of the Board of Regents are allowed only the reasonable expenses incurred by them in the discharge of their duties, and they are not entitled to any compensation for their services.

Accordingly, as I have said, if this is a civil office, I am of the opinion that it is not a civil office of emolument and that the prohibition of Section 40 of Article 16 does not apply.

So far as I have been able to find, after a careful investigation of the records of this department, no opinion has previously been rendered upon this question, nor do I find that the question has ever been presented to our courts.

I am of the opinion that the question is free from doubt.

Yours respectfully,

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UNORGANIZED COUNTIES—JURISDICTION—COURTS—  
CRIMINAL LAW.

Effect of organization of a county upon suits and prosecutions pending in the county to which it was attached.

AUSTIN, TEXAS, December 5, 1905.

Hon. T. B. Shell, County Attorney, Midland, Texas.

Dear Sir: Your letter of the 22nd ult. came duly to hand, but reply has been unavoidably delayed owing to a congestion of work in the department. You write:

"While Gaines County was attached to Martin for judicial pur-

poses, being unorganized, there were filed in the various courts of Martin County, district, county and justice, several suits, both civil and criminal. Gaines is now fully organized and the suits still pending. Will the cases be tried in Martin County where instituted, or will venue be changed to Gaines County courts?"

As I understand the law, prosecutions pending in Martin County for crimes and offenses committed in Gaines County before its organization, of which Martin County acquired jurisdiction only because Gaines County was at the time of indictment found, or information filed, attached to Martin County for judicial purposes, should be transferred to the proper court of Gaines County which has now become fully organized.

The precise question was decided in the case of *Hernandez vs. State*, 19 Texas Court of Appeals, 408, decided November 18, 1885.

Hernandez was indicted, tried and convicted in Kinney County for an assault with intent to murder, committed in the town of Del Rio. At the time of the commission of the offense, as also when Hernandez was indicted, Del Rio was in Kinney County. Thereafter Val Verde County was created out of a portion of Kinney County, including the town of Del Rio. Val Verde County was fully organized before the trial of the case in the district court of Kinney County. The Court of Civil Appeals, through Presiding Judge White, said:

"After the organization of Val Verde County the cause should have been transferred to the district court of that county for trial. Because the district court of Kinney County has lost its jurisdiction in the case in the creation of Val Verde County, judgment is reversed and cause remanded that it may be transferred to Val Verde County for a new trial."

I have found no more recent decisions in this State, but this case seems to have been decided in accord with the weight of authority.

See 12 Cyc., 241.

14 Century Digest, p. 854, and note on page 101 of Vol. 85 of American Decisions, and the cases there cited.

The rule is otherwise, however, in civil matters. The jurisdiction in civil matters of the courts of Martin County is unaffected by the organization of Gaines County. Martin County was the proper place to bring those suits at the time they were instituted, and the jurisdiction of the Martin County courts was not lost nor divested by the organization of Gaines County.

See *Dodson vs. Bunton*, 81 Texas, 659.

11 Cyc., 690; and note on page 102, Vol. 85 of American Decisions.

Replying to your inquiry as to what books Gaines County is entitled to, and how to get them, I refer you to Article 2807, et seq., Revised Statutes of 1895, from which you will see that application must be made to the Secretary of State. The Secretary of State will not, however, supply any books to an officer who fails to take out his commission and pay the fee therefor stipulated in Article 2439.

Yours very truly,

## STATUTES CONSTRUED—OFFICES AND OFFICERS.—APPOINTMENT TO FILL VACANCY.

Under Article 1079 and act of April 17, 1899, creating Fifty-sixth Judicial district, a vacancy in the office of clerk of the court is filled by appointment until a clerk can be elected only.

AUSTIN, TEXAS, December 11, 1905.

*Mr. Frank M. Spencer, Judge of Tenth Judicial District, Galveston, Texas.*

Dear Sir: I have your letter of 8th inst., from which I quote the following:

"The death of Mr. J. F. Simons, that occurred yesterday, has created a vacancy in the office of clerk of the district court of this county, the county embracing, as you are aware, two judicial districts, the tenth and fifty-sixth.

"I, as the judge of the tenth district court, joined by Judge Street (acting at my request), have this day appointed James C. Gengler to fill the vacancy.

"The question arises whether he holds by virtue of such appointment until the next general election, or whether, upon certificate by the judges showing the above state of facts, the Governor shall order a special election."

In reply to your request for my opinion on this question, I beg to advise you that Mr. Gengler holds only until the qualification of his successor, who will be elected at a special election to be ordered for that purpose by the Governor upon the certificate of Judge Street and yourself that a vacancy exists in the office of clerk of the district court of Galveston County.

The constitutional provision is that in case of vacancy in the office of clerk of the district court "the judge of the district court shall have the power to appoint a clerk who shall *hold until the office can be filled by election.*" (Section 9 of Article 5.) The statutory provision is Article 1079 of the Revised Statutes of 1895, which is:

"Whenever a vacancy may, from any cause, occur in the office of the clerk of the district court, the same shall be filled by the judge of the district court of such county, and the clerk so appointed shall give bond and qualify in the same manner as if he had been elected, and shall hold his office until the next general election, and until his successor shall have duly qualified. When such vacancy occurs in a county having two district courts the same shall be filled by the judges of such courts, and in such case the Governor, upon the certificate of such district judges shall order a special election to fill such vacancy."

The first sentence of Article 1079 is substantially the same as Article 1101 of the Revised Statutes of 1879, and the second sentence is substantially the same as Sections 1 and 2 of the Act of February 12, 1891 (Chapter 5, page 5, General Laws of the Twenty-second Legislature), which are:

"Section 1. Be it enacted by the Legislature of the State of Texas: That whenever a vacancy exists from any cause in the office of clerk of the district court in a county of this State where

there is more than one district court, the same shall be filled by appointment by the judges of such district courts of such counties; and the clerk so appointed shall give bond and qualify in the same manner as if he had been elected, and shall hold his office until his successor is duly elected and qualified.

"Section 2. The Governor, upon the certificate of such district judges that such vacancy exists, shall order a special election to fill said vacancy."

A reading of the Act of 1891 makes it clear, I think, that under Article 1079 of the Revised Statutes of 1895, in a county having two district courts, in case of vacancy in the office of district clerk the judges are authorized to appoint, not for the unexpired term, but only until the vacancy can be filled at a special election to be ordered by the Governor. It remains only to be considered whether Article 1079 of the Revised Statutes is, as to Galveston County, amended or changed by the Act of April 17, 1899, creating the Fifty-sixth Judicial District. (Chapter 79, page 116, of the Acts of the Twenty-sixth Legislature.) Section 6 of this act reads:

"The clerk of the court of the Tenth Judicial District shall perform the duties of clerk of the Fifty-sixth District; in case of vacancy in said office of said clerk, the same shall be filled by appointment by the judge of the Tenth Judicial District."

The language used in Section 1 of the Act of 1891 is: "The same shall be filled by appointment by the judges of such district courts of such county." In Section 6 of the Act of 1899 it is: "The same shall be filled by appointment of the judge of the Tenth Judicial District," as under Section 1 of the Act of 1891, so I take it, under Section 6 of the Act of 1899 the appointment is not to fill the vacancy for the unexpired term but only to fill it temporarily until a clerk can be elected.

Section 2 of the Act of 1891, which read, "The Governor, upon the certificate of such district judges that such vacancy exists shall order a special election to fill said vacancy (which provision is substantially repeated in Article 1079), is, I think, unaffected by Section 6, or any other provision of the Act of 1899.

My conclusion is that Judge Street and yourself should certify to the Governor the existence of a vacancy in the office of clerk of the district courts of Galveston County, whereupon the Governor "shall order a special election to fill said vacancy."

Yours truly,

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#### STATUTES CONSTRUED—PRACTICE OF MEDICINE.

Who are authorized to practice under Act of 1901.

AUSTIN, TEXAS, December 12, 1905.

*Mr. J. H. McHaney, County Attorney, Longview, Texas.*

Dear Sir: Yours of 14th came to hand in due time, and we regret that the congested condition of business in this department has prevented our giving it attention at an earlier date.

You ask for the construction of the acts of the Twenty-seventh Legislature relating to the practice of medicine in this State.

Section 8 of the act in question creates several classes of persons in so far as the practice of medicine, surgery, etc., is concerned in this State.

1. Those who begin to practice after the act becomes effective.
2. Those who were practicing in Texas prior to January 1, 1885.
3. Those who begin practice after January 1, 1885, and who complied with the law of the State regulating the practice in force prior to the going into effect of this act and prior to January 1, 1891.
4. Those who have had diplomas recorded since the first day of January, 1891.

Before those of the first class are entitled to practice medicine in this State they must comply with all of the provisions of the act as to examinations before one of the boards, securing license and having same recorded in the district clerk's office in the county in which he offers to practice.

Those of the third class are entitled to practice if they have complying with all the provisions of the act as to examinations, etc., the only prerequisite to their authority being that they were practicing prior to January 1, 1885.

Those of the third class are entitled to practice if they have complied, prior to January 1, 1891, with the laws of the State regulating the practice of medicine, in force prior to July 9, 1901, this being the date of going into effect of the act in question.

The laws of the State regulating the practice of medicine prior to the going into effect of the Act of the Twenty-seventh Legislature are contained in the Revised Statutes of 1895, Article 3777 et seq., and Article 438 et seq., of the Penal Code.

These provisions of the Revised Statutes of 1895 were brought forward from the Revised Statutes of 1879, and consisted of the Acts of 1879, 1876 and 1873. Under the provisions of these articles a person was entitled to practice medicine in this State, either under a certificate of a Board of Medical Examiners of either of the several districts of the State, or a diploma from some accredited medical college, which certificate or diploma must have been recorded in the office of the district clerk of the county in which he offers to practice.

Under the provisions of the Act of the Twenty-seventh Legislature parties who began the practice of medicine after January 1, 1885, and had recorded by the district clerk of the county in which they practiced, prior to January 1, 1891, either a certificate from a Board of Medical Examiners or a diploma from some accredited college, are entitled to practice medicine in this State, without further compliance with the provisions of said act.

Those parties who have had their diplomas recorded since January 1, 1891, are not entitled to practice medicine in this State without having presented to the State Board of Medical Examiners satisfactory evidence that their diplomas were issued by bona fide medical colleges of respectable standing, and receive a certificate from said Board, and have said certificate recorded, as provided for in Section 12 of the act.

The case of *Stone vs. State*, 13 Court Reporter, construes the provision last above mentioned.

Trusting that this will be satisfactory, I am,

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#### FEES—COUNTY OFFICERS.

Act of 1897 places county officers in three classes: (1) In counties containing less than 25,000 inhabitants, with an annual salary of \$2000 and 1-4 excess; (2) in counties containing more than 25,000 inhabitants and less than 37,500, with annual salary of \$2500 and 1-4 excess, etc.

Number of votes cast at Presidential election does not affect maximum amount of fees. Reports of officers.

AUSTIN, TEXAS, December 16, 1905.

*Hon. E. I. Hill, County Attorney, Belton, Texas.*

Dear Sir: We are in receipt of yours of 9th inst., relating to the act of the Special Session of the Twenty-ninth Legislature, and asking for a construction in regard to that portion of the act regulating the maximum amount of fees allowed county officials and the annual reports to be made by them.

The Act of 1897, above referred to, Section 10 places the maximum fees of the officers of this State in three classes:

1. The officers in those counties containing less than 25,000 inhabitants in one class.
2. It places officers in those counties containing more than 25,000 inhabitants, and less than 37,500 inhabitants in another class; and,
3. It places officers in those counties containing as many as 37,500 inhabitants in another class.

The maximum amount of fees of those officers of the first class is set at \$2000 per annum, and one-fourth of the excess; the maximum amount of fees of those officers in the second class is set at \$2250 and one-fourth of the excess, and the maximum amount of fees of those officers of the third class is set at \$2500 per year and one-fourth of the excess, the population of the county to be determined by the national census of 1900.

You state that Bell County, according to the United States census of 1900, contains more than 37,500 inhabitants, although there were polled at the last presidential election less than 3000 votes. The number of votes cast at the presidential election does not affect matter of the maximum amount of fees. This is regulated by the population of the county as shown by the national census of 1900, and that census showing that Bell County contains as many as 37,500 inhabitants, the officers of Bell County are entitled to receive as fees a maximum of \$2500 per annum, and in addition thereto one fourth of the excess.

You also ask if the officers of Bell County are required to make reports provided for in Section 11 of the Act of 1897. I assume that the officers you refer to are the county judge, county clerk, county attorney, district attorney, district clerk, collector of taxes

and assessor of taxes, these being the officers mentioned in Section 10 of the act whose maximum amount of fees are regulated.

Section 16 of the act provides that it shall be the duty of those officers named in Section 10 (being those mentioned above), and also the sheriff, to keep a correct statement of the sums coming into their hands as fees and commissions, in a book to be provided by them for that purpose in which the officer at the time when fees or monies shall come into his hands shall enter the same.

Section 17 of the act provides that the officers named in Section 10 of this act (being the officers mentioned above), in those counties having a population of 15,000 inhabitants, or less, shall not be required to make a report of fees, as provided in Section 11 of this act, or to keep a statement provided for in Section 16 of this act; *the population of the county to be determined by the vote cast at the next preceding presidential election on a basis of five inhabitants for each vote cast at such election*; provided, that all district attorneys shall be required to make the reports and keep the statements required in this act.

The report mentioned in Section 17 as being required in the provisions of Section 11 is as follows:

“Each officer mentioned in the preceding section (being the officers heretofore specifically named), and also the sheriff, shall, at the close of each fiscal year, make to the district court in the county in which he resides a sworn statement showing the amount of fees collected by him during the fiscal year, and the amount of fees charged and not collected and by whom due, and the number of deputies and assistants employed by him during the year, and the amount paid or to be paid each, etc.”

Section 17 provides that it is not necessary that the officers referred to make this report or keep the statement provided for in Section 16, and heretofore referred to, in those counties having a population of 15,000 or less; the population to be determined by the vote cast at the next preceding presidential election on a basis of five inhabitants for each vote.

You state that Bell County cast less than 3000 votes at the last presidential election. This being the case, Section 17 literally construed would bring about the anomalous condition of affairs that the maximum of fees of the officers of Bell county be limited to \$2500 per annum and one-fourth of the excess, with no provision of the law which would require them to make a report, as provided for in Section 11, or keep a statement as provided for in Section 16. And thus there would be afforded no means of ascertaining as to whether or not the officers of the county had exceeded in the collection of fees the maximum allowed by law.

A proper construction of a statute is to give effect to every word, clause and provision in the enactment, without permitting any one to nullify any other, and to harmonize detailed provisions of the statute with the general purpose or principle which the whole is intended to subserve, and the various portions of the statute must be construed so as to harmonize with each other.

The general system of legislation upon the subject matter should be taken into view and the statute construed in conformity there-

with. (See Endlich on Interpretation of Statutes, paragraph 40.) It is not proper in the construction of a statute to confine the attention to one section. Statutes must receive a reasonable construction, reference being had to their controlling purpose and to all of their provisions, the general intent being kept in view in determining the scope and meaning of any part. The presumption is that the lawmaker had a definite purpose and has adopted and formulated the provisions in harmony with that purpose.

The purpose for which a law was enacted is a matter of prime importance in arriving at a correct interpretation of its parts.

See Sutherland on Statutory Construction, Vol. 2, paragraphs 368, 369.

Ellis County vs. Thompson, 96 Texas, 22.

The object of the Legislature in passing the Act of 1897 regulating the fees of officers was not to enlarge the rights of the officers named, but to regulate the matter of fees so as to give to each officer out of the fees collected by him, a reasonable compensation for the services rendered, and to make the offices self-sustaining, and apply the excess of fees to the public use. To accomplish this end the compensation of the offices is placed strictly on the basis of a public service, and the fees are treated as a part of the public revenue, to be received by the officer and accounted for as directed. See *Ellis County vs. Thompson*, supra.

Keeping in view the intent of the Legislature in the passage of the Act of the Twenty-fifth Legislature, it must be construed so as to require all officers embraced within its provisions regulating the maximum amount of fees which may be retained, to make a report of all fees collected and charged and not collected, as provided for in Section 11, and to keep a correct statement of the sums coming into their hands as fees and commissions, as provided for in Section 16. Construing the act with this purpose in view, it must be held that if the census of 1900 shows that Bell County contains as many as 37,500 inhabitants, the officers of Bell County are required to make the reports provided for in Section 11, and to keep the statement provided for in Section 16, notwithstanding the vote polled at the last preceding presidential election might indicate, under the provisions of Section 17, that Bell County had less than 15,000 inhabitants.

A proper construction of Section 17 would be that if a county contains less than 15,000 inhabitants, according to the national census of 1900, but the vote at the last preceding election showed the population of the county to be as many as 15,000 inhabitants, counting five inhabitants for every vote, the officers would still be required to make the report and keep the statements provided for.

You are therefore respectfully advised that the officers of Bell County are entitled to retain as fees an amount not exceeding \$2500 per annum, and in addition thereto one-fourth of the excess of the fees collected by the respective officers; and that each of said officers and also the sheriff is required to make the report provided for in Section 11 and to keep the statement provided for in Section 16 of the Acts of the Twenty-ninth Legislature.



## ANTI-TRUST LAW.

An agreement by certain merchants to refuse credit to a person indebted to one of them is illegal.

AUSTIN, TEXAS, December 26, 1905.

*Mr. C. A. Beeman, Dallas, Texas.*

Dear Sir: We are in receipt of yours of 16th instant, in which you ask the following question:

"Is it a violation of any of our State laws for merchants to agree among themselves not to grant credit to any individual who owes another merchant, and has not, or does not make a satisfactory settlement of the debt?"

"If such an agreement (verbally) is not a violation, would one in writing stating an amount to be forfeited by the merchant violating the agreement?"

You are respectfully advised that an agreement, either verbal or in writing, is in violation of the anti-trust laws of this State.

Article 5313, Revised Statutes, as amended by the Acts of the Twenty-eighth Legislature, General Laws, 1903, page 119, Section 3, provides as follows:

"That either or any of the following acts shall constitute a conspiracy in restraint of trade:

"(1) Where any two or more persons, firms, corporations or associations of persons who are engaged in buying or selling any article of merchandise, produce or any commodity, enter into an agreement or understanding to refuse to buy from or sell to any other person, firm, corporation or association of persons any article of merchandise, produce or commodity."

Provisions of the above section prohibits in unequivocal language the proposed agreement.

It may be urged that an agreement not to "extend credit" is not an agreement "not to sell."

Credit is confidence or trust reposed in one's ability to pay what he may promise; the ability to buy on an opinion conceived by the seller that he will be repaid.

It is a fact of common knowledge that the greater portion of the commerce of the world and the business of this and all other countries is done on credit.

The credit of an individual is the trust reposed in him by those who deal with him that he is of ability to meet his engagements; whether this opinion be founded on fact or fancy, it is the basis of which trade is carried on in this country. It is a valuable asset, and can not be made the subject of an agreement between the sellers, whereby it is controlled, limited, restricted or in any manner interfered with; restricted credit means restricted trade: unlimited credit means boundless competition.

A very small percentage of people are able to pay as they go. The great majority are dependent upon their credit for necessities for themselves and their families. Under the proposed agreement a merchant might present a bill containing errors, and if he was not honest enough to correct them he would have the power of suspending the credit of his customer by reporting him as in arrears!

Such power strikes at the very roots of trade and can not be exercised in that manner under our laws.

An agreement not to extend credit is equivalent to an agreement not to sell to many individuals, for without funds or credit he would be unable to buy.

A merchant has the right to refuse to extend credit to any person to whom he does not desire to favor in any way, or may decline to sell his wares at all; but the law prohibits him from entering into an agreement with other merchants not to sell or to deny a certain class of citizens credit.

The agreement also violates other sections of the anti-trust laws, among which I will call attention to that provision defining a trust to be combination of capital, skill and acts, by two or more persons, etc., to create or which may tend to create or carry out restrictions in trade, or to prevent or lessen competition in the sale of merchandise, produce or commodities.

"Competition" is the struggle between rivals for the same trade at the same time. It is self-evident that there can not be competition unless there is trade, and so, though the popular saying is that competition is the life of trade, it is quite certain that trade is the mother of competition, for the latter springs from the former, so that whatever restrains trade restrains competition also.

*Prewing Co. vs. Belinder, 71 S. W. Rep., 691.*

Under the proposed agreement, after a person became indebted to a member of the association, if the individual was a person dependent upon his credit for supplies, the merchant would have the power to control his trade or deny him credit elsewhere by reporting him in arrears, and in that way restrict trade and lessen competition.

While such an agreement would doubtless protect the merchant from improvident or dishonest patrons, yet it could be made to operate with distressing effect upon individuals and their families, who, through misfortune, sickness or other causes, were prevented from meeting their obligations promptly.

Regardless of the good or evil effects of such an agreement, it is our opinion that the law denounces it as a conspiracy in restraint of trade, and you are so advised.

Very truly yours,

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COUNTY COMMISSIONERS — SUPERVISORS OF ROADS —  
COMPENSATION.

AUSTIN, TEXAS, January 2, 1906.

*Hon. J. H. Chisholm, Rockwall, Texas.*

Dear Sir: We are in receipt of yours of the 25th ult.

You desire to know whether or not the county commissioners of your county could be employed or authorized to supervise roads in their respective justice precincts and receive pay therefor in addition to their pay for ten days' road inspection.

You are respectfully advised that Section 44 of Article 3 of the Constitution provides that "the Legislature shall provide by law

for the compensation of all the officers, servants, agents and public contractors not provided for in this Constitution. \* \* \*

Article 4712 of the Revised Statutes provides: "The county commissioners \* \* \* are hereby constituted supervisors of public roads in their respective precincts, and each commissioner shall supervise the public roads within his commissioner's precinct once each year, and shall receive a compensation therefor of \$3 per day for the time actually employed in the discharge of his duties. \* \* \* provided, that no commissioner shall receive pay for more than ten days in each year."

You are respectfully advised that the Legislature has made it the duty of the county commissioners to supervise the roads and bridges of their respective precincts and it has fixed their compensation for performing such services at \$3 per day, not exceeding ten days in any one year.

In our opinion, all the compensation they are legally entitled to, regardless of the number of days required to discharge the duties prescribed by Article 4712 of the Revised Statutes, is \$3 per day for ten days in each year.

They are required under the conditions of their bonds to faithfully perform all the duties of their offices, and the commissioners court has no authority to use the public funds to provide a greater compensation for services than that allowed by law.

It may be said, however, that in a great many cases the compensation is wholly inadequate for the services performed, but that fact will not authorize the payment of additional per diem, the Legislature alone having authority to increase it.

Yours truly,

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#### OFFICES AND OFFICERS—COUNTY CLERKS.

A woman is eligible to office of county clerk.

ATTORNEY GENERAL'S DEPARTMENT.

AUSTIN, TEXAS, January 4, 1906.

*Miss Addie M. Strother, Groesbeck, Texas.*

Dear Madam: We acknowledge receipt of yours of the third inst. You ask for an opinion of this department as to whether or not a lady can legally hold the office of county clerk in this State.

Where no limitations are prescribed, the right to hold office under our political system is an implied attribute of citizenship. The basis of the principles to eligibility to office is the absolute liberty of the electors and the appointing authorities to choose and appoint any person who is not ineligible by the Constitution. Eligibility to office, therefore, belongs not exclusively or specially to electors enjoying the right of suffrage, but belongs equally to all persons whomsoever, not excluded by the Constitution of the State.

The Constitution of 1869, Article 3, Section 14, contains the provision that "no persons shall be eligible to any office, State, county or municipal, who is not a registered voter in this State." This provision was omitted in the Constitution of 1876, and the omission of this provision is not without significance. If the Constitution

of the State does not prohibit a woman (a feme sole) from holding office in this State, she is eligible to hold office.

Article 5, Section 20 of the Constitution provides as follows: "There shall be elected for each county by the qualified voters a county clerk, who shall hold his office for two years."

The Legislature of this State, following the provisions of the Constitution, enacted as follows:

"There shall be a clerk of the county court for each county who shall be elected at a general election for members of the Legislature, by the qualified voters of such county." See Article 1133, Revised Statutes of 1895.

The statute of Missouri, Article 886, contains the provision that "there shall be elected a school director who is a citizen of the United States, a resident taxpayer and *qualified voter* in the district."

Under this provision of the statute it was held that a woman could not hold the office of school director because she was not a qualified voter under the Constitution of Missouri. See State Ex Rel vs. McSpaten, 137 Mo., 628.

The Constitution of Oregon contains the provision that "no person shall be elected or appointed to a county office who shall not be an *elector of the county*."

Under the above stated, the Supreme Court of that State held that a woman was not eligible to the office of county superintendent. See State Ex Rel. vs. Stevens, 29 Oregon, 464.

In the case of the State Ex Rel. Crow vs. Hostetter, the question involved was whether or not Mrs. Wheeler, a woman, was ineligible to hold the office of county clerk. The provision of the Constitution under consideration was as follows:

"No person shall be elected or appointed to any office in this State, civil or military, who is not a citizen of the United States, and who shall not have resided in this State one year next preceding his election or appointment."

The last above mentioned case was a case arising under the Constitution and laws of Missouri, and is reported in 39 S. W. Rep., 270.

The court held in that case that there was no provision expressly requiring the clerk of the county court to be a male. The statute of that State in reference to county clerks provided that they should be citizens of the United States, above the age of twenty-one years, and should have resided in the State one year, and within the county three months. The court held that as there was nothing in the Constitution or in the statutes prohibiting females from holding the office of county clerk, Mrs. Wheeler was eligible to hold that office.

The Supreme Court of Ohio, in the case of Warwick v. State, held that a woman was incapable of holding the office of county clerk, because the Constitution provided that no person should be elected or appointed to any office unless he was a qualified elector. See 25 Ohio, page 21.

The Supreme Court of Iowa held that a woman was eligible to hold the office of county superintendent because there was no constitutional inhibition upon the right of a woman to hold that office. See Huff vs. Cook, 44 Iowa, 639.

The Supreme Court of this State in the case of *Steusoff vs. State*, held that a person was not ineligible to the office of tax assessor on account of not being a qualified elector, and in deciding the case the court said:

“When a Constitution has been framed which contains no provision defining in terms who shall be eligible to office, there is strength in the argument that the intention was to confide the selection to the untrammelled will of the electors.” See 80 Texas, page 428.

A careful reading of the Constitution will disclose that there are only two offices created by the Constitution which the Constitution requires shall be filled by qualified electors, viz., Senators and Representatives.

As to all other officers in this State, it merely provides that they shall be elected by the qualified electors.

The only disqualification prescribed by the Constitution as to the eligibility to hold office are contained in Article 16, Sections 2, 4 and 5, in neither of which is there a provision that only qualified electors shall hold office. Neither in the Constitution nor in the statute is there a provision that the county clerk shall be a qualified elector.

The power to choose officers is committed to male adults, and as to some offices the power to choose is still further restricted. There are also prescribed certain qualifications for, and certain restrictions upon, those who may be chosen to fill office in this State. Thus, one who gives or accepts a challenge is ineligible to any office. One who bribes an elector to secure his election can not hold the office to which he was elected.

An essential to the holding of the office of district judge is residence in the district for which the officer was elected. To be a member of the Legislature one must be, at the time of his election, a qualified voter and a resident citizen of the county for which he is chosen. None of these qualifications or restrictions prescribed by the Constitution may be disregarded. They are restrictions imposed by the people upon their unlimited freedom of choice.

The statute provides, as does the Constitution, that the county clerk shall be elected by the qualified electors of the county, but neither provides that the person elected shall be a qualified elector.

There being no express disqualification of females, and there being no provisions either of the Constitution or of the statute which would prohibit a female from holding the office of county clerk, you are respectfully advised that she is eligible to said office.

Yours very truly,

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#### SURETY COMPANY—ANTI-TRUST.

Re-insurance contracts, such as herein mentioned, in violation of anti-trust law.

AUSTIN, TEXAS, January 6, 1906.

*Hon. W. J. Clay, Commissioner of Insurance, etc., Capitol.*

Dear Sir: We are in receipt of yours of the 16th enclosing a proposed agreement between the American Surety Company, a corpo-

ration doing a surety business in this State, and the Fidelity and Deposit Company, a corporation engaged in like business, in which you desire to know whether or not the agreement is in violation of the anti-trust laws of this State.

We regret that pressure of business in this department has prevented a consideration of this matter until this time.

The proposed agreement is in part as follows:

“Whereas, The statutory bond now required by the General Laws of Texas of 1901, Chapter 136, for liquor dealers is \$5000 in amount, and for those dealing exclusively in malt liquors, \$1000 in amount: and experience has shown that said business is hazardous and that the risk of loss thereon is great:

“Now, therefore, this agreement of re-insurance between the said companies, witnesseth, as follows:

“1. That for the purpose of their mutual protection against the hazard of excessive losses on said bonds of suretyship for liquor dealers in the State of Texas, as required by the General Laws of Texas of 1901, Chapter 136, or by any acts amendatory thereto, it is agreed by said companies that each company shall pay to the other company

“(a) One-half of all losses actually paid by said other company on said bonds of suretyship; and,

“(b) One-half of any expenses, cost and counsel fees incurred and actually paid in investigating, settling or resisting any claim made; or in defending any action brought on any of said bonds; such payments from one company to the other to be made upon demand and upon presentation of evidence showing the actual payment of such losses, expenses, costs and counsel fees.

“2. That the consideration for said re-insurance shall be one-third of the premiums received by each company for its suretyship on each of said bonds, to be paid by it monthly to the other company so long as this agreement shall remain in full force.”

You are respectfully advised that in our opinion the proposed agreement is in violation of Article 5313, Revised Statutes, commonly called the anti-trust law, as its provisions come clearly within the terms of said act.

Yours truly,

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### TOWN—INDEPENDENT SCHOOL DISTRICTS.

What is a town?

AUSTIN, TEXAS, January 30, 1906.

*Mr. J. A. Hays, Bronte, Coke County, Texas.*

Dear Sir: Replying to your letter of 25th inst., a village having a population of less than two hundred inhabitants is not authorized to form an incorporation for free school purposes only. The village must contain a population of two hundred inhabitants or over.

When the petition for election is presented to the county judge, evidence should be presented to him as to the extent of the town or

village and as to its population, and before he is authorized to order the election he must find the fact to be that there are two hundred inhabitants or more within the *village proper*.

There is no definite or invariable test in such cases to determine what are the boundaries of a village.

In the case of the State vs. Town of Board, 79 Texas, page 63, Justice Gaines, who delivered the opinion of the court, said:

"It is insisted that the corporation should have been confined to the town as laid off into blocks and lots, but we think otherwise. A town may exist without being divided into lots; and on the other hand, neither naked blocks or lots, whether with or without a map, constitute a town. If the population extended beyond the platted portion of the town such extension was properly embraced within the limits of the incorporation."

Therefore, it is clear that in estimating the population of the town you are not restricted to so much of the town as is platted, but will consider the town as it actually is, and the county judge, from the evidence presented to him, must determine what is its population.

In the case of the State vs. Eidson, 76 Texas, 306, Justice Gaines in delivering the opinion of the court said:

"No definition of the word 'town' is given and it follows that we must take the word in its ordinary signification—a collection of inhabited houses. The term carries with it the idea of a considerable aggregation of people living in close proximity. A town population is distinguished from a rural population which is understood to signify a people scattered over the country and engaged in agricultural pursuits, or some similar avocation requiring considerable area of territory for its support. A section of country so inhabited can not be called a town, nor treated as a part of a town without doing violence to the meaning ordinarily attached to that word."

See also the case of Ewing vs. State, 81 Texas, page 178, in which it is said:

"From the nature of the case the area occupied by a town or city is so marked by the aggregation of residences and appurtenant structures that it is always practicable to fix the boundaries so as not to include any territory not authorized to be embraced."

At page 179 it is said: "A city does not extend beyond the area occupied by its houses and inhabitants."

It is impossible to give a better working rule, but I think that if you will call your county judge's attention to these cases he should have no difficulty, from the evidence which will be presented to him, in determining with reasonable certainty what is the population of the village.

It would seem that the county judge's finding upon the question of population would be conclusive, and the validity of an incorporation formed by a town or village for school purposes only, can not be questioned on the sole ground that the county judge erroneously found that the requisite population existed. See case of State vs. Gowin, 69 Texas, page 55.

I enclose under separate cover a copy of circular 47-B. Forms

Nos. 1 to 10 and all notes thereto should be carefully read before any proceedings are instituted.

Yours very truly,

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STATE TREASURER — SECURITY DEPOSITS — INSURANCE COMPANY.

Article 2860, R. S., prohibits State Treasurer from receiving from any individual, and keeping in the Treasury, securities of a domestic life insurance company for the protection of its policy holders. Said article held to include corporations.

AUSTIN, TEXAS, January 30, 1906.

*Hon. John W. Robbins, State Treasurer, Capitol.*

Dear Sir: We have received and considered your recent letter in which you say:

“Several days ago the Southwestern Life Insurance Company of Dallas proposed to deposit with the Treasurer of the State of Texas \$100,000 of approved securities for the protection of its policy holders. I construed Article 2860, Chapter 111, of the Revised Civil Statutes of Texas, to prohibit the Treasurer from accepting such securities, and refused to accept same. Yesterday Mr. John D. Mayfield, secretary of the Texas Life Insurance Company of Waco, Texas, tendered to the Treasurer \$100,000 of securities that had been approved by the Commissioner of Insurance to be deposited in the treasury for the protection of its policy holders, but I declined to accept the same for the same reason.

“I would most respectfully request your opinion as to whether the Treasurer is authorized under the laws of Texas to accept securities and deposit same in the treasury for the protection of the policy holders of a domestic life insurance company, organized and chartered under the laws of this State?”

Article 2860 of the Revised Statutes of Texas reads as follows:

“Art. 2860. All moneys received by the Treasurer shall be kept in the safes and vaults of the Treasury, and it shall not be lawful for the Treasurer to keep or to receive into the building, safes or vaults of the Treasury any money or the representative of money belonging to any individual, except in cases expressly provided for by law; nor shall it be lawful for said Treasurer to appropriate to his own use, or loan, sell or exchange any money or the representatives of money in his custody or control as such treasurer.”

This statute clearly prohibits you, as State Treasurer, from receiving from any *individual*, and keeping in the Treasury securities such as those referred to by you; and, while the language therein used may not, in strictness, include corporations in express terms, we think they are embraced in the spirit and purpose, if not in the letter, of the law.

It was doubtless the intention of the Legislature to exclude from the Treasury all moneys and securities not owned by the State, with the exceptions prescribed by law.

I find no statute creating an exception applicable to a life insurance company organized under the laws of Texas.



In this connection my attention has been called to Revised Statutes, Article 3067, as supplying authority for the requested action by you. It reads as follows:

“Article 3067. No life or health insurance company incorporated by or organized under the laws of any foreign government shall transact business in this State unless it shall first deposit and keep deposited with the Treasurer of this State for the benefit of the policy holders of such company, citizens or residents of the United States, bonds or securities of the United States or of the State of Texas, to the amount of one hundred thousand dollars.”

But this article of the statute, it will be noted, refers to *foreign companies* only. It has no application to domestic companies.

However much such action by you might contribute toward extending and building up the business of our home institutions, I am of the opinion that under the law as it now stands, you should decline to receive from them securities for deposit.

Truly yours,

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#### RECOGNIZANCES—BAIL BONDS—FORFEITURES OF.

Power of the Governor to remit.

AUSTIN, TEXAS, February 3, 1906.

*The Honorable Board of Pardons, Capitol.*

Gentlemen: We are in receipt of yours of the 30th relating to the application of one J. C. Tittle, pending before you, for release as a surety upon a supersedeas bond.

We note that the status of the matter is this:

One Frank Fossett charged with murder entered into a recognizance for his appearance before the district court of Tarrant County, with John E. Rahl and W. M. Holloway as sureties.

This recognizance was forfeited and final judgment taken thereon against the principal and the sureties. The applicant Tittle was not in any way connected with the original recognizance.

The sureties on the original recognizance appealed from the final judgment of forfeiture to the Court of Criminal Appeals and gave a supersedeas bond, on which bond J. C. Tittle was one of the sureties. The object of the application pending before you is to release the applicant Tittle from his obligation as surety upon a supersedeas bond.

You desire to know, first, has the Governor authority to remit a judgment on a supersedeas bond. Second. If he has this authority, can he do so without the consent of the commissioners of Tarrant County, and without the consent of the other officers of the court, who under the law have an interest in said judgment.

We will answer your second question first.

In the case of the State vs. Diches, 28 Texas Rep., 535, the Supreme Court held that the power of the Executive to act in the matter of remitting forfeitures clearly arises when there is a final judgment against the sureties on the bond or recognizance in the court of last

resort. In this case it was contended by the attorneys representing the State that the Governor could not remit the forfeiture after judgment so as to deprive the attorneys of the commissions to which they would have been entitled if there had been no remittitur by the Governor; that the right of the attorneys to the percentage is a vested right, and that their duties were discharged when the execution for the amount of the recovery was placed in the hands of the recoverer, and that there remained no other labor to be performed by them.

The Supreme Court held that the right of the attorneys to the fees for collecting the money did not attach on placing the execution in the hands of the sheriff.

We copy as follows from the opinion of the court:

“The clerk had no right to tax a part of the costs in this cause the amount of commissions which might become due to the attorneys representing the State on receipt of the money for which judgment had been rendered in behalf of the State. The commissions which might become due to the officers upon collecting the judgments are not costs taxed against the defendant. \* \* \* Commissions in this case which might become due to the attorneys if the money had been collected should have been taken from the money so collected, and we have said the commissions did not become due until the money is received.”

The case of *Smith vs. State*, 26 App., 49, involved the authority of the Governor to remit the commissions of the county attorney on forfeitures of recognizances and bail bonds. In this case a final judgment of forfeiture was rendered against the appellant Smith for a fine in the sum of \$707, besides costs of suit. The Governor remitted all of said fine except \$200 which amount, together with the costs, appellant paid.

The county attorney of the county claimed that he was entitled to 10 per cent commission upon the part of said fine remitted by the Governor, and had execution issue on said judgment to collect his commission. An injunction was granted on the application of appellant to restrain the collection of this commission. The court held that an injunction would lie, and in disposing of the matter, said: “As to the right of the county attorney to commissions upon that part or parts of the judgment which had been remitted by the Governor, the case of the *State vs. Diches*, 28 Texas, 536, is directly in point. In that case it was held that commissions on adjudged forfeitures became due to the attorneys representing the State only when the money is collected and they are to be taken out of the money collected. If the money be not collected no right to commission accrued to the attorneys, and this, notwithstanding that their failure to collect is attributable solely to the act of the Governor in remitting the forfeiture.”

You are therefore advised in respect to your second question that the authority of the Governor to remit a fine or forfeiture is not dependent upon the consent of the county commissioners court of the county in which the forfeiture was taken, or upon the consent of the officers, who, under the law, would be entitled to a commission on the fine or forfeiture when same should be collected.

The power of the Governor to remit fines and forfeitures is not restricted, within the limits of the grant given, under the Constitution and laws of this State, and can not be made to depend upon the consent or will of any other officer.

In reply to your first question you are advised that Article 4, Section 11 of the Constitution provides that the Governor shall have the power to remit fines and forfeitures under such rules as the Legislature may prescribe.

Acting under the provisions of the Constitution, the Legislature of this State has provided that in criminal actions, except treason and impeachment, the Governor shall have power after conviction to remit fines, grant reprieves, commutations of punishment and pardons. (Article 1016, Code of Criminal Procedure.) Article 1017, which is the article bearing directly upon the point at issue provides as follows:

“The Governor shall have power to remit forfeitures of recognizances and bail bonds.”

A “recognizance” is an undertaking entered into before a court of record in session, by the defendant in a criminal action and his sureties, by which they bind themselves respectively in a sum fixed by the court, that the defendant will appear for trial before such court upon the accusation preferred against him. (Article 304, Code Criminal Procedure.)

A “bail bond” is an undertaking entered into by the defendant and his sureties for the appearance of the principal therein before some court or magistrate to answer some criminal accusation. (Article 305, C. C. P.)

The only difference between a “recognizance” and a “bail bond” is that a recognizance is an undertaking not signed but made a matter of record in the court where the same is entered into, and a “bail bond” is an undertaking written out and signed by the defendant and his sureties. Each is an undertaking entered into, by a defendant charged with a crime, for the purpose of securing his appearance before the court or magistrate to answer the criminal accusation against him. His failure to appear authorizes a forfeiture of the recognizance or bail bond, as the case may be. It is this forfeiture which the Governor is granted authority to remit under the Constitution and laws of this State; and his authority, in so far as remitting forfeitures is concerned, is limited to forfeitures of “recognizances and bail bonds.”

The case before you is not an application to remit the forfeiture of the recognizance of Frank Fossett, but is an application made by a surety on a supersedeas bond given on appeal from a judgment of forfeiture of the recognizance of said Fossett.

You are advised that it is our opinion that the authority granted to the Governor under the Constitution and laws of this State is not such as to give him power to release a surety on a supersedeas bond given on an appeal from a final judgment of forfeiture of a recognizance or bail bond.

The Governor’s power is the remitting of the forfeiture of the recognizance. Of course, a remission of this forfeiture would carry with it an absolute release of the sureties upon the supersedeas bond.

This fact, however, would be no reason to support a theory that he would have the power to release the surety.

I return herewith all papers enclosed.

Yours truly,

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### COUNTIES.

Claims against a county must be paid in the order of their registration.

AUSTIN, TEXAS, February 9, 1906.

*Hon. F. Stevens, County Judge, Rockport, Texas.*

Dear Sir: Reply to your letter of 30th ultimo has unavoidably been delayed owing to a congestion of work in the department resulting from the necessity for a speedy preparation for submission in the Court of Civil Appeals of the numerous tax suits against the railroads under what is known as the "Love Bill."

You ask if the receipts of your county for the current year should be first applied to the payment of warrants issued during the current year for current expenses, or should they be applied to the payment of county warrants in the order of their registration.

You explain that your doubt is occasioned by an expression of our Supreme Court in the case of *Pendleton v. Ferguson*, 89 S. W. Rep., 761. Chief Justice Gaines in the course of his opinion having said:

"In *Sherman vs. Shobe* it is held that 'it is only upon the surplus of the general revenues of a county which remain after the current expenses have been paid, that a general creditor has a claim.' If so as to a county so it must be as to a State."

It was not so held in the case of *Sherman vs. Shobe*, though the language quoted by Justice Gaines does appear in the opinion in that case.

In *Sherman vs. Shobe*, 94 Texas, 126, a judgment creditor of the city of Sherman caused a writ of garnishment to issue against Grayson County for the purpose of subjecting to the payment of her judgment an indebtedness claimed to be due from the county to the city.

The facts were that an epidemic of small pox having broken out in the city, a verbal agreement was entered into between the city and county authorities that the city should take care of all the cases in the city and adopt all proper quarantine measures and that the county should reimburse the city one-half of the expense incurred. The city carried out the agreement on its part and the commissioners court passed an order authorizing the issuance of a warrant in favor of the city for one-half of the expenditures so incurred.

The sole question in the case was if the indebtedness from the county to the city was subject to garnishment by a creditor of the city. The court held it was not on either of several grounds. The last paragraph of the opinion, in which occurs the expression quoted by Justice Gaines in the *Pendleton* case, is as follows:

"But we think the judgment in this case ought to be reversed for still another reason. The money paid by the city in maintain-

ing the quarantine made necessary by the epidemic of smallpox was presumably money raised by taxation for the payment of the current expenses of the city government. The debt of the county to the city is clearly a debt of that fund, and, in our opinion, is subject to *the same exemption as that fund*. It is a clearer case than that of the City of Sherman vs. Williams, 84 Texas, 421, where the same principle was applied. It is only upon the surplus of the general revenues of a county that remain after the current expenses have been paid that a general creditor has a claim and to subject that surplus to the payment of his debt the writ of garnishment is not the remedy. And we apprehend *the same reason* exists for refusing to subject this fund now in the hands of the county of Grayson as would exist against impounding the tax money in the hands of the city's treasurer."

It is manifest, I think, that in transcribing the opinion of the court in this case the stenographer inadvertently wrote "county" for "city" in the phrase "surplus of the general revenues of a county." What Justice Gaines intended to say was unquestionably, I think, that the debt which the county owed the city was subject to the same exemption as would be the money in the Treasury of the city, and as that debt, when paid, would constitute a part of the current revenue fund of the city, it was not subject to garnishment, whether or not it exceeded the current expenses of the city.

It has frequently been decided by our courts that it is only out of the surplus of the general revenues of a *city* that remain after the current expenses have been paid that a general creditor can be paid, but it never has been decided that that rule applied also to a county. On the contrary, such a holding would be directly in the face of the statutes as construed in the case of Clarke & Courts vs. San Jacinto County, 45 S. W. Rep., 315. In that case the court discussed Articles 853 to 859 of the Revised Statutes.

The county asserted the right under Article 858 of the Revised Statutes, authorizing the creation of "other classes of funds" to subdivide the third-class fund into six special classes and register third-class claims against one or other of the subdivisions. The Court of Appeals denied the authority of the commissioners court to so subdivide the third-class funds, and concluded thus:

"If it be conceded that Article 858 so far modified Article 857 as to authorize the creation of other classes of funds out of those required by the latter it would not be allowed that the authority to do so can be so used as to destroy the right of holders of registered claims, under Article 856, to have their claims paid out of the appropriated fund *in hte order of registration*. This is an *imperative requirement* which imposes a duty upon the county and *confers a right* upon its creditors, and there is nothing in the other provisions to qualify either."

It can not be presumed that the Supreme Court intended, in a case in which the question was not raised and in so casual a way to deny the correctness of the construction of Article 857 adopted by the Court of Civil Appeals in the case of Clarke & Courts vs. San Jacinto.

I am convinced that the court did not intend to do that, but that

as I have suggested the word "county" was inadvertently used for "city."

Until it shall be held in a case in which the question is squarely presented for decision that Article 857 was invalid or was not correctly construed in the case, city claims against a county must be paid in the order of their registration as required by this article.

Yours very truly,

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CONSTRUCTION OF STATUTES—WOLF SCALP LAW.

"Coyote, wolf" construed to mean "coyote-wolf."

AUSTIN, TEXAS, February 10, 1906.

*Hon. M. E. Blackburn, County Attorney, Junction, Texas.*

Dear Sir: The question which you present in your letter of 5th inst. is one of some difficulty, and not one which the Attorney General can decide.

It seems to me, from reading of the first section of the act to which you refer (Chapter 36, page 113 of the General Laws of 1903), that the comma between the words coyote and wolf should not be there, because the provision for the payment of "the sum of \$5 each for any other kind of wolves" is meaningless if the preceding provision is to be read "the sum of fifty cents for each coyote, wolf, wildcat or catamount."

I have examined the enrolled bill and find that the act is correctly printed in the Revised Statutes.

A coyote is a wolf and possibly the least dangerous and destructive of the several kinds of wolves found in Texas.

From a recent report on the subject by the United States government I see that stockmen are paying for coyotes frequently a bounty of \$1 to \$2, pay from \$10 to \$20 for other kind of wolves, which you will notice is the same proportion fixed by the act.

I think the intent of the act was, and that a court would construe it to mean, that for a coyote-wolf the bounty shall be fifty cents, and for any other kind of wolf \$5.

Yours very truly,

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STATUTE CONSTRUED—INTANGIBLE ASSETS LAW—CAR COMPANIES.

What are car companies under Chapter 146, Acts Twenty-ninth Legislature. (Intangible assets law.)

AUSTIN, TEXAS, February 16, 1906.

*Hon. J. W. Stephens, Comptroller, Capitol.*

Dear Sir: Reply to your letter of 6th inst. has been delayed by reason of a congestion of work in the department resulting from the necessity for a speedy preparation for submission in the Court

of Civil Appeals of the numerous suits against railroads for taxes, under what is known as the "Love Bill."

I quote from your letter:

"From communications from various concerns engaged in the business of 'car companies' we find that many of such concerns (corporations) are chartered for entirely different kinds of business and use such cars merely for the purpose of carrying on the business authorized under their charters. Many of these concerns are non-resident corporations which own no property in this State other than the cars sent into and through the State.

"For instance, the St. Louis Car Company, of St. Louis, Mo., whose letter is enclosed herewith, together with one from the Streets Western Stable Car Line, is engaged in the manufacture of street cars, and in order to secure prompt and safe delivery of its products when sold, it owns and uses its own cars for shipment. It is to be assumed that this company received mileage from the railway companies for the use of its cars.

"Under this state of facts two questions suggest themselves to us, viz.:

"First. Such corporations not being authorized by their charters to engage in the business of a 'car company' so called, would they come properly under the provisions of Chapter 146, Acts Twenty-ninth Legislature, merely because they engage in such business?

"Second. Chapter 146 being an ad valorem tax bill, if it is such a bill, would foreign corporations which have no property in this State be subject to taxation under the general tax laws of this State, but whose cars are engaged from time to time during the year in transportation into and through the State, such cars being in the State only temporarily, be liable to assessment and taxation under the provisions of said bill?"

To your first question I answer that a corporation whose charter does not authorize it to engage in the business of a "car company" can not lawfully do so, and is not and can not lawfully become a "car company" within the meaning of that term as used in the act referred to. Nor is a corporation required to make reports under the act as a "car company" because in the carrying on of its lawful business, and incident thereto, it owns and uses its own cars.

Under the facts stated, neither the St. Louis Car Company nor the Street's Western Stable Car Line is a "car company" within the act, each of them being engaged in the manufacture and sale of street cars, and the use of cars for shipment of such street cars being merely incidental to the business, and not of itself a business authorized by its charter.

We have received other similar inquiries from the Texas Refining Company, Greenville, Texas, the Texas Brewing Company, Fort Worth, Texas, and Mr. Sam R. Perryman, of Houston, Texas, on behalf of the Kentucky Refining Company of Louisville, Kentucky. As these inquiries should have been more properly addressed to you, I refer the letters herewith.

We have not examined the charters of the domestic corporations or the permit of the foreign corporations referred to, but if it shall appear to you from the reports submitted, or from an examination

of the charters or permit that the business which the corporation is authorized to carry on in this State is not one of those named in the first section of this act, I think the corporation is not subject to the provisions of the act, notwithstanding that in the carrying on of its business it owns and uses its own cars or its own pipe lines.

You verbally asked to be advised if the Kirby Lumber Company is required to make a report under this act, because in the carrying on of its business it owns and operates a tram road.

I have examined the charter of this corporation and find that the purpose for which it is organized is:

“The establishing and maintaining a lumber company, with the right and power to acquire, hold and own lands by lease or purchase for the purpose of acquiring the supply of lumber, timber and logs necessary to the conduct of said business; to purchase, lease, erect and operate all necessary mills, planing mills, dry kilns, tram roads and all other *necessary incidents to such business*; to manufacture and sell lumber, timber and lots, together with the purchase and sale of such goods, wares and merchandise used for such business.”

Clearly this corporation is not a railroad company or a “car company.” It is a lumber company and the act does not operate upon such companies.

To your second question I reply that a foreign corporation of any of the kinds named in the first section of the act, which does business in Texas, must make the report required by the act, whether or not it owns any tangible property situated in the State. The purpose of the act is to ascertain the amount, if any, of the intangible assets in Texas of such a corporation, and such assets are taxable just as would be its tangible property, if it owned any, having a situs in Texas.

A car company, for example, incorporated under the laws of another State, which leases its cars to shippers or railroads, to be run within or into the State of Texas, is doing business in the State within the meaning of the act, and must make the prescribed report.

Yours truly,

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#### TAXATION—PROPERTY OF LODGES.

Lodges and Benevolent societies extending benefits to its members only, held not to be institutions of purely public charity. Where property is not used exclusively by institution, held not to be an institution of purely public charity.

AUSTIN, TEXAS, February 16, 1906.

Hon. J. W. Stephens, Capitol.

Dear Sir: We are in receipt of your letter enclosing a communication from the tax collector of Bexar County, submitting the following statement and inquiry, viz.:

“San Antonio Lodge No. 11, Independent Order of Odd Fellows, owns valuable property in San Antonio, Texas, on the corner of St. Mary and Houston Streets. The first two stories are rented to vari-



ous persons for various purposes, and the third floor is used by the lodge for its regular meetings and is rented to other lodges on the nights when not used by San Antonio Lodge No. 11. The rentals received go into the general fund, building fund, widows and orphans' fund, and contingent fund of the lodge, and are used exclusively for the purposes of the lodge in paying sick benefits, funeral benefits, assisting the sick and needy when in distress, assisting widows and orphans, and in keeping up the expenses of the lodge, such as repairs, janitor, heat, light, etc. The entire property and the income derived therefrom are used exclusively for the above purpose and no other.

"From the income of the property, the lodge dispenses aid to its members and others in sickness or distress, and without regard to the poverty or riches of the recipient, and the funds, property and assets are pledged and are bound by its laws to relieve, aid and administer to the relief of its members when in want, sickness and distress, and provides homes for its helpless and dependent members, and to educate and maintain the orphans of its deceased members.

"Under the Acts of the Twenty-ninth Legislature of 1905, on page 314, an act to amend Article 5065 to Title 104, Chapter 2, of the Revised Civil Statutes of the State of Texas, and under Section 6 of said act, we desire to be informed upon the following questions:

"First. Is the above property exempt from taxation under said act?"

You ask to be advised upon this question.

The act amending Article 5065 of the Revised Statutes, relating to exemptions from taxation, provides that the following property shall be exempt, viz.:

"All buildings belonging to institutions of purely public charity, together with the lands belonging to and occupied by such institutions not leased or otherwise used with a view to profit, unless such rents and profits and all moneys and credits are appropriated by such institutions solely to sustain such institution, and for the benefit of the sick and disabled members and their families and the burial of the same, or for the maintenance of persons when unable to provide for themselves, whether such persons are members of such institutions or not."

The latter portion of the section defines an institution of purely public charity, thus:

"An institution of purely public charity under this act is one which dispenses aid to its members and others in sickness or distress, or at death, without regard to poverty or riches of the recipient; also when the funds, property and assets of such institutions are pledged and bound by its laws to relieve, aid and administer in any way to the relief of its members when in want, sickness and distress and provides homes for its helpless and dependent members and to educate and maintain the orphans of its deceased members or other persons."

It is too clear for argument that an exemption from taxation is never to be assumed, and whenever a doubt arises it must be re-

solved in favor of the State. *Railroad Company vs. Dennis*, 116 U. S., 665; *Railroad Company vs. Thomas*, 132 U. S., 185.

Our Constitution empowers the Legislature to exempt certain property from taxation. The same section of the Constitution which grants power to the Legislature to exempt certain property from taxation provides:

“That all laws exempting property from taxation other than the property above mentioned shall be void.” (Article 8, Section 2.)

This section prescribing the property which may be exempted by the Legislature, in so far as it is material here, is as follows:

“The Legislature may, by general laws, exempt from taxation \* \* \* all buildings used exclusively and owned by institutions of purely public charity.”

A construction of this provision as it relates to the subject matter here involves two questions, viz.:

1. Is the property a building used exclusively and owned by the institution?

2. If so, is the institution one of “purely public charity?”

Both questions must be answered in the affirmative before the exemption exists.

The Supreme Court of this State has answered the first question in the negative. In the case of *Morris vs. Chapter No. 6, Royal Arch Masons*, 68 Texas, 698, the facts upon which the opinion of the court was predicated are as follows:

The property consisted of a parcel of land in the city of Austin upon which was erected a three-story brick building, which is known as the “Masonic Temple.” The third or upper story of the building was divided into convenient rooms, which were occupied and used by plaintiff and other Masonic bodies to hold their meetings in, and was used for no other purpose; the other Masonic bodies mentioned paying to plaintiff rents for the use of said rooms. The first and second stories of said building were divided into rooms which were rented to different persons, and plaintiff received a monthly rental for each of said rooms.

The Supreme Court of the State declined to pass upon the question as to whether or not the institution was one of “purely public charity” within the meaning of the Constitution, but held that the property was subject to taxation for the reason that it was not used exclusively by the institution.

In passing upon the question the court said:

“The building in question is not used exclusively by appellee in the sense given to those words in the Constitution. The exclusive use would be the actual and direct use for the purposes of the association and not a use by others for revenue, although that revenue may be exclusively appropriated for the objects of charity. \* \* \* The property in controversy having been leased for purposes of private character, we think the court below erred in holding it exempt from taxation.”

The Constitution authorizes the Legislature to exempt “all buildings used exclusively and owned by institutions of purely public charity.” The Supreme Court has held that the term building in this provision includes the land upon which the building is situated,

used in connection with such institution, but does not include buildings owned by the institution not used exclusively for the purposes of the institution. *Red vs. Johnson*, 56 Texas, 284; *Cassiano vs. Ursuline Academy*, 64 Texas, 675; *St. Edward's College vs. Morris*, 82 Texas, 1; *Theological Seminary vs. People*, 101 Ill., 578.

The act of the Twenty-ninth Legislature attempts to exempt not only "all buildings belonging to institutions of purely public charity," together with the lands belonging to and occupied by such institutions, *not leased or otherwise used with a view to profit*, but also attempts to exempt said buildings and lands if devoted to the following uses:

1. "If such rents and profits and all moneys and credits are appropriated by such institutions, solely to sustain such institution and for the benefit of sick and disabled members and their families and the burial of the same, or
2. "For the maintenance of persons unable to provide for themselves, whether such persons are members of such institutions or not."

This is an expansion of the constitutional exemption, as construed by the Supreme Court of this State in the cases referred to, and, being such, is void.

As was said in the case of *Morris vs. Masons*, *supra*, the Constitution and the statute enacted in pursuance thereto mean that a building leased for profit "is not exempt although such profit may be appropriated for the purposes of the charity, and not to the private gain of its promoters or stockholders."

Assuming that the first question could be answered in the affirmative, still the exemption would not exist unless the institution claiming it is of "purely public charity" within the meaning of the Constitution.

The Legislature of 1905 has undertaken to construe the Constitution of 1876 by defining what is meant in that instrument by an "institution of purely public charity." Contemporaneous legislative construction of the Constitution is entitled to weight, but the instrument must be construed so as to assume that its framers and the people who adopt it employed words in their natural sense and that they intended what they said. (Cooley on Constitutional Limitation 7 Edition, 92; *Holly vs. State*, 14 App., 505.)

The section of the Constitution which the Legislature has undertaken to construe is one which restricts their power of exemption of property from taxation.

A proper rule as to the weight which should be given to their construction of the Constitution; under such circumstances, is laid down by the Supreme Court of Indiana in the case of *Maise vs. State*, 4 Indiana, 345, which is as follows:

"Where the constitutional provision is restrictive of legislative authority, the construction given by the Legislature, sitting in judgment on the extent of its own powers, should not be entitled to much weight. "To admit such an exposition as binding," says a later writer, "would be to permit the department restricted to do away with the very restriction imposed."

The Supreme Court of this State in the case of *Cassiano vs. Ursu-*

line Academy, *supra*, held that legislative expansions of exemptions under this section of the Constitution are void. If the institution was not one of purely public charity within the meaning of the Constitution, it can not be made so by legislative enactment and in determining whether or not it comes within the terms of the Constitution, the words must be construed in their ordinary and common meaning.

The Supreme Court of Ohio in the case of *Morning Star Lodge No. 26, I. O. O. F., vs. Hayslip*, in construing a constitutional provision identical with ours, in so far as this subject matter is concerned, and in passing upon a claim of exemption by the Odd Fellows Lodge, whose funds were used "solely to sustain the institution," said:

"A charitable or benevolent association which extends relief to its own sick and needy members and to the widows and orphans of its deceased members, is not an institution of purely public charity." (23 Ohio State Rep., 144.)

The Supreme Court of Pennsylvania in construing Section 1, Article 9, Constitution of 1874 of that State, exempting "institutions of purely public charity" from taxation, held:

That a "Masonic Home" which, by means of voluntary contributions without charge to the beneficiary or profit to itself, or pay to its officers, houses and maintains indigent, afflicted, or aged persons unable to support themselves, is not "an institution of purely public charity," and is not exempt from taxation.

I quote the following excerpt from the opinion of the court:

"The contention turns on the constitutional meaning of the words 'purely public charity.' Words in a Constitution that do not of themselves denote that they are used in a technical sense are to have their plain proper, natural and obvious meaning. \* \* \* The legal definition of the word 'charity' has been the subject of much discussion in the courts, especially in those of England, but its meaning here, disregarding all technical sense, is a 'gift to promote the welfare of others.' The appellee clearly is a charity, \* \* \* but is it a public charity? The word 'public' relates to and affects the whole people of a nation or State. This home is open to those only who are Masons. A man to be admitted must be a Mason.

"When the eligibility of those admitted is thus determined, it seems to us that the institution is withdrawn from 'public' and put in the class of 'private' charity. \* \* \* To exclude every other idea of 'public' and distinguish from 'private' the word 'purely' is prefixed by the Constitution. This is to intensify the word 'public'—not 'charity.' It must be 'purely public'; that is, there must be no admixture of any qualification for admission, heterogeneous, and not solely relating to the public. \* \* \* However pure may be the charity, however commendable its purpose, it is not 'purely public,' and its property must under the Constitution, be taxed; not because this court says so, but because the people have said so in their fundamental law." (*Philadelphia vs. Masonic Home of Philadelphia*, 28 Atlantic Rep., 154; 23 L. R. A., 924.)

In the well-considered opinion of the Supreme Court of Kentucky,

in the case of *Newport vs. Masonic Temple*, there is an exhaustive review of the authorities. It appeared from the record in that case that the appellee was the owner of a four-story brick building and the ground upon which it stood; that the lower story was rented by the postmaster as a postoffice and the second floor was rented for offices and the third floor and fourth floor were used by the association for the purposes of its organization.

The first and second floors which were rented out were assessed for taxation. All of the appellee's revenue and income from rents was devoted to the payment of the balance of a debt due for erecting the building and for the relief of the distressed and indigent members of the Masonic order and their families.

Exemption from taxation was claimed under a provision of the Constitution of Kentucky, exempting from taxation institutions of "purely public charity."

The court, in passing upon the question, said:

"The words 'purely public' need no definition. They do not include any restricted or private charities. These may be very valuable, and the spirit prompting them is much to be commended; but the exemption of property from taxation had assumed such proportions at the time of the adoption of our present Constitution that it was seen fit not to exempt property from taxation unless devoted to a 'purely public' charity. A Masonic lodge which provides for its members and their families or the widows and orphans of those who are dead, is a commendable private charity; but in no sense 'purely public.' This question has often been presented to the courts, and so far as we have seen under provisions like ours the decisions are uniform, \* \* \* when the right to admission depends on the fact of voluntary association with some particular society, then a distinction is made which concerns not the public at large. The public is interested in the relief of its members because they are men, women and children, not because they are Masons. A home without charge exclusively for Presbyterians, Protestants, Catholics, or Methodists, would not be a public charity. \* \* \* It is not a question to be decided on sentiment. If it were, our inclinations would prompt to a different conclusion, but there is not much sentiment in the Constitution. It is a barrier erected by the whole people against encroachments on the rights of a people as a whole. \* \* \* There are many commendable organizations owning a large amount of property and doing much work of benevolence, such as the Knights of Pythias, the Elks, the Odd Fellows, the Red Men, Sons of Temperance, and the like, but so long as they confine their beneficence to their own members or to their widows and orphans, or are not designed for charitable purposes 'purely public,' they can not be regarded as institutions of 'purely public charity' within the meaning of our Constitution. To so hold would be to give substantially no effect to the words 'purely public' in that instrument, and leave few, if any, private charities which would not be exempt from taxation.

"The section is framed so minutely that it is impossible to escape the conclusion that it was designed to narrow exemptions from taxation and to limit them to the objects expressly named. It must

be fairly construed with a view to promote its purposes, and the exemptions allowed by it can not be extended by implication." (49 L. R. A., 252.)

We can not add anything to the above opinion of the Supreme Court of Kentucky.

Applying the rules of law announced in the decisions above referred to the statement submitted with this inquiry, the institution named is not an institution of "purely public charity" within the meaning of the Constitution. It is true that it would be an institution of "purely public charity," as defined by the section of the act under consideration, but the Legislature, in attempting to define such an institution has attempted to expand the constitutional exemption from taxation.

To reinforce the conclusion reached as to the institution in question not being one of "purely public charity," attention is directed to the proceedings of the Constitutional Convention relating to exemptions from taxation. The Committee on Revenue and Taxation, by a majority report, recommended the following:

"There shall be exempted from taxation only churches, public asylums, county property to be used for public purposes; the property used by universities, colleges and schools; libraries (except law and medical libraries), philosophical apparatus in use, the lands and other property used exclusively for agricultural fairs; clothing in use; and household and kitchen furniture to the value of \$250." (Journal, 1875, page 382.)

The minority report of the committee did not recommend any specific property for exemption, but recommended that property might be exempt from taxation by a vote of two-thirds of both houses of the Legislature. (Journal, 1875, page 423.)

On the 23d day of October, 1875, an amendment was offered to the section relating to exemptions from taxation, as follows:

"Except such property (not to exceed two hundred and fifty dollars to each head of a family, and all property belonging to churches, institutions of learning, charitable institutions and cemeteries, and used only for such purposes) as may be exempted by the Legislature."

This amendment was lost by a vote of 60 to 10. (Journal, 1875, pages 465-467.)

Another amendment was offered as follows:

"But the Legislature may, by general law, exempt from taxation public property used for public purposes, actual places of religious worship, places of burial not used or held for private or corporate profit, and institutions of purely public charity." (Journal, 1875, page 467.)

This amendment was withdrawn. (Page 485.)

The following amendment was offered:

"The Legislature may exempt from taxation property used for worship, education, burial, halls of Turners, Masons, Odd Fellows and similar societies; hospitals, and all property used for purely public charity, and all public property used for public purposes; and no other property."

This amendment was lost.

It is evident that the members of the Constitutional Convention drew a distinction between such institutions as Masons, Odd Fellows and similar societies, and institutions of "purely public charity," and meant by the use of the term those institutions which are purely public in their charities, and whose beneficence is not restricted to members of the institution and their relatives.

The property in question is not exempt from taxation.

Yours very truly,

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RAILROADS—TRAIN DISPATCHER—POSTING OF  
BULLETINS.

AUSTIN, TEXAS, February 17, 1906.

*Hon. L. J. Storey, Chairman Railroad Commission, Capitol.*

Dear Sir: We are in receipt of yours of the 1st inst., calling attention to an Act of the Twenty-eighth Legislature amending Revised Statutes, Article 4560c, page 162, prescribing the duties of certain employees of railway companies relative to delayed trains.

The latter portion of Section 1 provides that if the agent shall neglect or refuse to perform the duty prescribed, he shall be punished "as may be prescribed by law."

You desire to know what is the penalty prescribed by law, if any.

Second. The Act of the Twenty-seventh Legislature, page 265, amending Revised Statutes, Article 4576, by adding "or shall fail, neglect or refuse to obey any lawful requirement, order, judgment or decree made by the Railroad Commission of Texas," and then prescribes a penalty of not more than \$5000.

You desire to know if the Commission issues an order requiring the railroad companies to post bulletins notifying the public of the time that delayed trains are expected to arrive at stations where such trains are required by law or the order of the Railroad Commission to stop, and said companies violate said order, whether or not they would be liable for the penalty prescribed by Article 4576 for disobeying said order.

(1) You are respectfully advised that the law prescribes no penalty upon railroad agents for failure to post the bulletins required by Article 4560c, Revised Statutes.

An act providing penalties for such failure was introduced in the Legislature, but failed of passage.

(2) In our opinion the Railroad Commission has the power to issue an order requiring railroad corporations to post bulletins in a public place at all depots having telegraphic communication with the train dispatcher's office, such stations being those where their passenger trains are by law, or by order of the Railroad Commission, required to stop. The Railroad Commission can not require railroad corporations to post bulletins at any station where their trains are not required to stop, and where they have no telegraphic communication with the train dispatcher's office.

Yours very truly,

## ELECTION LAW—NOMINATIONS.

Two elections for two distinct purposes held on the same day must have separate election officers and separate returns made of election.

AUSTIN, TEXAS, February 23, 1906.

*Mr. A. R. Dean, Sherman, Texas.*

Dear Sir: We are in receipt of yours of 19th and in reply thereto you are advised that if no nominations have been made by a political party, of candidates for offices to be filled at a general city election, the names will have to go on the official ballot as independent candidates.

The provision of Article 128a requiring that nominations shall be made thirty days before the general election refers to nominations made by primary election, and parties desiring to secure their names upon the official ballot as independent candidates may do so at any time before the mayor of the city has the official ballot printed. If no nominations are made and there are no independent nominations, Section 47 does not apply.

Under the provisions of this section, if the official ballot has not been delivered to the precinct judges, the voters may provide their own ballot. This has no reference to the contingency of no nominations having been made. If no primaries are held making nominations, and there are no independent nominations, the mayor will be compelled to print a blank ballot, heading it "official ballot" and placing the names of the offices to be filled on the ballot, and voters will be compelled to write the names of those parties for whom they desire to vote.

In reply to your communication of the 20th you are advised that if an election is held on the same day for city officers and on a bond issue, two ballots must be prepared; there must be two sets of election officers, and two separate and distinct returns made of the elections. In other words, the elections must be separate and distinct and each held as though the other was not being held.

Yours truly,

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 ELECTION LAW.

County executive committee may exclude negroes and Mexicans from participation in primary election.

AUSTIN, TEXAS, March 9, 1906.

*Mr. A. S. Prescott, Alpine, Texas.*

Dear Sir: I quote from yours of 3rd instant as follows:

"A petition to the Democratic Executive Committee is in circulation asking said Committee to order a primary election under the auspices of the Democratic Party, in which it is especially asked that negroes and Mexicans be debarred from participating in said primary election. The question is raised that the proceedings is not constitutional."



Section 103 of the Terrell election law provides as follows:

“The Executive Committee of any party for any county may prescribe additional qualifications for voters in such primaries not inconsistent with this act.”

The term “qualifications,” as used here, must be understood as meaning “fitness or capacity.” While the law is mandatory in the matter of holding primary elections for making nominations of candidates for all offices upon all political parties whose nominee for Governor received as many as one hundred thousand votes at the last preceding general election, it is evident that it was the intention of the Legislature to leave the matter of the constituency of the several political parties to the discretion of the several Executive Committees of the several counties, granting them the power to prescribe such tests of fitness and capacity for participation in the party primary as they deem expedient; provided it is not inconsistent with the law.

As was said in the Peoples Party case (6 Wyo., 464), “We have searched the election law in vain, but discover no limitations upon party nominations,” except the following:

1. Nominations by those parties whose nominee for Governor received one hundred thousand votes at the last general election must be made by primary election.
2. Parties whose nominee for Governor received less than one hundred thousand votes, but as many as ten thousand votes at the last general election must hold a meeting on the 2nd Tuesday in May and determine whether they will make nominations by primary election, or convention, and notify the Secretary of State of their action.
3. Independent and non-partisan candidates must be nominated by petition filed with the Secretary of State within thirty days after the fourth Saturday in July.

The law prescribed who shall not vote in this primary election of convention, but there is no mandatory provision as to who shall be entitled to vote. The several political parties having power of organization are to be the judges of the qualifications of their constituent members. *Marcus vs. Ballot Comr.*, 36 L. R. A., 296.

The use of official ballots renders it absolutely necessary to make some regulations in regard to nominations in order to ascertain what names shall be printed on the ballot. The right to vote can only be exercised by the individual voter. The right to nominate flowing necessarily from the right to vote, can only be exercised by a number of voters acting together. It follows, that if an official ballot is to be used nominations must be regulated in some way; otherwise the scheme would be impracticable and the official ballot become the size of a blanket. While so regulating it the act carefully preserves the right of every citizen to vote for any candidate whose name is not on the official ballot. See *Walt vs. Bartley*, 28 Amer. St. Rep., 814.

The official ballot for the election must contain a blank column on which any qualified voter may write the name of any party for whom he desires to vote, if the name is not on the ballot. This secures his right of equal ballot, under the Constitution, and no provision of

that instrument is violated because a citizen may be excluded from participating in the primary elections of political parties.

The Democratic Executive Committee of your county has the legal authority to prescribe such an additional qualification for participation in its primary election in the county as will exclude negroes and Mexicans.

Yours very truly,

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PUBLIC LANDS—LEASES AND LESSEES.

Commissioner can not, during the life of a lease, extend its term.

AUSTIN, TEXAS, April 6, 1906.

*Hon. John J. Terrell, Commissioner of the General Land Office,  
Austin, Texas.*

Dear Sir: We have received and carefully considered your letter of recent date in which you say:

“A lease on public domain was granted to W. F. Youngblood on 50,000 acres of land for five years from June 24, 1899. His application asked for a five year lease. About August 1, 1900, the lessee requested that the contract be changed to a ten year lease. That was attempted to be done by striking the word ‘five’ out of the original contract and writing the word ‘ten’ above it, and a note made on the wrapper containing the papers in the words, ‘Contract changed to ten years 8-7-1900 at request of lessee.’ Did this act have the legal effect of doing what was purported to have been done, or was it an abortive effort which had no effect whatever on the original lease contract, and should I now disregard the lease and sell the land upon proper application?”

We answer your first question negatively, and your second and third questions affirmatively.

In other words, in our opinion, the Commissioner of the General Land Office was without authority to extend the life of said lease, and you should now disregard the attempted extension thereof, and sell the land, upon proper application.

Truly yours,

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STATUTES CONSTRUED—PUBLIC LANDS—LEASES AND  
LESSEES.

Assignee of lease may purchase under Section 5, Act April 15, 1905, notwithstanding his assignor had fixed but not completed his right to purchase.

AUSTIN, TEXAS, April 6, 1906.

*Hon. J. J. Terrell, Commissioner of the General Land Office, Austin,  
Texas.*

Dear Sir: We have received and carefully considered your letter of this date, which reads as follows, viz.:

"A lease in this office, now in good standing, was transferred by the original lessee, and the assignee designated the land in the lease which he desired to buy and it was classified and appraised and the assignee and the county clerk were notified. Since that notification he transferred the lease to another party and that party now seeks to designate the same land which he desires to buy, the land in both cases being the same. I have doubt as to whether or not the law authorizes this last assignee to buy the land after his vendor had fixed his rights to buy. This is controlled by Section 5 of the Act of April 15, 1905. As the lease terminates within a few days I would be glad to have your opinion on this just as soon as possible."

Replying, we have to say, in our opinion, under the provisions of the above mentioned statute, the "last assignee" in the case stated by you is authorized to buy the land (if the right of purchase is in other respects complete in him), despite the fact that his immediate predecessor in the lease had, in the manner pointed out in this statute, fixed his own right to buy the same land but had not completed his purchase before transferring lease.

Of course, in making a sale to such last assignee the statutory requirements must be observed, and he must, himself, "first give written notice to the Commissioner specifying the land he wishes to buy."

Truly yours,

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STATE HEALTH OFFICER—APPROPRIATION BILL—  
QUARANTINE STATION.

Construction of appropriation for residence of employees and purchase of tug.

AUSTIN, TEXAS, April 7, 1906.

*George R. Tabor, M. D., State Health Officer, Capitol.*

Dear Sir: We have received and carefully considered your letter of the 5th inst., in which you say:

"The Twenty-ninth Legislature, at the First Called Session, passed the following act:

"Provided the State Health Officer is hereby authorized to use all the receipts of the quarantine station at Galveston during the two fiscal years ending August 31, 1907, for the purpose of building a residence for quarantine officers and employees at Galveston, with proper slips and walls for the protection of the State's vessels at such station, and for the purchase of one steam tug to replace the Hygeia, provided the residence and tug herein provided for shall not cost over \$50,000, and provided further that he is hereby authorized to sell the Hygeia and apply the proceeds arising therefrom in the payment of the amount herein provided for; provided further that if in his judgment it would be advisable to sell the old residence building he is hereby authorized to sell same and apply proceeds as above provided for."

"Upon a previous occasion I wrote you for an opinion as to the

manner of deposit into the State Treasury of this money so that it might be drawn out by warrants through the Comptroller's Office for the purpose stated.

"I received an opinion from your office, which was submitted to the Comptroller and State Treasurer, but I was unable to secure an agreement from the Comptroller that he would issue warrants drawn by this department for the improvements provided for upon this fund as per your opinion.

"The receipts of the Galveston Station have been deposited in a bank, where it is at this time, and as I am very desirous, and have been, of transferring the money to the State Treasury, and also desirous that it should be deposited in such a manner that it can be drawn against as provided for in this act, I would like very much to have an opinion from you as to how this can be done."

Replying, we beg to call to your attention our letter to you under date of September 28, 1905, upon this subject, in which we said:

"We are in receipt of yours of the 25th referring to the Act of the Twenty-ninth Legislature, page 458, authorizing you to use the receipts of the quarantine station at Galveston for certain purposes. You desire to know whether or not you will be required to deposit the receipts in the State Treasury, and after being deposited, if you will be able to draw on said money through the Comptroller for the payment of contracts as provided for in said act.

"You are respectfully advised that these receipts must be deposited in the State Treasury. After they have been deposited, the act above referred to is sufficient authority for the Comptroller to draw his warrant on same for the purposes named in the act."

I now beg to confirm our former letter in all respects.

In support of the opinion heretofore expressed, I call your attention to the following provisions of the Penal Code of the State of Texas, viz.:

"Article 96. If any officer of the government, who is by law a receiver or depository of public money, or any clerk or other person employed about the office of such officer, shall fraudulently take or misapply or convert it to his own use, any part of such public money or secrete the same with intent to take, misapply or convert it to his own use, or shall pay or deliver the same to any person, knowing that he is not entitled to receive it, he shall be punished by confinement in the penitentiary for a term not less than two nor more than ten years.

"Article 97. Within the term 'misapplication of public money' are included the following acts: \* \* \*

"3 The deposit, by the officer of the government, of public money in his hands, at any other place than the treasury of the State, when the treasury is accessible and open for business or permitting the same to remain on deposit at such forbidden place, after the treasury is open."

You will observe that these statutory provisions not only authorize the deposit of said funds in the Treasury of the State, but make it a penal offense to ignore or disregard those provisions.

With regard to your failure to secure an agreement from the Comptroller that he would issue warrants against said fund at

your request and direction, I will say that I understand from him that his objection is based upon the proposition that when money has once been deposited in the Treasury of the State; it can not be withdrawn except by authority of an appropriation thereof.

Answering that objection, your attention is called to the fact that the proviso just quoted at length in your letter, as above shown, authorizing you to use all the receipts of the quarantine station at Galveston during the two fiscal years ending August 31, 1907, for the purposes indicated, is found in the *appropriation act* passed by the Twenty-ninth Legislature of Texas. The terms and legal effects of this act is to, and does, set aside for the purposes indicated certain moneys, which moneys, when paid into the Treasury remain to the credit of the Quarantine Department of the State, and is subject to the orders of the head of the department. The Comptroller and Treasurer do not require any further authority than the appropriation bill to receive and pay out this money. It is as complete an appropriation as an appropriation for any other department of the government.

I, therefore, advise you to place the money referred to by you in the State Treasury.

Truly yours,

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#### MEDICAL LAW—CRIMINAL STATUTES.

Must have certificate from board of examiners as a qualification to practice medicine.

AUSTIN, TEXAS, April 18, 1906.

*Mr. S. R. Red, Houston, Texas.*

Dear Sir: I am in receipt of yours of 17th inst., in which you state that you do not as yet really know what our opinion in reference to the question you have propounded is.

Not in any spirit of complaint, but in a condition of mind as pleasant as ever existed, I beg leave to state also that neither have I really known until now what you want to know.

You present a question which you ask us to answer yes or no, and if so answered say it will give you the information desired.

The question is as follows:

“Does the present medical law in its application to the years 1865 to 1891 mean that a compliance with the criminal statute is full compliance with the law?”

I am at a loss to know why there should be any distinction drawn between a compliance with the criminal statute and a compliance with the civil statute, or why they should be in any manner confused with the construction of the medical laws of this State.

If a person violates no penal law of this State in the practice of medicine, his practice must be lawful, and while the law in force between the years 1885 and 1891, being Articles 3777 to 3789, inclusive, of the Revised Statutes of 1895, provided that the Board of Medical Examiners should examine all applicants for certificates of qualifications to practice medicine, whether such applicants hold

diplomas or not. Articles 438 and 440 of the Penal Code did not make it an offense for a party to practice medicine in this State at that time without having a certificate from an authorized board of examiners if he had a diploma from an accredited medical college.

Article 438 made it an offense for a person to practice medicine without a certificate from the Board of Medical Examiners or without a diploma from an accredited medical college, and Article 440 made it an offense for any person to practice medicine without first having filed for record with the clerk of the district court a certificate or diploma. If he had either a certificate or diploma and had it recorded, he violated no criminal law of the State in the practice of medicine, and it has been expressly held by the Supreme Court of this State in the case of *Wilson vs. Vick*, 53 S. W. Rep., 576, that notwithstanding the apparent conflict between the civil statutes and the Penal Statute, a party who had either a certificate or a diploma, and had had same recorded with the district clerk of the county in which he practiced, was entitled to receive and recover pay for such practice.

The court said:

“There is an apparent inconsistency between the provisions of the civil statutes and those of the Penal Code which we have found it somewhat difficult to reconcile upon satisfactory grounds. Clearly the Penal Code does not prohibit a physician from practicing his profession who has received a diploma from a proper college and who has had it properly recorded. Nor is there any express prohibition in the civil statute. It would seem, however, that the purpose of making it the duty of the Examining Board to examine physicians with diplomas was to enable them to pursue lawfully the practice of medicine—a thing not necessary unless the practice without a certificate from the Board was unlawful.”

The Supreme Court in this case overruled the decision of the Court of Civil Appeals in the same case, reported in 51 S. W. Rep., 45, wherein they held that a physician was not entitled to recover unless he had recorded a certificate from the Board of Medical Examiners; and in overruling the decision the Supreme Court held that he was entitled to recover if he had either a certificate or a diploma recorded.

I therefore answer your question in the affirmative.

Yours truly,

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STATUTES CONSTRUED—ELECTION LAW—UNORGANIZED  
COUNTIES—CONVENTION VOTE.

Unorganized counties are not entitled to any vote in State or district convention.

AUSTIN, TEXAS, April 20, 1906.

*Hon. H. C. Hord, Chairman Democratic Executive Committee, Sixteenth Congressional District, Sweetwater, Texas.*

Dear Sir: We are in receipt of yours of the 16th inst., in which you ask whether or not an unorganized county is entitled to a vote

in the State and district conventions, held for the purpose of nominating candidates for State and district offices.

You are advised that an unorganized county is not entitled to a vote in State and district conventions. For election purposes, unorganized counties are a part and parcel of the counties to which they are attached for judicial purposes.

Section 7, in providing for the division of counties into election precincts makes it incumbent upon the commissioners court of each county to divide that county and the counties attached thereto for judicial purposes into convenient election precincts.

Section 16 provides, that if a county has an unorganized county attached to it for judicial purposes the collector of taxes shall deliver to the board charged with the duty of furnishing election supplies, as many certified lists of the electors resident in such unorganized county, who have paid their poll tax or received certificates of exemption, as there are election precincts in the county. The provisions of this section were evidently enacted for the purpose of furnishing election officers of the organized county with information as to whether or not parties living in the unorganized county have paid their poll tax or secured their certificates of exemption. To further carry out the intent of the law and make effective and convenient the provisions of Section 2 to the effect that electors living in unorganized counties may vote at an election precinct in the county to which it is attached for judicial purposes, it is provided in Section 15 that there shall be a certified list of persons resident in unorganized counties who have paid their poll tax or received a certificate of exemption for *each precinct* of the county to which the unorganized county is attached for judicial purposes, thus enabling the election officers of the organized county to determine whether or not a resident of an unorganized county has paid his poll tax or received his certificate of exemption, no matter in what election precinct of the organized county he may offer to vote.

It is further to be noted that Section 36 of the Terrell election law expressly provides that returns of elections shall be made in accordance with the provisions of Articles 1743 to 1749, inclusive, of the Revised Statutes of 1895. Article 1747 provides that the returns of elections in any unorganized county shall be made to the clerk of the county to which the unorganized county is attached for judicial purposes.

It is very evident from the provisions of the Terrell election law and the Revised Statutes of 1895 that the primary election vote of an unorganized county is included in the vote of the organized county to which it is attached for judicial purposes.

Section 120 provides that each county in a State or district convention shall be entitled to one vote for each 300 voters, or major fraction thereof, cast for the candidate for Governor for the political party holding the convention at the last preceding general election, and in case at such election there were cast for such candidate for Governor less than 300 votes in any county, then all such counties shall have one vote.

The provisions of the Terrell election law, construed either alone

or in connection with the provisions of the Revised Statutes, which were not repealed thereby, provide no way of determining either officially or otherwise as to whether an unorganized county cast for Governor less than 300 votes or more than 300 votes at the last general election, as there is no requisition of a separate return of the vote of an unorganized county either to the Secretary of State or State or district chairman, but the vote is returned as a part of the vote of the county to which it is attached for judicial purposes. Again, Section 120 provides that candidates for all State and district offices shall, in the nominating convention, have prorated among them the convention vote of each county in proportion to the vote cast for each candidate in the primary election in such county.

Section 117 provides that the chairman of the executive committee in each county shall, as soon as the vote cast in the primary election has been counted, prepare a tabulated statement of the votes cast in his county for each candidate for each nomination for the State and district offices, and shall immediately mail such statement to the chairman of the State and district executive committees. There is no provision made, either in this section or in any other section of the Terrell election law for certifying to the State and district chairmen the primary election vote of an unorganized county, and no requisition that it be done; and this being true, there is no method of determining legally how a convention vote of an unorganized county should be prorated among the candidates before the State and district conventions according to the proportion of the vote cast for each candidate in the primary election in such unorganized county.

The primary election vote of the unorganized county, under Section 117 of the Terrell election law is included in the primary election vote of the county to which the unorganized county is attached for judicial purposes, and in this manner enters into and affects the prorating of the convention vote of the organized county.

Again, under the Revised Statutes of 1895, carried forward from the Acts of 1881 and 1885, the vote of the unorganized county is certified to the Secretary of State after the general election in the vote of the organized county, and thus enlarges the vote of the organized county at the general election, and in this manner the convention vote of the organized county is increased to the extent that the vote of the unorganized county in the general election increases in the aggregate the vote of the organized county. Therefore, the organized county is in fact represented in the State and district convention to the extent of the actual vote cast therein at the general election, and affects the prorating of the convention vote of the organized county to the extent of its primary vote.

It is further to be noted that an unorganized county has no political organization through which it can work, and no method is provided whereby it may elect delegates to represent it in State and district conventions and cast a convention vote therein.

Therefore, you are advised that an unorganized county does not come within the provisions of Section 120 of the Terrell election



law, allowing all counties which cast less than 300 votes at the last general election one convention vote, and such county is not entitled to any convention vote in State and district conventions.

Yours truly,

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COUNTY SURVEYOR—COMPENSATION—EXPENSES.

County surveyor entitled to \$3 for each English lineal mile run; not entitled to expenses, such as car fare, meals, chain carriers and such fees as are allowed for office work in addition thereto. In designation of homestead surveyor is entitled to \$5 per day, and this amount shall include pay for chain carriers. County surveyor entitled to only the specific charges provided by statute.

AUSTIN, TEXAS, April 25, 1906.

*Mr. J. H. Rush, County Surveyor, Hunt County, Greenville, Texas.*

Dear Sir: We have received and carefully considered your letter of 23rd, in which you say:

"I would like to have your construction of two items in Article 2470, Revised Statutes of Texas, where it reads as follows in regard to fees of office of county surveyors, towit:

"(a) Surveying any tract of land, including all expenses in making the survey, and returning the plat and the field notes of the survey, for each English lineal mile actually run, \$3.

"(b) For services in designating a homestead, to include pay for chain carriers, for each day's service, \$5."

"My construction of the item marked (a) is that a county surveyor is entitled to pay for each mile actually run at \$3; also entitled to pay for any expense incurred, such as car fare, meals and chain carriers used in making surveys, also for such fees as are allowed for office work.

"Paragraph marked (b) I construe to mean that a county surveyor is entitled to pay for a day's services at \$5 while designating a homestead; also is entitled to as much as is necessary to pay chain carriers.

"I would be pleased to have a ruling from you at once in regard to the matters stated above."

In reply we beg to say that we can not agree with you in your construction of the statute mentioned. In fact, said statute seems hardly open to construction, but clearly and unequivocally discloses the legislative intention that a county surveyor shall not be permitted to charge, in addition to the specific amounts mentioned in the statutes, an additional amount to cover such items of expense as car fare, meals and chain carriers. The paragraph of the statute which you have marked (a) distinctly provides that the fee of \$3 for each English lineal mile actually run shall include all expenses in making the survey, and returning the plat and field notes of the survey.

Likewise, the paragraph which you have marked (b) distinctly provides that the fee of \$5 per day for services in designating a homestead shall include pay for chain carriers.

We are of the opinion that for the classes of work mentioned in the above quoted paragraphs of the statute, the county surveyor may legally charge only the specific amounts therein enumerated, and in addition thereto such fees as are by said statute allowed for office work.

Respectfully,

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STATUTES CONSTRUED—DEPOSITORY LAW—SCHOOL FUNDS—COUNTY.

Construction of provisions relating to amount of check to accompany bid, amount of bond of depository selected for less than two years and conditions of bond.

School funds must be deposited with a depository when one is selected.

AUSTIN, TEXAS, April 25, 1906.

*Hon. Charles A. Wilcox, County Judge, Georgetown, Texas.*

Dear Sir: Replying to your letter of 20th instant:

1. Section 21 of what is known as the depository law provides that a bid by a banking incorporation desiring to be selected as county depository shall be accompanied by a certified check "for not less than one-half of one per cent of the county revenue of the preceding year."

We construe "year" as here used, to mean calendar year. "Unless from the context or otherwise a different intent is gathered the word 'year,' when used in a statute, is construed to mean a calendar year." 30 Amer. & Eng. Ency. of Law, 1308.

2. Section 22 requires the court to select a depository "of *all the funds* of the county." The bond which the depository must give "shall in no event be for less than the *total amount of revenue* of such county for the entire two years for which the same is made," and it is a second time provided that "the penalty of said bond not to be less than the *total annual revenue* of said county for the years for which said bond is given." (Section 23.)

One of the conditions of the bond is "that *all county funds* shall be faithfully kept by said depository, and accounted for according to law." (Section 23.)

When a depository is selected the court is required by order to designate it "as a depository of *the funds* of said county" and it thereupon becomes the duty of the county treasurer "immediately upon the making of such order to transfer to such depository *all the funds*, belonging to said county, and immediately upon the receipt of *any money* thereafter to deposit the same with said depository to the credit of said county." (Section 24.)

By Section 29 it is made the duty of the county treasurer "upon the presentation to him of *any warrant* drawn by the proper authority, if there shall be money enough in the depository belonging to the fund upon which said warrant is drawn, and out of which the same is payable, to draw his check as county treasurer upon the county depository, in favor of the legal holder of said warrant," etc.

We think it is clear that the school funds of the county, both permanent and available, are within the operation of the law, and are to be deposited with the depository when one is selected, and we are of the opinion that in estimating the amount of the bond the revenue of the county from all sources whatsoever must be considered, including its apportionment of the State's available school fund, and its income from the investment of its permanent school fund.

3. Though your third question is not free from difficulty we have concluded that the proper construction of Section 30, read together with Section 23, is that when a depository is selected for a shorter period than two years, as provided in Section 24, that the amount of the bond to be required should be for not less than the total amount of revenue of the county from all sources whatsoever, during the period for which the depository will be selected. It must be for not less than this amount and should be for a larger amount should the court deem it necessary for the protection of the county. For example, your county may have on hand, in cash, a large amount of money belonging to the sinking fund of its outstanding bonds, and perhaps an amount to the credit of its permanent school fund. These amounts should be taken into consideration in determining the amount of the bond which the depository must give.

4. Some words have manifestly been omitted in Section 23 of the act with the result that the condition which the bond shall contain is not intelligible, as printed in the session laws. One of the well established rules of construction is:

"Words may be interpolated in a statute or silently understood as incorporated in it where the meaning of the Legislature is plain, and unmistakable, and such supplying of words is necessary to carry out that meaning and make the statute sensible and effective." (Black on Interpretation of Laws, page 84.)

By referring to Section 27 and to Section 35 of the act, the latter relating to the bond which a city depository must give, it is manifest that between the words "any" and "county" in the third line from the end, of Section 24, the following words were omitted: "Funds shall be in said depository applicable to the payment of said check, and that all."

It is the opinion of this department, and we have so advised, that the last seven lines of Section 23 should be read thus:

"The penalty of said bond not to be less than the total annual revenue of said county for the years for which said bond is given, and conditioned for the faithful performance of all the duties and obligations devolving by law upon such depository, and for the payment upon representation of all checks drawn upon said depository by the county treasurer of said county whenever any funds shall be in said depository applicable to the payment of said check, and that all county funds shall be faithfully kept by said depository, and accounted for according to law, and that any suits arising thereon shall be tried in the county for which such depository is selected."

Yours truly,

## GUAYULE—GREASE WOOD.

Construed to be within the meaning of the word "timber."

AUSTIN, TEXAS, April 28, 1906.

*Hon. John J. Terrell, Commissioner General Land Office, Austin, Texas.*

Dear Sir: We are in receipt of your letter of yesterday in which you say:

"Herewith I hand you a letter from Judge J. C. Griner of Del Rio, addressed to myself, which fully explains itself. You will note that Judge Griner desires to procure from the State, through this department authority to gather from the leased lands of the State, a certain growth called "guayule" commonly known in the locality where it exists as "Black Grease-wood," known to contain elements of a commercial value, in that in recent years, under certain processes, rubber has been made from these plants. At the suggestion of Judge Griner, as well as a desire on my part, the enclosed letter is herewith enclosed, and I will ask that you kindly advise me, at your earliest opportunity, what authority I have under the law, if any, to dispose of this plant, also you will please advise me what rights, if any, the lessees of the State, of lands containing this plant, have to dispose of same."

In reply, I beg to say:

Section 8 of Chapter CXXV of the General Laws of the Twenty-seventh Legislature of Texas (1901) page 296, provides as follows:

"Section 8. The Commissioner of the General Land Office shall adopt such regulations for the sale of timber on the timbered lands as may be deemed necessary and judicious. Such timber shall not be sold for less than five dollars per acre each, except in such cases as the Commissioner may ascertain by definite examination by an approved agent, appointed by him for that purpose, to be paid by the purchaser, to be sparsely timbered or containing timber of but little value, in which case he may sell the timber on such sections or parts of sections at its proper value, provided such timber is sold at not less than two dollars per acre."

After a careful consideration of this statute, and of the decisions of various courts construing somewhat similar statutes of other States, and of the United States, I have reached the conclusion that "grease-wood" is "timber" within the meaning of the above quoted act, and that, consequently, you have the right to sell same, subject to only the limitations therein prescribed.

The Act of 1899, page 50, provided that, "The Commissioner of the General Land Office shall adopt such regulations for the sale of timber on timbered lands as may be deemed necessary and judicious, such regulations to be subject to the approval of the Governor;" but you will note that in the Act of 1901, the words "such regulations to be subject to the approval of the Governor" have been omitted, thus leaving you clothed with sole discretion in the matter.

In this connection you will doubtless recall the decision in *Hornback et al. v. Terrell, Commissioner*, 85 S. W. Rep., 486, holding that under Section 8 of the Act of 1901, aforesaid, you were authorized to

adopt a rule requiring the purchaser of timber, as a prerequisite in such purchase, to make and file in your office a written application therefore substantially in the form prescribed by you.

As to such timber upon lands which are held under lease from the State, your right of sale of the timber is, of course, suspended during the life of the lease, the lessee being entitled to the exclusive possession of the land, free from the right of entry upon the part of another who might purchase the timber.

A lessee from the State of lands upon which such timber is found has no right to dispose of the timber. It is not the policy of the law to permit one who leases said lands for agricultural or grazing purposes to denude such lands of valuable timber growing thereon.

I consider it wholly immaterial whether the Legislature in enacting this statute had in mind the particular kind or character of timber called "grease-wood," in view of the broad and comprehensive language of the act, which, fortunately, is sufficiently general in its terms to embrace great stretches of timber in the State of Texas which have heretofore been considered of little, if any, value, but which, it seems, may prove of considerable value in manufactures and commerce, thereby materially increasing the revenue of the State.

Respectfully yours,

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GUARDIAN—PARENTS—MINORS—COUNTY CLERK—MARRIAGE LICENSE—STEP FATHER.

A step-father is not a parent within the meaning of R. S., Article 2957. Mother's consent without that of step-father will authorize county clerk to issue marriage license to minor.

AUSTIN, TEXAS, May 3, 1906.

*D. J. Cutberth, County Clerk Bosque County, Meridian, Texas.*

Dear Sir: In reply to your question by long distance telephone this afternoon I beg to say:

I understand from your statement that you desire to know whether you would be justified under the laws of this State in issuing a marriage license under the following circumstances:

The prospective groom is over the age of 21 years. The prospective bride is only 16 years of age. Her father is dead. Her mother, who has married again, is the statutory guardian of the estate of the minor, and consents to the issuance of the license and to the marriage, but the minor's stepfather objects.

Revised Statutes of Texas, Article 2957, reads as follows:

"No clerk shall issue a license without the consent of the parents or guardians applying, unless the parties so applying shall be, in the case of the male twenty-one years of age; and in the case of the female eighteen years of age."

Is the stepfather a parent of the minor within the meaning of this statute? This precise question seems not to have been decided in this State.

However, in *Heinemeier vs. Arlitt*, 67 S. W. Rep., 1035, it was held that the word "parent" as used in the articles of the Revised

Statutes of Texas concerning the appointment of guardians does not include a stepfather or a stepmother.

In *Castner vs. Egbert*, 12 N. J. (7 Hal.), 259, it was held that the word "parent" is understood in the strict sense and does not extend to those who are sometimes said to stand *in loco parentis* as used in a marriage act providing that an action may be maintained against a clergyman marrying a minor under the age of 21 years, unless a certificate in writing, under the hand of the parent or parents, guardian or guardians, granting permission for such marriage, shall be filed.

And in *People vs. Schoonmaker*, 117 Mich., 190, it was held that a stepfather is not the natural guardian of a minor orphan, and that his consent is not essential.

The trend of the decisions seems to be in the direction of authorizing the issuance of the license by the clerk upon the consent of the mother being given, regardless of the wishes of the stepfather.

Upon principle, and under the authorities, I am of the opinion that if you have the written consent of the mother therefor, you will be justified in issuing the license in this instance.

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#### FRANCHISE TAX.

Secretary of State has no authority to extend time of payment, as prescribed by law, or to waive any penalty prescribed by said law.

AUSTIN, TEXAS, MAY 4, 1906.

*The Citizens State Bank, Richardson, Texas.*

Gentlemen: We are in receipt of your letter of yesterday and note that the Secretary of State has advised you that you have become delinquent in the payment of your franchise tax, which was due on May 1st, and that you must send him \$2.50 as penalty.

I also note that you say you sent him Dallas exchange for the amount of said tax, and that this, without doubt, reached his office not later than noon of the 2nd, and that you believe that under such circumstances the penalty demanded of you is not just or right.

You ask us whether you should comply with the request of the Secretary of State or return to him the original draft in payment of said tax.

In reply I beg to say that this is not a matter upon which we would undertake to advise you were it not for the fact that it affects the public revenues.

By reference to the General Laws of Texas, 1905, page 22, you will find that the law requires such tax to be paid "on or before the first day of May of each year," and further provides that "any corporation, either domestic or foreign, which shall fail to pay the tax provided for in this article at the time specified herein shall immediately become liable to a penalty of 25 per cent on the amount of the tax due by it," etc.

Under these statutory provisions it was clearly your duty to actually pay said tax, in money, to the Secretary of State not later

than the first day of May, and upon failure upon your part to do so you became liable under the statute to the 25 per cent penalty therein prescribed.

Under the law, the Secretary of State has no authority to extend the time of payment, or to waive any penalty prescribed by law, in connection with a franchise tax. He informs me that your draft did not reach him until May 2nd, and that the uniform rule in his department has been to require payment of the franchise tax in money, or its equivalent, on or before the first day of May, and that the statement to the contrary shown in the newspaper clipping pinned to your letter was unauthorized.

Truly yours,

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#### STATIONERY CONTRACT—DEFICIENCY CERTIFICATES.

Under stationery contract the contractor must furnish supplies upon deficiency certificates at contract prices.

AUSTIN, TEXAS, May 24, 1906.

*Board of Public Printing, Capitol.*

Gentlemen: In response to your question of a few days ago relative to the duty of the Austin Book and Stationery Company under its contract to furnish supplies upon a deficiency certificate, I beg to say:

The general appropriation act approved May 23, 1905, concludes as follows:

“Nothing in this act shall be held to repeal or impair the authority conferred by Chapter 46 of the Acts of the Twenty-fifth Legislature, Regular Session, on pages 46 and 47 thereof, providing for the creation of deficiencies, and authorizing the Governor to act in cases of emergency.”

Chapter 46 of the Acts of the Twenty-fifth Legislature expressly authorizes deficiency certificates under the limitations therein prescribed.

Upon consideration of the statutes aforesaid, in connection with said contract of the Austin Book and Stationery Company, bearing date November 11, 1904, I am of the opinion that it is the duty of said contractor to furnish supplies upon such deficiency certificates in the manner and at the prices set forth in said contract.

: Respectfully,

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#### CITIES AND TOWNS—MAYOR PRO TEM.

Temporary absence of mayor does not authorize president pro tem of Council to veto an ordinance.

AUSTIN, TEXAS, July 11, 1906.

*City of Terrell Bonds.*

*Hon. J. Pat Coon, City Attorney, Terrell, Texas.*

Dear Sir: From your letter of the 10th inst. I understand the facts of the case upon which you desire advice to be these:

An ordinance was passed by the city council of your city at a meeting which was presided over by the president pro tempore, the mayor being absent from the city. The mayor returned to the city upon the following day, and thereafter the president pro tempore of the city council vetoed the ordinance. You ask if he was authorized to do so.

I am of the opinion that he had not the authority to either approve or veto the ordinance.

Article 404 of the Revised Statutes provides, substantially, that all ordinances adopted by the council shall, before they take effect, be placed in the office of the city secretary, and if the mayor approve thereof he shall sign the same, and such as he shall not sign he shall return to the city council with his objections thereto; and if the mayor shall neglect to approve or object to an ordinance for a longer period than three days after the same shall be placed in the secretary's office, the same shall go into effect.

Article 399 provides for the annual election of a president pro tempore, and provides that: "In case of the failure, inability or refusal of the mayor to act, the president pro tempore shall perform the duties and receive the fees and compensation of the mayor."

In his work on Municipal Corporations, Judge Dillon says (Section 222, page 303), "Where the charter provides that in case of the absence of the mayor from the city another officer shall act as mayor, only such an absence as will render the mayor unable to perform the duties of his office is intended," citing the case of Mayor of Detroit vs. Moran, 46 Mich., 213.

The charter of the city of Detroit contained the provision that certain resolutions of the common council before taking effect should be presented by the clerk to the mayor, who if he approved the same should write thereon his approval with the date thereof, or if he did not approve, he should return the resolution to the council with his objection in writing, and if he neglected to approve or return it at the next regular meeting after which it was presented to him by the clerk, it should take effect.

A resolution was passed by the council on May 28th, and on May 29th was presented by the clerk to the president of the common council, who, acting as mayor, signed it. On the afternoon of the same day the mayor, who was absent from the city on the 28th and forenoon of the 29th, returned and addressed a communication to the council returning this resolution with his objection. The next regular meeting of the council was held June 4th. It appeared that the clerk and president pro tempore were both informed that the mayor would return to and be in Detroit on the afternoon of the 29th in time to act upon this resolution before the time for the next regular meeting.

Construing the provisions of the charter, which I have substantially named above, the court said:

"We are clearly of the opinion that the mayor has until the first regular meeting of the common council, after the clerk has presented to him such a resolution, to approve or disapprove the same.  
\* \* \* The mayor has the full period in which to exercise the power conferred upon him."



Discussing the facts, the court said: "Was this such an absence from the city as would authorize the president to approve of this resolution as acting mayor? We are clearly of the opinion that it was not. It is not sufficient to justify the president in acting that the mayor is absent from the city. If it were, his stepping beyond the corporate limits for never so short a period would confer upon the president power to act—a construction which would be so productive of mischief that it could not be supposed to have been intended by the Legislature. It is only when the mayor is unable to perform the duties of his office by reason of absence from the city that the president can act. The absence in this case would not disable him from performing his duties, as he had until the next meeting of the council, and the president of the council could not anticipate a disability that did not in fact exist, and by a hasty approval of a resolution deprive the mayor of his right to consider the same."

See also the case of the City of Seattle vs. Boran, 5 Washington, 482.

It will be noted that under our statute the president pro tempore is authorized to perform the duties of the mayor only in case "of the failure, inability, or refusal of the mayor to act." As the mayor had three days in which to approve or disapprove the ordinance, and as his temporary absence did not disable him from performing his duties and exercising the power conferred upon him by Article 404, I am of the opinion that the action of the president pro tempore in vetoing the ordinance was unauthorized by law and without effect.

Yours truly,

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#### DISTRICT COURTS—SPECIAL TERM—GRAND JURY.

The district judge of any district in this State has authority to call a special term of his court for the purpose of indicting and trying parties when,

AUSTIN, TEXAS, July 24, 1906.

*Captain W. J. McDonald, Edna, Texas.*

Dear Sir: I am in receipt of yours of 23rd submitting the inquiry as to whether or not a special term of the district court may be held for the purpose of returning a bill of indictment against and trying a party for murder.

You are advised that prior to the passage of the Act of the Twenty-ninth Legislature, Chapter 83, page 116, special terms of the district court could not be held except for the purpose of disposing of accumulated business, which could not be disposed of during the regular term of the court.

The object of the passage of Chapter 83, Acts of the Twenty-ninth Legislature, was to authorize the judge of any district court in the State, whenever it became advisable, to hold a special term of his court for the purpose of disposing of business, either that which had accumulated during the regular term or new business.

This act specially authorized the district judge, at a special term

of the court called under its provisions, to appoint jury commissioners for the selection of a grand jury and also petit jurors, and to impanel a grand jury for the purpose of returning bills of indictment, and to try parties indicted during said special term.

We understand the decision of the Court of Criminal Appeals in the case of *Ex Parte Young*, 15 Texas Court Reporter, page 852, to so hold.

You are therefore, advised that in our opinion, the district judge of any district in the State has the authority to call a special term of his court for the purpose of indicting and trying parties for murder.

Yours very truly,

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A. & M. COLLEGE—LEASES AND LESSEES.

Directors of A. & M. College not authorized to lease part of college grounds.

AUSTIN, TEXAS, July 26, 1906.

*Hon. W. J. Clay, Commissioner of Agriculture, Insurance, Statistics and History, Capitol.*

Dear Sir: I have received and considered your letter of July 21, 1906, to which is attached a form of contract for lease by the board of directors of the Agricultural and Mechanical College to John C. Vick of a tract of land containing thirty acres, same being a part of the Agricultural and Mechanical College grounds, in Brazos County, for a term of twenty years, permitting the lessee to establish and operate a brick plant thereon for twenty years, and giving to him the right of then renewing the lease contract for another twenty years, or less time, at his option.

In your letter you ask whether said board of directors has authority to enter into such contract, and whether the contract aforesaid is in proper form and can be enforced.

Replying, I beg to say that, in my opinion, said board of directors is without authority to execute any lease whatever of any of the grounds of the Agricultural and Mechanical College.

I return herewith said form of lease contract.

Truly yours,

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QUARANTINE STATIONS—GOVERNOR'S AUTHORITY TO  
SUBMIT TO SECRETARY OF THE TREASURY A  
PROPOSITION FOR THE SALE OR LEASE OF.

Governor held to have no such authority in the absence of authority granted by the Legislature of the State.

AUSTIN, TEXAS, July 31, 1906.

*Governor S. W. T. Lanham, Capitol.*

Sir: You have referred to this department a letter from Hon. L. M. Shaw, Secretary of the Treasury, dated July 17, 1906, to

which is attached a copy of the Act of Congress, approved July 19, 1906, entitled "An Act to further protect the public health and make more effective the international quarantine," and in connection therewith have inquired whether or not, in our opinion, you as the Chief Executive have the authority to submit to the Secretary of the Treasury a proposition for the sale or lease of the quarantine stations and plants belonging to the State of Texas and now in operation.

In reply I beg to say that the Legislature of the State of Texas has made no provisions for such action by you, and in the absence of such legislation your question must be answered negatively.

The above-mentioned papers are returned herewith.

Respectfully,

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ANTI-TRUST—COTTON GINNERS' UNION—WHAT CONSTITUTES A TRUST.

Law governing creation of private corporations does not authorize such a corporation as a "Ginners' Union" for purposes suggested, in violation of anti-trust law.

AUSTIN, TEXAS, July 31, 1906.

*Mr. A. Siepman, Monthalia, Gonzales County, Texas.*

Dear Sir: We are in receipt of yours of 17th in which you state that a meeting of the gin men of your county was held on the 16th inst., for the purpose of considering the advisability of organizing a Cotton Ginners' Union; that it was ascertained that the prevailing charge for ginning cotton in your county was 60 cents per hundred pounds, or \$3 per bale of five hundred pounds; that the average runs of the gins of the State is about seven hundred bales; and on account of the expenses in operating it was deemed proper to advise an advance of 10 cents per hundred pounds of lint, or 50 cents per bale; and that "no pledge was made and everybody enjoined to do as he thought best to suit his own interest."

You desire to be advised:

1. If such an agreement would violate the anti-trust laws of this State.
2. If the gins of your county have the right to be incorporated as a "Ginners' Union," and as such state a certain rate for ginning as normal, provided you do not compel your members to comply with it.

We beg to advise you that the questions submitted are such as affect your private business and should have been submitted to your private counsel for advice; but in as much as the subject matter thereof is of general public interest, and relates to the chief products of this State, we will vary the rule that confines the official opinions of this department to State, district and county officials, in order that you may be advised upon the proposed understanding.

Cotton must be ginned and properly baled before it can be marketed. That process is absolutely essential to its proper preparation for market and transportation, and as such is also an aid to commerce.

Let us now examine the Acts of 1903, and ascertain its provisions concerning combinations, agreements or understandings relating to the preparation of products for market or transportation and aids to commerce.

Section 1 of the anti-trust statute, omitting irrelative provisions, is as follows:

"A trust is a combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons, or either two or more of them, for either, any or all of the following purposes:

"1. To create or which may tend to create or carry out restrictions in trade or commerce, or aids to commerce, or in the preparation of any product for market or transportation.

"2. To fix, maintain, increase or reduce the cost of the preparation of any product for market or transportation.

"3. To prevent or lessen competition in aids to commerce, or in the preparation of any product for market or transportation.

"4. To fix or maintain any standard or figure whereby the cost of the preparation of any product for market or transportation shall be in *any manner* affected, controlled or established.

"5. To make, enter into, maintain, execute or carry out any contract, obligation or agreement by which the parties thereto bind, or have bound themselves not to prepare for market or transportation any article or commodity \* \* \* or by which they shall agree in *any manner* to keep the cost of the preparation of any product for market or transportation, at a fixed or graded figure, or by which they shall in *any manner* affect or maintain the cost of the preparation of any product for market or transportation between them, or themselves and others, to preclude a free and unrestricted competition among themselves, or others, in the business of the preparation of any product for market or transportation, or by which they shall agree to pool, combine or unite any interest they may have in connection with the charge for the preparation of any product for market or transportation, whereby such charge might be in any manner affected."

The foregoing provisions appear to be decisive of the question propounded, and were, it seems, designated to prevent the acts and understanding which you propose. The fact that no binding agreement to advance the price of ginning would be made or entered into is immaterial. Acts indicate the intention.

If all the gin men, or any number of them, meet and agree that the price of ginning should be 50 cents per bale higher than the prevailing prices, and the participants afterward proceed to act upon the understanding, the subterfuge would be thinly veiled, and such an action would constitute a combination of acts in violation of the law. That which the law directly prohibits can not be done indirectly.

If such charges could be legally advanced upon such understandings to the amount of 50 cents per bale, they could be advanced \$5 per bale, or more, if you saw fit so to do, and by virtue of uniform action among the ginners, could compel the producers to pay exorbitant prices for such services.

The law does not countenance, and is intended to prevent, acts,

agreements, combinations, confederations or understandings whereby the cost or charge for preparing products of the field or forest for market or transportation is in any manner affected, controlled or established.

The purpose of the law is to produce the same wide and independent competition among those engaged in the business of preparing products for market or transportation as is required among those engaged in the business of buying or selling any commodity or article of merchandise.

In my opinion, the acts, understandings and agreements set forth, if acted upon, would violate the anti-trust laws of this State, and you are so advised.

Answering your second question, you are respectfully advised that the law governing the creation of private corporations does not authorize such a corporation as a Ginners' Union for the purposes suggested.

Yours very truly,

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INSURANCE—SURETY AND GUARANTY COMPANIES—  
COMMISSIONER OF INSURANCE—SECRETARY OF  
STATE.

A surety and guaranty company is an insurance company; number of its directors seven; articles of incorporation may provide for insuring titles to real estate, and must be filed in the office of Commissioner of Agriculture, Insurance, Statistics and History.

AUSTIN, TEXAS, August 2, 1906.

*Hon. W. J. Clay, Commissioner of Agriculture, Insurance, etc.,  
Capitol.*

Dear Sir: I am in receipt of your letter dated July 31, 1906, to which is attached a communication from J. H. Pickrell and others, relative to the incorporation of a surety and guarantee company, under the Revised Statutes, Article 642, Subdivision 37, as amended by Acts 1903, page 197, to be regulated by the provisions of Chapter 165 of the Acts of the Twenty-fifth Legislature (1897), submitting in substance the following questions, viz.:

1. Will such company constitute an insurance company within the meaning of Revised Statutes, Title 58?

I answer this question affirmatively. *People vs. Ross*, Secretary of State, 44 L. R. A., 124; Acts of Twenty-ninth Legislature, 1905, First Called Session, Chapter 6.

2. How many directors may such corporation have?

The answer to this question is found in Revised Statutes, Article 3037; not more than thirteen nor fewer than seven.

3. May the articles of incorporation of such company provide that the company may do a surety and guarantee business and also insure titles to real estate.

I answer, Yes.

4. Where shall the articles of incorporation be filed?

I am of the opinion that they should be filed in your office, and not in the office of the Secretary of State.

Respectfully,

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SURVEYOR—LAND DISTRICT—VACANT LANDS.

Where a tract of land for which application has been made lies within two counties or land districts, or the vacancy is continuous without the surveyor's district, he has authority to run into or through one or more counties and include all vacancy applied for.

AUSTIN, TEXAS, August 6, 1906.

*Hon. John J. Terrell, Commissioner General Land Office, Austin, Texas.*

Dear Sir: We are in receipt of your letter of 4th instant, in which you say:

"I hand you herewith sketch prepared by Deputy Surveyor Howard Land District which will illustrate the conditions as they exist upon the ground, which prompts me to submit to you the question I request that you answer, involving a proper construction of Section 8, Act 1905.

"From the sketch you will note portion of land lies in Dawson County, but the major part lies in Martin County. There is no question as to the land being vacant and subject to application and survey under Section 8. Application was made by Mr. Jesse F. Cross to survey of Howard Land District for survey of this vacancy, Dawson County being part of his district, and he made the survey beginning in Dawson County and run over in Martin and there completed, covering vacancy in both counties.

His field notes in all respects are regular and are recorded in both counties, except in so far as they may be irregular, or illegal, for that portion of vacancy which lies in Martin, which is not a part of Howard Land District.

"The question, therefore, arises, viz.:

"Under Section 8, Act 1905, did Howard District Surveyor have authority to begin survey in his district and run into another county or district, out of his territory, for more land that was necessary to make complement of a section which began in his territory or was he authorized, where the vacancy was continuous, to run into and through one or more counties and include all vacancy applied for?"

Replying, I beg to say:

Said Section 8 requires that the application therein mentioned shall be made "to the surveyor of the proper county or district in which the land, or a portion thereof, is situated," and also provides that "it shall be the duty of the surveyor to file and record such application and to survey the land," etc.

I think it clear from the face of the act that it was the intention of the Legislature, to authorize this district surveyor to do the very thing which your letter shows has been done in this instance, and that he would have been authorized to survey the entire continuous

tract, even though it had extended into and through several counties. Any other construction would render meaningless the words "or a portion thereof," in the law.

These words would have doubtless been omitted had the Legislature intended to restrict to one county or district the right of a county or district surveyor to make a survey under said Section 8.

Similar provisions are found in Revised Statutes, Article 4159, and in Chapter 124, Section 151 of the General Laws of the Twenty-ninth Legislature.

Respectfully,

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COMMISSIONERS COURT—COUNTY WARRANTS—TOLL  
BRIDGES.

Commissioners court is without authority to enter into contract with company to construct toll bridge and pay the company therefor \$5000 at end of stated time, the company to collect tolls during said time. Right to exact tolls for use of bridge is a valuable franchise which can exist only by legislative authority.

AUSTIN, TEXAS, August 6, 1906.

*Judge R. L. Bryan, County Judge of Somervell County, Glen Rose, Texas.*

Dear Sir: We are in receipt of yours of 1st instant, in which you say:

"Our county is badly in need of a bridge over the Brazos River but do not feel able to purchase it outright.

"We have a proposition before us by which a bridge might be built if the county could pay \$5000 in ten years, paying \$500 each year with interest at 8 per cent.

"The proposition is that a company be formed to build a toll bridge and that they operate it and collect tolls for ten years. That at the end of the ten years the bridge becomes the property of the county in consideration of the county having paid the company \$5000 toward the building of the bridge.

"I would like to have you advise me whether we can make this arrangement, and whether we can issue ten \$500 warrants, one due each year with 8 per cent interest. We feel that if we can give these warrants that it will almost assure us a bridge and our people are very much in need of it.

"We can meet the \$500 annual payments with interest without any inconvenience to the county."

In reply, I beg to say that in my opinion your commissioners court is without authority to enter into the proposed contract.

A right to exact tolls for the use of a bridge along a public highway, across a stream, is a valuable franchise which can exist only by Legislative authority.

Williams vs. Davidson, 43 Texas. 19.

Kent's Com. Vol. 3, 458.

The Legislature of Texas has, in Revised Statutes, Title 97, Chapter 8, conferred upon the commissioners court full power and au-

thority over the subject of bridges, whether free or toll, within the county, outside of incorporated cities, and towns.

Revised Statutes, Article 4792, reads as follows:

“The commissioners court shall have full power and authority to cause all necessary bridges to be built and kept in repair in their respective counties, and to make appropriations of money of the county therefor, when necessary.”

This article evidently contemplates that the bridges referred to therein, shall, ordinarily, be built by the regular road hands, and that the court may, in its discretion, appropriate therefor money of the county derived from the regular road and bridge taxes authorized by law, and that the use of bridges so built shall be absolutely free.

Revised Statutes, Article 4796 reads as follows:

“Whenever any county bonds have been or may hereafter be issued for the purpose of building bridges, it shall be lawful for the commissioners courts of the county or counties interested to assess and collect tolls on said bridges sufficient to pay the interest on bonds so issued; and, if thought proper, sufficient to pay the interest and create a sinking fund with which to pay the principal at maturity, all of which shall be done under such rules and regulations as the commissioners courts of the counties interested may prescribe.”

By this article the court is given authority to assess and collect tolls on bridges, for the purpose or purposes enumerated, but it should be noted that the county may collect tolls on only such bridges as may have been built with proceeds of county bridge bonds, and this necessarily means bridges which have been wholly paid for by, and which belong exclusively to the county.

It is clear that neither of the above quoted articles is applicable to the case presented by you.

The sole authority of the court to contract for a bridge upon which a bridge company may have and exercise a franchise to collect tolls, for the use of the bridge, is found in Revised Statutes, Article 4793, which reads as follows:

“The commissioners courts through whose county large creeks or water courses shall pass, over which it may be too burdensome for the overseers, with the hands apportioned to them to work on roads, to build bridges, may contract with a proper person or persons to build a toll bridge, for which the court shall lay the toll to be levied on all persons, cattle, horses, carriages, etc., passing over the same; to be granted to the undertaker for such a number of years as the said court may think proper, not to exceed ten years; and the builder or builders and their successors shall keep the bridge in constant repair during the term of the contract, and in default thereof shall forfeit all right and claim to the toll of such bridges.”

Note the provision that the court “may contract with the proper person or persons to build a toll bridge,” etc.

This article, upon its face, implies that the other contracting party, (in your case, the bridge company), shall, at its own expense, build a bridge, the sufficient consideration therefor being the grant of the franchise to charge tolls on the bridge for a specified number of years, not exceeding ten.



It could hardly have been the intention of the Legislature that the county should bear any part of the original cost of building such toll bridge, or of the expense of keeping it in repair during the life of the franchise. Indeed, Revised Statutes, Article 4794, plainly declares that "the commissioners court, before granting a license to any person to build a toll bridge, shall take bond in the sum of one thousand dollars, with good and sufficient sureties, conditioned that the undertaker or undertakers shall build and keep in constant repair the bridges so contemplated for the term of years agreed upon"; and this, to my mind at least, emphatically and conclusively negatives the idea that the Legislature intended to confer upon the court the right to make a contract binding the county for any part of the cost of the bridge.

Assuming that in your case the proposed bridge is to be built across the Brazos River at a spot where the public already has an easement, and that a public highway has been maintained there for many years, and that the proposed bridge company will not have any proprietary right in the land upon which the bridge is to stand, I think it clear that the bridge would be a part of the public highway, subject, however, to the right of the bridge company to collect tolls, and that upon expiration of the franchise to collect tolls, the bridge would in all respects be a part of the highway, just as though it had been built by the county entirely at its own expense.

Elliott on Roads and Streets, pp. 33, 34.

Angell on Highways, paragraphs 8, 9, and 14.

Jones vs. Keith, 37 Texas, 400, and cases cited.

Williams vs. Davidson, 43 Texas, 19.

Victoria County vs. Bridge Co., 68 Texas, 69.

State vs. Lawrence Bridge Co., 22 Kan., 461.

Pittsburg, etc., Ry. Co. vs. Bridge Co., 165 Pa. St., 37, and cases cited.

People vs. Banks, 57 N. Y., 568.

In Re Sutherland Bridge, 122 Mass., 459.

Amer. & Eng. Ency. of Law, Vol. 4, p. 945.

And in every such instance the bridge belongs absolutely and without restriction to the county at the expiration of the franchise, even though the contract between the bridge company and the county contain no express provision to that effect.

Elliott on Roads and Streets, pp. 33, 34.

State vs. Lawrence Bridge Co., 22 Kan., 460, 461.

Craig vs. People, 47 Ill., 487.

State vs. Lake, 8 Nev., 276.

Central Bridge Corporation vs. Lowell, 15 Gray., 106.

Thompson vs. Matthews, 2 Edw. (N. Y.), Ch. 212.

The settled policy of the law seems to be that a county can not embark in any business enterprise which is in any sense essentially private, although the same may be incidentally connected with that which pertains to its public duties.

Dillon on Mun. Cor., Section 106.

Williams vs. Davidson, 43 Texas, 24.

In this connection I beg to direct your attention to the following provisions of the Constitution of Texas, viz.:

Article 3, Section 52, reads, in part, as follows:

“The Legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of the State to lend its credit or grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever, or to become a stockholder in such corporation, association or company.”

The provisos which were inserted in this section, by way of amendment thereof, make certain exceptions, as follows:

“(a) The improvement of rivers, creeks and streams to prevent overflows, and to permit of navigation thereof, or irrigation therefrom, or in aid of such purposes.

“(b) The construction and maintenance of pools, lakes, reservoirs, dams, canals and waterways for the purpose of irrigation, drainage or navigation, or in aid thereof.

“(c) The construction, maintenance and operation of macadamized, graveled or paved roads and turnpikes, or in aid thereof.”

It is significant that toll bridges are not included within these exceptions.

Article 11, Section 3, provides that “No county, city or other municipal corporation shall hereafter become a subscriber to the capital of any private corporation or association, or make any appropriation or donation to the same, or in anywise loan its credit; but this shall not be construed to in any way affect any obligation heretofore undertaken pursuant to law.”

I am of the opinion that the contract outlined in your letter would be obnoxious to the above mentioned constitutional provisions.

Respectfully,

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#### RAILROADS—INTANGIBLE TAXES.

Intangible assets taxes must be paid in county to which unorganized county is attached for judicial purposes.

AUSTIN, TEXAS, August 10, 1906.

*Hon. J. W. Stephens, Comptroller of Public Accounts, Capitol.*

Dear Sir: We acknowledge receipt of the statement and inquiry of J. W. Terry of date August 7th, relating to the assessment by you of the intangible assets of the Pecos & Northern Texas Railway Company in the unorganized county of Palmer.

It appears from the statement submitted that you, as Comptroller of Public Accounts, have assessed the intangible assets of this railroad in said unorganized county, upon the theory that the railroad is a non-resident corporation having assets in an unorganized county. The Constitution authorizes the Legislature to provide by a two-thirds vote for the payment of taxes by non-residents of counties, to be made at the office of Comptroller of Public Accounts. (Article 8 of Section 11.) Section 12 of the same article authorizes the Comptroller to assess for taxation lands situated in unorganized counties, owned by non-residents of the unorganized county. This section of the Constitution is followed by statutory

provisions regulating the manner of assessment of lands in unorganized counties, belonging to non-residents. (Articles 5138 et seq.)

There is no provision of the Constitution or of the statute which authorizes you to assess for taxation any other property than lands situated in unorganized counties and belonging to non-residents of unorganized counties. Neither is there any special provision of the Constitution or statute which prescribes the place where personal property belonging to non-residents, situated in unorganized counties, shall be assessed for taxation.

Unorganized counties are for all purposes treated by our statutes as a part of the county to which they are attached for judicial purposes, and the Supreme Court of this State in the case of Llano Cattle Company vs. Faught, 69 Texas, 402, wherein the question was fairly presented to them, held that personal property situated in an unorganized county, belonging to either a corporation or natural person, and owned by a non-resident of the unorganized county, must be assessed for taxation and the taxes thereon paid in the county to which the unorganized county is attached for judicial purposes. This was approved in the case of Webb County vs. Gonzales, 69 Texas, 457.

We believe this decision announces the correct rule under the Constitution and laws of this State, and therefore beg leave to advise you that you have no authority to assess for taxation the intangible assets of the Pecos & Northern Texas Railway Company in the unorganized county of Palmer, and that the intangible assets of this corporation should be assessed for taxation and the taxes thereon paid in the county to which it is attached for judicial purposes.

Yours very truly,

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#### DALLAS COUNTY SPECIAL ROAD LAW.

Act intended by Legislature to be applicable to roads of county under supervision and control of commissioners court of Dallas County, rather than to roads or streets lying within an incorporated town within county, said law abolishing the system of working roads by hands warned out, and an incorporated city within the county may warn out hands to work the roads and streets within its limits, or pay \$3 street tax.

AUSTIN, TEXAS, August 11, 1906.

*Mr. John E. Davis, Mayor, Mesquite, Texas.*

Dear Sir: We are in receipt of yours of yesterday in which you say:

“Will you kindly advise me if the provision in the Dallas County special road law which abolishes the system of working the roads with hands warned out affects our right to warn hands out or collect \$3 street tax in the incorporated town of Mesquite?”

In reply I beg to say:

Section 15 of the special road law for Dallas County, Acts of the Twenty-ninth Legislature, Chapter 41, page 325, reads as follows:

“In Dallas County the payment of road taxes by labor is abolished, and all provisions of law concerning overseers shall be of no further force or effect.”

The caption of the present Dallas County road law, above mentioned, entitles it “An Act to create a more efficient road system for Dallas County,” etc., and the entire caption and the body of the act show that this road law was intended by the Legislature to be applicable to the system of roads in that county which is under the supervision and control of the commissioners court of Dallas County, rather than to the roads or streets lying within any incorporated town or city of the county.

I, therefore, answer your question negatively.

Truly yours,

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#### LUNATICS—SHERIFF'S FEES.

A sheriff or other officer is entitled to actual expenses incurred only, in the transportation of a lunatic to the asylum, said expenses to be borne by the county, upon sworn account. (See Article 123, R. S.) Acts Twenty-eighth Legislature, page 110, applies to fees in judicial proceedings.

AUSTIN, TEXAS, August 20, 1906.

*Mr. W. L. Wright, Sheriff, Wilson County, Floresville, Texas.*

Dear Sir: Replying to your letter of 18th inst., relative to the fees allowed by law to a sheriff for conveying lunatics to the asylum, I beg to say that the statute which is applicable in such cases is Revised Statutes, Article 123, which reads as follows:

“The expenses of conveying all public patients to the asylum shall be borne by the counties, respectively, from which they are sent, and said counties shall pay the same upon the sworn account of the officer, or person performing such service, showing in detail the actual expenses incurred in the transportation.”

Chapter LXXXIII of the General Laws of the Twenty-eighth Legislature (1903), page 110, shows in the caption and in the body of the act that it was intended to apply to only fees *in judicial proceedings*, and, in my opinion, it has no application whatever to the matter of conveying lunatics to the asylum.

Truly yours,

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#### PENSION.

A party who originally enlisted in the Confederate service from the State of Texas, and was a resident citizen at time of passage of Confederate pension law, is entitled to pension, although he resided for a while in another State, if otherwise qualified.

If he originally enlisted in Confederate Army from Texas, was a citizen of Texas in 1880 and also at the time of passage of Confederate pension law, his residence in this State construed to be continuous, although he may have resided for a while in another State.

AUSTIN, TEXAS, August 24, 1906.

*Hon. John T. Smith, Acting Comptroller of Public Accounts, Capitol.*

Dear Sir: I have received and carefully considered your letter, in which you say:

"I have the honor to request your opinion on the following clause of Section 2 of the pension law, towit: 'That such applicant is and has been continuously since the first day of January, 1880, a bona fide resident citizen of this State, or that he originally enlisted in the Confederate service from the State of Texas, and was at the date of the passage of this act a bona fide resident citizen of the State of Texas.'

"Does the word 'continuously' apply to an applicant who originally enlisted in the Confederate service from the State of Texas, who was a resident of this State at the date of the passage of the law, but has since then resided in Oklahoma, but has returned to Texas and filed his claim for a pension with this department?"

In reply, I beg to say that, in my opinion, your question should be answered negatively, and that the applicant is not disqualified by reason of the fact that he resided for a while in Oklahoma.

Truly yours,

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SCHOOL LANDS—OCCUPANCY OF—SIX MONTHS ABSENCE.

Not permissible in case of purchases under act of 1905.

AUSTIN, TEXAS, September 11, 1906.

*Mr. Geo. C. Herman, Batesville, Texas.*

Dear Sir: We are in receipt of your letter of the 3rd inst., relative to the "six months' absence clause" in the school land law of 1895, wherein you ask, in substance, whether, in our opinion, that clause was repealed by the Act of 1905, and whether actual settlers under the Act of 1905 have the right under the law to absent themselves from their lands six months in one year for the purpose of schooling their children.

Replying, I beg to say that, ordinarily, we restrict our opinions to questions submitted officially; but in view of the importance of the inquiries presented by you and the general desire of purchasers of such lands from the State for information upon the subject at the opening of schools throughout the State, an interest which is evidenced not only by the inquiry of our clients, but by many letters to this department, we have concluded to make an exception in this matter and to give you the benefit of our views in the premises, although the request is not an official one.

Said Act of 1895 contains the following provisions, viz.:

"All sales shall be made by the Commissioner of the General Land Office, or under his direction, and he shall prescribe suitable regulations whereby all purchasers shall be required to reside upon, as a home, the land purchased by them for three consecutive years next succeeding the date of their purchase, except when otherwise provided.

“And if any purchaser shall fail to reside upon and improve in good faith the land purchased by him, he shall forfeit said land and all payments made thereon to the State, in the same manner as for non-payment of interest, and such land shall be again for sale as if no such sale and forfeiture had occurred; provided, that all necessary and temporary absence from such land of such purchaser, for the time of not more than six months in any one year for the purpose of earning money with which to pay for the land, or for the purpose of schooling his children, shall not work a forfeiture of his title. \* \* \*”

It will be noticed that this privilege of six months absence from the land in one year for either of the two purposes mentioned in said statute was given to all such purchasers under said Act of 1895; and I am of the opinion that said privilege or right is in no instance and in no manner whatever affected by said Act of 1905, but may still be claimed and exercised by any such purchaser under the Act of 1895, just as though the Act of 1905 had never been passed.

Said Act of 1905 provides that: “In every purchase, except where otherwise provided, an original purchaser of a home tract under this act shall reside upon it or some portion of the land purchased as additional thereto, either at the same time or subsequently, for three consecutive years next succeeding the date of his purchase of the home tract.”

It will be observed that this Act of 1905, which took effect April 15, 1905, omits the above-quoted six months' absence clause which is found in the Act of 1895, and contains no corresponding or similar provision.

Consequently, purchasers under said Act of 1905 have no such right of absence, whether to make money to pay for their lands or for the purpose of schooling their children.

But in the enactment of said law of 1905 it was not the purpose of the Legislature to even attempt to deprive purchasers under the Act of 1895 of a pre-existing right or privilege, but the Legislature merely intended to change the rule for future sales, and to deny purchasers under the new law the aforesaid privileges which had been extended to them by former law.

In the above quoted portion of the Act of 1905 the clause “except where otherwise provided” means *except where otherwise provided in this act*, the reference being to other portions of the Act of 1905, which provided for purchase of certain classes of lands without the requirement of actual settlement thereon.

Truly yours,

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COMMISSIONERS COURT—COUNTY TREASURER—FEES OF OFFICE.

Commissioners court in fixing county treasurer's salary must act reasonably. Can not deny him any compensation or fix it at a merely nominal amount.

AUSTIN, TEXAS, September 18, 1906.

*Hon. J. O. Rouse, County Judge, Quitman, Texas.*

Dear Sir: The condition of work in the department has prevented an earlier reply to your letter of the 12th inst.

1. The ex-officio allowance to county officers may be changed by the commissioners court at any time during the term of office of the officer affected. See case of Colingsworth vs. Myers, 35 S. W. Rep., 414.

2. The commissioners court, of course, can not abolish the office of county treasurer, nor can they by indirection accomplish this result by denying to the incumbent of that office any compensation, or by allowing him merely a nominal compensation so as to make it impossible to secure an efficient officer to discharge the duties imposed upon the county treasurer.

The county treasurer is entitled to receive such commissions upon monies received and paid out by him as shall be fixed by the commissioners court, not exceeding 2 1-2 per cent for receiving and the like per cent for paying out all monies other than school funds, and not exceeding one-half of one per cent for receiving and the like per cent for disbursing school funds, with certain exceptions not necessary to be here noted. (Article 2467, Revised Statutes 1895, and Section 30 of the School Laws of 1905.)

Article 2469 limits the commission which the county treasurer shall be allowed to \$2000. This is in effect a legislative declaration that under ordinary circumstances \$2000 per annum is reasonable compensation for the county treasurer. Of course, conditions may be such in a county that having due regard to the duties which under the law the treasurer must perform, and the responsibility which he assumes a less amount would be a reasonable compensation and the Legislature has left this "largely in the discretion of the commissioners court within the rate named by the Legislature, and not to exceed \$2000 in any one year, trusting that tribunal to do justice between the county and its treasurer." (*Bastrop County vs. Hearne*, 70 Texas, 556.)

I think this case is authority for the proposition that the court can not deny the treasurer compensation, nor can it defeat his rights to commissions upon money which should have been delivered to and disbursed by him. The court said in this case: "The compensation of the treasurer is left largely but not entirely to the commissioners court."

I take it that the limitation on the discretion vested in the court is that it is "to do justice between the county and its treasurer," and allow the treasurer a reasonable compensation for the duties and responsibilities devolving upon him. This question was not before the court in the case referred to, but I think it fairly deducible from what was said in that case that the court so understood the law.

In the case of *State vs. the Mayor of Nashville*, 15 Lea (Tenn.), 697, it was held that an ordinance of the city council providing that the Mayor should receive no compensation for his services was void. The court said:

"If the council can deprive the mayor and the board of public

works and officers of all compensation, then it has the power to so emasculate those departments of the government that all vigor and efficiency will be gone, and the government of the city will be left practically in the hands of the city council."

It was urged in this case that as the council had power to change the compensation of the mayor it could reach the same end as that sought in the ordinance attacked by reducing the mayor's salary to a nominal amount. To this the court replied:

"When officials are advised of the fact that their power over a given matter is not absolute, but that they have a trust to discharge, a court will never presume that they will abuse that trust. If the city council should ever attempt to abuse their trust it will be time enough then to decide whether their action in the exercise of a clearly vested power is final and not subject to revisions by any tribunal—whether the only remedy left is an appeal to the electors at the ballot box. It might be that an ordinance reducing the mayor's salary to a nominal amount would be unreasonable and void \* \* \*." It was, however, unnecessary to decide the point in this case, and the court did not attempt to do so.

I am convinced that the action of the commissioners court in fixing the county treasurer's compensation is not final, and would be subject to revision by the courts. Were it not, the court by fixing the compensation at \$1 or \$10 or \$100 might make it impossible to secure an efficient officer to discharge the important duties which by law devolves on the county treasurer.

In the case of *De Soto County vs. Westbrook*, 64 Miss., 312, the facts were that during the term of office of the health officer of the county of De Soto the board of supervisors passed an order fixing his salary at \$1 per month. It had previously been \$15 per month. Under the code it was the duty of the board of supervisors to fix the salary of the health officer. The court said:

"What the salary should be was a matter within their discretion, provided they did not exceed the maximum specified in the statute or *place it so low as to virtually abolish* the office in the county. Within these limits, the salary should have been fixed at what the services of the officer were reasonably worth, and on this basis it might have been changed from time to time, if deemed necessary and proper. But the laws for the protection of the public health, under which appellee was appointed, are of general application, and can not be nullified in any county by the failure of the board of supervisors to fix the salary of the general health officer of the county after he has been duly appointed, or by their fixing it at a rate so far below the maximum that no competent physician will accept the office. If the operation of the law is unsatisfactory in any county, it must find relief in the mode provided by the statute or from the Legislature. The statute can not be repealed or abrogated, directly or indirectly, by the board of supervisors."

The jury in this case found that one dollar per month was not adequate compensation for the services rendered, and the court said:

"It appears that the action of appellants in reducing the salary of the chief health officer of their county from \$15 to \$1 per month



was intended to dispense with the officer in that county altogether, and that practically it was an ouster by indirection of appellee from the office which had been created and to which he had been appointed by an authority higher than the board of supervisors. Such action was a nullity, and the salary previously fixed by the board was not thereby changed."

I do not intend, of course, to express any opinion upon the reasonableness of the compensation which would inure to the treasurer from the per centage mentioned in your letter, viz., one fourth of one per cent upon receipts and the like per cent upon disbursements.

I have indicated to you the rule by which I think the legality of the action of the commissioners court would be tested, and this is all that is called for by your letter.

Yours very truly,

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SHERIFFS—COMPENSATION OF—FEES—EX-OFFICIO  
SALARY.

AUSTIN, TEXAS, September 21, 1906.

*Judge George S. March, Montague, Texas.*

Dear Sir: I am in receipt of yours of 15th.

The last act of the Legislature, fixing the ex-officio compensation of the sheriffs is Chapter 65, Acts of the Twenty-ninth Legislature, page 91. This act provides:

"For summoning jurors in district and county courts, *servicing of election notices*, notices to overseers of roads and doing all other public business not otherwise provided for, the sheriff may receive annually not exceeding \$500."

This act went into effect 90 days after the adjournment of the Regular Session of the Twenty-ninth Legislature.

Chapter 11, Acts of the First Called Session of the Twenty-ninth Legislature, known as the Terrell election law, provides in Section 145 that the sheriff or any constable "for serving copies of the order designating the bounds of election precincts, or the election judges, posting notices, and for serving all other writs or notices prescribed by this act shall be paid the amounts allowed by statutes for civil process."

This act becomes effective 90 days after the adjournment of the First Called Session of the Twenty-ninth Legislature, being after the act just previously quoted was passed and became effective.

Consequently, the provisions of Section 145 will control the provisions of Chapter 65 of the Regular Session and the fees prescribed in Section 145 would be exclusive of the ex-officio salary allowed the sheriff.

Yours truly,

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SURVEYORS—DEPUTIES—PRIVATE SURVEYORS.

It is the duty of the Land Commissioner not to accept field notes of surveys made by private surveyors, even though such field notes are

approved by a county or district surveyor, intention of Legislature that such surveying should be done by responsible party, under bond.

AUSTIN, TEXAS, September 25, 1906.

*Hon. John J. Terrell, Commissioner of the General Land Office, Austin, Texas.*

Dear Sir: We are in receipt of your letter of this date in which you state, in substance, that your department has been uniformly refusing to accept, as legal, field notes made, not by a county or district surveyor, but by a private surveyor who has not been deputized for such work, the field notes being approved, however, by a county or district surveyor.

In said letter you ask:

“Will you kindly advise if this holding is correct and should be adhered to, or should this class of work, done by other than county and district surveyors, or deputies, but approved by such county and district surveyors, be accepted here?”

Replying, I beg to say:

The Revised Statutes of Texas contain the following provision:

Article 4068 provides for the election of a county surveyor, and Article 4069 requires that he shall take the oath of office prescribed by the Constitution, and give bond.

Article 4071 requires the county surveyor to receive and examine all field notes of surveys made in his county upon which patents are to be obtained and to certify same according to law, and to record the field notes in a book to be kept by him for that purpose, etc.

Article 4073 requires that the surveyors of the several counties shall record in a well bound book all the surveys in the county or district in which he was elected, with the plat thereof that he may make, whether private or official, and that such records shall be open to the public.

Article 4074 makes it the duty of every district, county and special county surveyor, once in every three months to plat upon the map of his district or county, all surveys made to that date within the three preceding months, and transmit sketches and field notes of same to the Commissioner of the General Land Office.

Article 4076 is as follows:

“The county or district surveyor shall appoint as many deputy surveyors as he may deem necessary for the county or district, and shall administer to them the oath of office, and take the bond hereinafter prescribed, and shall furnish them such instructions as may be furnished to him from time to time by the Commissioners of the General Land Office; and such deputy surveyor, before he enters upon the duties of his office, shall enter into bond with two or more good and sufficient sureties, to be approved by the commissioners court, in the sum of five thousand dollars, payable to the Governor and his successors in office, conditioned for the faithful performance of the duties of his office, which bond shall be deposited and recorded in the clerk's office of the same county; and the county or district surveyor shall immediately report such appointment to the Commissioner of the General Land Office, and state when such deputy entered upon the discharge of the duties of his office.”

Article 4078 makes it the duty of all deputy surveyors to make returns of the field notes of every survey made by them (within three months thereafter) to the county or district surveyor for his approval, and provides that should he neglect to do so he shall be liable for the damages at the suit of any person thereby injured.

Article 4079 reads thus:

“Any county surveyor may do the work of a practical surveyor, and may also perform all the duties required of a deputy surveyor, and in such case he shall make out, certify to, record and return the field notes under his own official signature.”

In *Bates vs. Thompson*, 61 Texas, 342, the court said:

“The statutes directing the appointment and prescribing the duties of deputy surveyors plainly show that they are still required to do the field work (Revised Statutes, Articles 3840-3842), and we have no statute which makes it the duty of the principal surveyor to do such work.”

Article 4083 requires that “all district surveyors shall be governed in the discharge of their official duties by the same provisions of the law which regulate and prescribe the duties of county surveyors, so far as the same may be applicable.”

Article 4084 reads thus:

“Each district surveyor shall appoint one or more deputy surveyors, who shall qualify and give bond in manner and form as required of deputy county surveyors, and whose duty shall be the same as those of deputy county surveyors, so far as the same may be applicable. \* \* \*”

Article 4085 makes it the duty of each district surveyor, within twenty days after his election, to appoint as his deputy special county surveyor for each unorganized county within his district and declares that “the district surveyor shall immediately notify the Commissioner of the General Land Office of every such appointment,” and provides that “each special county surveyor so appointed shall have all the power, perform all duties and be subject to all the penalties pertaining to county surveyors, and shall keep in addition to the returns to be made to his principal, a record and map of all the transactions in his office to become part of the county surveyor’s records of such county whenever it may be organized.”

Article 4089 gives to the district or county surveyor of any county power to appoint a special deputy, who shall be empowered to perform all official acts which said district or county surveyor may legally perform, and requires that said special deputy surveyor, before entering upon the discharge of his duties shall give bond in the sum of \$5000, etc.

Article 4096 declares that:

“Any certificate of claim to land, which has been or may be obtained in the manner and form prescribed by law, shall be sufficient evidence to authorize any lawful surveyor, to survey for any person holding such certificate, any lands which he may point out agreeably to all the laws which do now or may hereafter exist on that subject.” etc.

Article 123 of the Penal Code is as follows:

“If any person who is an officer or clerk in the General Land

Office, or a district surveyor, or deputy shall directly or indirectly be connected in the purchase of any right, title or interest in any public land, in his own name or in the name of any other person, or shall take or receive any fee for employment for negotiating or transacting any business connected with the duties of his office, other than the fees allowed by law, he shall be fined in a sum not exceeding five hundred dollars."

Without attempting to particularize, it is obvious from the above mentioned statutory provisions, and from all of the provisions of Chapter 6, Title 87, concerning entrys and locations, that the Legislature contemplated that the surveys therein referred to should be made by responsible officers, acting under oath and under bond, and under stringent regulations prescribed by law and not by irresponsible private surveyors.

I here call attention particularly to those provisions of law above mentioned requiring the transmission to the Commissioner of the General Land Office of the names of all deputy surveyors, which requirements seem to me to clearly indicate the purpose of the Legislature to provide the General Land Office with the means of determining whether or not work submitted to it for approval in a given instance was done by one who was authorized by law to do that work; the inference being that if it was done by any other person it should not be approved or received by the Commissioner of the General Land Office but we are not restricted to the above mentioned statute. Article 4142 reads as follows:

"All surveys shall be made by authority of law or under and by virtue of some genuine land certificate which is at the time on file in the county or district surveyor's office where the land is situated and by a county, district or deputy surveyor duly appointed or elected and qualified.

Article 4144 reads as follows:

"The field notes of every survey shall state:

"1. The county or land district in which the land is situated.

"2. The certificate or other authority under or by virtue of which (it) is made, giving a true description of same by number, date, when and where issued, name of original grantee and quantity.

"3. The land by proper field notes with the necessary calls and connections for identification (observing the Spanish measurements by varas).

"4. A diagram of the survey.

"5. The variation at which the running was made.

"6. It shall show the names of the chain-carriers.

"7. It shall be dated and signed by the surveyor.

"8. The correctness of the survey, and that it was made according to law, should be certified to officially by the surveyor who made the same; and also that such survey was actually made in the field, and that the field notes have been duly recorded, giving book and page.

"9. When the survey has been made by a deputy the county or district surveyor shall certify officially that he has examined the field

notes, has found them correct, and that they are duly recorded, giving book and page of record."

These provisions of the law seem to my mind so clear, emphatic and unequivocal as to leave no doubt but that you have been merely performing your plain duty in declining to accept field notes of surveys made by private surveyors, although such field notes have been certified by a county or district surveyor.

The only decisions which I have been able to find to a contrary effect are: *Howard vs. Perry*, 7 Texas, 259; *Duren vs. H. & T. C. Ry. Co.*, 86 Texas, 290. In deciding the last mentioned case. Judge Gaines speaking for the court said:

"It seems that the survey and field notes were made by an agent of the locators, and were approved and adopted by the lawful surveyor. This is certainly a practice not to be commended, and one which it would seem the Legislature did not contemplate. Therefore, if the question were an open one, we might have difficulty in reaching the conclusion that a survey made by a locator for his own benefit could be adopted by the surveyor so as to give it any validity. But it was held in *Howard vs. Perry*, supra, that this could be done. It is true that in that case the locator was himself the deputy surveyor, but the court seems to attach no importance to that fact. In the opinion they say. 'But it is objected to the defendant's survey that it was made by and for himself. It is, however, approved by the district surveyor and thereby became, in contemplation of law, his act. And we apprehend that the deputy had no authority to make a survey for himself, and that validity of the survey depended wholly upon the approval of the district surveyor. Such is our construction of the opinion, and it is decisive of the point before us. Whatever our own views may be upon the question, as an original one, it has been too long recognized as a rule of property in every department of the State government to be now overturned.'"

I am free to admit that my views, as above stated, are inconsistent with the conclusions and reasoning of the Supreme Court as expressed in that decision, and consequently erroneous, if the laws now in force and applicable to your question are the same as those under which that decision was rendered: but I am convinced that such is not the case.

Judge Gaines' opinion states that the survey under which the *Duren* case arose was made in 1854; whereas, the last two above quoted articles appear not to have been the law at that time, but to have been inserted in our statutes by the codifiers of 1879.

I have not been able to find with definite certainty that these articles were first enacted as a part of the work of the codifiers of 1879, but I assume that they were from the fact that I have not been able, after a somewhat careful search, to find them in any prior act of the Legislature, and in none of the various publications of the Revised Statutes to which I have access is any marginal reference made indicating whence they came.

Therefore, it seems reasonably clear to my mind that there is no real conflict between the above quoted decision in the *Duren* case and your holding upon the point at issue; and I am of the opinion under the law to refuse to accept the field notes of surveys made by

private surveyors, even though such field notes were approved by a county or district surveyor.

Truly yours,

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#### LOCAL OPTION.

Special act of 1873 prohibiting sale of intoxicating liquors within three miles of Rancho school in Gonzales County, held to be in conflict with the provisions of Article 16, Section 20 of the Constitution as amended in 1891.

AUSTIN, TEXAS, October 1, 1906.

*Robert F. Nixon, Esq., County Attorney, Gonzales, Texas.*

Dear Sir: We are in receipt of yours of the 27th ultimo, and in reply you are advised that the special Act of 1873 prohibiting the sale of intoxicating liquors within three miles of the Rancho school in your county, is in conflict with the provisions of Article 16, Section 20 of the Constitution, as amended in 1891, and consequently is repealed by that amendment to the Constitution.

Long vs. State, 1 App., 709.

Ex Parte Combs, 38 App., 648.

Ex Parte Brown, 42 S. W. Rep., 554.

The act in question is one which the Legislature would not be authorized to pass under the present Constitution.

See Holley vs. State, 14 App.

Yours truly,

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#### LUNATIC—COUNTY PHYSICIAN.

Where a person has been adjudged a lunatic, and the father has given bond for his care and restraint, county physician has no authority to discharge lunatic upon the ground that he has recovered his mental faculties. Any patient may be discharged from the asylum upon the recommendation of the Superintendent, approved by board of managers.

AUSTIN, TEXAS, October 3, 1906.

*Judge J. Gus. Patton, County Judge Goliad County, Goliad, Texas.*

Dear Sir: We have received and carefully considered your letter of recent date concerning the case of Leonard Perkins.

We understand the facts to be that he was adjudged a lunatic, in your county, but was not conveyed to an asylum, his father having given bond under Revised Statutes, Article 140, for the care and restraint of the lunatic, of whom he still retains control, under said bond, although, in the opinions of some, including yourself and your county physician, the young man has been restored to sound mind.

You ask whether the county physician has authority, under the law, to either discharge or recommend the discharge of the young man upon the ground that he has recovered his mental faculties in full.

I am of the opinion that your question must be answered in the negative. I have not been able to find any law conferring any such authority upon the county physician.

Moreover, I have recently had occasion to go pretty carefully into the matter of statutory provisions concerning the discharge of persons who have heretofore been adjudged lunatics, but who have been restored, and I have found none which fits the case stated by you, assuming that in it no guardian was appointed by the court for the lunatic.

Under the provisions of Revised Statutes, Article 2750, a person who has been adjudged to be of unsound mind and who has been restored to his right mind may be discharged by the court from further guardianship at a hearing, under an affidavit of such restoration made by any person: but the statutory procedure is restricted by the terms thereof to cases wherein a statutory guardian has been appointed.

Revised Statutes, Article 120, reads as follows:

“Any patient, except such as are charged with or convicted of some offense and have been adjudged insane in accordance with the provisions of the Code of Criminal Procedure, may be discharged from the asylum at any time upon the recommendation of the superintendent, approved by the board of managers. Any patient coming within the above exemption can only be discharged by order of the court by which he was committed.”

Here we have provisions for the discharge of a patient from an asylum for the insane by the joint action of the superintendent and board of managers; but Revised Statutes, Article 121, provides that “when a patient is discharged, uncured, he shall be provided with a suitable guard and conveyed to his friends, or to the county from which he was sent,” and this language indicates clearly that it was not the intention of the Legislature to restrict such discharges to cases in which the lunatic has been restored to sound mind.

In the last sentence of Revised Statutes, Article 120, provision is made for a discharge in a case where the patient stands charged by law with, or has been convicted of some criminal offense, but in such cases a patient may be discharged only by order of the court by which he was committed.

In the individual opinion of the writer, it is to be regretted that the Legislature had not made broader provision for setting aside, or vacating, or declaring of no future force or effect, judgments of insanity.

Truly yours,

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#### DEPOSITORY—BOND OF—SURETY COMPANY.

County depository must furnish bond with personal security, under Act of Twenty-ninth Legislature, Section 35, pages 287-398. City depository may make bond in approved fidelity and surety company.

AUSTIN, TEXAS, October 3, 1906.

*Mr. J. H. Whitis, Cashier, First National Bank of San Saba, San Saba, Texas.*

Dear Sir: We have received and carefully considered your re-

cent letter in which you ask, in substance, whether, under the provisions of the law passed by the Twenty-ninth Legislature of Texas (General Laws 1905, pages 387-398), providing a system of State, county and city depositories, a surety company may become surety upon the bond of a county depository.

The portion of said statute which refers to county depositories provides, in Section 23, for bonds and sureties in the following language:

“Within five days after the selection of such depository it shall be the duty of banking corporation, association or individual banker so selected to execute a bond payable to the county judge and his successors in office, to be approved by the commissioners court of said county and filed in the office of the county clerk of said court will not less than five solvent sureties who shall own unencumbered real estate in this State not exempt from execution under the laws of this State, of as great value as the amount of said bond;” etc.

The portion of said statute concerning city depositories provides in Section 35 for bond and sureties as follows:

Within five days after the selection of such depository it shall be the duty of the banking corporation, association or individual banker so selected to execute a bond, payable to the city, to be approved by the mayor with the concurrence of the city council and filed with the city secretary, with not less than three solvent sureties, who shall own unencumbered real estate in the county in which said city is located, of as great value as the amount of said bond, or said depository may make said bond in some approved fidelity and surety company,” etc.

Waiving other differences (which are immaterial in the consideration of the question presented by you), it will be noticed that the law in reference to city depositories requires three sureties, but provides, in the alternative, that “a city depository may make said bond in some approved fidelity and surety company;” but that the law in reference to county depositories requires, in every instance, five sureties, and fails to say that such bond may be made by a fidelity and surety company, and, in fact, fails to indicate any intention upon the part of the Legislature that any one of the five sureties which are necessary may be a surety company.

In view of the fact that this distinction with regard to bonds and sureties in the two classes of cases is thus shown to have been present in the minds of the Legislature in enacting said statute, this department holds that the law requires personal security upon the bond of the county depository, and that a surety company can not be taken as a surety, either alone or in conjunction with other sureties upon said bond.

The opinions of this department are usually restricted to questions submitted officially, but we think the fact that your question is one of general interest involving the public revenues justifies the exception which we have made in undertaking to answer your inquiry.

Truly yours,



## INSANE ASYLUM—APPROPRIATION—BUILDINGS.

Held, no part of appropriation for "enlarging auditorium" can be used in erecting a new and separate building.

AUSTIN, TEXAS, October 3, 1906.

*Mr. John L. Terrell, President Board of Managers, North Texas Hospital for the Insane, Terrell, Texas.*

Dear Sir: We have received and carefully considered your letter of 29th ult., requesting a construction by this department of that portion of the appropriation act passed by the Twenty-ninth Legislature of Texas (Acts 1906, page 473), which relates to an auditorium for the above-mentioned hospital.

Your letter states, in substance, that your institution has for a long time used for auditorium purposes a small chapel on the second floor of the main building, which chapel it will probably be impracticable to enlarge; that said chapel was built when the hospital had rooms for only four hundred patients, whereas it now has rooms for nearly two thousand, requiring the services of more than two hundred employes; that an auditorium which may be used for church services and for all character of innocent amusements, etc., is a necessity; that the present chapel is wholly inadequate; is badly located and can not be made or enlarged to properly serve the end desired and accommodate the required number of people; and that the superintendent and entire board of managers of the institution are of the opinion that a separate and distinct house should be erected for an auditorium, and have had made temporary plans for a new house which will meet the requirements, the estimated cost of which will be within the amount to be appropriated for an auditorium.

You further state that the president and board of managers believe it would be safe and within the spirit of the law to proceed to the erection of such separate building. But desire to avoid the possibility of any future conflict of opinion upon the question:

Wherefore, they desire an expression from this department thereon, and ask that we give to the statute such liberal construction as we may, to the end that they may proceed to the erection of such separate building or auditorium.

Replying, I beg to say:

The precise language of the appropriation bill is:

"Enlarging auditorium for year ending August 31, 1907, \$10,000."

This language clearly implies the pre-existence of an auditorium, and I presume it certainly refers to the old room mentioned by you, although, as you say, it has always been known as "the chapel."

From your statement, I suppose there was, at the time of the passage of the statute, and that there is now, no other room at the institution to which that language could be held applicable.

Construction of a statute must be predicated upon ambiguity therein; and if there is in it no ambiguity, there is no room for construction.

In considering a rule of statutory construction, a Circuit Court of the United States said:

"The first observation pertinent to the consideration of this rule is that the province of construction lies wholly within the domain of ambiguity."

*Hamilton vs. Rathbone*, 175 U. S., 414. It must, therefore, appear that the statute is ambiguous, and thus open to construction."

*Re Fixer & Company*, 50 L. R. A., 607.

Sutherland in his work upon statutory construction, Section 324, says:

"The considerations of evil and hardship may properly exert an influence in giving a construction to a statute when its language is ambiguous or uncertain and doubtful, but not when it is plain and explicit. The same may be said of the consideration of convenience, and, in fact, of any consequences. If the intention is expressed so plainly as to exclude all controversy and is one not controlled or affected by any provision of the Constitution, it is law, and courts have no concern with the effects and consequences. Their simple duty is to execute it."

In Lewis' edition of the same work, Section 581, we find the following, to similar effect:

"But it happens sometimes that the intention is not clearly expressed or is uncertain. Then the hardship, the injustice and, in every point of view, the effects and consequences of particular construction of a statute will be considered; and the best effect of the law consistent with its language, ascertained in the light of all available aids to a true understanding of its meaning, will be deemed that intended by the Legislature. Arguments upon the policy of the law, though undoubtedly admissible, are to be listened to with much caution. The interpreters of the law have not the right to judge of its policy, and when they undertake to find out the policy contemplated by the makers of the law, there is great danger of mistaking their own opinions on that subject for the opinions of those who had alone the right to judge of matters of policy."

The Supreme Court of the United States held in substance, in *Bate Refrigerating Company vs. Sulzberger*, 157 U. S., 1, that where the language of a statute is plain and unambiguous, it is the duty of the court to enforce it according to the obvious meaning of the words, without attempting to change it by adopting a different construction based upon some supposed policy of Congress in regard to the subject of legislation, or upon considerations of injustice or inconvenience arising from the enforcement of the statute according to its terms.

The rule thus stated by the text writers, and by the courts for their own observance, applied, of course, with equal force when a statute is to be interpreted and carried into effect by any of the departments of government.

Let us then see whether or not the phraseology in which the appropriation in this instance is couched is not too plain and explicit to admit of construction.

The following definition is copied from Webster's International Dictionary:

"Engarge—To make larger; to increase in quantity or dimensions; to extend in limits; to magnify; as the body is enlarged by nutrition; to enlarge one's house."

The word "enlarge" is thus defined by Cyclopedia of Law and Procedure:

"To extend; to widen; to increase, as to increase the space in which the market is held."

It would thus seem that if the word "enlarge" be given its ordinary meaning the above quoted language of said appropriation bill is too clear and unambiguous to admit of construction, and that it can not fairly be held to authorize the erection of a new and separate building for use as an auditorium.

A statute as a whole sometimes contains satisfactory and conclusive evidence that a particular word which is found therein was used by the Legislature in a sense different from that indicated by the word itself, standing in the immediate connection in which it is found, but this is not one of those instances. Looking to the appropriation act as a whole, and particularly that portion of it which provides for said hospital, we find the Legislature itself drawing the distinction between the enlargement of an old building or room and the erection of a new one. Take, for instance, the fourth item below the one providing for the auditorium. It reads thus:

"For the purpose of erecting three new buildings, one to be an addition to old buildings, 60 feet front by 80 feet in width; one new building 78 feet front by 80 feet in width; one new building 78 feet in width by 152 feet in length; one female annex 88 feet in width by 181 feet in length, as per plans drawn and now in possession of Asylum Board, said buildings, when erected, to accommodate not less than five hundred patients, for year ending August 31, 1906, \$83,000.00."

I conclude that no part of the appropriation in question for "enlarging auditorium" can be used in erecting a new and separate building.

I am sure that it may be argued that the view of this appropriation which you say has been adopted by yourself and the Board of Managers is correct, for the reason that the Legislature would hardly have appropriated as much as \$10,000 for mere additions to or an increase of the size of the present auditorium, but I think that argument does not outweigh the importance of adhering to the above stated well-recognized rule of statutory interpretation.

The word "enlarging" here used by the Legislature clearly and unmistakably fixes the purpose to which the appropriation may be applied, and the amount of the appropriation can not change the force of the words so employed.

Yours truly,

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#### COMMISSIONERS COURT—OFFICIAL BONDS.

Application of surety to be relieved from county officer's bond is made

to the court when filed with the county clerk, and clerk must issue notice without action of court.

AUSTIN, TEXAS, October 4, 1906.

*Hon. T. M. Cor, County Attorney, Beeville, Texas.*

Dear Sir: I quote from your letter of October 2nd:

"One of the bondsmen of the county judge of Bee County has filed with the county clerk application to be relieved from the bond of the county judge, and the county clerk has issued notice of such application to the county judge, and the same has been served upon him by the sheriff. \* \* \*

"The question is, is the filing of this application with the county clerk a filing with the commissioners court, as intended by this article, or would the court have to meet in session to receive such application."

I am of the opinion that the application was made to the commissioners court by filing with the county clerk a petition or application directed to the commissioners court.

Article 3576, Revised Statutes 1895, is as follows:

"Any surety on any official bond of any county officer may apply to the commissioners court of the county to be relieved from his bond, and the clerk of the county court shall thereupon issue a notice to said officer, and a copy of the application, which shall be served upon said officer by the sheriff or any constable of the county."

This article is the same as article 3435 of the Revised Statutes of 1879, construing which Judge Gaines, speaking for the court, in *Kempner vs. County of Galveston*, 73 Texas, at page 222, said:

"The policy of the statute is to permit the surety upon a county officer's bond to terminate his liability upon the obligation at any time. Revised Statutes, Article 3435. *The right is given absolutely.*"

The statute does not require any order by the commissioners court or any action whatever by that court upon the filing of the application, but it is made the duty of the clerk "thereupon," that is, upon the application being made to the court, to issue a notice to the officer which, with a copy of the application, shall be served upon the officer or any constable of the county.

The clerk of the county court is ex-officio clerk of the county commissioners court (Article 1557), and I think that the application was made to the commissioners court within the meaning of the statute, when it was filed with the clerk of that court.

Yours truly,

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#### CONSTITUTIONAL LAW—JUSTICE'S PRECINCT.

Whether a precinct is entitled to two justices of the peace under Section 18 of Article 5 must be determined by the population according to latest U. S. census.

AUSTIN, TEXAS, October 4, 1906.

*Hon. Sam H. Smelser, County Judge, Boston, Texas.*

Dear Sir: Replying to your letter of 2nd inst.:

1. In the case of *Brooks vs. Dulaney*, 16 Texas Court Reporter,

9, decided June 7, 1906, our Supreme Court, construing the provision of Section 20, Article 5, of the Constitution, "that in counties having a population of less than 8000 persons there may be an election of a single clerk, who shall perform the duties of district and county clerk," held that it is not left to the Legislature to provide the means by which the population is to be determined in such a case, but that the rule prescribed by the Constitution in the cases of tax collector and representative members govern, which is that the population shall be determined by the latest United States census.

The provision of Section 18 of Article 5 is "that in any precinct in which there may be a city of 8000 or more inhabitants, there shall be elected two justices of the peace."

In view of the decision of the Supreme Court in the case referred to, I conclude that since the city of Texarkana has not, according to the latest United States census, a population of 8000 or more inhabitants, it is not entitled to two justices of the peace.

I think this must be so, since, even if the Legislature has the power to prescribe in the case of justices of the peace how the population shall be determined, it has not done so. Article 1563, Revised Statutes 1895, is in substantially the same language as the constitutional provision.

2. It is not required that the proposition for the issuance of common school district bonds shall receive a vote of two-thirds of all those entitled to vote at the election. It is sufficient if it receives the affirmative of two-thirds of the votes cast at the election. (See Section 3, Article 7 of the Constitution.)

Yours truly,

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#### VOTING.

If intention of voter can be ascertained, his ballot should be counted.  
Ballot not numbered should not be counted.

AUSTIN, TEXAS, October 12, 1906.

*Hon. F. W. Scabury, Rio Grande City, Texas.*

Dear Sir: Your letter of the 4th inst. reached the department in due time, but press of business in the Appellate Courts has prevented our replying earlier.

Your first question is:

Do Articles 1741 and 1742 of the Revised Statutes still control, or is there anything in the new law that supersedes or in effect amends them?

Referring to Article 1741, beg leave to advise that the provision therein that no ballot which is not numbered shall be counted is, in our opinion, expressly re-enacted in Sections 74 and 78 of the Terrell election law.

Section 74 provides that each ballot shall be numbered, and Section 78 provides that no ballots which are not numbered shall be counted.

While we do not find that the latter portions of this article have

been expressly re-enacted in the Terrell election law, we believe that under the general principles governing elections they are still in force, especially in view of the fact that Section 194 of the Terrell election law makes it cumulative.

As to Article 1742, we believe it is entirely superceded by Section 53 of the Terrell election law.

You also ask the following questions:

1. Should a ballot be rejected entirely in case a voter should write the name of any person over or under that of a candidate whose name he had scratched in lieu of writing it in the blank column.

2. Should a ballot be rejected entirely if the voter should run a line through the entire ticket and then write the name of one of the candidates thereon in the blank column, properly scratching the names of candidates for the same office in all other columns.

3. Should a ballot be rejected entirely if the voter should leave the names of two or more candidates for the same office on his ballot; or should said ballot in each of these cases be counted as to all the other offices and not counted as to the candidate for the office improperly voted for.

4. Should a ballot be rejected if marked with colored ink or colored pencil, such as is frequently carried by a business man.

Our election law being somewhat different from any I have had an opportunity to examine, decisions of other States are not of great value as precedents in the construction of the law in most particulars, and while almost every mark which a voter could make or omit to make has been discussed in various cases before the courts, the statutes under which the cases arose contained provisions which would distinguish the cases from any which might arise under our statute.

In some instances voters have neglected to make marks, or to indicate their intention, either wholly or partially, or have marked in the wrong place, or with the wrong kind of mark, and I find through all of the cases that the rule of construction runs against disfranchisement of a voter when such construction can be given without violating some rule of law or the policy of the Legislature, and if the intent of the voter can be arrived at without violating some express provision of the Terrell election law his vote should be counted.

While Section 53 prescribed how the ballot shall be marked or voted, I am constrained to believe that under the rules of law, especially under the liberal construction which we have felt called upon to give to the Terrell election law, that this section should not be considered mandatory to the extent of disfranchising a voter, if the election officers can arrive at his intent in the preparation of his ballot.

It would not be proper for this department to advise that a ballot can be voted in any other manner than that provided for in Section 53, still we believe that if the voter honestly desires to express his intention in the preparation of his ballot, without any attempt to mark his ballot for identification, his vote should be counted.

As maintaining the propositions we have announced above, beg leave to refer you to the following cases, viz.:

Hope vs. Flentge, 47 L. R. A., 806.

State vs. Russell, 15 L. R. A., 740.

Rutledge vs. Crawford, 13 L. R. A., 761.

I think if you will examine these authorities with the extended notes thereunder, you will reach the conclusion that our construction of this section is correct.

Beg leave, therefore, to advise you that in answer to your first question, a ballot should not be rejected entirely if a voter writes the name of another person over or under that of a candidate whom he has scratched, in lieu of writing it in the blank column, but the ballot should be counted entirely for all persons for whom the voter expresses a desire to vote. This also, we think, is the proper answer to give to your second question.

As to the third question, beg leave to advise that the ballot should be counted for all offices except that for which the voter leaves the name of two candidates for the same office when only one is to be voted for.

Replying to your fourth question, it is our opinion that the ballot marked should not be rejected because it is marked with colored ink or colored pencil, instead of black pencil or black ink.

Yours very truly,

#### VOTING—U. S. GOVERNMENT PROPERTY—RESIDENCE.

Party residing on property of United States over which it has exclusive jurisdiction not entitled to vote.

AUSTIN, TEXAS, October 12, 1906.

Mr. W. L. Evans, Eagle Pass, Texas.

Dear Sir: We acknowledge receipt of your inquiry presented in person, wherein you state that you are a resident, with your family, upon property owned by the United States government, which was ceded to that government by the State of Texas for the purpose of maintaining arsenals, forts, etc., under the provisions of the act of the Legislature of this State authorizing such cessions to be made.

You state that you receive a salary from the United States government, and look after this property for said government, and are required by the government to reside upon the property.

The question turns upon the proposition as to whether or not you are a resident of the State of Texas and of the county in which the property is situated on which you live.

The rule is clearly announced in McCrary on Elections, third edition, paragraph 59, that a residence within a place over which the United States has exclusive jurisdiction is not a residence within the State, county or township for voting purposes. See also Brightley's Election Cases, page 107, note.

In the supplement to 1st Metcalf (Mass.), the identical question was submitted to the justices of the Supreme Court of Massachusetts by the House of Representatives of that State, viz.:

"Are persons residing on lands purchased by or ceded to the

United States for naval yards, arsenals, dock yards, forts, light houses, hospitals and armories in this commonwealth entitled to the benefits of the State schools for their children in the towns where such lands are located? \* \* \*

“Are such persons so residing entitled to the elective franchise in such towns.”

The justices of the Supreme Court of that State, after discussing the matter, answered the questions as follows:

“We are of opinion that persons residing on lands purchased by or ceded to the United States for navy yards, forts and arsenals, and where there is no other reservation to the State than that above mentioned, are not entitled to the benefit of the common schools for their children in the towns in which such lands are situated. \* \* \*

“We are also of the opinion that persons residing in such territories do not thereby acquire any elective franchise as inhabitants of the town in which said territory is situated.”

The Attorney General of the United States was asked for his opinion upon this question, and the same is reported in Volume 6, opinions of the Attorney General, page 577.

He said that persons residing on lands purchased or ceded to the United States, where there was no reservation of jurisdiction to the State except such as is contained in statutes like ours, were not entitled to the benefits of the common schools for their children in the towns where the lands were situated, and did not acquire any elective franchise in the towns in which said territory was situated.

In the case of *Sinks vs. Reese*, the Supreme Court of Ohio held that persons residing upon property belonging to the United States and over which it had exclusive jurisdiction, though they had up to the time of becoming residents of such property been residents of the State of Ohio and citizens of Ohio, they ceased to be such citizens after they became residents of the property belonging to the United States, and were relieved of any obligation to contribute to the revenues of the county or State, and were subject to none of the burdens which the State imposed upon its citizens, and that they became subject to the exclusive jurisdiction of a power as foreign to the State of Ohio as was the States of Indiana or Kentucky.

The Constitution of Ohio required that electors should be residents of the State. So does our Constitution.

The State of Texas gave its assent to the United States government to purchase the territory on which you reside, or ceded it to the United States with the condition only that civil and criminal process might be served thereon by the officers of the State.

This provision was made with a view to preventing the territory from becoming a sanctuary for debtors and criminals. No offenses committed upon the territory on which you reside are committed against the laws of this State, nor can such offenses be punished by the courts of this State.

The Supreme Court of Ohio held in this case that the parties who reside upon the territory belonging to the United States were not entitled to vote in the county in which it was situated.



Judge Storey, in his Commentaries on the Constitution, says:

"States can not take cognizance of any act done in the places after the cession; and, on the other hand, the inhabitants of those places cease to be inhabitants of the State and can no longer exercise any civil or political rights under the laws of the State." (Section 1227.) See also:

McMahon vs. Polk, 47 L. R. A., 830.

Walcott vs. Halcomb, 23 L. R. A., 215.

In Re Town of Highlands, 22 N. Y. Supp., 137.

Fort Leavenworth Ry. Co. vs. Lowe, 114 U. S., 525.

McLean's Cases on Constitutional Law, page 536.

You are therefore advised that when you became a resident with your family upon property which has been purchased by or ceded to the United States in the State of Texas, and over which the United States has exclusive jurisdiction, with the reservation only that the State may serve process thereon, you ceased to be a citizen of the State of Texas and of the county in which the property is situated, and are not entitled to vote in this State.

Yours very truly,

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#### EPILEPTIC COLONY—WATER MAINS.

Construed to be duty of district or county attorney to institute proceedings to prevent tapping of water mains (being property of a State institution), by individuals; although neither the Constitution or the statutes of this State explicitly places the specific duty upon any attorney representing the State.

AUSTIN, TEXAS, October 15, 1906.

*W. J. Cunningham, Esq., District Attorney Forty-second Judicial District of Texas, Abilene, Texas.*

Dear Sir: We have received and carefully considered your letter of 12th inst., in which you say that the Board of Managers of the Epileptic Colony at Abilene have requested you to file suit in behalf of the State to prevent the tapping and use of water from the main water pipe extending from the lake to the Epileptic Colony, all of which, you say, is the property of the State.

You ask us to advise you whether or not it is your duty to file the suggested suit, and if so to cite you to the law upon which our opinion is based.

Replying, I beg to say:

The Constitution of Texas in Article 5, Section 21, provides that, "The county attorney shall represent the State in all cases in the district and inferior courts in their respective counties; but if any county shall be included in a district in which there shall be a district attorney, the respective duties of district attorneys and county attorneys shall, in such counties, be regulated by the Legislature."

Article 284 of our Revised Statutes provides that, "In counties where there is a county attorney it shall be his duty to attend the terms of the county and other inferior courts of his county, and to represent the State in all criminal cases under examination or prosecution in said county, and also to attend the terms of the district court, and to represent the State in all cases in said court during

the absence of the district attorney, and to aid the district attorney, when so requested."

As we understand it, you reside in Taylor County.

We have not been able to find any Constitutional or statutory provision which clearly and explicitly places upon any attorney representing the State, whether Attorney General, district attorney or county attorney, the specific duty of bringing suits of this character; but I am of the opinion that it is most consistent with the policy of the law, as declared by our Constitution and statutes, and by the decisions of the Supreme Court of Texas in *Day Land & Cattle Company vs. The State*, 60 Texas, 526, and in *Brady vs. Brooks*, 14 Texas Court Reporter, 163, to hold that if the duty in question has been in any manner imposed by law upon any of the officers above referred to, it is upon the district attorney, resident in the county.

Turning to the Acts of 1887, page 138, as now incorporated in Article 2907 of our Revised Statutes, I find the following provisions:

"The government is hereby authorized to order, through the proper officials, the institution, prosecution or defense of any civil action or suit whenever he deems such course proper for the assertion or defense of any right of the State, and to render said officials such assistance as to him may seem necessary or expedient."

I have accordingly prepared, and at my suggestion, the Governor has signed a letter addressed to you which is herewith enclosed, authorizing and directing you as district attorney, and in the name and on behalf of the State of Texas from time to time as you may see fit to institute and maintain in the district or inferior courts of Taylor County, any and all such actions or suits in law or in equity as you may deem proper and advisable, for the purpose of stopping said practice and preventing any and all unauthorized persons from taking water from said water main, and, generally, for the protection of any and all rights and interests of the State of Texas in the premises.

This appears to me to be the best practicable solution of the question, and I think it likely that your authority in the premises will be upheld by the courts.

At any rate, it is of importance to the State that the question which will thus be presented be finally tested. In this matter this department stands ready to give you any assistance within its power.

Truly yours,

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#### FEES—COUNTY JUDGE.

Commissioners court should allow county judge fee for each civil case finally disposed of in which pauper's affidavit has been filed, or in which party cast in the suit is unable to pay.

AUSTIN, TEXAS, October 18, 1906.

*Judge James Kimble, Groesbeck, Texas.*

Dear Sir: We are in receipt of yours of 17th in which you state that some civil cases have been filed and finally disposed of by you

as county judge, in which the parties cast in the suit were paupers who had filed the oath of inability to pay costs, and that the costs have never been paid and will not be paid by the parties.

You desire to know if you are entitled to collect fees from the county in these cases, under the provisions of Article 2449, Sayles' Civil Statutes.

There would be no controversy in reference to the matter but for the words ending the article, viz.: "Each State case."

The article is dealing in the first instance with the fees of the county judge in lunacy cases, and in the second instance it is dealing with civil cases finally disposed of by the county judge, by trial or otherwise. It provides that for each civil cause finally disposed of the county judge shall receive a fee of \$3 to be taxed against the party in the suit. This regulation as to fees in civil causes contains a proviso, that if the party cast in the suit has filed his oath of inability to pay costs during the progress of the cause, or be unable to pay costs, then the county judge shall be allowed by the commissioners court such compensation as they may deem proper, not to exceed \$3 for each State case. To construe this proviso as restricting the fees to be paid the county judge by the county, to State cases would, in our opinion, make it absurd, and impress upon the provisions of the article a construction which would be unwarranted.

It is a well known rule of statutory construction that clerical errors or misprints which, if uncorrected, will render a statute non-meaning, or nonsensical or would defeat or impair its intended operation, will be corrected by the court, and the statute read as amended.

The courts in construing statutes have read the word "issued" to be "filed" and have read the word "county" to be "city," and the word "plaintiff" to be "defendant," and the word "river" to be "ridge," and have never hesitated where one word has been erroneously used for another, to read into the statute the word that should have been used. And where a word or phrase in a statute would make it unintelligible, the word may be eliminated and the statute read without it. In all cases the statute must be interpreted according to its true meaning, purpose and intent, and words which are meaningless or inconsistent with the intention, otherwise plainly expressed in the act, may be rejected as redundant or surplusage. See Sutherland on Statutory Construction, Volume 2, paragraphs 3 and 4. Also Black on Interpretation of Laws, page 77.

The statute under consideration is dealing with the matter of civil causes, and in no way is attempting to prescribe the fees to be paid the county judge in any State case, and to construe the statute as to restrict the fees allowed the county judge when a party cast in a suit has filed a pauper's affidavit, or be unable to pay costs, to State cases, would make the statute unintelligible.

We believe the word "State" should be read "such" and by so reading it we believe the statute would express the intention of the Legislature.

You are therefore advised that in our opinion you are entitled

to such compensation in the cases to which you refer as may be allowed by the commissioners court, not to exceed \$3.00 in each case.

Yours truly,

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### DELINQUENT TAXES.

County attorney may bring separate suit as to each tract delinquent.

AUSTIN, TEXAS, October 18, 1906:

*Hon. J. W. Stephens, Capitol.*

Dear Sir: We are in receipt of yours of 17th, submitting the following inquiry:

"If a man owns several tracts of land in the same county, and allows taxes to become delinquent for a number of years, when suit is filed for recovery should all the tracts be put in one suit, or should suit be filed for each separate parcel of land, and for each year that it is delinquent."

Under the provisions of the delinquent tax act passed in 1897, and under the provisions of the Constitution of this State, taxes fix a lien only upon the tract of land upon which they are due. This act provides that each tract of land shall be separated in the delinquent tax record, giving the taxes due thereon and the years for which taxes are due.

Each tract of land is subject to lien for the taxes due thereon and the accrued costs, and the suit to be filed by the county attorney is not a suit in personam, exclusively, against the owner, but is a suit to foreclose the lien upon the particular tract of land upon which taxes are due, and we think the statute contemplates that each tract of land should become the basis of a separate suit for all taxes due upon the particular tract, including all years for which it is delinquent.

A suit was filed in the name of the State in Brewster County against unknown owners for State and County taxes, penalty and interest, for the years 1893, 1894, 1895, 1896, and 1897 on a certain 640-acre survey.

A plea in abatement was filed by the defendants in which they alleged that they were the owners of this particular survey and twenty-one other surveys, to foreclose a lien upon each of which the county attorney had filed twenty-two separate suits, and they further alleged that there was no excuse or authority for him to file separate suits against each tract of land, and they prayed the court to enter an order consolidating the twenty-two suits. The court refused to consolidate the suits, and the Court of Civil Appeals held that there was no error in so doing.

The Court of Appeals said that the consolidation "would have been a matter of right had it appeared that all the surveys had been assessed together to intervenors, or unknown owners, but each of the tracts, it seems, was assessed by itself, and suits were not improperly brought separately, and intervenors, in our opinion, had no right to insist upon a consolidation of them."

We think this is a proper construction of the statute, and if sev-

eral tracts of land are assessed together to one party or to unknown owners, only one suit should be brought for the several tracts; but if each tract is assessed separately to unknown owners, or to the owner, the county attorney is authorized to bring a separate suit as to each tract.

See *Watkins vs. State*, 61 S. W. Rep., 532.

Yours very truly,

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LAND PATENTS—GOVERNOR—SECRETARY OF STATE—  
SEAL OF STATE.

Where patent issued in 1879, having signature of Governor and seal of Land Office, but without seal of State affixed, Secretary of State advised, at this late date, not to affix seal of State.

AUSTIN, TEXAS, November 13, 1906.

*Hon. O. K. Shannon, Secretary of State, Capitol.*

Sir: We are in receipt of your recent letter enclosing one from Messrs. Davenport & Martin, of Stamford, Texas, in which they say:

“On April 16, 1879, O. M. Roberts, as Governor of Texas, by patent No. 366, Vol. 15, issued patent to Geo. Foster Williams as assignee of the B. B. B. & Co. R. R., certain lands in Jones County, Texas, but for some reason the seal of the State was not affixed to said patent, but the seal of the General Land Office was affixed. We desire to know if we are authorized to affix the seal of the State to said instrument if the same is submitted to us for that purpose.”

You ask us to advise you whether or not, under the circumstances stated, you would have the authority to affix the great seal of the State to the instrument mentioned.

In reply, I beg to say:

Section 19 of Article 4 of the Constitution of Texas provides that “there shall be a seal of the State, which shall be kept by the Secretary of State, and used by him officially under the direction of the Governor.”

Article 4175 of the Revised Statutes of Texas provides that “every patent for land emanating from the State shall be issued in the name and by the authority of the State, and under the seal of the State, and under the seal of the General Land Office, and shall be signed by the Governor and countersigned by the Commissioner of the General Land Office;” etc.

The statement of facts presented does not indicate that the Governor has, in this instance, directed you to affix the seal of State to said patent.

However, we do not know of any authority under which you would be required or authorized to affix the seal of State to the above mentioned patent. We advise you to decline to do so.

The letter of Messrs. Davenport & Martin is herewith returned to you.

Respectfully,

## APPROPRIATION ACT CONSTRUED.

Cost of making clothes for inmates of State Lunatic Asylum may be paid out of appropriation for "dry goods and clothing."  
 Construction formerly placed upon similar appropriation act, if not unreasonable, may be considered in determining intent of Legislature.

AUSTIN, TEXAS, November 14, 1906.

*Dr. B. M. Worsham, Superintendent State Lunatic Asylum, Austin, Texas.*

[ Dear Sir: We are in receipt of your letter of the 13th inst., in which you say:

"For a number of years we have been making all the clothing used by the patients at this institution, and on September last the annual contract was let for goods enough to make clothes for all the male patients, which practically exhausted the appropriation for that purpose. On account of the great demand for skilled labor, we have been unable to get a tailor at the salary allowed by the Legislature for this institution, viz.: \$33 per month, and for more than a month we have been forced to close the tailor shop. The question I wish you to determine is whether or not we can have the goods made up, and pay the same out of the appropriation for dry goods and clothing. There is not enough money in the appropriation, as it stands now, to buy additional clothing, and we can do nothing with the goods unless we have the suits made."

The appropriation acts of 1903 and of 1905, respectively, contain these items of appropriation for said institution, viz.:

"Salary of head seamstress, \$300.  
 "Salary of six seamstresses, \$1440.  
 "Salary of tailor, \$400."

And "dry goods and clothing, \$18,000," for each year.

From your oral statement, in connection with your letter, we understand:

1. That the bulk of the appropriation of \$18,000 for "dry goods and clothing," has already been expended in purchasing goods out of which to make such clothing, leaving the institution practically without funds with which it might purchase ready-made clothes.

2. That for years the time of the tailor employed under the third above quoted item of said appropriation acts, respectively, has been and must of necessity be consumed in making repairs in this line of work, leaving little, if any, time to be devoted to making clothes, and that for years it has been and now is utterly impossible for one tailor, and the head seamstress and the six seamstresses to make the necessary clothes.

3. That under the appropriation act of 1903 you paid out of said appropriation for "dry goods and clothing" the cost of making such clothes from goods purchased for that purpose, thereby saving about \$1500 as compared with what would have been the cost of ready-made clothing.

The appropriation act does not specify "ready-made clothing," and the words "dry goods and clothing" found in said above quoted item appear to have been intended by the Legislature to indicate the ob-

ject or purpose for which the amount of that item of the appropriation was to be expended rather than to define or restrict the means or method by which such object or purpose should be attained.

It is probable that when the current appropriation was made by the Legislature, it had knowledge of the above mentioned custom under which the expense for making clothing had been incurred and paid under the appropriation act of 1903, and that it contemplated that items couched in the same words in the appropriation act of 1905 should be similarly construed, such construction being not unreasonable under the phraseology employed.

This department is of the opinion that, under the circumstances above enumerated, your question should be answered affirmatively, and that the reasonable cost of making up the goods already on hand, into clothing, for use of the inmates of the institution may be properly paid out of the current appropriation for "dry goods and clothing."

Truly yours,

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#### COUNTY PHYSICIAN—FEES.

A county physician is not entitled to compensation under Article 1024a, Penal Code; for performing an autopsy at an inquest.

AUSTIN, TEXAS, November 16, 1906.

*Hon. John M. Murch, County Auditor, Galveston, Texas.*

Dear Sir: Your letter of 14th instant was received yesterday.

After a further consideration of the matter I have reluctantly reached the conclusion that the county physician of Galveston County is not entitled to compensation, in addition to the monthly salary which he receives from the county, for making an autopsy at an inquest. In your letter you say:

"As to the services the county physician is under contract to perform, all I can say is that the county commissioners court elected a physician to act as county physician, to perform such services as I presume may be necessary or required of a county physician. I know of no written contract specifying the particular nature of the services to be rendered."

If the compensation paid by the county is intended and understood to cover all medical services which are required of the county physician by law, or which may be required by him of the county commissioners court, then, without stopping to consider the legality of the contract, I think he could not claim under it, and, at the same time, beyond it. If the making of autopsies at inquests is one of the services understood and intended to be included in and compensated for by the contract of the county with him, the county physician can not, while accepting the compensation under the contract, claim also the compensation authorized by Article 1024a of the Code of Criminal Procedure, assuming that the provisions for compensation in this article inure to the benefit of the county physician.

If making autopsies at inquests is not one of the services covered by his contract with the county, then his right to compensation for such services depends upon the proper construction of Article 1024a of the Code of Criminal Procedure.

It is as follows:

“Whenever an inquest is held to ascertain the cause of a death, the justice of the peace is hereby authorized, if he deems it necessary, to call in the county physician, or if there be no county physician, or if it be impracticable to secure his services, then some regular practicing physician, to make an autopsy in order to determine whether the death was occasioned by violence; and if so, the nature and character of the violence used; and the county in which such inquest and autopsy is held shall pay to the physician making such autopsy, the excess over ten dollars to be determined by the county commissioners court after ascertaining the amount and nature of the work performed in making such autopsy.”

If it were an original question, I should be disposed to express the opinion that the county physician is entitled to the statutory compensation, when he acts, quite as well as is another physician acting in the absence of the county physician. I can see no reason for holding that the provision for compensation to “the physician in making such inquest and autopsy,” denies compensation to the county physician but allows it to another than the county physician who may be called in when it is impracticable to secure the services of the county physician.

I find nothing in the act which added Article 1024a (formerly 989a) to the Code of Criminal Procedure (Chapter 101, page 155, General Laws 1893), which suggests that the Legislature intended to require the county physician to render this service without compensation. Article 1024b (formerly 989b) which was added to the Code of Criminal Procedure by the same act, reads:

“If upon such inquest it becomes necessary to determine whether death has been produced by poison, it is hereby made the duty of the justice of the peace, upon request of the physician performing such autopsy, to call in to his aid, if necessary, some medical expert or chemist qualified to make an analysis of the stomach and its contents \* \* \*.”

If the expression, “the physician making such autopsy” in Article 1024a excludes the county physician, so would the expression “the physician performing such autopsy” in Article 1024b. I can not see the necessity or reason for such construction.

But the decision of the Supreme Court in the case of County of Galveston vs. Ducie, 91 Texas, 665, decided May, 1898, would indicate that it was the opinion of the court that the county physician is not entitled to compensation for making autopsies at inquests.

A sufficient statement of that case for the present purpose is that on December 24, 1894, the commissioners court of Galveston County elected Dr. Ducie as county physician. His duties under his appointment were to give medical attention to the prisoners at the jail, both the criminals and the pauper insane, and county paupers at the poor farm and any one sick within the jurisdiction of the



county, confined as a prisoner, pauper or lunatic, and to attend inquests whenever anybody was found dead. These duties were to be performed for a stated salary of \$80 per month. The evidence did not show whether or not a county physician had been appointed by the county judge in accordance with the State quarantine law, or that appellee was to perform the duties prescribed for that officer. The Court of Civil Appeals for the First Supreme Judicial District certified to the Supreme Court, among other questions the following:

“Did the commissioners court have the authority to appoint the appellee county physician at a stated salary per month to perform the duties indicated?”

To this question the Supreme Court answered, in part: “Counties are not liable for the services of medical men at inquests which may be held under the provisions of the Code of Criminal Procedure. *Fears vs. Nacogdoches County*, 71 Texas, 337. To the first question propounded, we answer that the commissioners court of Galveston County was authorized to make the contract for medical services to be rendered to paupers and prisoners for whose care and support the county was required to provide. *Monghon & Sisson vs. Van Zandt County*, 3 Willson, C. C., Sec. 198. The court had not the authority to make the contract with Dr. Ducie for his services at inquests, and to that extent the contract made was not binding upon the county.”

Though not referred to in the opinion, it appears that in the brief for appellee (pages 666, 667 of the report) Article 1024a of the Code of Criminal Procedure was called to the court's attention. The case of *Fears vs. Nacogdoches County*, 71 Texas 337, cited in the *Ducie* case was decided in 1888, nearly five years before the enactment of the Act of 1893, which added Article 1024a to the Code. In that case the Supreme Court held that under then existing laws there was no provision for the compensation of a physician summoned to aid in or conduct a post-mortem examination at an inquest. Justice Gaines, who rendered the opinion for the court said, in part:

“A post-mortem examination at a coroner's inquest is frequently necessary for the detection and punishment of crime. It does not seem just to impose this duty, without compensation, upon a learned and enlightened profession whose custom it is not to refuse the calls of charity. But they must look to the Legislature for relief. We can only declare the law as we find it and as it now stands we think there is no provision for their compensation.” It would seem that the Act of 1893 was passed to supply this omission in the laws.

The Supreme Court, in the *Ducie* case, could not have intended to declare the Act of 1893 invalid, since one year later, in *Polk County vs. Phillips*, 92 Texas, 630, it held a physician who acted in the absence of the county physician to be entitled to compensation for services rendered under Article 1024a.

I can harmonize the *Ducie* case with the *Phillips* case and the statute, only by assuming that the court regarded Dr. Ducie as at least de facto county physician, and was of the opinion that Article 1024a did not, as to county physicians, change the law as declared in the *Fears* case. This, I admit, is rather a violent assumption in view of the language which I have quoted from the opinion and the answer

of the court to the third question certified, but I do not see how otherwise to give effect to the decision on this point.

Yours truly,

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CRIMINAL DISTRICT COURT OF GALVESTON AND HARRIS  
COUNTIES—DISTRICT JUDGE—DISTRICT CLERKS.

Terms of office of criminal district judge and of criminal district clerks  
of Galveston and Harris Counties begins August 20th.

AUSTIN, TEXAS, November 30, 1906.

*Hon. S. W. T. Lanham, Governor, Capitol.*

Dear Sir: Complying with your request for the opinion of this department relative to the office of Judge of Criminal District Court of Galveston and Harris Counties:

Under the Act of 1866 (Act of the Eleventh Legislature, page 33), the Judge of the Criminal District Court for Galveston and Harris Counties was elective, and held his office for four years. The clerk of this court, for each of said counties, under this Act, was appointive by the judge of the court, and was removable by said judge at any time for misconduct, etc. This act was entirely superseded by the Act of 1870 (Chapter 26, Acts Twelfth Legislature, page 37). It is under this act, as amended by the revision of the Statutes in 1879, that the appointments now in question, are made.

Under the Act of July 23, 1870, the term of office of the judge of this court was four years, and no term was fixed for the clerks of said courts. In the revision of the statutes in 1879, the following provisions were incorporated, namely:

“Article 1483. Said judge shall hold his office for a term of two years, and until his successor is qualified.”

“Article 1488. There shall be appointed by the Governor a clerk of said court for each of said counties, who shall hold his office for a term of two years, and until his successor is qualified.”

The Revised Statutes of 1879 became effective at twelve o'clock, meridian, September 1, 1879. The above articles are now in force as Articles 1509 and 1511 of the Revised Statutes of 1895. In view of the conclusion reached by us, as to the law governing the term of office of these respective officers, it will become necessary to consider the history of appointments, by the executive, of persons to fill each of these offices. The records in the office of the Secretary of State disclose the following:

The first appointment of a judge of the Criminal District Court for Galveston and Harris Counties, under the Act of July 23, 1870, was that of Hon. Samuel Dodge, made July 29, 1870; he resigned July 31, 1874. On August 1, 1874, Hon. Gustave Cook was appointed. He was reappointed August 3, 1878.

In 1879, through the operation of the revision of the statutes, the term of office was fixed at two years, in lieu of four, and the first appointment, under the revision, was that of Hon. Gustave Cook,

which was made August 20, 1880. He was reappointed June 4, 1883, and resigned October 1, 1888.

On September 21, 1888, Chas. L. Cleveland was appointed and was reappointed September 22, 1890. Upon his death Hon. E. D. Cavin was appointed February 13, 1892. He was reappointed April 4, 1892, and again on September 22, 1892, and again September 24, 1894, and again September 22, 1898. He resigned September 12, 1899.

On September 14, 1899, A. C. Allen was appointed. He was reappointed January 4, 1901. On January 11, 1902, Hon. J. K. P. Gillaspie was appointed; he was reappointed September 31, 1902, and again January 19, 1905.

CLERK CRIMINAL DISTRICT COURT, GALVESTON COUNTY.

The first appointment under the Act of July 23, 1870, was that of George P. Douglas, August 17, 1870. He died December 1871. W. H. Griffin was appointed January 1, 1872. M. H. Royston was appointed September 10, 1874, and reappointed September 10, 1878.

The term of office, having been fixed at two years by the revision of the statutes of 1879, the first appointment thereunder was made August 20, 1880, and M. H. Royston was appointed. He was reappointed March 15, 1883, and again May 1, 1885, and again April 19, 1887. He died and J. A. Owens was appointed October 11, 1880. C. J. Adams was appointed September 6, 1892, to take effect October 11, 1892. He was reappointed October 11, 1894. R. A. Burney was appointed November 26, 1900, and reappointed November 24, 1902, and again reappointed January 20, 1905. He died February, 1905, and Mr. Bruce, the present incumbent, was appointed February 1, 1905.

CLERK OF CRIMINAL DISTRICT COURT, HARRIS COUNTY.

The first appointment of the Act of July 23, 1870, was that of Jas. H. Cos, made August 2, 1870. He failed to qualify, and Jas. M. Hart was appointed August 9, 1870. He resigned August 31, 1871, and C. Schmidt was appointed September 9, 1871. Henry Brashear was appointed September 10, 1874, and reappointed September 10, 1878.

The revision of the statutes of 1879 fixed the term of the clerk at two years, and the first appointment thereunder was made August 20, 1880, Henry Brashear being appointed. He was reappointed March 15, 1883, and again December 22, 1885, and again February 21, 1887, and again August 25, 1890. Samuel S. Ash was appointed January 23, 1893. Geo. W. Ellis was appointed February 7, 1895. There is no record of any other appointment until February 25, 1903, at which time C. E. Reynolds was appointed. He was reappointed January 19, 1905.

You will note that the first appointment under the revision of the statutes of 1879, which became effective September 1, 1879, for each of these officers, was made on the same date, namely, August 20, 1880.

Should it be the law that every appointee's term began from the date of his appointment, and extended over a period of two years

you will readily see that there would be as many beginning dates of the term as there are appointments, for except in very few instances, the appointments were not made upon the same date.

The rule of law relating to appointments, authorized to be made by the executive, where no date is fixed in the statutes for the beginning of the term, is that the term begins upon the date of the first appointment under the statutes and continues for two years from and after that date, and the term of office of each successive appointee for a whole term or a part of an unexpired term will be regulated and controlled by the date fixed by the first appointment. This rule is well established by the authorities.

Under an act of Kansas it was provided that the Governor should appoint by and with the advice and consent of the Senate a bank commissioner, whose term of office should be four years, and until his successor was appointed and qualified. The Supreme Court of that State said:

“In the absence of a statutory provision upon that subject, it has been held that where a statute authorizes the appointment of an official, and declares the tenure of the office and is silent on the point as to the beginning of the appointee’s term, the commencement of the official term begins to run from the date of the first appointment.” (State Ex Rel vs. Breindenthal, 55 Kansas, 308.)

An Act of the Legislature of the same State passed in 1881, which took effect March 6, 1881, provided that the mayor of certain cities, by and with the consent of the council, may appoint a city treasurer and other city officers. No date was fixed for the beginning of the term, the statute authorizing the appointments had this provision: “The term of any appointed official shall be for a period of two years, and until his successor is appointed and qualified.” At the time the law became effective there was in office a city assessor, who had been appointed prior to the time the law became effective. The first appointment made by the mayor and city council after the Act of 1881 went into effect was on February 26, 1882. The court held that this date fixed the beginning of the term of office under the act, and the party appointed upon this date should continue to hold office for the period of two years. This language is used disposing of the question:

“The Act of 1881 is silent upon the point as to the beginning of the first appointee’s term. A term of office means ‘a fixed and definite period of time.’ ‘the fixed period of time for which the office may be held.’ A period or term of two years designates consecutive terms of two years following each other in regular order, the one commencing where the other ends.

“Since no time is fixed by the statutes for the commencing of the official term, it begins to run from the date of the first appointment. As the Legislature did not fix the time when the official term of the city assessor under the Act of 1881 was to begin, the time of the commencement of the term was necessarily left to be fixed by the appointing power. \* \* \* The first appointment made by the mayor and city council after the Act of 1881 went into effect was on February 6, 1882. \* \* \* The term of office for city assessor began upon the day of the first appointment, and con-

tinued for two years from and after that date. As the first appointment was on February 6, 1882, the term of office of city assessor commenced on that date and continued for a period of two years."

The same rule is announced by the Supreme Court of South Carolina in the case of Verner vs. Seibels, 60 South Carolina, page 572, and also in the case of Haight vs. Love, 25 American Reports, 234.

By a statute of Missouri it was provided that the Governor should appoint for each of several cities of that State an inspector of petroleum, oils, etc., which should hold his office for two years, and until his successor was duly appointed and qualified. *The Statutes of that State were devised in VRGT, and the first appointment made after this revision* was on the 18th day of June, 1879. On the 20th day of June, 1881, another appointment was made. On the 12th day of June, 1883, another appointment was made. There was no appointment for the term commencing June 18, 1887, but Keedy, who was appointed June 4, 1885, remained in office until September 26, 1888, when the then Governor of the State appointed Geo. M. Belt thereto, and undertook to issue to him a commission for two years, expiring September 26, 1890. The court held that this could not be done, but that June 18, 1879, the day upon which the first appointment was made under the revision of the statutes, fixed the beginning of the term of office, and that Belt's term expired June 18, 1889, and his commission for a period beyond that date was unauthorized. We quote the language of the court in disposing of the question:

"The statute is silent on the point as to the beginning of the first appointee's term, and the reason for this is most obvious, since the power of appointment being lodged in the executive, it belonged to him in fact, if not in law, to determine the time of the inception of the actual official term of such appointee: the duration of that term was already fixed by law. But if the Legislature, being possessed of the power, *had* fixed the date of the commencement of the first appointee's official term, it would not be questioned that such initial point, being once made sure and steadfast, would recur at every corresponding period of two years. This must be true, or else the premises from which this conclusion is drawn, sustained as it is by authority, that a "term of office uniformly designates a fixed and definite period of time," must be false. As the Legislature did not fix the date when the official term of the first appointee under the new law was to begin, this date was necessarily left to be fixed by the appointing power: but, *when* fixed, the determination thus reached must have been as effectual in all its incidents and consequences as if previously made by the Legislature.  
\* \* \* This reasoning leads to this result: That the *date* of the appointment, first made by the Governor for the office in question, initiated the official term of the first appointee, and that all subsequent appointments necessarily had reference to such initial period, and, so far as lawful, conformed thereto. This conclusion is well sustained by authority."

Following the rule of law announced in the above decisions, which is undoubtedly sound, you are respectfully advised that the term of each of these officers began on the date of the first appoint-

ment under the revision of the statutes in 1879, namely, August 20, 1889. Therefore, the term of each of the appointees expired August 20, 1906.

Yours most respectfully,

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TEXAS RANGERS—PROPERTY OF—CLAIM AGAINST STATE  
FOR LOSS OF A HORSE.

Such claim should not be allowed unless it shows that such horse was "killed in action." Claim examined and found insufficient.

AUSTIN, TEXAS, December 6, 1906.

*Hon. John A. Hulcn, Adjutant General, Capitol.*

Sir: We have received and carefully considered your letter of the 1st inst., enclosing claim of Captain W. J. McDonald, of the ranger force, for the value of a horse killed "while in service." You ask us to advise you whether you are authorized under the law to approve this claim for payment out of the appropriation for maintenance of the ranger force.

Section 8 of the act providing for the organization of a ranger force (Chapter 34, General Laws, Twenty-seventh Legislature, Acts 1901, pages 41-43), reads thus:

"Each officer, non-commissioned officer and private of said force shall furnish himself with a suitable horse, horse equipment, clothing, etc.; provided, that if his horse is killed in action it shall be paid for by the State at a fair market value at the time when killed."

The question presented by you is as to whether or not this horse was "killed in action" within the meaning of said statute.

I am of the opinion that such fact is not sufficiently shown by the record which you present to us. The claim is stated thus: "The State of Texas to W. J. McDonald, August 30, 1906, to one horse killed while in service, \$150.00."

The affidavit of Captain McDonald in support of the claim states that "this horse was being ridden by Private Millican for scouting purposes, and was injured which caused his death," etc.

The joint affidavit of Joe L. Beckham and J. S. Strickland, M. D., reads thus: "This is to certify that Captain McDonald's horse 'Sam,' that fell on and crippled W. A. Millican by falling on his leg and stabbing a spur into his (the horse's) side and into his intestines on the 20th day of June, and was operated on by Dr. Strickland and kept and attended to by Joe Beckham for two weeks at the time, and also for two days prior to his death on the 12th day of August, 1906, and we hereby certify that the said horse died on account of the wound when he fell on Ranger Millican, who was using him for scouting purposes, and that a blood vessel broke and the horse bled internally, which caused him to die."

I am of the opinion that "killed in action," as used in this statute, means killed in a fight while the ranger was directly undertaking to enforce the law in accordance with the provisions of the act providing for the organization of the ranger force, or under

circumstances presenting a closely analogous case. The very general terms employed in the statement of this claim, and in the affidavits supporting same do not, in my opinion, bring the case within the letter or spirit of the statute, and, as now presented, the claim should, in my opinion, be rejected by you. It may be, however, that the facts, if fully stated, would warrant the approval of the claim. I think the affidavits should show specifically and in detail the immediate circumstances attending the fatal injury to the horse and should show clearly that at the moment of the injury the ranger and the horse were actively employed in the performance of some duty imposed by the statute under consideration. We will then advise you under the facts so presented.

The claim and affidavits are herewith returned.

Respectfully,

#### GIRLS' INDUSTRIAL COLLEGE — APPROPRIATION — CONTINGENT EXPENSES.

Held that traveling expenses, the same being for the purpose of advertising the institution, could not properly be paid out of contingent appropriation for said institution. Legislature made no specific provision for traveling expenses.

AUSTIN, TEXAS, December 11, 1906.

*Hon. J. W. Stephens, Comptroller of Public Accounts, Capitol.*

Sir: I have your letter of yesterday enclosing two accounts approved by Cree T. Work, President of Girls' Industrial College at Denton, for payment out of the appropriation for "Contingent Expenses" for that institution, said accounts being for the following items of expense, viz.:

First. For expenses of President Work and Professor C. N. Adkisson in connection with lecture and demonstrations at Panhandle Teachers' Association, Clarendon, Texas, November 30-December 1, 1906:

Railroad and car fare.....	\$46 90
Hotel expenses . . . . .	11 40
Drayage . . . . .	1 15
Incidentals—telegrams, repairs, etc.....	1 50

Total.....\$60 95

Second. Expenses of Mrs. C. T. Work to meeting of State Federation of Women's Clubs, at El Paso, Texas, November 21-23, 1906, in the interests of the College of Industrial Arts:

Railroad fare . . . . .	\$20 60
Hotel . . . . .	14 80
Car and hack fare.....	55

Total.....\$35 95

You ask us to advise you whether, in our opinion, you have the authority to issue warrants for payment of these or similar accounts out of said appropriation.

Your question, stated in other words, is this: Are such claims within the meaning of "contingent expenses" as those words are employed in that portion of the General Appropriation Act of 1905, which relates to the Girls' Industrial College?

Webster's Dictionary thus defines the word "contingent": "An event which may or may not happen; that which is unforeseen, undetermined or dependent on something future; a contingency."

From the work entitled "Judicial and Statutory Definitions of Words and Phrases," I quote the following:

"The adjective 'contingent' as used in appropriation bills to qualify the word 'expenses' has a technical and well understood meaning. It is usual for Congress to enumerate the principal classes of expenditure which they authorize, such as clerk hire, fuel, light, postage, telegrams, etc., and then to make a small appropriation for the minor disbursements incidental to any great business, which can not well be foreseen, and which it would be useless to specify more accurately. For such disbursements a round sum is appropriated under the head of 'contingent expenses.' *Dunwoody vs. United States* (U. S.), 22 Ct. Cl., 269, 280."

"A contingent expense must be deemed to be an expense depending on some future uncertain event. *People vs. Village of Yonkers* (N. Y.), 39 Barb., 266, 272."

I think these authorities furnish a correct guide to what was evidently in the minds of the members of the Legislature in framing and passing said appropriation act.

Said appropriation act makes specific provision for various anticipated expenses of that institution, including \$500 for each year for printing bulletins, catalogues, etc., and \$175 for each year for stationery and postage, and then provides for contingent expenses of \$1000 for each year.

Now, the expenditures embraced in these two accounts seem to have been made in advertising the institution, and certainly we may reasonably assume that the Legislature would have made specific provision for payment of advertising expenses had it contemplated that any such expenses were to be incurred in addition to such items as would properly be payable out of the appropriation for printing bulletins, catalogues, etc., and for stationery and postage. The fact that additional advertising may be considered desirable or beneficial to the institution affords no excuse for giving to the words "contingent expenses" a forced construction, or a meaning broader than their ordinary signification: and, as those words are usually employed in appropriation bills, they are not, in my opinion, broad enough to include expenses of the character indicated by these two claims.

I am, therefore, of the opinion that your question should be answered negatively.

Respectfully,

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#### COUNTY CLERK—OFFICIAL BONDS—FEES.

County Clerk is not entitled to fee for recording the official bonds of a county officer.



AUSTIN, TEXAS, December 12, 1906.

*Hon. Tom M. Drew, County Clerk, Livingston, Texas.*

Dear Sir: In reply to your inquiry last week, I wrote that I thought you were entitled to a fee of 10 cents for each one hundred words for recording the official bonds, to be paid in each case by the officer whose bond is recorded. I have had occasion to re-examine the question and have concluded that I was in error.

I have not examined the statutes relating to each officer of the county, but understand that your inquiry related particularly to the bond of your tax collector, since we have received a similar inquiry from him.

The statute (Article 5159) provides substantially that the tax collector shall give bond, payable to the county judge of his county and his successors in office "to be approved by the commissioners court of his county, which bond shall be recorded and deposited in the office of the clerk of the county court."

I have concluded that the tax collector is not required to see to the recording of his bond in the county clerk's office. When he has taken the oath of office and presented his bond to the commissioners court and secured their approval of the bond, he has, I think, qualified fully. If his right to the office were called in question, I think he would be required to show no more than this. His bond is delivered when he presents it to the commissioners court for their approval, and when it has been approved by that court it is a perfected and binding obligation whether or not it is recorded.

The duty rests upon the court to have the bond recorded and it is the clerk's duty to record it. Therefore, I conclude that the tax collector is not chargeable with any fee for the recording of his bond. Article 3575 of the Revised Statutes of 1895 is as follows:

"All official bonds of county officers that are required by law to be approved by the commissioners court and which have been so approved shall be recorded by the clerk of the county court in a book kept for that purpose."

This confirms my conclusion that the duty is upon the commissioners court to file the bond for record, and not upon the officer.

Whether the clerk is entitled to be paid by the county a fee for recording the bond is not so clear, but I think he is not. Article 2459 provides for the payment to the county clerk of a compensation for all ex-officio services. The article specifies a number of such services, but includes as well "all other public services not otherwise provided for." Article 3575, above quoted, makes it the duty of the clerk to record official bonds which have been approved by the commissioners court, and as I find no compensation expressly provided for in such a case, I think this is an ex-officio service within the meaning of Article 2459.

Yours truly,

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#### DISTRICT CLERK—COSTS IN CIVIL CASES.

Clerk not authorized to give preference or priority to his own fees, or those of any other officer. If deposit for costs be insufficient to pay

all costs at date of application of such deposit, should be paid in proportion to the several amounts due.

AUSTIN, TEXAS, December 15, 1906.

*Mr. George L. Fearn, County Auditor, Dallas, Texas.*

Dear Sir: In reply to your letter of yesterday, I beg to say that I do not know of any statute which authorizes a district clerk in making application of money deposited for cost in a civil case to give any preference or priority to his own fees or to the fee of a stenographer or other officer.

I am of the opinion that if the deposit be insufficient to pay all costs which are payable under the law at date of the application of such deposit, it should be credited upon the costs of the several officers in proportion to the several amounts due said officers, respectively,

Yours truly,

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PUBLIC LANDS—MINERAL CLAIMS—LOCATION—FILING,  
ETC.—AGENT.

AUSTIN, TEXAS, January 26, 1907.

*Hon. John J. Terrell, Commissioner of the General Land Office, Austin, Texas.*

Dear Sir: We have received and carefully considered your letter of 23rd instant, reading as follows:

“On September 20, 1901, S. A. Wright for A. M. Ellsworth posted two mineral claims in Presidio County, named Sun Set and Sun Rise. On November 6, 1901, Wright filed with the county surveyor applications for Ellsworth for a survey of said claims. They were surveyed November 16th, and applications and field notes were filed in Land Office December 5, 1901.

“Later, Ellsworth was advised that there was some question as to validity of Wright’s authority to file for him.

“On January 2, 1902, Ellsworth posted the same land and on February 26, 1902, he filed with the county surveyor his application as required by law, naming the claims as before, Sun Set and Sun Rise. The survey was made March 22, 1902 and applications and field notes were filed in Land Office April 4, 1902.

“With reference to his last posting on January 2, 1902, Mr. Ellsworth made the necessary affidavit of the non-interest of former locators, but made no such affidavit when making his first location in November, 1901. This affidavit becomes material when it is known that under the act of 1889 and 1895, and prior to this location by Ellsworth, *other persons had filed on most all of these two claims.* The prior claims were forfeited either for failure to apply for patent in five years, or for failure to return the field notes to the Land Office within thirty days, or for failure to do the necessary assessment work. All the forfeitures of former files transpired before Mr. Ellsworth filed in November, 1901.

The question to be determined is, whether or not Mr. Ellsworth’s

failure to make the affidavit of non-interest of former locators when he filed in November, 1901, is such fundamental omission as will prevent the issuance of patent, or could such affidavit now be accepted and patent legally be issued?"

Since your letter was received I have conferred with Messrs. J. T. Robison, Chief Clerk, and Mr. J. W. McDougall, Legal Examiner, of your department, in person, and have, with them, examined the files concerning these two mineral claims.

I find therefrom that on January 30, 1902, there was filed in your office what purports to be an affidavit made by said A. M. Ellsworth on January 23, 1902, which is in form substantially as provided by Revised Statutes, Article 3493, and which upon its face recites substantially that it was made to perfect and to cure any defect in the prior application which had been filed for said Ellsworth by his agent, Wright, on November 6, 1901, etc.

The law does not specifically state when the affidavit provided for by Revised Statutes, Article 3493, shall be made, nor where the same shall be filed, and I am inclined to believe that it is not absolutely necessary that it shall be filed contemporaneously with the application for a survey, but that in the absence of any rule of your office to the contrary, it may be made within a reasonable time after the original affidavit may be filed in the office of the county surveyor, where the land lies, although it would doubtless be more in harmony with the requirements of law for such affidavit to be filed in your office, or, possibly, filed and recorded in the office of the county surveyor, and then deposited in your office.

It is true that the above mentioned affidavit by Ellsworth was made in conjunction with and as a part of a second attempt upon his part to make a location upon these two mineral claims, and that this second attempt was ineffectual for the reason that the field notes were not returned to your office within the time prescribed by law. But I think the second application, survey and field notes may be treated as surplusage, and as of no effect whatever, leaving the affidavit of Ellsworth to be treated as supplementary to the first attempt which Ellsworth made through his agent Wright, to locate these two mineral claims.

I am of the opinion that if the original of this Ellsworth affidavit was in fact filed in the office of the county surveyor of Presidio County at, or about its date, as aforesaid, you would, upon satisfactory evidence of that fact being filed in your office, be justified in treating said affidavit as being in full compliance with the requirements of Revised Statutes, Article 3493, and as completing the first location by Ellsworth, through Wright.

On the other hand, if said original affidavit was not so filed at, or about its supposed date, as above stated, a more difficult question would be presented, upon which I will undertake to advise you upon presentation of the facts involved. At this juncture, it is hardly necessary to determine whether the statutory affidavit of non-interest can yet be made by Ellsworth.

I will suggest, however, that no disadvantage could result from making and filing at this time, by Ellsworth, of a statutory affidavit of non-interest, disconnected from any attempt to make a new loca-

tion in lieu of the location which said agent, Wright, undertook to make.

In this connection I deem it proper to direct your attention to Revised Statutes, Article 3489, which gives to the owner of any mining claim who desires a patent, five years after the filing of the application for survey in which to file with you their application for a patent, accompanied with the receipt of the State Treasurer showing that \$25 per acre has been paid to the State Treasurer, by the applicants for a patent.

As I understand the facts of this case, Ellsworth neither paid to the State Treasurer the price of the land, nor made to you an application for a patent therefor, until after the expiration of five years from the date of the original application by Wright for a survey, and until after the expiration of the thirty days thereafter within which you might, for cause shown, have re-instated his claims.

It is my understanding that the application for patent was dated December 18, 1906, and that same was filed in your office three days later, and that the statutory deposit was not made in the hands of the State Treasurer until December 26, 1906, although the said application for survey was made to the county surveyor November 6, 1901.

But as that feature of this case is not embraced in your questions, I express no opinion thereon.

Truly yours,

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#### COMMISSIONERS COURT—GALVESTON SEA WALL.

Commissioners court has no authority to make an appropriation for the purpose of defraying, or to assist in defraying, expenses incurred in employment of counsel to appear before congressional committee at Washington for purpose of securing appropriation for deepening Galveston harbor, building sea wall, etc.

AUSTIN, TEXAS, February 4, 1907.

*Hon. John M. Murch, County Auditor, Galveston, Texas.*

Dear Sir: We are in receipt of yours of 10th, wherein you ask if the commissioners court of your county has the authority to appropriate money for the purpose of defraying or assist in defraying the expense incurred by employing counsel or other agent to appear before Congressional Committees and Departments at Washington, on behalf of the people of Galveston County, for the purpose of looking after and securing appropriations for deepening Galveston harbor, constructing forts, sea walls and other improvements by the General Government on and around Galveston Island.

You are advised that it is our opinion that the commissioners court has no authority to make such an appropriation. The commissioners court has not such general control over the finances of a county as is ordinarily conferred upon the directors of a private corporation, and those opinions of the Supreme Court of this State intimating that the commissioners court had such general authority were expressly overruled in the case of *Bland vs. Orr*, reported in 99 Texas, page 492.

The commissioners court has only such special powers as are specifically conferred by the Constitution and laws of the State, and have not any general authority over the county business such as to authorize it to make any expenditure of money which, in its discretion, it may deem to the interest of the county. The commissioners court is authorized to expend money only in matters which are strictly "county business" such as the statute gives it authority to expend.

Article 1637 of the Revised Statutes defines the powers of the commissioners court, and there is nothing in this definition of power which would even by implication give your court power to expend the funds contemplated for the purposes specified.

Bland vs. Orr, 90 Texas, 492.

Mills County vs. Lampasas County, 90 Texas, 603.

In special matters and cases where the interest of the county may require the service of an attorney the commissioners court may contract for one, but such court can not make an order which will warrant the payment of the people's money to an attorney for services not required in the protection or the enforcement of strictly county business coming within the jurisdiction of said court.

Grooms vs. Atascosa County, 32 S. W. Rep., 188.

State vs. True, 95 S. W. Rep., 1028.

The commissioners court has no authority to appropriate the county's money unless specially authorized by statute to do so, although they may believe that the appropriation is for the general good of the county.

Jefferson County vs. Young, 86 S. W. Rep., 985.

It can only appropriate the county's funds for legitimate services, or to pay a legitimate indebtedness of the county, and what constitutes legitimate services and legitimate indebtedness depends upon the power and authority given to the court by statute to make contracts and incur liabilities. A county can not be burdened with expense or debt except so far as the power is given therefor. Being the creature of the Constitution and statute, the extent of its action toward incurring liability must be limited by the Constitution and statute.

Payne vs. Washington County, 25 Fla., 806.

Scofford vs. Bank, 9 Neb., 317.

The powers of the commissioners court must be strictly construed, and there can only arise such powers as are specially granted or as are incidentally necessary for the purpose of carrying into effect such powers.

Pacific Ry. Co. vs. Washington County, 3 Neb., 42.

Stewart vs. Otoe County, 2 Neb., 180.

I direct your attention also to the following cases:

Ellis vs. Washoe County, 7 Nev., 291.

Doster vs. Howe, 28 Kansas, 353.

Hornblower vs. Duden, 35 Cal., 668.

Yours very truly,

MUNICIPAL CORPORATION—MAYOR OF CITY OR TOWN—  
ELIGIBILITY TO HOLD OFFICE OF—RIGHT TO CON-  
TRACT WITH CORPORATION OF WHICH HE  
IS A STOCKHOLDER..

AUSTIN, TEXAS, February 7, 1907.

*Frank Beauman, Lampasas, Texas.*

Dear Sir: I am in receipt of yours of the 5th relative to the same inquiry contained in yours of the 3rd, and I regret that pressure of business in this department was such as that my reply to yours of the 3rd was not full enough to give you the information you desired. We will be pardoned for giving at times indefinite answers to inquiries made when it is known that the work of this department is such that we can not give to questions submitted the consideration they at all times deserve.

You state that you contemplate becoming a candidate for the office of mayor of the city of Lampasas, and desire to know if the fact that you own stock in the Lampasas Light and Power Company, a corporation which sells the city lights, will make you ineligible to hold the office of mayor of the city.

You also ask, if you should be elected mayor, if the lighting company could still do business with the city under its implied contract: there being no express contract, or whether it would be prohibited from continuing to do business with the city on account of the fact that you, as mayor, would be a stockholder in the company.

You also ask if you would make yourself liable for a violation of Article 266 of the Penal Code, provided no contract was made with your sanction while you held the office of mayor.

Replying to that portion of your inquiry relative to your eligibility to hold the office of mayor while you are a stockholder in the light company, you are advised that this fact would not make you ineligible to hold this office. Article 266 of the Penal Code is not a declaration of the eligibility of city officers, but prevents a city officer from being interested in any contract with the city. It provides that any officer of any city who shall become in any manner pecuniarily interested in any contract made by such city, through its agents or otherwise, etc., shall be guilty of a misdemeanor. It does not make ineligible to hold a city office a person who at the time of his election is a stockholder in a corporation with which the city has at least an implied contract for the furnishing of electric lights.

There would be involved in the situation, however, after you became mayor of the city, the following question, viz.:

1. Would a contract, either express or implied, of the city government with the Lampasas Light and Power Company be void either by express declaration of the statute or as being against public policy?
2. Would you, as mayor of the city, casting no vote as to the making of the contract, and not in any manner giving your sanction to the contract, be guilty of a violation of Article 266 of the

Penal Code, should a contract, either express or implied, be made by the city with Lampasas Light and Power Company?

The case of *Sylvester vs. Webb*, 52 L. R. A., 518, was decided by the Supreme Court of Massachusetts. One of the selectmen of a town, who was also a contractor and builder, placed a bid with the board of selectmen for the building of a schoolhouse. By a vote of five to four, the selectman and contractor being one of the five, the building was let to the selectman. The court held in this case that the contract with the city was not void on the ground of public policy merely because the vote of the selectman who received the contract was necessary to authorize the contract.

This case was decided upon the theory that the statutes looking to the prevention of corruption in contracts affecting public interest did not apply to city and town officials. Where such statutes do apply to city and town officials the weight of authority is that when a contract is made by the city with any corporation of which a member of the city council is a stockholder, and the vote of the member of the city council is necessary in order to make a contract, such contracts are void.

In the case of *Capital Gas Company vs. Young*, 29 L. R. A., 463, the Supreme Court of California held that the fact that the mayor of a city is also the president and stockholder of a gas company which furnishes gas to the city, not by virtue of any contract, but by requirement of law, when the mayor has no authority in the matter of procuring gas does not defeat the right to enforce payment from the city although the charter of the city provides that no officer shall be directly or indirectly interested in any contract, work or business, or the sale of any article for which payment is to be made from the city treasury.

In this case the mayor of the city of Sacramento was also president of the Capital Gas Company. The gas furnished the city was not furnished under any express contract, but under the civil code of the State the company was bound, upon proper demand, to furnish gas to the city and was not a free agent with power to contract or refuse to do so. The statutes of that State made a contract, entered into by the city with any corporation, where an officer of the city was also an officer and stockholder in the corporation absolutely void.

In the case of *Milford vs. Milford Water and Light Company*, 3 L. R. A., 122, the Supreme Court of Pennsylvania held that a city under an ordinance passed by the council of which a majority were also directors of the water company was absolutely void under the act of that State prohibiting municipal officers from being interested in any contract with a corporation.

In this case a majority of the city council were directors of the water company and voted for and passed the ordinance making the contract. There was a statute similar to Article 266 of the Penal Code of this State making it a misdemeanor for any officer of the city to be interested in any contract with the city.

In the case of *Trainer vs. Wolfe*, 140 Pennsylvania, 279, the Supreme Court of that State held that a contract entered into by the city officers with a corporation in which the city officers were

interested was absolutely void, because the contract was prohibited by law and its execution made a criminal offense.

In this case the party interested in the corporation, who was also a member of the city council, cast the deciding vote upon the contract.

The two cases last above cited were discussed in the case of Marshall vs. the City of Ellwood, 189 Pennsylvania, 348.

This case involved the passage of an ordinance by the city making a contract with the Ellwood Water Company. One of the members of the city council was also a stockholder in the Ellwood Water Company, and he was its secretary.

The court held that, although he was a stockholder and secretary of the water company, and also a member of the city council, the ordinance passed was not rendered invalid by his vote, because a majority of the members of the council, without counting his vote, voted in favor of the ordinance.

The court used this language:

"The decisions of this court in the cases of Milford vs. Milford Water Company, 124 Pa., 610, and Trainer vs. Wolfe, 140 Pa., 279, fully establish the disqualification in such circumstances. (That is, the disqualification of the party in question holding the position of city councilman.) The literal reading of the 66th section of the act in question deals with the individual and prescribes the penal consequences of his dereliction in very plain and emphatic terms. But those consequences are personal to the offender and do not in terms extend to, or embrace, the legal effect of the municipal transactions in which he participated. \* \* \* In the Milford Borough case referred to the ordinance in question was passed by a majority of members who were also directors of the water company. As the act of each member in voting for the ordinance was a criminal and, therefore, a void act, the combined vote of the whole was illegal and void, and the ordinance was necessarily a void ordinance. \* \* \*

"In the Trainer case the members of the school board were divided, and the deciding vote was cast by a member who had an interest in the land, the purchase of which was the subject of the pending resolution. It followed that the ordinance was passed by means of a disqualified vote, and, therefore, came within the ruling of the Milford Borough case."

In this case the court held that as the city council consisted of six members, four of whom, besides the disqualified member voted for the ordinance, and these four votes being a clear majority of the council, the vote of the disqualified members had no legal efficacy in the passage of the ordinance, and that, therefore, the ordinance was not void.

This we believe to be sound logic and a rule of law supported by the weight of authority.

Therefore, if, after you become mayor of the city of Lampasas, a contract is made by the city with the Lampasas Light and Power Company and your vote decides the question of making the contract, the contract would be void as against public policy. If, how-



ever, the contract is made without your vote and sanction it would not be void.

Coming now to the question of your personal liability for violation of Article 266 of the Penal Code:

We advise that if an express contract is made by the city with the Lampasas Light and Power Company, and you take any part in making the contract either by vote or solicitation, you would be guilty of a violation of Article 266 of the Penal Code; otherwise you would not be guilty.

As bearing upon the question herein discussed, I direct your attention also to the following cases:

Commonwealth vs. Commissioners, 2 S. & R. (Pa.), 191.

Call Publishing Co. vs. City of Lincoln, 29 Neb., 149.

Adams vs. Burke, 201 Ill., 395.

Berka vs. Woodward, 45 L. R. A., 420.

Spearman vs. City of Texarkana, 22 L. R. A., 855.

Yours truly,

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COMMISSIONERS' PRECINCTS, REDIVISION OF—AUTHORITY OF COMMISSIONERS COURTS TO REDISTRICT—CONSTITUTIONAL LAW.

Section 18, Article V, Constitution of Texas, does not inhibit re-division of county in commissioners precincts.

Quaere: Is legislative action necessary to put these constitutional provisions into operation?

AUSTIN, TEXAS, February 8, 1907.

*Senator George B. Griggs, Senate Chamber.*

Dear Sir: I am in receipt of your letter of this date upon the question of a proposed amendment to Section 18, Article V, of the Constitution of Texas relative to the redistricting of counties into four commissioners precincts, together with printed copy of S. J. R. No. 5, by yourself, and in reply to your inquiry, beg to say that, while the question presented by you may not be entirely free from doubt, I am of the opinion that said section of the Constitution does not inhibit a redivision, now or hereafter by the commissioners court of a county into commissioners' precincts, and that such redivision, if made pursuant to appropriate legislation on the subject, will be valid.

Whether or not such redivision can be made in the absence of legislative authority therefor is a question upon which I express no opinion, none being called for in your letter, as I understand it.

Yours very truly,

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CITY CHARTER—DELEGATION OF LEGISLATIVE POWER—LEGISLATURE—CONSTITUTIONAL LAW.

The Legislature may, without violating the State Constitution, provide in a municipal charter that same shall become effective only upon

an acceptance thereof by a majority of the qualified voters of the city.

AUSTIN, TEXAS, February 8, 1907.

*Hon. A. J. Baskin, House of Representatives, Capitol.*

Dear Sir: We are in receipt of your letter of recent date concerning a bill providing for a special charter for the city of Fort Worth, and in reply, beg to say:

The weight of authority, generally, and of the decisions of the courts of Texas appears to be to the effect that the Legislature may, without violating the State Constitution, provide in a municipal charter that same shall become effective only upon an acceptance thereof by a majority of the qualified voters of the city.

Dillon's Municipal Corporations, Vol. 1, Sec. 44, and cases cited.

Graham vs. City of Greenville, 67 Texas, 62.

Werner vs. City of Galveston, 72 Texas, 27.

Johnson vs. Martin, Wise & Fitzhugh, 75 Texas, 37.

Stanfield vs. State, 83 Texas, 320.

Century Digest, Vol. 10, Column 1393, Sec. 116.

Respectfully,

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#### TAXES—DELINQUENT TAX ACT—POLL TAX.

Poll tax is lien upon real estate, and collector is not authorized to accept payment of taxes upon real estate, unless poll tax is also paid.

AUSTIN, TEXAS, February 8, 1907:

*Mr. W. B. McCampbell, Corpus Christi, Texas.*

Dear Sir: We are in receipt of your favor of the 6th inst., enclosing communication from the tax collector of your county submitting the following inquiry:

"A party who owns real estate and also assessed with a poll tax refuses to pay poll tax and penalty on it. Can I issue a receipt for the property tax and let the poll tax go?"

The delinquent tax act passed by the Twenty-fifth Legislature, Section 10, page 136, provides that after the thirty-first day of January the tax collector shall by virtue of his tax rolls seize and levy upon and sell so much personal property belonging to such person as may be sufficient to pay his taxes, together with the penalty, etc., and if no personal property be found for seizure and sale, the collector shall, on the 31st day of March make up a list of the lands and lots upon which the taxes for the preceding year are delinquent, *charging against the same all taxes and penalties assessed against the owner thereof.*

Section 3 of the act provides that to each tract or lot of land there shall be apportioned its pro rata share of the entire tax, penalty and cost.

You will see from the provisions of this act of the Twenty-fifth Legislature that after the 31st day of March of each year a lien attaches to the real estate of a party for all taxes due by him, including taxes upon his personal property and his poll tax. Under

our Constitution and this and other statutes of the State, all of the taxes assessed against a taxpayer, upon delinquency, becomes a lien upon his real estate, except that his homestead is subject to a lien only for the taxes assessed against it. Section 15, Article 8, Constitution; Article 5232j, Sayles' Civil Statutes; Masterson vs. State, 17 Texas Civil Appeals, 94; 42 S. W. Rep., 1003; Guergin vs. City of San Antonio, 5 S. W. Rep., 140; Turner vs. City of Houston, 51 S. W. Rep., 642.

This being a correct proposition of law the poll tax of a person becomes a lien upon his real estate if not paid within the time prescribed by law, that is, prior to the 31st day of March, and the tax collector is not authorized to do anything to impair or affect that lien. An acceptance of the taxes due upon the real estate without requiring the poll tax also to be paid might impair or affect the lien upon the real estate for the poll tax. Therefore, the tax collector is not authorized to accept from the party the payment of the taxes upon the real estate unless the poll tax is also paid.

This is not even authorized when a party has purchased the property of another which property is legally bound for the payment of any poll tax, but under such circumstances the purchaser is required to pay the poll tax of the party from whom he purchased the land, but the tax collector is only authorized to issue to him an ordinary memorandum receipt therefor. (Section 16, Terrell Election Law.)

Yours very truly,

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#### COUNTY SCHOOL LAND—TAXES.

Vendee holding county school land under executory contract of sale required to pay taxes.

AUSTIN, TEXAS, February 13, 1907.

*Hon. J. W. Stephens, Comptroller of Public Accounts, Capitol.*

Dear Sir: We have received and carefully considered your letter of the 2nd inst., in which you say:

"Referring to enclosed copy of contract between the county judge of Val Verde County and W. E. Kaye, I have the honor to request your opinion as to whether the same conveys such title to Mr. Kaye that would subject the land to taxation as his property.

"I am informed that this contract was made by the county judge in pursuance of an order passed by the commissioners court of Val Verde County authorizing him to do so.

"You will note that this contract was entered into on the 1st day of August, 1895. This department holds that the land became taxable on January 1, 1896, and is endeavoring to collect the taxes thereon for 1896 and subsequent years.

"The present owner of this land contends that said contract does not convey sufficient title to subject the land to taxation, but claims that it is exempt under the law exempting school lands, and has asked that we submit the question to you."

The copy of contract attached to your letter bears date August 1, 1895, and in its essential features is substantially similar to the

contract of sale of the Dallas County school lands lying in Archer County, which were involved in *Tabor vs. State of Texas*, 85 S. W. Rep., 835.

In that case, it seems, the court considered both the proposition for purchase and the order of the commissioners court accepting same, and it is also true that in the case submitted by you for our consideration we have before us neither a proposition for sale nor the order of the court accepting it; but it is hardly likely that they would change the legal status of the transaction as evidenced by the written contract first above mentioned.

As this matter is presented by you, it seems to be within the rule laid down by the Court of Civil Appeals in the *Tabor* case, *supra*.

From the opinion in that case I quote the following:

"That our tax laws should be construed, as they long have been, to require the vendee holding lands under an executory contract of sale to pay the taxes assessed against such lands, we entertain no doubt. Lands so held are subject to execution as the property of the vendee, and the title of such vendee will support an action of trespass to try title. The fact that a county is the vendor ought not to change the legal status of such vendee. True it has been held that county school lands, so long as they remain the property of the county, are exempt from taxation, even in the hands of a lessee (*Daugherty vs. Thompson*, 71 Texas, 192, 9 S. W. Rep., 99), but after the lands are sold by the county they become the property of the vendee for the purposes of taxation, as well as of execution, even though the sale be on a credit, and the contract executory. It would certainly be unreasonable to treat a county selling its school lands on a credit as owner both of the notes or obligation taken for the purchase price and of the land. True, the county is not entirely divested of title to the lands until they are entirely paid for, but until a forfeiture or rescission takes place on account of the default of the purchaser the purchaser is to be regarded as the owner, and the lands may be sold for taxes as his property."

In the *Tabor* case a motion for rehearing was denied, and the Supreme court denied a writ of error.

Under the authority of the above mentioned decision we concur in your conclusions as above set forth.

However, we deem it proper to say in this connection that our conclusion is based upon the assumption that the contract of sale above mentioned is valid. Upon that question we express no opinion, the order of court referred to in the contract of sale not being before us, and the statement submitted by you not disclosing whether or not the commissioners court in making such order exceeded its authority and therein undertook to confer upon the county judge discretion and powers which were not authorized by law.

Respectfully,

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RAILROAD COMMISSION—RAILROADS—GALVESTON  
CAUSEWAY.

Railroad Commission has no authority to require railroad company to

erect or maintain any character or kind of structure across navigable or other waters for use of its trains, without being so authorized by the Legislature.

AUSTIN, TEXAS, February 14, 1907.

*Hon. Allison Mayfield, Chairman Railroad Commission, Capitol.*

Dear Sir: We are in receipt of yours of 9th, enclosing copy of an order entered by the Railroad Commission, under date February 2, 1907, requiring the Gulf, Colorado & Santa Fe Railway Company, the Galveston, Harrisburg & San Antonio Railway Company, the Missouri, Kansas & Texas Railway Company of Texas and the International & Great Northern Railway Company to jointly construct a causeway across Galveston Bay.

You ask for the opinion of this department upon the following points, viz.:

1. Has the Railroad Commission the authority under existing law to make such an order?
2. If the Railroad Commission has not authority under existing law, can the Legislature confer such authority under the Constitution?

The Railroad Commission is merely an administrative board created by the State for carrying into effect the will of the State as expressed by its legislation. It is purely a creature of the statute and possesses no power except what the statutes expressly confer upon it.

*Reagan vs. Farmers Loan & Trust Company*, 154 U. S., 362.

*In Re Railroad Commissioners*, 15 Neb., 679.

*Railroad Commissioners vs. Oregon Railroad Co.*, 17 Ore., 65.

*Spofford vs. Bucksport Railroad Co.*, 66 Maine, 26.

*Neal vs. Mortland*, 85 Maine, 62.

The principal purpose of most of the statutes of the several States creating Railroad Commissions is the regulation of freight and passenger rates. Some of these commissions, however, are invested with comprehensive powers of regulation over all matters relating to the safety of passengers and freight and to the convenience of the public in its business relations with railroad companies.

The Act of 1891 creating the Railroad Commission had for its principal purpose, if not its only purpose, the regulation of freight and passenger rates, and the power "to correct abuses" relates only to such abuses as affect freight and passenger tariffs. *I. & G. N. R. Co. vs. Railroad Commission*, 89 S. W. Rep., 961.

The Supreme Court, in the case of *Railroad Commission of Texas vs. Houston & Texas Central Ry. Co.*, 90 Texas, 340, held that the power "to correct abuses," conferred by the Legislature on the Railroad Commission, was not limited to abuses growing out of the regulation of freight and passenger tariff, but was intended to refer to all abuses and improper uses of the franchises which had been granted to the railroads of the State, as well as to all abuses connected with or growing out of the business transacted in the exercise of such franchises. It was under this construction of the statute creating the Railroad Commission, that is its power to correct abuses, that the Supreme Court upheld the order of the Railroad Commission relative to the compressing of cotton.

In the I. & G. N. case, above referred to, the court said that they were in error in announcing that doctrine, and that the power of the Railroad Commission relative to the matter of compression of cotton must be found in the provisions of Section 3 of the Railroad Commission act, making it the duty of the Commission "to adopt all necessary rates to govern and regulate railroad, freight and passenger tariffs." In this case the question was as to the authority of the Railroad Commission to make an order requiring the construction and maintenance of connecting tracks at Italy, Texas. The court held that this authority did not come from the grant of the statute creating the Railroad Commission of power "to correct abuses" and that to thus construe the law would make it unconstitutional, as containing something in the body not included in the caption. It was held that the authority to make the order must come from some other statute than that creating the Railroad Commission, and the decision of the court upholding the order made by the Railroad Commission was predicated upon the act of May 1, 1903, containing the express provision that a failure to comply with its terms should be deemed an abuse of the corporation's rights and privileges, subject to regulation and correction by the Railroad Commission.

Since the Railroad Commission has not the authority to correct all abuses and all improper uses of the franchises of a railroad company "the question then arises," says the Supreme Court, in the H. & T. C. case, "what abuses can the Railroad Commission correct?" We think it must be some abuse which has been defined by the law and that the Commission would not by this power be authorized to enact a law defining what is an abuse or a disregard of duty on the part of the railroad corporation.

"Has the Legislature of Texas defined any act or acts as an abuse on the part of railroad companies under which the Commission would have power in the suppression thereof to adopt the regulations in question?"

Article 4579 imposes upon the Railroad Commission the duty to see that all laws of the State concerning railroads are enforced and obeyed, and that violations thereof are promptly prosecuted, and penalties due the State therefor recovered and collected, but before any order of the Railroad Commission can be predicated upon this article or upon its power to correct abuses other than those relating to freight and passenger tariffs, there must exist some statute of the State defining the duties of the railroad company in relation to the act sought to be brought within the jurisdiction of the Commission.

There is no statute of this State making it an abuse or improper use of the franchises of a railroad company, or an abuse connected with or growing out of the business transacted in the exercise of such franchises, for it to fail to erect and maintain any certain character of structure over which its trains run across navigable or other waters. Neither is there any statute of the State imposing upon railroad companies the duty of erecting and maintaining any certain character of structure across any navigable or other waters, except that contained in Article 4437, which is not material to the question here involved. Its liability as to such structures is under the common law making it subject to pay all damages caused by reason of

its negligence either in the character of structure erected or the maintenance thereof, to the parties injured thereby. It owes a duty to the public as a common carrier—of passengers to exercise a high degree of care in constructing and maintaining bridges for the use of its trains, but failing to perform a common law obligation gives the Commission no authority.

The Legislature of this State has not seen fit to provide the character of structures which shall be erected nor the manner of their erection, except as indicated above, and has not seen fit to provide that a failure to so erect and maintain would be an abuse of its privileges and franchises, and having failed to do this the Railroad Commission has no authority to enter an order requiring any railroad company to erect or maintain any character or kind of structure across navigable or other waters for the use of its trains.

We, therefore, answer your first question in the negative.

As to the second question:

The Supreme Court, in the case of *Houston & Texas Central Ry. Co. vs. Harry*, 63 Texas, 259, in construing Section 2, Article 10 of the Constitution, prior to the amendment thereof in 1890, said:

“It rests with the Legislature to determine what, on the part of a railway, constitute abuses, and to determine what laws will correct them, as well as what remedies may be necessary to secure the enforcement of such laws.

Over these matters the Legislature has full power, in the absence of some constitutional restraint.

Whether abuses shall be corrected through statutes which declare the act or acts which constitute an abuse a crime punishable in some of the modes in which crime is ordinarily punished; or whether the given abuse shall be corrected through a civil action given to the person whose private right has been violated, in which not only actual compensation for the wrong done may be recovered, but in which damages in excess of this, in the way of punitive or exemplary damages, may be recovered, was left to the discretion of the Legislature.”

This principle was also announced in the case of *S. A. & A. P. vs. State*, 79 Texas, 269.

There is nothing in conflict with either of these decisions in the case of *Railroad Commission vs. H. & T. C. Ry. Co.*, 90 Texas, 340, or *I. & G. N. R. R. Co. vs. Railroad Commission*, 89 S. W. Rep., 961, which were decided under Article 10, Section 2, as amended in 1890.

The Legislature may require railroad companies to construct and maintain safe roadbeds, tracks, bridges, cattleguards, etc., and impose a penalty for failure to do so. *Clark & Marshall on Private Corporations*, Vol. 1, page 706.

You are therefore advised that it is our opinion that the Legislature has the authority to provide what, on the part of the railroad companies, will constitute an abuse of their privileges and franchises as to the subject-matter here under consideration, and to determine what laws will correct such abuses, and to confer upon the Railroad Commission power to see that such laws are obeyed.

Yours truly,

## CONFEDERATE HOME—EMPLOYEES THEREOF.

Families of officers and employees not entitled to food and lodging in the Home at expense of State, except appropriation act for years ending August 31, 1906, and August 31, 1907, provides for "salary of Superintendent, with board for himself and family not to exceed \$500 per year."

AUSTIN, TEXAS, February 18, 1907.

*Hon. W. C. Walsh, President Board of Managers, Texas Confederate Home, Austin, Texas.*

Dear Sir: We beg to acknowledge receipt of your recent letter in which you state that you are instructed by the Board of Managers of the Confederate Home to ask our official advice on the following points, viz.:

"First. Are the wives, children, or other members of the families of officers and employees (not being employed in any capacity in the Home), entitled to food and lodging in the Home, at the expense of the State?

"Second. If they are not, has the Board any authority to permit them to remain in the Home upon payment for board and lodging?

"Third. Is not all available space in the Home the exclusive property of disabled Confederate Veterans and the force necessary to administer to their wants?"

Replying to your questions, I beg to say that neither in the Act of February 27, 1891, establishing The Texas Confederate Home, nor in any act amendatory thereof, nor in any act affecting that institution, excepting only the general appropriation act for 1905, have I been able to find any provision which requires or authorizes the Board of Managers of the Home to permit the wife, or child, or other member of the family of any officer or employee of said institution to receive food and lodging in the Home at the expense of the State, or even to remain there upon payment of board and lodging.

Said appropriation act appropriates, "For the years ending August 31, 1906, and August 31, 1907, respectively: Salary of Superintendent, with board for himself and family, not to exceed five hundred dollars per year, and fuel, lights, water and housing, \$1500." And it is the duty of the Board to comply with this provision of said appropriation act down to and including August 31, 1907.

It will be noted that said appropriation act makes no provision for board or lodging of the wife, child or other member of the family of any other officer or employee of said institution.

As the law now stands, the Board of Managers has no authority to permit the wife or child or other member of the family of any officer, other than the Superintendent, or of any employee of the institution, to remain in the Home and receive food and lodging there at the expense of the State, or even upon payment of board and lodging.

In view of the foregoing I suppose it hardly necessary to answer your third question more specifically.

Respectfully,



## COUNTY JUDGE—FEES OF OFFICE.

County judge is entitled to receive three dollars for each criminal action tried and finally disposed of before him. Not entitled to such fee when case is merely dismissed.

AUSTIN, TEXAS, February 25, 1907.

*Hon. R. A. Sexton, County Attorney, Marshall, Texas.*

Dear Sir: We are in receipt of yours of 21st wherein you ask if the county judge is entitled to collect the fee of \$3 when the county attorney gives the defendant a verdict of "not guilty," and no other action is taken in the case. I call your attention to the case of Breckenridge vs. State, reported in the 27th Court of Appeals Reports, page 528, from which I quote the following:

"A county judge is entitled to demand and receive the sum of \$3 for each criminal action *tried and finally disposed of before him*. He is not entitled to said fee in a case which is merely *dismissed*. A *dismissal* is not a *trial* of it within the meaning of the law. A dismissal of a case is to send it out of court without a trial of any of the issues involved in it. It is a final disposition of that particular case but not a trial of it. A final disposition of a case does not of itself entitle the county judge to the fee allowed by Article 1075, supra. To entitle him to the fee the case must have been *tried and finally disposed of before him*. He must both try and finally dispose of it. Such is the plain language of the statute. A trial is an examination before a competent tribunal according to the laws of the land, of the facts put in issue in a cause, for the purpose of determining such issue.

A trial is an examination of a cause before a judge who has jurisdiction of it. It is a judicial examination of the issues between the parties, whether they be of law or of fact.

State vs. Brown, 63 Mo., 439.

Words & Phrases, Vol. 8, p. 7095.

A trial, within the meaning of the statute allowing a justice of the peace a certain fee for the trial of a cause, was held to be an examination before the justice of the peace according to the law of the land, or the facts or law put in issue, for the purpose of determining such issue. Anderson vs. Pennis, 32 Cal., 265. A trial is a judicial examination of the issues between the parties, but when the court does not examine the issues it would be a stretch of the law to hold that there had been a trial. Where no jury was ever empaneled and on the action coming on for trial an order was made on plaintiff's motion, allowing him to discontinue the action, there was no trial within the meaning of the statute providing that a trial fee of \$3 may be taxed for the trial of an issue of fact.

Keeping in view the decision of the Court of Appeals, as cited above, and the provision of the statute that the fee is demandable "for each criminal action tried and finally disposed of" before the county judge, as was said in the New York case, it would be a stretch of the law to hold that a case had been tried before a county judge when there had been no determination of the issues of fact or law between the State and the defendant, but merely an order made

upon the State's motion that a judgment of "jury and verdict of not guilty" be entered.

You are therefore advised that under the statement submitted by you, the county judge would not be entitled to the \$3 fee.

Yours truly,

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STATE BANK LAW—STOCKHOLDERS—RESPONSIBILITY  
OF FOR DEBT OF CORPORATION.

AUSTIN, TEXAS, February 26, 1907.

*Messrs. Smith, Crawford & Soufield, Beaumont, Texas.*

Gentlemen: In reply to your letter of the 18th inst. asking a construction of Section 59 of the State Bank Law of 1905, I reply that we find some difficulty in construing that provision of the act.

It occurs to us that either the clause "and for twelve months after the date of the transfer thereof," or the clause "or at the date of such default" will have to be construed out of the act.

I think it clearly the intention of the Legislature to make individual stockholders of a State bank responsible for the payments of the obligations of the bank contracted before such stockholder transferred his stock, but as to whether this responsibility shall extend beyond twelve months after the date of the transfer of such stock is not so clear.

If the default clause above quoted means that the stockholder shall be responsible for the default, at the date of such default, whether the default is made within the twelve months or longer, then the twelve months clause above quoted would be ineffective and would mean nothing, and would thereby be construed out of the act.

This statute making stockholders responsible for debts of a corporation should be strictly construed. There is no difficulty in understanding the twelve months clause, but there is some difficulty in understanding exactly what was intended by the default clause above quoted. It is susceptible of the construction that a stockholder is responsible for the defaults of the bank regardless of when the default takes place. If this is the meaning of the statute there would be no necessity for the twelve months clause and it would be ineffective, and as the twelve months clause expresses a clear intent, and the default clause is susceptible of more than one construction, and its purpose really doubtful, we, therefore, conclude that the proper construction of the law is that a stockholder of a State bank is responsible for all defaults made by his bank on debts contracted prior to the date of the transfer of the stock and within twelve months after the date of such transfer only.

Yours truly,

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MUNICIPAL CORPORATIONS—DEBTS OF THE CORPORATION—ABOLISHMENT OF THE INCORPORATION—  
COMMISSIONERS COURT—TAXATION.

R. S., Article 616, provides for the payment of debts of a municipal corporation which has been abolished, and properly belonging thereto

shall be turned over to county treasurer, and the commissioners court shall provide for sale and disposition of same and for settlement of debts due by corporation, and have power to levy and collect taxes.

AUSTIN, TEXAS, February 26, 1907.

*Hon. V. D. Glass, County Judge, Linden, Texas.*

Dear Sir: In reply to your letter of the 21st inst., enclosing therewith a letter from J. B. Bartlett, I advise that Revised Statutes, Article 616 provides for the payment of the debts of a municipal corporation which has been abolished under the provisions of that Chapter and which provides that "all the property belonging thereto shall be turned over to the county treasurer of the county, and the commissioners court of the county shall provide for the sale and disposition of the same, and for the settlement of the debts due by the corporation, and shall carry out and enforce all legal contracts of such corporation, and for this purpose shall have power to levy and collect a tax from the inhabitants of said town or village in the same manner as the said corporation would be entitled to under the provisions of this chapter;" but so far as this provision of the law appears to be mandatory upon the county commissioners court the same has been held unconstitutional by the Supreme Court of this State. *Electric Light vs. Keenan*, 88 Texas, 197.

Therefore, you are without authority to proceed to pay the debts of that corporation at this time under that provision of the law.

However, I call your attention to Acts of 1905, page 325, which Act provides for the appointment of a receiver to take charge of the corporate property of a municipal corporation after the same has been abolished.

I call your attention to Section 2 of that act which provides for the appointment of a receiver who shall take charge of the property and dispose of the same and pay the claims against the corporation under the direction of the district court. This provision of the act provides that the creditors of said corporation are allowed six months after the appointment of a receiver to present their claims, properly verified, to the receiver for payment. Of course, I understand there has been no receiver appointed for your town, and nothing can be done towards paying an outstanding obligation of that town until such receiver is appointed under this act.

I further call your attention to Section 3 of that act which provides that "limitations shall not run, begin to run, or be please against such city or town at any time prior to six months after the appointment of such receiver. But no receiver shall be appointed for any such city or town whose corporate existence is now dissolved. When the application therefor is not filed in said court within two years from the date when this act takes effect."

I think the proper construction of this provision of that act would make it read as follows: "But no receiver shall be appointed for any such city or town whose corporate existence is now dissolved; when the application therefor is not filed in said court within two years from the date when this act takes effect."

With this construction of that act, the creditor, Mr. Bartlett, referred to in your letter, would have until July 15th of this year to

apply for a receiver for the dissolved municipal corporation, and if such receivership is not applied for until after that time his claim would be barred and he has no other remedy now except through receivership under this act.

I return Mr. Bartlett's letter as per your request.

Yours truly,

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COMMISSIONERS COURT—COUNTY BONDS—ROAD AND  
BRIDGE—COURT HOUSE—INTEREST AND SINKING  
FUND—GENERAL REVENUE.

Proposition submitted to voters to issue bonds of county must be in legal form. Provision must be made for interest and sinking fund.

AUSTIN, TEXAS, February 28, 1907.

*Hon. A. E. Amerman, County Judge, Houston, Texas.*

Dear Sir: In reply to your letter of the 25th inst., I wish to confine myself entirely to the analysis of your election order and its validity.

The order provides

(1) "Shall the commissioners court of Harris County be authorized to issue bonds of said county in the sum of \$500,000 payable in forty years after date, bearing interest at the rate of four per cent per annum, payable annually or semi-annually, as the commissioners court may determine, with option of redeeming said bonds at any time after ten years from date, said commissioners being authorized to set aside a sufficient per cent of the present ad valorem tax to pay the interest and to create a sinking fund to redeem them at maturity, and to levy a tax sufficient to pay the interest and to redeem them at maturity for the purpose of erecting a court house for the county of Harris."

(2) "Shall the commissioners court of the county of Harris be authorized to issue bonds of said county in the sum of \$500,000, payable forty years after date, with the option of redeeming same at any time after ten years after date, bearing interest at the rate of four per cent per annum, payable annually or semi-annually, as the commissioners court may determine, the said commissioners court being authorized to set aside a sufficient per cent of the present ad valorem tax to pay the interest and to create a sinking fund to redeem them at maturity, and to levy a tax sufficient to pay the interest on said bonds and create a sinking fund sufficient to redeem them at maturity, for the purpose of constructing lasting and permanent county roads, bridges, ditches and drains, and to maintain same."

(3) "Said election shall be held under the provisions of Chapter 149, Acts of the Twenty-sixth Legislature, Laws of 1899, and the Terrell election law, and of the several laws applicable to the purposes of this election, and only qualified voters who are property taxpayers of the county shall be allowed to vote and all voters who desire to support the propositions shall have printed upon their ballots the words 'For the resolution to issue bonds for court house, and

for the construction of lasting and permanent county roads, bridges, ditches and drains.' Those desiring to vote against the resolution shall have printed upon their ballots the words, 'Against the resolution to issue bonds for court house, and for the construction of lasting and permanent county roads, bridges, ditches and drains.'"

The form of ballot prescribed in your order does not segregate or provide a separate ballot for the court house bonds and road and bridge bonds, but formulates a ballot in such a way as to make it impossible for a voter to vote for or against court house bonds without, at the same time, voting for or against road and bridge bonds. In other words, he can not vote for court house bonds and against bridge bonds, and vice versa.

In your letter of the 25th inst. you undertake to meet this objection by calling my attention to another provision in your bond order, which reads as follows: "provided that the said ballots may have printed upon them the phrases 'for the resolution,' etc., and 'against the resolution,' " etc., stated separately as to the construction of the court house and the construction of roads, bridges, ditches and drains.

It is true that this provision so provides, but through your notice to the public you do not tell them what kind of a ballot the commissioners court will prescribe or have at the polls on election day for use in this election. The proposition to vote on them jointly, as provided in the main provision of your order, is an illegal provision and is not such an order or notice as the voters are entitled to have given them before the election. They are entitled to have notice that a proposition will be submitted for their vote in a legal way only, and not a notice that the provision will be submitted by a ballot in either a legal or illegal form.

Your order provides that you may submit the proposition by ballot in either a legal or illegal form. The law requires, and the voters are entitled to, a notice that an election will be held and the proposition submitted on legal ballots only.

In submitting each proposition, Subdivisions 1 and 2 of your order provide, in part, as follows:

"The said commissioners court being authorized to set aside a sufficient per cent of the present ad valorem tax to pay the interest and to create a sinking fund to redeem them at maturity, and to levy a tax sufficient to pay the interest on said bonds and to create a sinking fund sufficient to redeem them at maturity for the purpose," etc.

Here is another double proposition submitted twice, once in each of those subdivisions on your order. You notify the voters that they are to vote upon the issue of bonds, the interest and sinking fund for each to be paid out of the present ad valorem tax, levied, assessed and collected for current expenses of your county, and you also provide that you will levy and collect a sufficient tax to pay the interest on said bonds and create a sinking fund sufficient for their redemption at maturity.

Your commissioners court has no authority to issue county bonds, the interest and sinking fund of which to be protected by the levy and collection of a tax for current expenses. You can not have

a double proposition submitted to your people in this particular, one an illegal proposition and the other a legal one. Voters are entitled to have notice of an election wherein they are expected to vote upon a bond issue, the proposition for which is submitted to them in a legal way only, and you do not tell them in your order, and, therefore, in your notice, whether you will protect these bonds with the general revenues of the county, or whether you will levy, assess and collect a tax, as the law provides, to protect these bonds.

As to the legality of an order of this kind, especially as to the requirement that a tax must be levied sufficient to pay the interest and provide a sinking fund to redeem the bonds at maturity, I need only to call your attention to the latter part of Article 11, Section 7, of the Constitution of the State, which reads as follows:

“But no debt for any purpose shall ever be incurred in any manner by any city or county unless provision is made at the time of creating the same for levying and collecting a sufficient tax to pay the interest thereon and provide at least two per cent as a sinking fund.”

This particular part of this section applies to all counties in the State. *Terrell vs. Dessaint*, 71 Texas, 770.

The Supreme Court of this State, in construing Section 5, Article 11 of the Constitution, which construction applies also, in my opinion, to Section 7, in *Bank vs. City of Terrell*, 78 Texas, 460, used the following language:

“The city had no authority to pledge or appropriate any part of the current revenues to the payment of the principal or interest of the debt. That fund is devoted, by the Constitution, to the support of the city government, and is always under the control of the council for that purpose.”

In other words, you have no authority under the law to appropriate the current revenues of your county to the payment of interest and providing a sinking fund for bonds issued by your county.

I am, therefore, of the opinion that your bonds order is invalid, and will not support an issue of bonds.

My conclusions herein, and my opinion, are not based upon the political rights of the voters (though the same might properly be considered), but purely upon the legal proposition going to the validity of the bonds sought to be issued.

Yours truly,

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#### ANTI-TRUST—BANKING.

Bills of exchange and drafts, etc., are commercial instruments to facilitate commerce, and any agreement between banks to fix charge for collection would constitute a restriction to commerce, and therefore in violation of anti-trust law.

AUSTIN, TEXAS, February 28, 1907.

*Hon. I. C. Baker, District Attorney, San Antonio, Texas.*

Dear Sir: We are in receipt of your favor of 27th instant from which we quote the following:

"I have been consulted by several bankers, members of the San Antonio Clearing House, as to whether the carrying into effect of a resolution now pending before the members of said organization, would in any manner violate the anti-trust law. The resolution reads as follows:

"Resolved, that this association recommends to its members that a charge of one-eighth of one per cent be made on all collections sent for credit and received from banks in the larger Texas cities bearing out of State endorsements."

You are respectfully advised that Subdivision 1 of Section 1 of the Anti-trust Act of 1903, defines a trust to be " \* \* \* a combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons, or either two or more of them for either, any, or all of the following purposes: "To create or which may tend to create or carry out restrictions in trade or commerce as aids to commerce or in the preparation of any product for market or transportation, or to create or carry out restrictions in the free pursuit of any business authorized or permitted by laws of this State."

Bills of exchange, drafts, and the character of paper to which you refer are commercial instruments to facilitate commerce, and if not a part of the commerce itself, clearly come within the term, and may be designated as "an aid to commerce" (9 Mich., 241; Nathan vs. Louisiana, 17 U. S., 507); and any combination, agreement or understanding between banks to fix the charge for collections, would, in my opinion, constitute a restriction in commerce and aids to commerce, in violation of said act.

Again. The understanding, if adopted and acted upon by any two or more of the banks, would violate that provision of the same section quoted, which prohibits the creation or carrying out of the restrictions in the free pursuit of any business authorized or permitted by the laws of this State. The banking business is a business authorized by the laws of this State. Collections such as you have mentioned are a part of such business, and any understanding between banks to charge not less than a certain rate for collections creates a restriction in the free pursuit of that business within the terms of that act. The purpose of the law is to encourage the widest character of competition between all persons engaged in a similar business, and to prevent any understandings or agreements whereby any such persons can not exercise his own free judgment in carrying on his business, and perform the services incident thereto at whatever price he may see fit to charge.

Therefore, we are of the opinion that the resolution, if adopted and acted upon by any two or more of the banks, will constitute a violation of the anti-trust laws of this State.

Yours very truly,

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CITIES—REGULATION OF SALOONS—POLICE POWER  
—CITY CHARTER.

City of Dallas may fix limits within said city in which intoxicating liquors may be sold.

AUSTIN, TEXAS, March 2, 1907.

*Hon. Gilbert Irish, City.*

Dear Sir: We are in receipt of your inquiry asking for our opinion as to the validity of the provision of the proposed amendment to the Dallas city charter in so far as it seeks to fix the limits within said city in which the sale of intoxicating liquors may be allowed.

We have not before us the provisions of the charter, but, as we remember the provisions, the right to engage in the sale of intoxicating liquors is restricted to the principal business portion of the city and to the confines of the State Fair grounds during the State Fair.

You desire an opinion as to whether or not the limits so fixed are so arbitrary and unreasonable as to make the provision fixing same invalid.

It is our opinion that the provisions are not invalid as being arbitrary or unreasonable.

The Supreme Court of the United States has gone so far, even in upholding State legislation enacted in the bona fide exercise of its police power, as to hold that such legislation would be respected, even though it might indirectly interfere with interstate commerce. Legislation looking to the purpose of preserving the public health, safety or morals, or the abatement of public nuisances, is so construed as to give a large discretion to the Legislature to determine, not only what the interests of the public require, but what means are necessary for the protection of such interests.

*Holden vs. Hardy*, 169 U. S., 366.

*Austin vs. Tennessee*, 179 U. C., 343.

In the case of *Beer Company vs. Massachusetts*, 92 U. S., 25, the Supreme Court held that if the public safety or the public morals required the discontinuance of the manufacture of malt liquors, the Legislature might prohibit such manufacture, notwithstanding it might result in the injury and inconvenience of individuals and corporations engaged in such manufacture; and in the case of *Mugler vs. Kansas*, 123 U. S., 623, and *Kidd vs. Pierson*, 128 U. S., 1, this principle was extended so far as to hold that such laws might be enforced against persons who, at the time, own property, the chief value of which consisted in its fitness for manufacturing intoxicating liquors, without even compensating them for the diminution in value resulting from such prohibitory enactments.

The constitutionality of the method of restricting liquor licenses to certain localities has been almost uniformly sustained, unless the designation of the place wherein liquors may be sold is purely arbitrary and based upon no principle of reason.

In one form or other, the right to a license is made to depend on the will of private citizens by the statutes of a considerable number of States, viz: Arkansas, Florida, Iowa, Indiana, Illinois, Kentucky, Mississippi, Missouri, Oregon and Rhode Island; and in one form or other the right to the license is placed under local regulations of counties, towns or cities, and the constitutionality of this method of licensing has been sustained, unless the principles upon which it is regulated are based upon arbitrary action not founded upon unreasonableness.



The possession and enjoyment of the right to engage in the sale of intoxicating liquors is subject to such reasonable conditions as may be deemed by the governing authority essential to the safety, health, peace, good order and morals of the community. As it is a business attended with great danger to the community it may be entirely prohibited, or be permitted under such conditions as will limit, to the utmost, its evils.

Freund, Police Power, paragraphs 212 and 229.

Crowley vs. Christenson, 137 U. S., 86.

The exercise of the police power of a State, as it relates to the supervision of the liquor traffic is the most common; and the most common mode of exercising this police regulation by cities and towns is the determination of the localities in which the trade will be allowed. The sale of intoxicating liquors may be highly dangerous and offensive to the people when prosecuted in one locality, while the danger or offensiveness may be dissipated altogether, or considerably abated, if it is carried on in a different locality; and the prohibition of engaging in the sale of intoxicating liquors in any locality does not offend any constitutional limitation if the locality selected is a reasonable one; and it is only in those cases where the limits selected in which the prosecution of the business is prohibited are so extensive as to amount to a practical prohibition of the trade that such regulation will be unconstitutional.

Teideman's Limitations of Police Power, paragraph 104, page 311.

Where the charter of a city specially authorizes the authorities of the city to "license, regulate and prohibit" the sale of intoxicating liquor, they may, by ordinances, provide for the issuing of licenses in one part of the city and prohibit the sale of liquor in another part, if the discrimination as to places be not arbitrary or unreasonable.

People vs. Crieger, 28 N. E. Rep., 812.

Black on Intoxicating Liquors, Sec. 227.

The power to regulate the liquor traffic confers the power to confine it to designated parts of a city.

In Re Wilson, 32 Minn., 145.

Dillon, Municipal Corporations, Vol. 1, Sec. 364.

Abbott's Municipal Corporations, Vol. 1, Sec. 130.

Smith on Municipal Corporations, Vol. 2, Sec. 1342.

The right to sell intoxicating liquors in any and all quarters of a city is not an absolute right, and the municipal authorities may designate the districts or precincts of a city within which the business of liquor selling shall be confined.

Strauss vs. Galesburg, 203 Illinois, 234.

Swift vs. People, 63 Ill. App., 453.

In Re Wilson, 32 Minn., 145.

Gorrell vs. New Port, 1 Tenn. Chancery App., 120.

Any designation of districts or precincts within which the business of selling of intoxicating liquors shall be confined is not invalid, unless it is arbitrary and unreasonable distinction between different parts of the city, or different places in the city, not founded

on any public necessity or any inherent difference of suitability for the business.

Ex Parte Theison, 30 Fla., 529.

Chicago vs. Netcher, 48 L. R. A., 261.

Rowland vs. Greencastle, 58 N. E. Rep., 1031.

The above citation of authorities is sufficient to show that the principle is almost unanimous that unless the designation of the limits and places within which the sale of intoxicating liquors may be prosecuted is an arbitrary and unreasonable designation, it will not be invalid.

It will be noted, too, that these decisions are based upon ordinances of cities under power to "regulate" the sale of intoxicating liquors, and, in our opinion, the power of the Legislature to grant to a city by special charter the right to prescribe saloon limits is much broader than is the power of a city to prescribe such limits under its authority to regulate.

The limits sought to be prescribed in the amendment to the charter are certainly not arbitrary or unreasonable.

Yours very truly,

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#### COMMISSIONERS COURT—COUNTY DEPOSITORY LAW.

Bids for county funds must be accompanied by certified check as provided by depository law.

AUSTIN, TEXAS, March 6, 1907.

*Hon. John W. Hornsby, County Judge, Austin, Texas.*

Dear Sir: We are in receipt of yours of this date submitting the following statement and inquiry:

The commissioners court of Travis County advertised for bids from banking institutions under the county depository law. Bids were received from two or such institutions, one of which accompanied its bid by a certified check for the proper amount, and the other did not accompany its bid by such certified check. The bid of the institution which was not accompanied by a certified check was for the highest rate of interest upon the county funds, but the commissioners court considered that such bid was not a valid bid, and did not consider same in the selection of a county depository, but unanimously awarded the contract to the other bidder.

You desire to know:

First. Was the commissioners court correct in its conclusion that a bid was invalid which was not accompanied by a certified check in the proper amount.

Second. The commissioners court having unanimously accepted the bid of the other institution and said institution having tendered the court a valid bond as the depository under such award, can the court now review its action and re-advertise.

As to the first question.

Section 21 provides that "any banking corporation \* \* \* desiring to bid shall deliver to the county judge \* \* \* a sealed proposal stating the rate of interest that said banking corporation \* \* \* offers to pay on the funds of the county \* \* \*. Said bid shall be accompanied by a certified check for not less than one-half of one

per cent of the county revenue for the preceding year as a guarantee of good faith on the part of the bidder that if his bid is accepted he will enter into a bond," etc. This section provides further that upon failure of the banking corporation to which the contract is awarded to comply with the contract the certified check which accompanies the bid shall go to the county as liquidated damages, and the county judge shall re-advertise for bids.

The Legislature had a definite purpose in requiring each bid to be accompanied by this certified check, viz.: to indemnify the county against the expense of re-advertising for bids and to partially, if not wholly, protect the county against loss which it might sustain by reason of the possibility that upon an award after re-advertisement, it might be necessary to make a contract for a less rate of interest upon the county funds than that bid by the institution to whom the original award was made.

The object of legislation requiring certified checks for specified amounts to accompany bids is clearly expressed in the case of *Irving vs. The Mayor of New York*, 131 N. Y., page 137, viz.:

"The purpose of the check is to indemnify the city against the expense of re-letting the contract and against the damages it might sustain by being compelled, through the default of a bidder to execute his contract, to re-let the work at an increased price."

The condition of affairs confronting your commissioners court is a practical illustration of the possible evil against which the Legislature sought to protect the county. Assume that the commissioners court had considered the bid which was not accompanied by a certified check a valid bid, and had awarded the contract to this banking institution. Assume further that this institution had failed to comply with its bid. Under the law the county judge would be compelled to re-advertise for bids and it would have no indemnity against this expense by any deposit having been made by the banking institution to which the first award had been made. Assume further that upon the second advertisement no bids were received offering as high a rate of interest as had been offered by the institution to whom the first award was made: or assume that no bids were received at all upon the re-advertisement and the commissioners court should be compelled to make a contract for a less rate of interest than that bid by the institution to whom the first award was made. In either of these events the county would have no indemnity against this loss.

A bidder is not entitled to a contract, and has no right of action to compel the award of a contract if his bid is not in compliance with the law.

*Nazet v. Pittsburg*, 137 Pa., 548.

*Jones Bros. Hardware Company vs. Erb*, 54 Ark., 645.

*People vs. Buffalo County Commissioners Court*, 4 Neb., 150.

*Anderson vs. Directors of Public Schools*, 26 L. R. A., page 77, and authorities cited.

You are therefore advised that a bid of a banking institution which is not accompanied by a certified check for not less than one-half of one per cent of the county revenue for the preceding year, is not a valid bid, and the commissioners court of your county was correct in so treating it.

As to the second question :

You are advised that the commissioners court of your county having complied with the law as to the time and manner of opening bids, and there being no unfair action, fraud or undue haste upon the part of said court, and it having, out of the discretion allowed under the law, awarded the contract to a bidder which had complied with all respects with the law, and said bidder having tendered said court a valid and sufficient bond, under such award, the court can not now rescind its action and re-advertise for bids. *People vs. The Contracting Board, 46 Barb (N. Y.), 254.*

Yours very truly,

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COMMISSIONERS COURT—GUARDS—SHERIFF—JAILER  
—LUNATICS.

Authority of commissioners court to hire guards for prisoners and lunatics discussed at length.

AUSTIN, TEXAS, March 8, 1907.

*Hon. A. E. Amerman, County Judge, Houston, Texas.*

Dear Sir: We are in receipt of your favor of 6th, and are also in receipt of a communication from the sheriff of your county upon the same subject matter. I deduce from the communications the following facts:

The sheriff of your county has never employed or appointed a jailer, but resides at the jail and is in charge of same, and has so resided since he was elected sheriff; that a large number of prisoners are confined in the jail constantly—on an average of seventy-five to one hundred ordinary prisoners, most of them being of the ordinary type of jail birds who would lose no opportunity to escape from the jail. Besides these, the sheriff has lunatics in the jail under his care and custody, on average of from fifteen to twenty, for the reason that room can not be secured for them at the asylum; that the sheriff is not able to take care of and guard these lunatics himself; that during the term of office of the sheriff, up to November, 1906, the commissioners court, by written order entered on the minutes of said court, authorized and directed the sheriff to employ three guards at the jail, and to pay them one dollar and fifty cents per day each; that on July 21, 1905, the commissioners court passed the following order:

“It being in the judgment of the court necessary to employ guards for the safe keeping of prisoners and the security of the county jail, the sheriff of Harris County is hereby authorized and empowered to employ three guards at the county jail for its security and the safe keeping of the prisoners, the compensation to be one dollar and fifty cents per day each.”

This order of the commissioners court was revoked on December 15, 1906, since which time no order has been made by the commissioners court authorizing the sheriff to employ guards at the jail. Upon this statement of facts, the following inquiries are submitted:

1. “Is the county responsible for the pay of jailer or turnkey?”

2. "Can the persons performing the duties ordinarily devolving upon jailer and turnkey, be legally paid by the county, by designating them as 'guards'?"

3. "If it is necessary to the proper care and custody of prisoners confined in the Harris County Jail, that four persons be in charge of said jail, who is responsible for the salaries of the two persons performing the duties of jailer and turnkey, the sheriff or Harris County?"

4. "Please define the meaning of the term 'guards' as used in Article 4898, Revised Statutes. Do the persons described in No. 3 all come within the definition of guards, or are two of them jailer and turnkey and two of the guards within the meaning of said article?"

5. "Please construe Articles 49 and 52 and 1094 of the Code of Criminal Procedure and answer the following: (1) Does the law contemplate that the sheriff shall employ the necessary assistance in 'safe keeping of all prisoners committed to his custody?' If so, is he responsible for their pay? (2) Construing these articles together with Article 1098, Code Criminal Procedure, when prisoners become numerous, as in Harris county, is it incumbent upon the sheriff to employ a jailer or turnkey and to pay them himself, before applying to the county for additional guards; or can he, by refraining from appointing a jailer or turnkey, compel the county to allow him guards and to receive compensation therefor?"

Article 49 of the Code of Criminal Procedure provides that "each sheriff is the keeper of the jail of his county and responsible for the safe keeping of all the prisoners committed to his custody."

Article 52 provides that "The sheriff may appoint a jailer to take charge of the jail and supply the wants of those therein confined; and the person so appointed is responsible for the safety of prisoners and liable to punishment as provided by law for negligently or wilfully permitting a rescue or escape. But the sheriff in all cases exercise a supervision and control over the jail."

Article 4898, Revised Statutes of 1895, provides that "Whenever in any county it may be necessary to employ guards for the safe keeping of prisoners and the security of jails, the sheriff may, with the approval of the commissioners court, or in case of emergency, with the approval of the county judge, employ such number of guards as may be necessary, and his account therefor, duly itemized and sworn to, shall be allowed by said Commissioners court and paid out of the county treasury."

Article 1098 of the Code of Criminal Procedure provides that "The sheriff shall be allowed for each guard necessarily employed in the safe keeping of prisoners one dollar and fifty cents for each day, and there shall not be any allowance made for the board of such guard, nor shall any allowance be made for jailer or turnkey."

Much controversy has arisen as to the use of the words in the article last above quoted, "jailer or turnkey." Whatever distinction there may have been originally between the duty of a jailer and the duty of a turnkey, such a distinction evidently does not exist today. The authorities define a "turnkey" to be "a person who has charge of the keys of a prison for opening and fastening the doors;

a prison warden." A warden is defined to be "an officer who keeps." A jailer is defined to be "the keeper of a jail or prison."

So whether the keeper of the jail is called a jailer or a turnkey, the duties devolving upon him are the same.

Under Article 49 the sheriff is made "the keeper of the jail of his county," and under Article 52 he may relinquish this duty to a jailer should he see proper to do so, and the jailer thus appointed assumes the duties and responsibilities of the sheriff for the supplying of the wants of the prisoners and for their safe keeping.

From the statement submitted, it appears that the sheriff himself has retained the duty of "keeper of the jail of his county." His duty as such is to supervise and control the jail, and it is incumbent upon him to do or cause to be done at least all that is required of the jailer, under Article 52; and for any willful neglect in the performance of his duties as a jailer, he is subject to criminal prosecution. (Gordon v. State, 2 App., 154.)

The appointment of a jailer is discretionary with the sheriff, and if he fails to appoint the keeping of the jail of his county is an official duty of his. If he does appoint a jailer, the keeping of the jail of the county is an official duty of the jailer, and while either of these officers as keepers of the jail would be responsible for any negligence or willfulness in permitting a rescue or escape, the primary duties of these officers is to have in custody and charge the jail with reference to necessary manual acts of mechanics or laborers to preserve the jail in the condition in which the jail is required by law to be kept, and to provide for and supply the wants of the prisoners confined therein.

To keep is to "maintain, carry on, conduct or manage." It involves the control and management of a place, and "keepers" are persons who have the general charge, control, management and supervision of a place. (State vs. Irvin, 91 N. W. Rep., 760; Goff v. Douglas County, 24 N. E. Rep., 60; People vs. Rice, 61 N. W. Rep., 540.)

The keeper of a house is one having government of and exercising control and direction over the house and the inmates thereof. (Nelson vs. Territory, 49 Pac. Rep., 920.)

Keeping a jail refers to the maintenance of the jail and of the prisoners, but not to the protection of the prisoners from escape, but only to their safe custody, and the official duty upon the sheriff as keeper of the jail does not require him to employ any guard to watch the jail or aid in securing the persons confined therein. (Mitchell vs. Leavenworth County Commissioners, 18 Kansas, 188.)

If the sheriff sees proper to assume the official duty of "keeper of the jail of his county" and at the same time appoint a jailer, as that term has been explained above, the jailer thus appointed is but a deputy of the sheriff in the keeping of the jail, and must look for his compensation to the sheriff.

The appointment of a jailer being discretionary with the sheriff, if in the exercise of that discretion he had not appointed a jailer, but assumes that duty himself, he can not impose upon the county the obligation of compensating as a guard any person as a guard whom he retains in his employ, to perform the duties only which devolve upon him as "keeper of the jail of his county." (Seivert vs.

Logan County (Ill.), 63 Ill., 155; Union County vs. Patton (Ill.), 63 Ill., 458.)

In other words, the county is not liable for nor is it authorized to pay compensation, except the fees allowed under Article 1097, to those persons, whether it be the sheriff and assistants or the jailer and assistants, for keeping the jail of the county; that is, for having general supervision, direction and control of the jail and supplying the wants of those therein confined.

The intention of the Legislature in enacting Article 4898 was to provide for those contingencies wherein it is necessary that in addition to the person or persons who are "keepers of the jail," that for the safe keeping of the prisoners and for the security of the jail, the services of other persons are necessary.

A guard is a person stationed to protect prisoners or protect the jail against the rescue or escape of prisoners, and when it becomes necessary, either by reason of the number of persons confined in jail or on account of the physical condition of the jail, that guards be employed, it is not only within the authority of the commissioners court to employ same, but it is their duty implied from their responsibility as officers of the county to employ a requisite number of persons as guards.

Therefore, answering your questions seriatim, you are advised:

1. The county is not responsible for the pay of jailers or turnkeys.

2. Persons performing only the duties devolving upon a jailer or a turnkey, are not entitled to receive from the county compensation therefor, as guards.

3. If it is necessary to the proper care and custody of prisoners confined in jail that four persons be in charge of said jail, two of whom perform only the duties devolving upon a jailer or turnkey and two of whom perform the duties of guards, the county is liable for the compensation of the latter two if either the commissioners court or the county judge in an emergency authorizes their employ. The county is not responsible for the compensation of those two performing only the duties devolving upon a jailer or turnkey.

4. A guard, within the meaning of Article 4898, is a person whose duty is either to protect the jail against injury or destruction from without, or to protect the prisoners confined in jail from rescue or escape, and those persons only performing such duties are entitled to compensation from the county as guards.

5. Construing Articles 49, 52, 1094 and 1098 of the Code of Criminal Procedure, and Article 4498 of the Revised Statutes of 1895, together, the law does not contemplate that the sheriff shall employ all needed assistance in the safe keeping of all prisoners committed to his custody. The duty is imposed upon him to employ only such assistance as is necessary to "keep the jail," as that term has been defined above.

It is not mandatory upon a sheriff to employ a jailer or turnkey and pay for same himself, however numerous the prisoners may become or not he will appoint a jailer or any other person to assist him in performing his duties as "keeper of the jail."

Yours very truly,

## COMMISSIONERS' COURT—COUNTY JUDGE—TAXATION.

Three members of the commissioners court shall constitute a quorum for the transaction of any business, except that of levying county taxes.

AUSTIN, TEXAS, March 11, 1907.

*Hon. Geo. M. Thurmond, Del Rio, Texas.*

Dear Sir: In reply to your letter of the 26th ult., with reference to an opinion I had rendered for Judge J. G. Griner, county judge, in which letter you criticise my opinion rendered Judge Griner, which opinion is as follows:

"In the office last Friday you stated that your county commissioners court had transacted business through three of its members in the absence of the county judge, and you desired to know if the business of said court should be legally transacted by three of its members in the absence of the county judge, and how many members of the commissioners court, in the absence of the county judge, are necessary to constitute a quorum to transact the business of the court?"

"Revised Statutes, Article 1534, provides that 'any three members of said court, including the county judge, shall constitute a quorum for the transaction of any business except that of levying a county tax.' Revised Statutes, Article 1533, provides that 'the said commissioners, together with the county judge, shall compose the commissioners court, and the county judge, when present, shall be the presiding officer of said court.'

"There is no particular provision of the law which requires any particular number of the county commissioners to constitute a quorum to transact business in the absence of the county judge, and the law does not expressly provide that the commissioners court can transact business in the absence of the county judge, and the law does not expressly provide that the commissioners court can transact business in the absence of the county judge. Neither do the Constitution nor the statutes expressly require that the county judge shall be present during the transaction of the business of the court, but Article 1533, above cited, does provide by implication that the business of the court may be transacted by the commissioners in the absence of the county judge. There being no law fixing the number of commissioners who shall constitute a quorum in the absence of the county judge, I conclude it would require all four of the commissioners to constitute a quorum to transact business in the absence of the county judge, and *West vs. Burke*, 60 Texas, 51, is authority for this conclusion. That opinion, in part, reads as follows:

"The Constitution provides that four commissioners, with the county judge as presiding officer, shall constitute a county commissioners court. The act to organize the commissioners court provides that any three members of the court, including the county judge, shall constitute a quorum. From Section 11 of the act we conclude that this court may meet and transact business in the absence of the county judge, and in that event some other member of the court may preside. Section 13 provides that the judge or any three of the commissioners may call special terms, but there is no intimation in the law that in the absence of the judge any number of the commissioners



less than the whole will constitute a quorum for the transaction of business.'

"It therefore follows that from the authorities herein cited, any order or orders of the commissioners court entered in the absence of the county judge when less than the full four members of the said commissioners court are present, would be absolutely void and of no effect."

I did not reach the conclusion therein without having fully considered the authorities cited by you in conflict therewith.

Without the opinion of the Commission of Appeals, in the case of *West v. Burke*, I would be very much inclined to sustain your contention. but with that opinion before me I hardly see how any other conclusion could be reached.

You will observe that in the case cited by you, of *Racer vs. State*, 73 S. W., 968, the Court of Criminal Appeals, through Judge Davidson, gave an opinion in direct conflict with the opinion of *West v. Burke*, in 60 Texas, and in which Judge Davidson made the following statement:

"The validity of the law is attacked because on Monday the opening of the term of the commissioners court which ordered the election, it was not presided over by the county judge, that is, he was absent. This is wholly immaterial. The county commissioners court is authorized to transact its business whenever there is a quorum present, and this consists of three members. (Sayles' Revised Civil Statutes, Articles 1533 and 1534.)"

As stated above, if this was the only construction of that particular statute, your contention might be sustained; but the Court of Criminal Appeals, is not the highest authority upon the construction of the Civil Statutes, and, therefore, can not be taken as setting aside a decision approved by the Supreme Court construing this civil statute.

In the case of *Cassin v. Zavalla County*, 70 Texas, 421, Judge Gaines, speaking for the Supreme Court, says:

"The statute provides that any three members of the court shall constitute a quorum for the transaction of any business except that of levying a county tax."

You will observe that in that case the question raised by you herein was not before the court and this could not be construed as a construction of that provision of the statute overruling the case of *West v. Burke*, supra.

I freely admit that there is plenty of room to justify your construction of the law, especially so when supported by the authorities herein cited, but none of the authorities cited by you refer to the case of *West vs. Burke*, supra, and it occurs to me that that opinion is still the law in this State, and we do not feel inclined, notwithstanding the authorities cited, to overrule that decision, which is clearly in point of the question raised by you, and has not been overruled, in my opinion, by any authority of equal weight since its rendition. I have the highest regard for Judge Davidson's opinion, but do not feel that it should be taken when in conflict with an opinion rendered by the Commission of Appeals, approved by the Supreme Court.

Yours truly,

## LEGISLATURE—PARLIAMENTARY LAW.

A rule of the Senate which restricts constitutional power of Legislature and curtails its powers to act when quorum is present is void.

AUSTIN, TEXAS, March 11, 1907.

*Hon. A. B. Davidson, Lieutenant Governor, Capitol.*

Dear Sir: I am in receipt of yours of the 9th inst., from which I quote the following:

"I have held that a rule of the Senate which restricts the constitutional power of the Legislature and curtails its powers to act when a quorum is present is void, and in so holding it is contended by many of the Senators that a rule has been vacated without authority,  
\* \* \*

"Senate Rule No. 3 provides as follows: 'And no member shall absent himself from the sessions of the Senate without leave, unless he is sick or unable to attend.'

"Rule No. 4 provides: 'A call of the Senate may be demanded by five members, and if there be any absent, the names of the absentees shall be called again. If they do not answer the sergeant-at-arms, or a special messenger, may be sent for them, and the question pending shall be, without motion, laid on the table, until the absentees appear, or the call be suspended.'

"Subdivision 4 of Rule 61 provides that it shall 'take a two-thirds vote of the Senate to excuse absentees.'

You desire to know whether either one or more, or all, of these rules are in conflict with the Constitution of this State.

The questions propounded are of a delicate nature, for they concern the validity of the rules of action and the exercise of power by a tribunal which constitutes a part of a co-ordinate branch of the government. Questions involving the powers of another department of government should be, and are, approached with reluctance. However, the judicial department has frequently been called upon and unquestionably has the power to pass upon such questions when properly raised, as the Supreme Court of Massachusetts, speaking through Mr. Justice Hoar, took occasion to say, in the case of *Burnham vs. Morrissey*, 14 Gray, 226:

"The House of Representatives is not the final judge of its own powers and privileges in cases in which the rights and liberties of the subject are concerned. But the legality of its action may be examined and determined by this court. That House is not the Legislature, but only a part of it, and is, therefore, subject in its action to the laws, in common with all other bodies, officers, and tribunals within the commonwealth. Especially is it competent and proper for this court to consider whether its proceedings are in conformity with the Constitution and laws; because, living under a written constitution, no branch or department of the government is supreme."

Since you request the opinion of this department, I deem it proper to comply therewith.

The first question I will consider will be the constitutional rights of a quorum of the Senate.

Section 10 of Article 3 of the Constitution of this State provides:

“Two-thirds of each house shall constitute a quorum to do business, but a smaller number may adjourn from day to day and compel the attendance of absent members in such manner and under such penalties as each house may provide.”

Therefore, two-thirds of the Senate *shall constitute a quorum to do business*. That is, when a quorum is present the Senate can do business, not otherwise. A quorum possesses all the powers of the whole body, and may exercise every right, privilege and power as fully as when the entire membership is present.

In *Re Gunn*, 19 L. R. A., 525.

The body becomes vitalized and clothed with constitutional authority when two-thirds of the Senate present themselves together. A less number can only adjourn from day to day and compel the attendance of absent members; but when a constitutional quorum assembles, the power of the Senate arises, and the power to exercise all the authority vested by the Constitution in that body, becomes a fundamental right of such quorum, which can not legally be thwarted or hindered by the action of any single member or fraction of the majority present. The Constitution of the United States, Section 5, Article 1, is almost identical in language with that of the Constitution of this State, except that it provides that a *majority* of each house shall constitute a quorum to do business, but a smaller number may adjourn, etc.

In construing that provision the Supreme Court of the United States, speaking through Mr. Justice Brewer, said:

“The Constitution provides that a majority of each house shall constitute a quorum to do business. In other words, when a majority are present the house is in a position to do business. Its capacity to transact business is then established, created by the mere presence of a majority, and does not depend upon the disposition or assent or action of any single member or fraction of the majority present. All that the Constitution requires is the presence of a majority, and when that majority are present the power of the house arises.”

*United States v. Ballin*, 144 U. S., 5.

The Constitution is the highest authority in our government. Its voice may be said to be omnipotent. The powers exercised by either branch of the government are delegated powers and must be exercised in conformity with the Constitution. That warrant has clothed a quorum of the Senate with full powers to transact business. That power, therefore, became a fundamental right inhering in such quorum which can not be legally annulled or impeded when they desire to exercise it. It can not be maintained, that the framers of the Constitution intended that a minority, and a small one at that, should have the power to prevent the quorum from exercising the powers expressly granted to it. No such conclusion can be reached by any language used in that instrument.

Mr. Cooley, in his excellent work on Constitutional Limitations, lays down the following rule of construction:

“Every positive direction contains an implication against anything contrary to it, or which would frustrate or dissappoint the purpose of that provision.”

Cooley, *Constitutional Limitation*, p. 127.

Again at page 99, the same writer says:

“Another rule of construction is, that when the Constitution defines the circumstances under which a right may be exercised or a penalty imposed, the specification is an implied prohibition against legislative interference to add to the conditions, or to extend the penalty to other cases.”

The constitutional declaration that “two-thirds of each House shall constitute a quorum *to do business*,” is a mandatory provision, a positive direction. It defines the circumstances and conditions under which the Senate has authority to act, and to exercise the powers granted to it; and, therefore, by implication, and by an implied prohibition, negatives the idea or assumption that the Senate could legally adopt any rule of procedure that would prevent a quorum of that body from transacting any business within the scope of its authority and at such time as it may choose to act.

It may be contended that Section 11 of Article 3 of the Constitution which provides that “each house may determine the rules of its own proceedings, \* \* \*” is a limitation upon such rights if the Senate should see fit to so provide.

In my judgment, such a doctrine can not be maintained, as it would lead to results in conflict with well established rules of construction. It would bring the two provisions of the Constitution in open conflict with each other, whereas, they should be construed together. The two sections of the Constitution, when so construed, are not in conflict. The Senate undoubtedly has authority to adopt rules for its own procedure, but it may not by such rules ignore constitutional restraints or violate the fundamental rights of a quorum of its own body to transact the business before it. The proper construction of that section would seem to be that the Senate may adopt such rules as will enable a quorum (or a greater number should such be present), to proceed in an orderly manner to transact the business of the body, and by no recognized rule of construction can the proposition be maintained that the framers of the Constitution intended, in Section 10, to confer upon a quorum the power to transact the business of the Senate, and in Section 11, they intended to confer upon the Senate the power to adopt rules that would prevent such quorum from transacting such business when one or more of its members should be absent. Such a presumption is contradictory and absurd, and will not be presumed, and in order to give effect to a design so unreasonable, it would require the support of the most direct, explicit declaration of such intent.

McMullen vs. Hodge, 5 Texas, 76-77.

The Constitution of the United States confers power upon each House of Congress to determine the rules of its proceedings in identical language with the Constitution of Texas.

U. S. Constitution, Art. 1, Sec. 5, Sub. 2.

In construing that section, Mr. Justice Brewer, in the case of U. S. vs. Ballin, *supra*, says:

“The Constitution empowers each House to determine its rules of procedure. It may not, by its rules, ignore constitutional restraints, or violate fundamental rights, and there should be reasonable rela-

tion between the mode or method of proceeding established by the rule which is sought to be obtained."

Now, let us examine the rules of the Senate which you have brought into question, and determine if they violate the fundamental rights of a quorum as vouchsafed by the Constitution.

Rule 4 provides that "a call of the Senate may be demanded by five members, and if there be any absent, the name of the absentees shall be called again. If they do not answer the Sergeant-at-Arms, or a special messenger, may be sent for them, and the question pending shall be, without a motion, laid on the table until the absentees appear, or the call be suspended."

The practical application of that rule, as I understand it, is that when five members demand a call of the Senate and it develops that some member or members of the Senate are absent, without leave, the Sergeant-at-Arms, or a special messenger, is dispatched for such absentees and the question pending is laid on the table until such absentees appear, or, on the other hand, some member may move to excuse the absentees, which, under the Rule 61, requires a vote of two-thirds of the members present to accomplish, and until such absentees are excused by a vote of two-thirds of the members present, or until such absentees are found and brought in, the Senate can not further consider the pending business, although a quorum is present, and a majority desire to proceed with the business.

It is my opinion that so much of Senate Rule No. 4 which provides: "And the question pending shall be, without motion, laid on the table until the absentees appear, or the call be suspended" (by excusing the absentees), is in conflict with Section 10, Article 3 of the Constitution, and, therefore, void; because, it prohibits a quorum of the Senate from exercising a fundamental right expressly granted by the Constitution.

I am of the opinion that the Senate may legally adopt rules providing, among other things, that:

First. No member shall absent himself from the sessions of the Senate, without leave, unless he be sick or unable to attend. (Rule 3.)

Second. A call of the Senate may be demanded by five (or any other number of), members, and if there be any absent the names of the absentees shall be called again, and if they do not answer, the Sergeant-at-Arms, or special messenger, may be sent for them. (Rule 4); and—

Third. That it shall require a two-thirds vote (or any other number decided upon), of all members present to excuse the absentees."

But I am firmly of the opinion that you can not legally adopt or enforce a rule that will arbitrarily suspend pending business until you have brought in or excused derelict members when there is a quorum present and it desires to proceed with the business before it. In other words, when there is a quorum present and a roll call shows absentees, it can not have any relation to the constitutional right of the quorum to proceed with the pending business, whether the absentees be excused or not. The absentees have no constitutional right to compel a suspension of the business pending before the quorum. If such be the case, the Constitution gives one absent member

more power than it has delegated to the quorum, and also, more power when he is absent from the body than when he is present.

Should the five or more members desire the presence of the absentees I think they would have the legal right, under the rules, to have the Sergeant-at-Arms dispatched for them, and have them placed under arrest and brought before the bar of the Senate. But no rule can legally stop the business of the Senate until such arrests are made, as long as a quorum is present and they desire to proceed. Moreover, one or more members absenting themselves do not carry away with them any of the constitutional prerogatives of the Senate as long as a quorum remains in attendance, but all the power of the body continues to reside in the quorum, and by absenting himself the member confides to the quorum remaining the rights and interests of his constituency. The mere act of excusing him can not clothe the Senate with any power not possessed independently of such action. The only legal effect of such action is to discharge such absentees from any penalty that may have been incurred by reason of absenting himself without leave.

But whenever a sufficient number absent themselves to break a quorum, the minority remaining are stripped of all constitutional authority, except to adjourn from day to day, and to compel the attendance of absentees. The authority to do business is at once divested when a quorum is broken.

The framers of the Constitution vested in the minority of the Senate to protect the body by clothing a less number than a quorum with undoubted authority to compel the attendance of absentees in order that the business of the State may not suffer because of the dereliction of those, who, from caprice, or other motives, absent themselves from the sessions with the hope of impeding or defeating the business pending before the body.

The Senate of the United States had adopted rules for a call of the Senate. (Jefferson's Manual, Sec. VII, page 143.) Also, for compelling the attendance of absentees *Id.*, Sec. VIII.

But, in either case, the question arises on whether or not a quorum be present, and so long as a quorum is present they may proceed with the business. Likewise, in the lower house of Congress, the call of the House is dependent upon the absence of a quorum, and when a quorum is present they may proceed to transact business. (Rule XV, Sections 2, 3, and 4, Rules House of Representatives, page 277.)

Rule XVI of the House of Representatives of the Texas Legislature, page 50, provides:

“\* \* \* until a quorum appears, should the roll call fail to show one present, no business shall be done except to compel the attendance of absent members or to adjourn. Whenever a quorum is shown to be present the House may proceed with the matters on which the call was ordered, or may enforce and await, the attendance of the absentees.”

Therefore, it will be seen that neither of the Houses of Congress or the House of Representatives of this State, all acting under similar constitutional provisions, have any rule relating to the call of the House or compelling the attendance of absentees that will ar-

bitrarily suspend pending business when a quorum is present and they desire to proceed.

And, as heretofore stated, I am of the opinion that such a rule conflicts with the Constitution of this State and can not be enforced. As Mr. Cooley says, at page 77:

“For the Constitution of the State is higher in authority than any law, direction, or order made by any body or any officer assuming to act under it, since such body or officer must exercise a delegated authority, and one that must necessarily be subservient to the instrument by which the delegation is made. In any case of conflict the fundamental law must govern, and the act in conflict with it must be treated as of no legal validity.”

Cooley, Constitutional Limitation, p. 77.

You state that some of the Senators have said that a rule has been vacated without authority, and you desire an opinion upon that phase of the question also.

We can not offer better authority than Mr. Cooley, who lays down the following principle:

“Whoever derives power from the Constitution to perform any public function, is disloyal to that instrument and grossly derelict in duty, if he does that which he is not reasonably satisfied the Constitution permits. Whether the power be legislative, executive, or judicial, there is manifest disregard of constitutional and moral obligation by one who, having taken an oath to observe that instrument, takes part in an action which he can not say he believes to be no violation of its provisions.”

Cooley, Constitutional Limitations, p. 1909.

An unconstitutional law or rule is binding upon no citizen. That is elementary, and likewise, if the presiding officer of the State should become convinced that a rule adopted by the Senate is in conflict with the Constitution, manifestly it becomes his duty to uphold the Constitution, rather than the rule. In either event, the exercise of such discretion carries with it its responsibility, and the officer is responsible to the body over which he presides should he abuse the power vested in him.

I have treated this subject at some length, realizing its importance, and after careful consideration of the questions involved, I conclude that so much of Rule 4 which provides, “and the question pending shall be, without a motion, laid on the table until the absentees appear, or the call be suspended,” is in conflict with Section 10, Article 3 of the Constitution of this State, and can not be enforced so long as the roll call shows a quorum of the Senate present, and such quorum desires to proceed with the pending business.

Yours very truly,

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#### DELINQUENT TAXES—RIGHT OF REDEMPTION.

Where land is sold to State for taxes for certain years under judgment of foreclosure, and there were taxes due for prior years, the State is estopped from collecting taxes for such prior years, the acts of the county attorney held to be acts of the State.

AUSTIN, TEXAS, March 21, 1907.

*Hon. J. W. Stephens, Building.*

Dear Sir: Yours of the 7th came to hand in due time, but we have been unable to reply earlier.

You state therein that certain lands in Presidio County were reported delinquent for the taxes for 1892 to 1905, inclusive, and that the county attorney brought suit to foreclose the tax lien on these lands for the taxes of 1904 only, and on June 5, 1906, under a judgment obtained foreclosing the lien for the year 1904 only, the lands were sold to an individual by the sheriff acting under process issued under said judgment.

You state that the purchaser at said tax sale paid to the tax collector of Presidio County, on January 31, 1907, the taxes delinquent for 1905 on the same lands and received a redemption receipt which he now presents to your office for a certificate of redemption, and that the party who was the purchaser at said sale and to whom the redemption receipt was issued by the tax collector, insists that he is entitled to a certificate of redemption upon the payment of all taxes delinquent for the years subsequent to 1904.

You desire to be advised:

First: Whether, within the period of two years allowed under the law for redemption from sale by the owner the purchaser at the tax sale is entitled to complete redemption upon payment of the taxes for 1905, as stated above?

Second: If the first question is answered in the affirmative, then, whether the original owner, if he redeems from the purchaser within two years, may redeem from the State on the same terms?

I direct your attention first to the case of the city of Houston vs. Bartlett, decided by the Court of Civil Appeals, First District, in which a writ of error was denied by the Supreme Court, reported in 68 S. W. Rep., page 730.

The facts disclosed by the opinion in that case are, substantially, as follows:

In 1897 the city of Houston recovered a judgment with foreclosure of tax lien upon the land in controversy for taxes due for the years 1894, 1895, and 1896, with an order of sale of said property.

At the time the suit was brought taxes were also due upon said property for the years from 1887 to 1893, inclusive, but said taxes were not included in the suit, and no mention of same nor of the State's lien for said taxes was made in the petition nor in the judgment rendered thereon.

In 1898, the city recovered a judgment for taxes due for the years 1887 to 1893, inclusive, and also for the year 1897, with foreclosure of tax lien and order of sale.

Upon this latter judgment an order of sale was issued and the property was sold by the sheriff in accordance with law and purchased by a private individual. The purchaser at the sale conveyed the property to the defendant in error, Bartlett, who paid a valuable consideration therefor, and had his deed recorded. He brought the suit to cancel and relieve the cloud upon his title consisting of the tax lien claimed by the city to secure the payment of taxes assessed against said property for the years 1894, 1895, and



1896, being the taxes included in the first judgment. He secured a judgment in the court below, which was affirmed by the Court of Civil Appeals. The city submitted the proposition that it could not be estopped from the collection of its taxes by reason of the mistakes, omissions or wrong doings of its officers, or other persons, and that it would not be estopped from collecting taxes for the years 1894, 1895, and 1896, because it had previously sued for and collected taxes for the years prior and subsequent to said years, for the reason that each year's tax was a separate cause of action and separate suit might be brought therefor.

The question was further raised that at the time the defendant in error's vendor purchased the property, there was an unsatisfied judgment in favor of the city for taxes which could not be lawfully relinquished.

I quote the following from the opinion of the court:

"The acts of the city attorney of the city of Houston in procuring a judgment in favor of said city foreclosing lien by the city upon the property in controversy, and ordering the sale of the whole of said property without any reservation in favor of any pre-existing encumbrance, and in procuring the sale of said property under such judgment, must be considered the acts of the city of Houston, and are conclusive and binding upon the city. It is well settled that a purchaser at a sale made under a judgment of this kind acquires all of the title of both the plaintiff and defendant in the judgment, and takes the property, discharged of all liens in favor of the plaintiff, regardless of whether or not such purchaser has notice of unsatisfied liens in favor of plaintiff which were not foreclosed, or in anyway sought to be protected by the judgment under which the sale was had."

The court cites the case of *Vieno vs. Gibson*, 85 Texas, 432. In this case a purchaser at a sale of land under a judgment foreclosing the vendor's lien was informed by the plaintiff's attorney, at the time of the sale and before his purchase, that the land was sold subject to an outstanding lien, being another vendor's lien note.

The Supreme Court held that, notwithstanding such notice and knowledge, the purchaser took the land discharged of such lien.

I quote further from the opinion of the court in the *Bartlett* case, after citing the *Vieno* case:

"The lien in plaintiff in error's favor upon said property for all taxes due prior to the rendition of said judgment was extinguished by such sale, and plaintiff in error's security page 4 out ..  
29, 1864.

The court held that the purchaser under the first sale acquired the title to the land, and that a sale of land for taxes frees it in the hands of the purchaser from all liens or liabilities for taxes of previous years.

The same rule was followed in the case of *Shoemaker vs. Lacy*, 45 Iowa, 422, and *Phillips vs. Willmarth*, 98 Iowa, 32.

The Supreme Court of Illinois in the case of *Law vs. Tax Collector*, 116 Ill., 244, held that where the State sells land in satisfaction of a tax judgment, it can not defeat the purchaser's title by a re-sale of the same land for taxes which were due and owing when

the judgment was rendered and which might have been included in it.

The Supreme Court of Pennsylvania in the case of *Irwin vs. Trego*, 22 Pa. St., 368, held that while a sale of land for taxes will not divest the taxes assessed upon it for the year of the sale, yet, it does divest the land of all taxes assessed for any year prior to that in which the sale was made.

The same rule was announced in the case of *Huzzard vs. Trego*, 35 Pa. St., 9.

In *McFadden vs. Goff*, 32 Kansas, 415, the court said:

"A valid tax deed extinguishes and destroys all other titles and liens existing or based upon anything existing at the time of the levying of the tax upon which the tax deed is founded."

The Supreme Court of Missouri held that a valid sale and conveyance of land for taxes under a junior assessment cuts off all former titles or liens.

*Jarvis vs. Peck*, 19 Wis., 84.

*Sayles vs. Davis*, 22 Wis., 225.

*Eaton vs. North*, 29 Wis., 75.

In *Robbins vs. Barron*, 32 Mich., 36, the court said

"A tax title, if valid, destroys and cuts off all liens and encumbrances previously existing against the land."

In *Langley vs. Chapin*, 134 Mass., 82, the court said:

"A sale of land for non-payment of taxes, if valid, creates a title paramount to any existing estate therein."

The contrary doctrine announced in the cases of *Adams vs. Osgood*, 42 Neb., 450; *Mayor vs. Cowan*, 78 Tenn., 209; *State vs. Werner*, 10 Mo. App., 41, and *Cowell vs. Washburn*, 22 Cal., 520, are each based upon special statutes not similar to ours, in some of which it was provided that the sale of land for taxes, which did not include all taxes due, was invalid.

The Act of the Twenty-fifth Legislature, page 132, provides that "taxes shall remain a lien upon said land. \* \* \* The land may be sold under the judgment of the court for all taxes, interest, penalty, and costs shown to be due by such assessment for any preceding year."

It is provided in Section 6 of this act that the commissioners court shall file a list of all lands so advertised for taxes due for any year, or number of years, the tax on which remains unpaid, with the county clerk of the county, "and are to be sold under the provisions of this act for all the taxes, interest, penalty and costs."

The section further provides that the petition shall pray for judgment, and "that such lands be sold to satisfy said judgment for all taxes, interest, penalty and costs."

Section 8 provides, relative to the deed made by the sheriff to a purchaser at such sale, that "any such deed shall be held in any court of law or equity in this State, to vest a good and perfect title in the purchaser thereof, subject to be impeached only for actual fraud.

Article 8, Section 15 of the Constitution provides that "the annual assessment made upon landed property shall be a special lien thereon \* \* \*, and such property may be sold for the payment of the

taxes and penalties due by such delinquent under such regulations as the Legislature may provide."

Section 11 of the Act of the Twenty-fifth Legislature provides that any incorporated city or town shall have the right to enforce the collection of delinquent taxes due it under the provisions of this act.

There is nothing in the Constitution or in the statute which would require a different rule to be applied as to the rights of a purchaser at a delinquent tax sale from that announced in the decisions cited herein, from which we conclude that the acts of the county attorney of a county in procuring a judgment in favor of the State foreclosing a lien for taxes upon land for any year or years, and ordering the sale of the whole of said land, and procuring a sale under such judgment, must be considered as the acts of the State, and conclusive and binding upon the State, and when said lands are sold under said judgment to a private individual, the lien of the State for all taxes due for years prior to those included in the judgment is extinguished by such sale, and the purchaser at such sale is entitled to a redemption upon payment of all delinquent taxes due upon said land for the years subsequent to that for which the land was sold.

Answering your second question, you are advised that the original owner of the land would not be relieved of his liability to the State for the taxes due for years prior to those included in the judgment, although the lien upon said land would be extinguished and he would not be entitled to redeem without the payment of all taxes due and unpaid for years both prior to the judgment and subsequent thereto.

Yours very truly,

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REFUND CLAIMS—APPROPRIATION FOR—CLAIM  
REJECTED.

AUSTIN, TEXAS, March 23, 1907.

*Mr. Ricardo Contreras, Rio Grande City, Texas.*

Dear Sir: We have carefully considered your refund claim for \$15.65 which is referred to in the certificate from the Commissioner of the General Land Office, of date January 7, 1907, and regret to have to advise you that under our construction of the general appropriation act passed by the First Called Session of the Twenty-ninth Legislature of Texas (Acts 1905, page 442), this claim can not properly be approved for payment.

In the first place, it is not supported by affidavit to the effect that the claim is valid and unpaid. Such affidavit is uniformly required in support of refund claims. It is true that such affidavit could be yet supplied were the claim one which is embraced by said appropriation act; but, in our opinion, it is not, for the following reasons:

This claim is based upon the fact that, according to your affidavit of November 8, 1906, which is set out in full in said certificate of the Commissioner of the General Land Office, you supposed when you

were making application to purchase that the land described in your application was another and different tract from the tract which was afterward awarded to you by the Commissioner, the error being one made by you in confusing the tract of land which was advertised for sale and described in your application and afterward awarded to you, by the Commissioner with the tract which you, in fact, desired to purchase.

It appears from said affidavit, and from the certificate of the Commissioner, that after the land was awarded to you, you failed to make settlement thereon and file an affidavit of such settlement in the General Land Office within the time prescribed by law for you to do those things, and that by reason of such failure upon your part the award to you was cancelled.

In short, no error of any kind or default of the Commissioner is shown or claimed, and it is clear that the error was your own.

It is true that said appropriation act authorizes refund in case of "erroneous sales:" but I am of the opinion that in using these quoted words, the Legislature meant only sales made through error upon the part of the General Land Office, and did not intend to provide for refund of purchase money in case of sales made through error of the purchaser. If said appropriation act were to be construed to authorize repayment of purchase money in cases in which the purchaser misdescribed the land which he meant his application to cover, and in such application described an entirely different tract of land, such construction would prove an open door to fraud upon the State, because it would permit unscrupulous purchasers who, for any reason, changed their minds after making application to have their application cancelled and the purchase money paid returned to such purchaser, although the State and the General Land Office might be wholly blameless, and might by such procedure be deprived of the cost of such original advertisement of the land (or re-advertisement thereof), as well as of availing itself of some other and competitive bid of almost equal amount.

I am of the opinion that this claim should not be approved without further legislative action authorizing it. It is not clear to my mind that our Constitution will permit such legislative action, but upon that feature I express no opinion, as that question is not now presented.

The certificate of the Commissioner is herewith returned to you.

Truly yours,

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STATE REVENUE AGENT—COMMISSIONERS COURT—  
BOARD OF EQUALIZATION—TAX ASSESSOR.

Commissioners court has no authority to instruct tax assessor as to value at which he should list property for taxation.

The board of equalization has no authority or jurisdiction over acts of tax assessor until his lists of property shall be submitted to them, and then only to the extent to inspect, approve, correct and equalize said assessments.

AUSTIN, TEXAS, March 30, 1907.

*Hon. W. J. McDonald, State Revenue Agent, Austin, Texas.*

Dear Sir: We are in receipt of yours of 30th, wherein you state that many tax assessors claim that they are instructed by the commissioners court to assess property at figures below the actual value of the property.

You desire to know if the county commissioners court has any authority to do so, and if it is not their duty, under the law, to raise the valuation of property when it is too low, after notice given.

Replying, we advise that the county commissioners court has no authority whatever to instruct the tax assessor as to the value at which he should list property for taxation. Primarily, the duty and obligation is upon the owner of property to state its value under oath. Article 5075 provides that the taxpayer shall make and sign a statement verified by his affidavit, of all property, both real and personal, in his possession, or under his control, which he is required to list for taxation either as the owner or holder thereof or as guardian, parent, husband, trustee, executor administrator, receiver, accounting officer, partner, agent or factor.

Article 5076, as amended by the Act of the Twenty-fifth Legislature (Chapter 142, page 203), provides what this list shall contain, that is: that it shall truly and distinctly set forth a description of the property and the value thereof.

Article 5098, as amended by the Act of the Twenty-fifth Legislature, provides that the tax assessor shall require each person rendering a list of property for taxation to subscribe to the following oath or affirmation which shall be printed or written at the bottom of said list, viz.:

"I..... do solemnly swear that the above inventory rendered by me contains a full, true and complete list of all taxable property owned or held by me in my own name (or for others, as the case may be) in this county, subject to taxation in this county, and personal property in this county subject to taxation in this county by the laws of this State, on the 1st day of January, A. D. .... and that I have *true answer made to all questions propounded to me touching the same so help me God.*"

This affidavit subscribed and sworn to by the party listing the property is an oath that the party has truly and distinctly set forth all of his property subject to taxation, and the value thereof. The value mentioned in the list, as it affects real property, is the "true and full value in money." The value as it affects personal property is "its true and full value in money." (Article 5088, Sayles' Civil Statutes.)

There rests upon the tax assessor the obligation and duty to require the party listing property for taxation to make oath as to the truth of the matters contained in the list, and in addition thereto it is his duty to attest officially the oath made and subscribed by the party listing the property. Under the provisions of Article 5100, Sayles' Civil Statutes, for every failure or neglect by a tax assessor to administer the oath to each person rendering a list of taxable property to him, he forfeits the sum of \$50, which should be de-

ducted out of his commissions for making assessments for county taxes, and for each and every failure or neglect to attest the oath officially, after same has been made and subscribed before him, he forfeits an additional \$50 to be deducted from his commissions on the assessment of county taxes.

The list referred to must be made by the tax assessor, subscribed and sworn to and attested prior to the time, and before any duty is imposed upon the commissioners court as a Board of Equalization in respect to the taxation of the property. If the valuation fixed by the party furnishing the list is, in the judgment of the tax assessor, correctly stated, it is his duty to list the same accordingly, but if he is satisfied that the value is too low, he shall list the same at such value as he, as a sworn officer, deems just. If, however, a party not a resident of the county owns property in the county subject to taxation, he may list the same and make oath thereto before any officer authorized to administer oaths, and forward the same by mail to the tax assessor of the county wherein the property is taxable.

If the tax assessor is not satisfied with the valuation of an assessment made by a non-resident, he has no authority to change the valuation, and must refer the same to the Board of Equalization of his county for their action. (Article 5099.)

It is the duty of the tax assessor to submit all the lists of property rendered to him, to the Board of Equalization, prior to the first Monday in June, or as soon thereafter as is practicable, for their inspection, approval, correction or equalization. (Article 5126.)

The Board of Equalization shall convene and sit on the second Monday in June of each year or as soon thereafter as is practicable before the 1st day of July, to receive the assessment lists or books of the assessors of the county for inspection, correction, equalization and approval. (Article 5120.)

Not until the tax assessor has furnished all the lists of property rendered to him, to the Board of Equalization, has that tribunal any authority or jurisdiction over the acts of the tax assessor, and then only to the extent to inspect, approve, correct and equalize said lists. The duties and responsibilities of the tax assessors are his own, subject neither to the control or supervision of the Board of Equalization. Its supervision is over his lists furnished it on the first Monday in June, or as soon thereafter as practicable.

The duty to list and value the property is first upon the owner or his agent. The list and valuation must be sworn to before the tax assessor, if the party is a resident of the county, and if not a resident of the county, then before some officer authorized to administer oaths. If a tax assessor fails or refuses to require oath to be made, or to attest same after it is made, he subjects himself to a penalty of \$50 for each list, and it is the duty of the commissioners court to deduct from his commissions for the assessment of county taxes, all penalties thus accrued, and if it fails to do so, there is a remedy at the hands of the prosecuting attorney of the county to prevent the payment of such commissions without the deduction of accrued forfeitures.

It is the duty of the Board of Equalization to see that every per-

son has rendered his property in accordance with law, and in order to determine this it has the power to send for persons, books and papers and swear and qualify witnesses to ascertain the value of property, and to lower or raise the value as the facts in the case may justify.

Yours truly,

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COMMISSIONERS COURT—TAXATION—REDEMPTION OF—  
BOARD OF EQUALIZATION—TAX ASSESSOR.

The rate of taxation can only be fixed at a regular term of commissioners court.

AUSTIN, TEXAS, April 2, 1907.

*Judge Guy Mitchell, Edna, Texas.*

Dear Sir: Replying to yours of 29th ultimo, beg to advise that the commissioners court of your county would not have the authority, at the August term, to reduce the rate of taxation from that theretofore fixed at the February term of the court. The rate of taxation can only be fixed at a regular term of the court when all the members are present, and there would be no regular term of the court in August prior to the second Monday. Article 5130, Sayles' Civil Statutes, requires that the tax assessor shall, on or before the first day of August, return his rolls and assessment books for final approval by the Board of Equalization, and the commissioners court would have no authority to change the rate after this had been done.

This court would have the authority, however, at any regular term held between the February regular term and the 1st day of August, to reduce the local rate of taxation.

Yours truly,

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ANTI-GAMBLING LAW.

Has emergency clause, and went into effect on March 28, 1907.

AUSTIN, TEXAS, April 6, 1907.

*Senator Q. U. Watson, Senate Chamber, Capitol.*

Dear Sir: I have your inquiry as to when House Bill No. 84, commonly known as the anti-gambling law, goes into effect.

Replying, I beg to say that said bill carries the emergency clause; the certificates of the officers of the Senate and of the House conclusively show that the bill was properly passed; the journals of the Senate and of the House show that said bill received a two-thirds (2-3) vote of the members elected to each House, respectively; and I am of the opinion that the act became effective on March 28, 1907, when it was signed by the Governor.

Respectfully,

## INSURANCE COMMISSIONER—AUSTIN FIRE INSURANCE COMPANY.

Reduction of capital stock authorized.

AUSTIN, TEXAS, April 24, 1907.

*Hon. R. T. Milner, Commissioner of Insurance, Capitol.*

Dear Sir: We are in receipt of yours of the 23rd, enclosing communication from Mr. A. F. Hancock, Secretary of the Austin Fire Insurance Company.

We assume the following to be a correct statement of the facts, and of the inquiry upon which you desire advice, namely:

On July 9, 1906, the directors of the Austin Fire Insurance Company ascertained that the company had sustained a loss of approximately \$275,000, and to meet this loss, it would be necessary, and the company desired to reduce its capital stock fifty per cent. The condition of the company, at that time, was as follows: Original capital stock subscribed, \$529,000; stock not paid for, \$45,366; total collections on stock, \$483,634.

On June 30, 1903, a reduction of twenty per cent was made of the capital stock amounting to \$96,726, leaving capital stock paid in on July 9, 1906, of \$386,908.

The Commissioner of Insurance, at the time of the loss above referred to, authorized the company to reduce its capital stock one-half, namely: to the amount of \$193,454, by reason of the impairment mentioned above, and in order that the company might meet the obligations, which had arisen by reason of the loss mentioned above. The amount of reduction of the capital stock was transferred to the surplus fund, but the company did not reduce the capital to the extent authorized by the Commissioner of Insurance, but only to the extent of reducing such stock to two hundred thousand dollars, leaving a balance of \$6,545 of the capital which the company, under the authority of the Commissioner of Insurance was authorized to take from the capital. This amount, \$6,546 is being taken from the capital and placed in the surplus fund each month as rapidly as payments are made by stockholders on their stock notes, these stock notes being due on December 31, 1906, aggregating \$45,366.87 and are payable in quarterly installments, the last of which falls on October 9, 1907. The statement is made by the company, that the balance of the reduction of capital stock, authorized by the Insurance Commissioner, and also by the stockholders and directors of the company, is now being made as fast as payments are being made by the stockholders upon their stock notes, and that capital stock certificates are not issued to the stockholders until they have paid the full amount due upon the stock notes.

The inquiry from the above statement is: Has the company the authority to reduce its capital stock to the amount of \$200,000 only instead of the one-half reduction as authorized by the Commissioner of Insurance?

As a general rule of law, when the amount of capital stock of a corporation is fixed by its charter and articles of association, or by the general law, it has no power, in the absence of authority from the Legislature to reduce the same, either directly or indirectly.



It is within the power of the Legislature to authorize a corporation to reduce the amount of its capital stock by a provision to that effect, either in its charter or the general law. In order, however, that the reduction of the capital stock of a corporation may be made, action upon the part of the corporation to that end is necessary, and the special requirements of the statements must be substantially complied with. The reduction of the capital stock is such a fundamental change in its affairs, that, although it has been duly authorized by an act of the Legislature, it can not lawfully be affected merely by the act and consent of the Board of Directors, but must be authorized by the stockholders at a corporate meeting.

Article 3077, Sayles' Civil Statutes provides that when the general stock of any fire insurance company becomes impaired, the Commissioner of Insurance may, in his discretion, permit such company to reduce its capital stock and the par value of its shares in proportion to the extent of impairment, provided that in no case shall the capital stock be reduced to an amount less than \$100,000.

The Commissioner acted within his authority in this case in authorizing the Austin Fire Insurance Company to reduce its capital stock fifty per cent, as such a reduction would not reduce the capital to an amount less than \$100,000.

The method to be pursued by a corporation organized for the purpose of a fire insurance business is not provided for by a statute. Article 3096d of the Revised Statutes, being an Act of the Twenty-fourth Legislature, page 97, makes express provision as to the method to be pursued by life and accident insurance companies in the reduction of the capital stock. There are no such provisions as to fire insurance companies, nor as to corporations generally, the laws governing which would control, if there were any. Therefore, the method is left to the discretion of the stockholders of the company, and in making the reduction after same has been authorized by the Commissioner of Insurance under Article 3077, it might be done by the company purchasing its shares and cancelling or retiring the same, or by accepting the surrender of shares, and giving the holders in exchange therefor a proportionate amount of its assets, provided no rights of creditors are involved, or it might be done by cancelling shares which have not yet been issued, or the amount of corporate assets over and above the amount of capital stock, as reduced, may be added to the surplus and treated as such by the corporation. However, the distribution among the stockholders of such surplus is not authorized when it appears that the original capital stock was impaired at the time of the decrease and the creditors of the company may prevent such a distribution upon such a reduction if their debts were contracted or matured prior to the reduction, or under a statute authorizing the reduction but containing no provisions to meet the exigencies of an impaired capital. A reduction can not take the form of distributing the assets of the corporation to the shareholders without retaining enough in hand to answer for these debts, secured or unsecured.

Thompson on Corporations, Vol. 2, Paragraph 2121, Vol. 7, Paragraph 8692.

Cook on Corporations, Vol. 1, Chapter 17, Paragraph 289.

Clark and Marshall Private Corporation, Vol. 2, Paragraph 411.

It does not appear that an attempt has been made, or that there is any desire upon the part of the Austin Fire Insurance Company to distribute among the stockholders the amount of authorized reduction of capital stock after same has been transferred to the surplus fund. On the contrary, it appears that the reduction was sought and the transfer made for the purpose of meeting the San Francisco losses. There is no provision of our law, which makes illegal the method being pursued by the Austin Fire Insurance Company in the reduction of their capital stock to the extent authorized by the Commissioner of Insurance. Neither would the company be required to reduce the capital stock to the full extent authorized by the Commissioner of Insurance, although it would have no authority to reduce the capital stock more than was authorized by the Commissioner of Insurance.

Yours very truly,

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#### ANTI-GAMBLING LAW—FORTY-TWO CLUB.

Not in violation of anti-gambling law, as amended by Thirtieth Legislature, to play game designated "Forty-Two" with dominoes, the hostess awarding prize to winner.

AUSTIN, TEXAS, April 26, 1907.

*Hon. W. N. Stokes, County Attorney, Vernon, Texas.*

Dear Sir: We are in receipt of yours of 23rd wherein you state that "the ladies of our town have what they call a forty-two club, which club meets weekly at the home of some of its members, where they spend the afternoon playing the game with dominoes called forty-two. It has been the custom of the hostess to award a prize to the member winning the largest number of games during the afternoon."

You desire to know whether or not the above constitutes a violation of the gambling law as amended at the Regular Session of the Thirtieth Legislature.

While this act purports to amend only Article 388 of the Penal Code, it amends not only that Article, but also Articles 382 and 390.

In order that the matter may be presented intelligently, I quote below Article 388, as amended, enclosing within parenthesis the additions to the old article.

Article 388a of the amendment is a substitute for Article 382 of the old Code, and Article 388c of the amendment is simply a repetition of a portion of the provisions of Article 388, as amended. Article 388b is a substitute for Article 390 of the old Code.

Article 388 as amended with the additions in parenthesis, as indicated above, is as follows:

"If any person shall bet or wager at any gaming table, or bank, or pigeon hole, or penny-lind table, or nine or ten pin alley, such as are mentioned in the six preceding articles, or shall bet or wager any money or other thing of value at any of the games included in

the six preceding articles, or at any of the following games, viz.: poker-dice, jack pot, high dice, high-die, low dice, low-die, dominoes, euchre with dominoes, poker with dominoes, sett with dominoes, muggins, crack-loo, crack-or-loo (or the game of matching money or coins of any denomination for such coins, or for other things of value), or at any game or any character whatever that can be played with (cards) dice or dominoes, or at any table, bank or alley, by whatsoever name the same may be known (or whether named or not and without reference as to how the same may be played) and without reference as to how the same may be construed or operated (or shall bet or wager upon anything in any place where people resort for the purpose of betting or wagering), he shall be fined not less than ten dollars nor more than (fifty) dollars; (the maximum fine was twenty-five dollars under the old bill) provided, no person shall be indicted under this section for playing said games with dominoes or (cards) at a private residence (occupied by a family, unless same is commonly resorted to for the purpose of gaming, and provided further that no banking game played with cards or dominoes shall be exempted from the provisions of this act on account of being played at a private residence occupied by a family, and provided further, that for betting on any gaming table or bank the court or jury may in addition to said fines impose a jail penalty of not less than ten nor more than thirty days)."

You will notice that the additions consist of adding to the prohibited games the game of matching coins of any denomination for such coins, or for other things of value, and of adding games played with cards, and including any game whether named or not, without reference as to how the same may be played.

It is also made unlawful in the amendment to "bet or wager upon anything at any place where people resort for the purpose of betting or wagering." The maximum fine is changed from \$25 to \$50, and the exemption from indictment for playing at a private residence does not include games played with dice.

There is also added to the exemption from indictment the provision that the private residence must be occupied by a family, and must not be "commonly resorted to for the purpose of gaming."

The amendment contains no radical change from the character of prohibited games, for it is still required that for a person to be guilty, he must "bet or wager" at the game.

The addition which has caused so many inquiries to be addressed to this department relative to the character of transactions mentioned in your letter, is the following:

"Or shall bet or wager upon anything in any place where people resort for the purpose of betting or wagering."

Substantially the same provision is contained in the amendment (Article 388b), viz.: That "any place \* \* \* shall be considered as used for gaming \* \* \* if the same is resorted to for the purpose of gaming or betting." The word "gaming" as used in this provision must be construed as synonymous with "gambling" in order that the several provisions of the act might be harmonized. You will notice that the addition to the Article 388a, quoted above, qualifies the place at which betting or wagering generally is pro-

hibited, by the words "where people resort for the purpose of betting or wagering." The word "resort" here must be construed to mean something of a common occurrence; the habitual frequenting of a place for the purpose of betting or wagering; not only must the place be one of frequent and common assemblage, but the purpose for which it is resorted to must be illegal.

People vs. Pinkerton, 44 N. W. Rep., 180.

State vs. Sam, 27 Amer. Rep., 454.

O'Brian vs. State, 28 Mich., 213.

State vs. Norton, 19 Texas, 102.

Wheelock vs. State, 15 Texas, 260.

Lynn vs. State, 27 App., 590.

Hopkins vs. State, 33 S. W. Rep., 975.

Armstrong vs. State, 34 App., 645.

The question as to whether or not a place is a resort for the purpose of gaming is one of fact to be determined in each particular case. The provision taking from the exemption a private residence occupied by a family, is that it must be commonly resorted to for the purpose of gaming. We think the term here is synonymous with the word "resort" contained in other provisions of the amendment.

To come within the inhibition of the amendment, the game must be one upon which money or other thing of value is bet or wagered. No definition of these terms having been placed in the statute, the meaning as understood at the time of its enactment, must be applied to them, the presumption being that the Legislature used these words in their ordinary acceptation.

A bet or wager is an agreement between two or more persons that a sum of money or some valuable thing, in contributing which all agree to take part, shall become the property of one or more of them, on the happening in the future of an event, at the present uncertain, or upon the ascertainment of the fact in dispute. Rich vs. State, 38 Texas Crim. App., 199.

A wager is a contract by which two or more parties agree that a sum of money or other thing shall be paid or delivered to one of them upon the happening or not happening of an uncertain event. The terms are synonymous, generally.

Amer. & Eng. Ency. of Law, Vol. 4, page 5, Vol. 29, page 1082.

Long vs. State, 22 App., 194.

Stearns vs. State, 21 Texas, 692.

There is a clear distinction, however, between a wager or bet, and a premium or reward. In a wager or bet, there must be two parties, and it is known before the chance or uncertain event upon which it is laid is accomplished, who are the parties who must either lose or win. In a premium or reward, there is but one party until the act or thing or purpose for which it is offered has been accomplished. A premium is a reward or recompense for some act done; a wager is a stake upon an uncertain event. In a premium, it is known who is to give before the event; in a wager, it is not known until after the event. Alvord vs. Smith, 63 Ind., 62.

In the case of Harris vs. White, 81 N. Y., 532, the court said:

"A bet or wager is ordinarily an agreement between two or more that a sum of money or some valuable thing, in contributing which

all agreeing take part, shall become the property of one or more of them on the happening in the future of an event, at the present uncertain, and the stake is the money or thing thus bet upon the chance. There is in them this element that does not enter into a modern purse, prize or premium, viz.: that each party to the former gets a chance of gain from others and takes a risk of loss of his own to them."

This case involved the recovery of a premium or prize offered by a third party upon a horse race. The court, in holding that it could be recovered, said:

"Illegal gaming implies gain and loss between the parties by betting, such as would excite a spirit of cupidity. (People vs. Sergeant, 8 Cow., 139.) A purse, prize or premium is ordinarily some valuable thing, offered by a person for the doing of something by others, into the strife for which he does not enter. He has not a chance of gaining the thing offered; and if he abide by his offer, that he must lose it and give it over to some of those contending for it is reasonably certain. These words 'purse, prize or premium' are not within the meaning of the Revised Statutes when those statutes utter the words 'bet or stakes.' And when the learned referee found that the agreement of these parties was to drive in contest of speed for purses, prizes or premiums, and found that it did not stipulate in its terms for driving for a bet or wager, his findings were consistent."

In the case of Porter vs. Day, 71 Wis., 299, the question was whether betting for a reward, purse or stake offered by a third party to one whose horse should win in a running or driving race, was illegal under a statute prohibiting betting and wagering upon a horse race. The court said:

"If two or more men owning trotting horses should contribute equally or otherwise a sum of money, and put it into the hands of some other person for the purpose of offering it as a premium or reward to them only, and to the owner of the horse who should win the race, such a transaction would undoubtedly come within the rule which prohibits betting on a horse or other race. Where there is no claim that the competitors are the sole contributors to the premium or purse which is offered to them as competitors, we are unable to find any decided case which holds that the betting for such purse or premium is illegal or prohibited, unless the same be expressly prohibited by the laws of the State in which such rewards are offered."

It is essential to a wager or bet that there should be two or more contracting parties, all contributing to the sum staked or wagered, and each getting a chance of gain from others, and taking a risk of loss of his own to them; there must be a mutual risk.

A contest for a prize which is furnished by a hostess, not participating in the chance to win the prize, lacks the element of a bet or wager. If the prize is contributed by the contestants in the game alone, the successful contestants to have the prize, there would be the element of gaming.

A question of similar nature to the one you propound was before the Supreme Court of North Carolina, in the construction of a statute which made it unlawful for any person to play at any game of

chance at which money, property or other thing of value was bet; and the court in disposing of the question, said in construing the statute, that it had "no application to the long prevailing custom of 'shooting for beef,' 'shooting for turkeys' and other similar trials of skill. It is true, there each participator pays for the privilege or so called 'chance' of shooting for the prize, but there is no chance in the sense of the acts against gambling. These are trials of skill which the law has never discouraged, and not games of chance in any sense. Nor does the statute prohibit the social diversions in which the hostess offers prizes for the most successful player at cards or other games. In such cases, if there are games of chance, the players bet nothing. They lose nothing if unsuccessful and pay nothing for a chance of winning."

We think the principle announced by the Supreme Court of North Carolina is a sound legal principle as applied to the construction of the act of the Thirtieth Legislature.

You are therefore advised that the transaction mentioned in your letter is not any violation of said act.

Yours very truly,

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SUBSTITUTE SENATE BILL NO. 185—DISTRICT ATTORNEY.

Substitute Senate Bill No. 185, increasing compensation of district attorneys in district composed of four or more counties does not go into effect at time of passage, not having passed both Houses by a two-thirds vote.

AUSTIN, TEXAS, May 1, 1907.

*Hon. J. W. Stephens, Capitol.*

Dear Sir: I have your letter of this date relative to Substitute Senate Bill No. 185, which was passed by the Thirtieth Legislature at its regular session, and was approved by the Governor on April 29th, same being an act increasing the compensation to be paid by the State to district attorneys in districts composed of four or more counties.

You ask if said act is in force and effect at this time.

The certificates upon the enrolled bill, and the journals of the Senate and of the House of Representatives, show that this bill did not receive, in either House, a two-thirds vote of the members elected to such House, the vote in the Senate being, yeas 18, nays 4, and the vote in the House being, yeas 81, nays 15.

Section 39 of Article 3 of the Constitution of Texas, is as follows:

"No law passed by the Legislature, except the general appropriation act, shall take effect or go into force until ninety days after the 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 the members elected to each House, otherwise direct said vote to be taken by yeas and nays, and entered upon the journals."

I am, therefore, of the opinion that this act will not become effective

until ninety days after adjournment of the Regular Session of the Thirtieth Legislature, which occurred on April 12, 1907.

Respectfully,

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PURE FOOD LAW—DRUGGIST—PHYSICIAN'S  
PRESCRIPTIONS.

Provisions of second subdivision of Section 3 of act do not apply to prescriptions of physicians given in regular course of practice and filled either by themselves or druggists. Provisions do apply, however, to packages prepared and kept in stock for sale as a medicine.

AUSTIN, TEXAS, May 3, 1907.

*Hon. C. E. Gilmore, House of Representatives, Capitol.*

Dear Sir: We are in receipt of yours of the 26th ultimo asking our construction of the second subdivision of Section 3 of the pure food law passed at the regular session of the Thirtieth Legislature. You desire to know if this section applies to prescriptions of regularly practicing physicians, filled either by themselves or by druggists.

Section 3 of this act defines the term "misbranded" as applied to drugs. The second subdivision under consideration provides that the article shall be deemed *misbranded* "if the package fail to bear a statement on the label of the quantity or proportion of any alcohol, morphine, opium, cocaine, heroin, alpha or beta cocaine, chloroform, cannabis indica, chloral hydrate, or acetanalid, or any derivative or preparation of any such substances contained therein." This provision refers to a package, as does the first provision thereof, the language of which is that an article is misbranded "if the contents of the package as originally put up shall have been removed in whole or in part, and other contents shall have been placed in such package."

A package, within the meaning of this section, must be construed to be a bundle put up for commercial handling; that is, a thing in a form suitable for handling as an article of sale.

U. S. vs. Goldback, 25 Fed. Cases, 1342.

May vs. City of New Orleans, 51 La. Ann., 1064.

It does not mean packages other than those prepared for the purpose of being placed upon the market for sale. This construction is borne out, not only by the provisions of this particular section, but this is the intent of the Legislature, as gathered from the context of the act.

You are, therefore, advised that is the opinion of this department that the provisions of the second subdivision of Section 3 of the act do not apply to the current prescriptions of physicians, given in the regular course of practice and filled either by themselves or by druggists. The section would apply, however, to packages prepared and kept in stock for sale as a medicine, even though the prescription of a physician is made the basis of preparation of such packages.

Yours very truly,

## RAILROAD COMPANIES—C. O. D. SHIPMENTS.

Railroad companies accepting and transporting shipments designated as "shipper's order, notify" of intoxicating liquors are not subject to occupation tax imposed by Thirtieth Legislature.

AUSTIN, TEXAS, May, 4, 1907.

*Hon. Sam. C. Lowrey, County Attorney, LaGrange, Texas.*

Dear Sir: We are in receipt of yours of the 27th wherein you ask to be advised if railroad companies, under the act of the Thirtieth Legislature, commonly known as the "C. O. D. law," and the amendment thereto, are required to pay the occupation tax imposed thereunder for engaging in the business of delivering shipments of whisky, such as are commonly designated as "shipper's order, notify."

The provisions of the act imposing the occupation tax are as follows:

"Any person, firm or corporation doing business in this State shall, at each office or place kept, operated or maintained by such person, firm or corporation, at which intoxicating liquors legally deliverable are delivered upon the payment of the purchase price thereof, commonly designated as "shipments C. O. D.," pay annually for each office or place so kept an annual occupation tax of five thousand dollars."

The amendment of this act, approved and going into effect April 5, 1907, in so far as is material to this inquiry, is as follows:

"No person, firm or corporation shall be required to keep, operate and maintain any office at which intoxicating liquors are deliverable upon the payment of the purchase price therefor, nor shall any such person, firm or corporation be compelled to receive, transport or deliver any intoxicating liquors, the purchase price of which, or any part thereof, is to be paid said person, firm or corporation on delivery."

The business upon which the occupation tax is imposed is the keeping, operating and maintaining an office at which intoxicating liquors are delivered upon payment of the purchase money therefor. This description of the business taxed is contained both in the original act and in the amendment thereto.

The business sought to be prohibited by the imposition of the tax is defined by the Legislature as "commonly designated as shipments C. O. D." The amendment to the act provides that no person, firm or corporation shall be compelled to receive, transport or deliver any intoxicating liquors, the purchase price of which, or any part thereof, is to be paid said person, firm or corporation on delivery. This is the same business upon which the tax is imposed; the evident intent of the Legislature being to relieve the transportation companies of what has been considered heretofore as being a common law obligation by reason of having been so universally pursued, for a long period of time, of receiving, transporting and delivering intoxicating liquors C. O. D.

The tax being prohibitory as well as the act itself being penal, no person, firm or corporation can be brought within its terms unless the language is such as to clearly include the business in which they



are engaged. The business which they may, at their option, relinquish, and upon which the occupation tax is imposed, must come within the meaning of what is commonly designated as "shipments C. O. D." in order to come within the provisions of the law.

The initials "C. O. D." have a clearly defined judicial meaning. As expressed in common parlance, they mean "collect on delivery," and, when used, are a direction to the transportation company to collect the amount named from the consignee on the delivery of the goods to him.

American Express Company vs. Wettstein, 28 Ill. App., 96.

Collinder vs. Densmore, 14 Amer. Rep., 224; or, as expressed by another court, the abbreviation is a direction to deliver the goods upon payment of the charges due the seller for the price and the carrier for the carriage of the goods.

State vs. Intoxicating Liquors, 73 Maine, 278.

State vs. Oneal, 58 Vermont, 140.

Adams Express Company vs. McConnell, 27 Kansas, 238.

These initials have acquired such a fixed and determined meaning that the courts will take judicial notice of same.

State vs. Carl, 51 Amer. Rep., 565.

Sheffield Furnace Co. vs. Hull Coal & Coke Co., 101 Ala., 446.

"C. O. D. shipments," as that term is commonly designated, are carried almost exclusively, if not entirely so, by express companies, and these companies have advertised the pursuit of this method of business and engaged in same for such a length of time and so universally that some of the courts have held that it had become a part of their business as a common carrier under the common law. The object of the statute is to relieve them of this common law obligation. It was never intended, in my judgment, to impose the occupation tax upon railroad companies for accepting shipments commonly designated as "shipper's order, notify," or to relieve them of any obligation to accept such shipments. The character of this kind of a shipment is such as not to come within the meaning of the business taxed, or within the meaning of the business which a railroad company may relinquish at its option. These shipments are made in the following manner: A vendor ships merchandise by freight to the consignee, receives a bill of lading from the railroad company, and to the bill of lading attaches a draft. The draft with bill of lading attached is either endorsed to the bank at the place of shipment, or sent by the consignor to a bank at the place of residence of the consignee for collection. When the consignee is notified of the arrival of the shipment he goes to the bank, pays the draft, receives the bill of lading, presents same to the agent of the common carrier and receives the shipment. The railroad company has nothing to do with the collection of the draft, its duty being to deliver the shipment upon presentation of the bill of lading. The purchase money of the goods is not handled by the railroad company, either in the way of collecting same or returning same to the consignor. This is an entirely separate and independent transaction performed by the bank.

You are therefore advised that railroad companies accepting and transporting shipments commonly designated as "shipper's order,

notify" of intoxicating liquors are not subject to the occupation tax imposed under the act of the Thirtieth Legislature.

Suggest, however, that where these shipments are made into local option territory, it is, probable, under the decisions of the courts of this and other States, that the officer of the bank located in a local option territory who collects the drafts and transmits the money to the consignor would be guilty of a violation of the local option law.

Should this question be involved in your inquiry, I direct your attention to the following cases:

Seley et al. vs. Williams, 50 S. W. Rep., 399.

Railway Company vs. Brown, 66 S. W. Rep., 343.

Railway Company vs. Johnson, 50 American State Rep., 540.

Wayland vs. Railway, 9 American State Rep., 512.

Yours truly,

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PUBLIC BUILDINGS—WHAT CONSTITUTES SAME—DISINFECTATION OF.

Public buildings include all buildings belonging to the State or any county or incorporated city or town, devoted to governmental purposes; also all private buildings devoted to uses of a public character, as hospitals, school buildings, etc.

AUSTIN, TEXAS, May 6, 1907.

*William M. Brumby, M. D., State Health Officer, Capitol.*

Dear Sir: We have your letter of recent date in which you say:

"I intend issuing a circular relating to the disinfection of public buildings in the State, but before doing so, would like to have an opinion from you upon the construction to be placed on Section 1, S. B. No. 95, approved April 6, 1903, as to what constitutes a public building."

Said Section 1 provides:

"That it shall be the duty of the State Health Officer of Texas, and he is hereby authorized and empowered to prepare rules and regulations governing the proper disinfection and sanitation of public buildings and of railway coaches and sleeping cars operated in the State of Texas."

Without undertaking to give here an exhaustive enumeration of the buildings embraced by this act, I will say that the words "public buildings," as therein used, include:

(1) All buildings owned by the State, or any county or incorporated city or town, and devoted to governmental purposes; such as the State Capitol, court houses, city halls, jails, penitentiaries, eleemosynary institutions, etc.

(2) All buildings, whether so owned, or owned privately, which are devoted to uses of a public character, in contradistinction to uses which are of a private nature: such as hospitals, school buildings, lecture halls, railroad depots, club rooms, opera houses, rooms for the exhibition of moving pictures, office buildings, hotels, restaurants, etc.

The enforcement of this statute involves the exercise of the police power of the State, in protection and conservation of the public health, a power which has practically no limitation, save that of reasonableness, to be determined and declared by the courts upon the facts of particular cases as they arise, rather than by any invariable or general rule. The courts usually construe such statutes very liberally in order to give effect to the humane purposes of the law, and to enable the officers who are charged with the duty of its enforcement to effectively carry out its provisions.

Truly yours,

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INDUSTRIAL COLLEGE OF ARTS—BOARD OF REGENTS OF  
—DORMITORY—CONSTRUCTION OF

Contract may be entered into and construction performed prior to availability of appropriation for purpose.

AUSTIN, TEXAS, May 6, 1907.

*Mr. Clarence Ousley, President Board of Regents, College of Industrial Arts, Fort Worth, Texas.*

Dear Sir: I have your letter of recent date propounding certain questions in connection with an item of the general appropriation act passed by the Thirtieth Legislature, which reads as follows:

“For dormitory building (complete), to be named Stoddard Hall, including lighting and heating plant to supply main building and dormitory, provided said dormitory shall only be used to accommodate girls, resident of Texas, \$50,000.”

Your questions are as follows:

“First. Would it be within our discretion to erect two buildings instead of one, both dormitories, and both being connected by colonnades or covered walks? or could we make two separate buildings? or could we make two buildings with a common dining room? It is the desire of the Board for reasons of discipline, health and social contact, to make two buildings if we may be permitted to do so under the terms of the law. The two buildings would be under one administration, and would be entirely one institution excepting in the matter of physical construction.

“Second. May we proceed upon the approval of this act by the Governor, and let the contract or contracts, notwithstanding the fact that the appropriation is not available until September 1st? Of course, in letting the contract now and having the building constructed at once, the contractor would be compelled to wait until September 1st for his compensation. We greatly desire to begin the construction at once, in order to have the building ready for the next fall term.”

In reply, I beg to say:

First. I am of the opinion that under the terms of this appropriation act your Board of Regents will not be authorized to construct two buildings, the evident purpose of the Legislature being that but one dormitory building should be erected and paid for out

of this appropriation. The fact that the two buildings might have a common dining room would be immaterial and would not justify your Board in the erection of two dormitory buildings, nor would such action by the Board be justified by the fact that the two buildings would be under one administration and would be one institution except in the matter of physical construction.

However, while it will be necessary that the proposed dormitory building shall be literally and in good faith one, in actual physical construction, I think there is no good reason why the Board of Regents may not, subject to that limitation only, adopt such design for the building as they may deem best adapted to the requirements and needs of the institution; and I think that both the letter and spirit of the appropriation act would be observed should the Board see fit to adopt plans calling for one building with two wings substantially and permanently connected with each other in such manner as to make the complete building a unit.

Second. I see no legal objection to letting the contract whenever the Board of Regents may desire to do so; provided such contract shall contain a provision to the effect that nothing is to be paid thereunder by the State of Texas before the 1st day of September, 1907, the day upon which the above mentioned appropriation will first become available.

Press of work in this office has prevented an earlier reply.

At your suggestion, I am sending a carbon copy hereof to President Cree T. Work, Denton, Texas.

Yours truly,

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NORTH TEXAS HOSPITAL FOR INSANE—EPILEPTIC COLONY.

Superintendent insane asylum justified under law in refusing to receive at said institution persons afflicted with epilepsy, there being a State institution for the taking care of persons so afflicted.

AUSTIN, TEXAS, May 7, 1907.

*Charles L. Gregory, M. D., Superintendent North Texas Hospital for the Insane, Terrell, Texas.*

Dear Sir: I have your letter of 30th ultimo, in which you say: "Since the completion of additional room at this institution for 500 patients about one year ago, we have admitted all white insane persons applying indiscriminately until quite recently and of course have admitted many epileptics among them. However, we now have but a limited amount of room left and every mail brings from two to five applications for admission of the insane proper; many of these are of the acute or supposedly curable class to which the law gives preference, and it is my desire to provide for these as fast as they apply as there is some chance of either restoring or improving them. But as to the epileptics, they are considered as incurable and chronic cases; and, should we fill up the institution with them, we could not take the urgent, curable class of cases.

“With the foregoing statement of facts and conditions, I wish to know if I can justly and legally decline to receive incurable epileptics, referring them to the Epileptic Colony provided for them.

“The county judges or the clerks in making up the papers and evidence, are many times apt to leave out facts showing the applicant to be epileptic, and from the transcript we receive we can not always tell whether or not the patient is an epileptic until they arrive here.

“Many of the judges know we do not wish to receive epileptics, and it appears to me as if they follow this course in order to get them here when they think we must or will admit them.

“Of course, this places me somewhat at a disadvantage and I wish to know whether or not we are obliged to receive such cases and under these conditions. I invariably state when ordering in patients that if epileptic we can not admit them; still they send them many times.”

In reply to your inquiry, I beg to say:

From the act of the Twenty-sixth Legislature, approved February 9, 1899, providing for the erection and building of a branch asylum for the cure and treatment of the Epileptic Insane of this State, as amended by Chapter 11 of the General Laws of the Twenty-seventh Legislature, approved February 21, 1901, I quote the following provisions, viz.:

“All persons afflicted with epilepsy who shall have been bona fide residents of the State for one year next preceding the filing of his (their) application with the county judge, as herein provided, shall be admitted into the Epileptic Colony under the provisions of this act, with the following exceptions:

- “1. Idiots and imbeciles who are afflicted with epilepsy.
- “2. Those who are infirm and bedridden, or suffering from contagious or infectious disease.

“By the term ‘idiot’ and ‘imbecile’ are meant children or persons who by arrest of development before or soon after birth have but little or no mind.

“All epileptics with the above exceptions, confined in the three insane asylums when the Epileptic Colony is ready for occupancy shall at once be transferred to the colony. When any person is hereafter admitted to any of the insane asylums and it shall be found that such person is an epileptic, he shall at once be transferred to the Epileptic Colony \* \* \*

“The object of the colony being to secure the humane, scientific and economical treatment of epileptics, to fulfill this design it shall be the duty of the Superintendent and Board of Managers of the colony to prepare and adopt by-laws, rules and regulations for the government of the colony, prescribing the duty of all officers and employees and for enforcing the necessary discipline and restraint of all patients. \* \* \*”

“Whereas, there are about two hundred epileptic insane in the several asylums of the State who are in great need of separation from the other insane at the asylums; and, whereas, there are also about two hundred epileptic insane throughout the State who are in great need of care and treatment, and can not be admitted into

the several asylums of the State on account of the crowded condition of said asylums, therefore, an emergency and an imperative public necessity exists which makes it necessary that the constitutional rule requiring bills to be read on three several days be suspended, and that this act take effect and be in force from and after its passage, and it is so enacted."

The bill carrying the foregoing emergency clause passed the Senate and also the House by a unanimous vote, and became a law upon the day of its approval by the Governor.

From the foregoing, it is apparent that it was the purpose of the Legislature to make provision for the taking care at the Epileptic Colony at Abilene, of all the epileptic insane of the State, with the exceptions above noted, and that, at the earliest practicable moment.

I am of the opinion that, under the circumstances stated by you, you are pursuing the correct and legal course in declining to receive epileptics into the North Texas Hospital for the Insane; and I am of the opinion that it is your duty, as superintendent of that institution, to decline to retain there patients which you received without knowing they are epileptics, but whom you subsequently find to be afflicted with epilepsy.

The evident policy of the law is to require that with the exceptions noted, all persons afflicted with epilepsy, who have been bona fide residents of this State for one year next preceding the filing of the application with the county judge, shall be admitted into the Epileptic Colony, and that they shall not henceforth be admitted into or retained in any other asylum or hospital for the insane, within this State.

Truly yours,

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#### LIFE INSURANCE COMPANIES—ACCIDENT—HEALTH.

Life insurance company, doing also accident, health, etc., insurance, may be permitted to withdraw from State as to its life insurance business, and continue to do accident, health and loan business; provided said company does not maintain agencies in this State for purpose of collecting premiums, etc.

AUSTIN, TEXAS, May 9, 1907.

*Hon. R. T. Milner, Commissioner of Insurance, Capitol.*

Dear Sir: We are in receipt of yours relative to the life insurance companies which, by virtue of their charter and license, are authorized to do, and do, in addition to life insurance business, what is known as accident insurance, health insurance business and loan business.

You desire to know whether or not these companies which transact these several kinds of business, in addition to the life insurance business, will be permitted to withdraw as to the life insurance business alone, and continue to transact in this State the other branches of insurance mentioned, without coming within the provisions of what is known as the "Robertson bill"; and also if these companies should withdraw from the State, would they be permitted to main-

tain agencies in the State for the purpose of collecting premiums upon policies heretofore written, without coming within the provisions of this bill?

The provisions of the bill, in so far as they affect the question under consideration, are "that all stock or mutual companies incorporated under the laws of this State, or any other State of the United States, or any foreign country, for the purpose of doing a life insurance business, *and engaged in doing a life insurance business in the State of Texas, shall*, as a condition of their right to do business in this State invest and keep invested in Texas securities and in Texas real estate, as hereinafter provided."

You will note that the provisions of this law do not affect companies which are merely incorporated as life insurance companies, but in addition to being incorporated as such, the company must be engaged in doing a life insurance business in the State of Texas. This law does not become effective until ninety days after adjournment of the regular session of the present Legislature, and no insurance company will come within its provisions which does not engage in doing a life insurance business in the State of Texas after the law becomes effective.

The decision of the question involved depends upon what is meant by the term "engaged in doing a life insurance business in the State of Texas," and in arriving at the intent of the Legislature the purpose of the enactment of the Robertson bill must be sought. It is very evident that the intent of this act is to protect not merely the public generally, who have not, but may, become policy holders, but also those who have already become policy holders.

It is made a condition of the right of these companies to do business in this State, that they shall invest and keep invested in the securities prescribed, a certain per cent of the amount of legal reserve heretofore, or hereafter set apart and apportioned to policies of life insurance written on the lives of citizens of this State.

Section 5 provides that this investment shall be made of the current accumulated reserve, at least every six months; that is, each company shall, on or before the 30th day of June, and the 31st day of December of each year, invest 75 per cent of the reserve accumulated for the preceding six months, and shall, in addition thereto, invest each six months 25 per cent of 75 per cent of the accumulated reserve upon policies heretofore written upon the lives of citizens of this State until the full amount of 75 per cent of such reserve has been invested. In other words, under the provisions of the act, all stock or mutual life insurance companies will be required, on the 1st day of January, 1908, to have invested in the securities mentioned in this act, the full amount of 75 per cent of the accumulated reserve belonging to or apportioned to policies upon the lives of citizens of Texas for the preceding six months. In addition thereto, these companies are required to have invested by the 1st day of January, 1908, 25 per cent of the 75 per cent of the reserve accumulated prior to June 30, 1907, upon policies on the lives of citizens of this State; and thereafter, on the 30th day of June, 1909, these companies are required to have invested the full 75 per cent of the reserve accumulated for the preceding six months, and in addition thereto an

additional 25 per cent of the 75 per cent of reserve accumulated prior to June 30, 1907, upon policies on the lives of citizens of this State. Again, by the 1st day of January, 1909, these companies are required to have invested the full 75 per cent of the reserve accumulated for the preceding six months, and in addition thereto the remaining 25 per cent of the 75 per cent of reserve accumulated prior to June 30, 1907, upon policies on the lives of citizens of Texas. Thereafter, these companies are required to invest and keep invested the accumulated reserve and the full 75 per cent reserve for each preceding six months.

It is thus clear that the intention of the Legislature was not only to require the investment of reserve which might accumulate in the future upon policies to be written or which have already been written upon the lives of citizens of Texas, but to require the investment of such accumulated reserve upon all policies which have heretofore been written upon the lives of the citizens of this State, and keep same invested.

A construction of the act which would authorize a life insurance company, by merely ceasing in the future to solicit new policies, to avoid the investment of the accumulated reserve upon policies which have heretofore been written and upon which the company continues to collect premiums, maintaining agencies in the State for that purpose, would destroy the effect of the law in so far as any protection to those who have already become policy holders is concerned. Therefore, it is our opinion, that although a life insurance company may issue no new policies after this law, becomes effective, and may make no new assurances, still, if it has policies outstanding upon which it continues to receive premiums and pay losses, maintaining agencies in the State for that purpose, it would be engaged in doing a life insurance business in Texas, within the meaning of this law.

Life insurance companies can not exempt themselves from the provisions of this act on the ground that they are not doing business in Texas, because they are only collecting premiums and paying losses on old policies and are issuing no new policies. The courts have held that this is "doing business in the State," within the meaning of statutes regulating life insurance companies.

Price vs. St. Louis Life Ins. Co., 3 Mo. App., 262.

Smyth vs. International Life Ins. Co., 35 Howard Prac. (N. Y.), 126.

This principle was announced by the Supreme Court of the United States in the case of Mutual Life Insurance Company vs. Spratley, 172 U. S., 611, in the following language:

"It can not be said with truth, as we think, that an insurance company does no business within a State unless it have agents therein who are continuously seeking new risks and it is continuing to issue new policies upon such risks. Having succeeded in taking risks in the State through a number of years, it can not be said to cease doing business therein when it ceases to obtain or ask for new risks or to issue new policies, while at the same time its old policies continue in force and the premiums thereon are continuously paid by the policy holders to an agent residing in another



State, and who was once the agent in the State where the policy holders resided. This action on the part of the company constitutes doing business within the State, so far as is necessary, within the meaning of the law upon this subject."

The decisions cited above are based upon statutes, the peculiar construction of which, we think should not be applied in all respects to the matter under consideration here. As was said by the Supreme Court of Tennessee, in the case of *State vs. Conn. Mutual Life Insurance Co.*, 61 S. W. Rep., 77: "The term or phrase 'doing business' does not have and can not have a uniform and unvarying meaning, but is governed largely by the connection, in view of the object of the statute, and these statutes are governed largely by the objects intended to be affected by them."

The statute of this State defines what is meant by "doing business in this State" by an insurance company as to make the company subject to State, county and municipal taxes and licenses, and the agent thereof personally liable for such taxes and licenses, regardless of whether the company which he represents has a permit to do business in Texas or not. This definition is contained in Article 3094 of the Revised Statutes which was Section 3 of the Act of July 9, 1879, and reads as follows:

"Whenever any person shall do or perform within this State, any of the acts mentioned in Article 3093, for or on behalf of any insurance company therein referred to, such company shall be held to be doing business in the State, and shall be subject to the same taxes, State, county and municipal, as insurance companies that have been legally qualified and admitted to do business in this State, by agents or otherwise, are subject; the same to be assessed and collected as taxes are assessed and collected against such companies, and such persons so doing or performing any of such acts or things shall be personally liable for such taxes."

The acts mentioned in Article 3093, the doing of which for or on behalf of any insurance company holds such company to be "doing business in the State," are the following:

1. Soliciting insurance on behalf of an insurance company.
2. Taking or transmitting, other than for himself, any application for insurance, or any policy of insurance to or from an insurance company.
3. Advertising, or otherwise giving notice that he will receive or transmit such application, or receive or deliver a policy of insurance for such company.
4. Examining or inspecting any risk.
5. *Receiving or collecting, or transmitting any premium of insurance.*
6. Making or forwarding any diagram of any building or buildings.
7. Doing or performing any other act or thing in the making or consummating of any contract of insurance for or with any insurance company other than for himself.
8. Examining into, adjusting or aiding in adjusting any loss for or on behalf of any insurance company.

It will be noticed that these acts are placed disjunctively and

therefore the doing of either or any of them by any person for or on behalf of any insurance company, would hold the company to be "doing business in the State." If any person for or on behalf of any insurance company should receive or collect, or transmit any premium of insurance, regardless of whether the receipt, or collection, or transmission of such premium was under an original contract of insurance, of the renewal of a policy from year to year through the payment of annual premiums, such company would be considered as "doing business in the State" so as to become not only liable as such to all taxes and licenses and other regulations, but to make its agent liable individually for such taxes, and in addition thereto guilty of an offense if the company which he represents has not a permit to do business in Texas.

The provisions of this statute should be applied in determining whether or not an insurance company comes within the provisions of the Robertson bill.

The principle announced in the case of *State vs. Conn. Mutual Life Insurance Co.* (supra), is the correct one, in our judgment, to be applied in determining whether or not an insurance company comes within the provisions of this bill. This case involved the question of liability for a privilege tax of 2 1-2 per cent of gross premium receipts. The facts were that prior to July, 1894, the Connecticut Mutual Life Insurance Company prosecuted its business of life insurance in the State of Tennessee through resident agents and local and general agencies. At that time it withdrew from the State so far as soliciting or attempting to do any new business was concerned, leaving, however, quite a large number of policies in force. It kept alive its existing policies by receiving premiums thereon as before, except that the money was sent by mail or otherwise, to its agents or agencies outside the State, and not paid to the company in the State. The question involved was whether or not the company was "doing business in Tennessee." The Supreme Court of Tennessee held that the company was not liable for the privilege tax, and in so holding used this language:

"We may admit that the receipt of premiums is doing business; but, when such collection is made in a foreign State, it does not amount to doing business in Tennessee, but in such foreign State. When the premium is paid and the renewal made and completed in a foreign State, we are unable to see how any business is done in Tennessee. Neither the policy is renewed or continued, nor is the money paid in Tennessee, but both are in the foreign State. There is nothing done in Tennessee, no new business done or solicited; no agent there and no agency, no contract made, no money paid, no receipt for renewals given, and no business done of any character. The postal and express authorities are not the agents of the company, but of the insured, as the company's policies stipulate that the premiums shall be paid at the home or foreign office. It is said that this view will operate hard upon domestic companies and such foreign companies as continue to issue policies and do any active business in the State. In other words, that a company may come into the State and write a large number of risks, then withdraw, and collect its premiums in another State and thus escape taxation while

it receives the protection of the laws of the State. It is true, such condition of affairs might arise, but we can not decide the question before us upon any consideration of expediency or public policy, but upon a proper construction and application of the law as we find it. We are of the opinion that this company, under the facts, is not liable for the tax."

It will be noted that this decision was rendered after the decision in the case of Insurance Co. vs. Spratley, cited above, and the Tennessee Supreme Court discusses the effect and application of the decision of the Supreme Court of the United States.

You are advised therefore that the companies in question incorporated as life, accident and health insurance companies, and having permits to do business as to each of these classes of insurance, in Texas, may continue to engage in the business of accident insurance or health insurance without coming within the provisions of the Robertson bill; but although they may cease to solicit new contracts of life insurance, and cease to issue new policies of life insurance, still, they would be required, if they continue to maintain agencies in this State and through such agencies collect premiums upon life insurance policies heretofore written, to invest the reserve heretofore accumulated upon these policies, and in addition thereto, to invest the reserve which may hereafter accumulate each six months upon such policies, and comply in all other respects with the provisions of the Robertson bill. If, however, they do not maintain agencies in Texas, through which these premiums are collected, they would not come within the provisions of the Robertson bill.

Hazeltine vs. Mississippi Valley Ins. Co., 55 Fed. Rep., 743.

Eastern Building & Loan Association vs. Bedford, 88 Fed. Rep., 7.

Mutual Reserve Fund Life Association vs. Boyer, 50 L. R. A., 538.

Yours very respectfully,

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#### SUPERINTENDENT OF BANKING—BIENNIAL REPORT OF.

Cost of printing to be paid out of appropriation for public printing, under the provisions of R. S., Article 4230.

AUSTIN, TEXAS, May 13, 1907.

*Hon. J. W. Stephens, Comptroller of Public Accounts, Capitol.*

Sir: We are in receipt of your letter of this date in which you say:

"I herewith enclose you account in favor of Von Boeckman-Jones Company for \$288.87, and would thank you to advise this department if the same should be paid out of the State Bank Examination Fund, or out of General Revenue."

The bill to which you refer was rendered to the Department of State and is for printing 1100 copies of the biennial report of the Superintendent of Banking of the State of Texas, of date December 31, 1906, which was made pursuant to the provisions of Section 39, Chapter 10, General Laws, First Called Session, Twenty-ninth Legislature.

Section 72 of the above mentioned act makes it the duty of the Superintendent of Banking to make such report to the Legislature on or before the 1st day of February during its session.

Revised Statutes, Article 4230 contains the following provisions:

“There shall be printed, under the supervision of the Secretary of State, eleven hundred copies of the annual reports of the Comptroller of Public Accounts, Treasurer, Commissioner of the General Land Office, Superintendent of the Penitentiary, Superintendent of the Lunatic Asylum, of the Blind, Deaf and Dumb, and the reports of all other officers who are required to make to the Governor or the Legislature,” etc.

Section 39 of the act first above mentioned, after making provision for the payment by banks of certain examination fees, proceeds thus: “Permanent surpluses shall be reckoned in estimating these fees, the same as capital stock, the aggregate sum collected from the banks of the State, being reckoned upon a basis to cover the entire expense of the examination of banks, traveling expenses of the superintendent and examiners, the reports required by this act, and a sufficient time for the office work, required by the examiner to prepare necessary reports to the superintendent, all sums collected from banks for the purpose of this act to be paid directly into the State Treasury and credited to the State Bank Examination Fund, which is hereby created. Payment for salary to the examiners, and for other expenses under this act, to be paid upon the certificate of the superintendent by warrant of the Comptroller upon the State Treasurer.” Standing by themselves alone the provisions of said Section 39 would seem broad enough to authorize the payment of this printing account out of the State Banking Examination fund; but when the above quoted provisions of Section 39 are considered with said Article 4230, it would seem that said account should be paid like accounts for printing other reports of heads of departments and out of the general revenue upon approval by the State Board of Public Printing.

It is true that Section 39 in declaring the items of expenses to be paid out of said State Bank Examination fund mentions “the reports required by this act,” and, as we have seen, the reports of the Superintendent to the Legislature, for the printing of which this bill was rendered, is in a literal sense one of the reports required by this act; but I am of the opinion the words “the reports required by this act” should be construed to mean only such reports other than that of the Superintendent to the Legislature and that the printing of reports of the latter class should be held to fall under the provisions of said Revised Statutes, Article 4230, which specifically embraces them.

The account is herewith returned.

Respectfully,

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SHELBY COUNTY SPECIAL ROAD LAW—NATIONAL  
GUARDS—EXEMPTION FROM ROAD DUTY.

Special road law for Shelby County does not exempt members of National guard from road duty.

Statutory privileges and exemptions not a vested right, but is subject to legislative action.

AUSTIN, TEXAS, May 15, 1907.

*Hon. J. O. Newton, Adjutant General, Building.*

Dear Sir: We are in receipt of yours of the 15th in which you ask if the special road law for Shelby County, passed at the Regular Session of the Thirtieth Legislature, can repeal and repeals the exemption from road duty granted under Sections 83 and 85, Chapter 104, Acts of the Regular Session of the Twenty-ninth Legislature, to an organized company of the Texas National Guard, located in Shelby County—this company having complied with the provisions of the General Law before the enactment of the special law referred to.

You are advised that the exemption granted under Chapter 104, Acts of the Twenty-ninth Legislature, is merely a statutory privilege, in which the members of the Texas National Guard have no vested right. This character of an exemption from public service is merely a personal privilege and gratuity, which may be withdrawn at any time at the pleasure of the Legislature. The principle underlying these exemptions is very clearly stated by Judge Cooley in his work on Constitutional Limitations, Chapter 11, p. 546, as follows:

“A citizen has no vested right in statutory privileges and exemptions. Among these may be mentioned—exemptions from the performance of public duties upon juries, or in the militia, and the like; exemptions of property of person from assessment for the purpose of taxation; exemptions of property from being seized on attachment, or execution, or for the payment of taxes; exemption from highway labor and the like. All these rest upon reasons of public policy and the laws are changed as the varying circumstances seem to require.”

The exemption of the members of the Texas National Guard from road duty and jury service rests upon the same reasons of public policy as does the exemption of members of fire departments and exemptions of like character from such service. Such exemptions are granted to particular persons or classes purely on grounds of public policy, and are always subject to legislative regulation or repeal, and when the law granting it is repealed, the right of exemption ceases, even in favor of those persons, who, by the performance of specified services, have earned the exemption under its provisions. This legal principle is well established by the authorities, among which I cite the following:

Dunlap vs. The State, 76 Ala., 460.

Ex Parte Rust, 43 Ga., 209.

Appeal of Scranton, 74 Ill., 161.

Bragg vs. The State, 78 Ill., 328.

Beamish vs. The State, 65 Tenn., 530.

Ex Parte House, 36 Texas, 83.

The special road law of Shelby County, Section 28, provides that every male person of a sound mind and not disabled who is over 21 years of age and under 45 years of age, except ministers of the gospel in the actual discharge of their ministerial duty, a resident of the county, shall be subject to road service.” This is in direct conflict with the Act of the Twenty-ninth Legislature, exempting from

road duty members of the Texas National Guard. The exemption contained in the Act of the Twenty-ninth Legislature can be revoked at any time, at the pleasure of the Legislature, either in the enactment of a general law, or in the passage of a special road law for a particular county in the State. The Legislature has exercised this authority in the enactment of a special road law for Shelby County, and you are advised that notwithstanding the individual members of the company had complied with the provisions of the General Law before the enactment of the special law referred to, they would not be exempt from road duty in Shelby County.

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#### NOTARIES PUBLIC—MEMBERS OF THE LEGISLATURE.

Member of Legislature can not, under Article 3, Section 18 of Constitution, hold office of notary public.

AUSTIN, TEXAS, May 17, 1907.

*Hon. T. J. Bowles, Nevada, Texas.*

Dear Sir: I am in receipt of yours of 15th in which you ask if a member of the Legislature can be appointed notary public during his term of office as a member of that body.

While Section 4, Article 16 of the Constitution provides that one person may at the same time hold the office of notary public and any other office, there is another provision of the Constitution, being Section 18, Article 3, which renders a member of the Legislature ineligible "to any office or place the appointment of which may be made in whole or in part by either branch of the Legislature."

The provision of the Constitution relating to the appointment of notaries public is as follows:

Article 4, Section 26: "The Governor, by and with the advice and consent of two-thirds of the Senate shall appoint a convenient number of notaries public for each county, who shall perform such duties as now are or may be prescribed by law."

Under these provisions of the Constitution, the right of a member of the Legislature to hold the office of notary public is in nowise determinable by Section 40 of Article 16 of the Constitution. A man could hold the office of notary public and the office of a member of the Legislature at one and the same time if it were not for the provisions of Section 18, Article 3. This provision of the Constitution renders a member of the Legislature ineligible to the position of notary public, or to any other position where the Senate has to confirm the appointment of such officer.

If it were not necessary that the appointment of a notary public be confirmed by the Senate, unquestionably, under Article 16, Section 40 of the Constitution, and the decision of the Supreme Court in the case of *Gaal vs. Townsend*, 14 S. W. Rep., 366, a member of the Legislature could be a notary public, but since the appointment of a notary public is made in part by a branch of the Legislature, a member of either House of that body is ineligible to hold the office of notary public.

Yours truly,

## STOCK LAW—SUBDIVISION OF COUNTY.

Petition for election should be filed before beginning of term of commissioners court. When a subdivision adopts stock law, no part of such subdivision entitled to another election within two years.

AUSTIN, TEXAS, May 17, 1907.

*Hon. J. B. Randolph, County Attorney, Junction, Texas.*

Dear Sir: In your letter of the 15th inst., you ask the following questions:

"Can a petition on a stock law election carve any territory out of the county that they might want, and call it a subdivision of the county? In other words, what is a subdivision of a county with reference to the stock law?"

"If three justice precincts are joined in an election and the stock law carries, can one of these precincts get another election as a separate subdivision in less than two years?"

"Is it necessary for a petition for stock law to be filed before the court meets in order that that court may act on the petition?"

To which questions I reply as follows:

1. Section 22 of Article 16 of the Constitution of the State reads as follows:

"The Legislature shall have the power to pass such fence laws applicable to any subdivision of the State or counties as may be needed to meet the wants of the people."

Section 23: "The Legislature may pass laws for the regulation of live stock, and the protection of stock raisers in the stock raising portion of the State, and exempt from the operation of such laws other portions, sections, or counties; and shall have the power to pass general and special laws for the inspection of cattle, stock and hides, and for the regulation of brands; provided, that any local law thus passed shall be submitted to the freeholders of the section to be affected thereby and approved by them, before it shall go into effect.

Revised Statutes, Article 4978 reads as follows:

"Upon the written petition of fifty free holders of any county, or upon the petition of twenty free holders of any subdivision of the county, the commissioners court of such county shall order an election to be held in said county or subdivision, on some day named in the order, for the purpose of enabling the free holders of such county or subdivision to determine whether hogs, sheep and goats shall be permitted to run at large in such county or subdivision."

This provision of the statute was amended by the acts of the Twenty-ninth Legislature, page 139, to include horses, mules, jacks, jennets, and cattle.

It, therefore, occurs to me that the people of any county or precinct of any county, or any subdivision of a county, have the right to petition the commissioners court, and obtain therefrom, an election to determine whether or not the stock referred to in the statute shall be permitted to run at large, and that such citizens have a right to designate the particular subdivision in which an election is desired.

2. If three justice precincts are joined in an election, and the stock law carries, I am of the opinion that one of such precincts

would not have the right to petition the commissioners court, and obtain therefrom an order for an election within two years after the preceding election, and my conclusion is based upon the latter part of the Acts of the Twenty-ninth Legislature, page 139, which reads as follows:

“Upon the written petition of two hundred free holders of any of the above named counties, or upon the written petition of fifty free holders of any subdivision of the above named counties, if the law be in force in that subdivision only, the commissioners court shall be authorized and required to order an election on the date therein named, to determine whether or not said law be repealed; provided, that such petition be not filed within less than two years from the date this law goes into effect.”

It occurs to me to be the clear intent of the law that when a subdivision of a county has voted and carried a stock election, that no part of such subdivision is entitled to be granted another election within two years following the election, at which the same was adopted it appearing to be the intention of the Legislature that when such local option has been adopted in any county or subdivision of such county, that the same shall not be repealed within two years, and it is my opinion, under the facts stated in your question, that the commissioners court would not be authorized to order another election for any part of the subdivision of a county, which had adopted the local option stock law at a previous election until the expiration of two years from such previous election.

3. In order for the commissioners court to legally act upon a petition for a local option stock election, it is necessary that such petition be filed before the beginning of the term, at which it is expected to represent such petition, and if the petition should not be presented until the date the court opens, or at any time during the term, it would not be proper or legal for the commissioners court to act upon such petition during that particular term.

Barlow vs. State, 80 S. W. Rep., 375:

Cox vs. State, 88 S. W. Rep., 812.

Robertson vs. State, 70 S. W. Rep., 542.

Yours truly,

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INSURANCE LAW (ROBERTSON BILL)—INSURANCE COMPANIES—INVESTMENTS AND DEPOSITS—REPORTS.

Said act will become a law prior to expiration of thirty days after 30th day of June, 1907. Reports prescribed by said act must be made for year 1907, and within thirty days after June 30, 1907, and semi-annually thereafter within thirty days after 30th day of June and 31st day of December.

AUSTIN, TEXAS, May 20, 1907.

*Hon. R. T. Milner, Commissioner of Insurance, Capitol.*

Sir: I have received and carefully considered your letter of recent date concerning House Bill No. 112, commonly known as the “Robertson bill,” which was recently passed by the Thirtieth Legislature of Texas.



You ask, in substance, when said act will become a law, and when the reports and the investments and deposits thereby required must be made.

My conclusions upon the questions raised by you are as follows:

First. Section 39 of Article 3 of the Constitution of Texas provides:

“No law passed by the Legislature, except the general appropriation act, shall take effect or go into force until ninety days after the 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 the members elected to each House, otherwise direct; said vote to be taken by yeas and nays, and entered upon the journals.”

Under the foregoing constitutional provisions ninety full days must elapse, in such cases, between the adjournment of the Legislature and the taking effect of the law; hence, this act will become a law on July 12, 1907. *Halbert vs. San Saba Springs Land & Livestock Association*, 89 Texas, 231.

Second. Section 7 of said act is as follows:

“That each insurance company doing business in this State and coming within the provisions of this act, shall, within thirty days after the thirtieth day of June, and thirty-first day of December of each year, file with the Commissioner of Insurance, Statistics and History of this State, a statement duly executed and sworn to by either the president or secretary of the company, showing the entire amount of the reserve on its entire business in force in this State on June 30th, and December 31st, respectively, and an itemized schedule of its investments in Texas property and Texas securities, which shall also be sworn to.”

As we have already seen, this act will become a law prior to the expiration of thirty days after the Thirtieth day of June, 1907.

I am, therefore, of the opinion that the reports prescribed in said Section 7 must be made this year, and within thirty days after June 30, 1907, and semi-annually thereafter within thirty days after the 30th day of June, and 31st day of December, respectively, of each year.

Third. Sections 3, 4, 5 and 6 of said act are as follows:

“Section 3. That all bonds, stocks, mortgages and securities (except policies upon which loans may be made) in which the seventy-five per cent of the insurance reserve belonging, or apportioned to policies upon the lives of citizens of Texas, shall be invested as above provided, shall be by the company so investing deposited in the vaults of the Treasury of the State of Texas or with any national bank in this State designated and appointed by the Comptroller of the Currency as a depository for moneys and funds belonging to the United States, or with any State bank or trust company or national bank in this State authorized and appointed by law as a depository for State moneys and funds, and the president of any depository in which any such securities are deposited shall forward to the State Treasurer of this State quarterly, or whenever demanded by him, a statement of the character and amount of the securities so deposited and such securities shall at all times be subject to the payment of any

money that may become due on any of such policies of insurance: provided, that no securities when deposited under the provisions of this act, shall be withdrawn without authority, in writing, from the State Treasurer.

“Section 4. That insurance companies which have loaned, or which may hereafter loan, to Texas policy holders on the sole security of their policies, more than twenty-five per cent of the entire reserve, shall only be required to invest in Texas securities the remainder of said seventy-five per cent of the reserve.

“Section 5. That the investment and the deposit provided for in this act shall be made of the reserve, on account of current business at least every six months, that is to say, each company shall on or before the thirtieth day of June and the thirty-first day of December of each year invest and deposit the amount of the reserve required by this act on account of the accumulated reserve for the preceding six months. And as to the part of the accumulated reserve upon the policies heretofore written upon the lives of citizens of this State and required by this act to be invested and deposited in this State, each company shall have until the first day of January, 1908, in which to invest and deposit twenty-five per cent of the whole amount of such accumulated reserve required by this act to be so invested and deposited, and thereafter each company shall invest and deposit twenty-five per cent of such part of the said accumulated reserve every six months until the whole amount of the reserve required by this act has been so invested and deposited.

“Section 6. That insurance companies organized and having their domicile in States of this Union wherein at this time, by the law of such home State, such company or companies, are required to deposit with officers within the home State securities covering the entire reserve upon the business transacted in that State and all other States, in such manner to secure equally all policy holders of such company, shall have two years after this act takes effect in which to comply with the provisions of Section 3 of this act. Provided, that the fact of such deposit in the home State shall be shown to the Commissioner of Insurance, Statistics, and History of the State by a certificate under the hand and seal of the proper officer of the home State of such company or companies.”

I am, therefore, of the opinion that the investments and deposits required by said act must be made as hereinafter stated, viz.:

(a) No such investment or deposit need be made on or before the 30th day of June, 1907, because the act will not have become a law upon that date; but there must be invested and deposited on or before the 31st day of December, 1907, the amount of reserve required by this act on account of the accumulated reserve since said act took effect, the same being a little less than six months; the portion of such six months period which will have elapsed prior to the taking effect of said act falling under the provisions of the concluding paragraph of said Section 5, and, therefore, under the following subdivision (b).

And each company within the operation and effect of said act must, semi-annually thereafter, on or before the 30th day of June and the 31st day of December of each year, invest and deposit the

amount of reserve required by said act on account of the accumulated reserve for the preceding six months.

(b) Except as provided in the above quoted sections 4 and 6, and as hereinafter set forth in subdivision (c), each company embraced within the provisions of said act must also, prior to the 1st day of January, 1908, invest and deposit twenty-five per cent of the entire seventy-five per cent of the aggregate amount of the legal reserve set apart and apportioned to the policies of life insurance written by such company on the lives of citizens in this State prior to July 12, 1907, the date upon which said act will become a law, and must semi-annually thereafter, and prior to the 1st day of each July and December, respectively, invest and deposit an additional twenty-five per cent of said seventy-five per cent reserve until the whole amount of such seventy-five per cent reserve shall have been invested and deposited.

It will be seen that such twenty-five per cent installment payments of said seventy-five per cent reserve must be made as follows:

1. On or before December 31, 1907.
2. On or before June 30, 1908.
3. On or before December 31, 1908.
4. On or before June 30, 1909.

It should be borne in mind that meanwhile such companies must make the aforesaid semi-annual investments and deposits on account of current business, as herein above indicated.

The purpose of the Legislature was to require the permanent investment of not less than seventy-five per cent of the aggregate amount of the legal reserve set apart and apportioned to the policies of life insurance written on the lives of citizens in this State, whether written before the passage of the act or to be thereafter written; the plan adopted permitting the investment of such portion of such reserve upon such policies written before the act shall become a law, to be made in four equal semi-annual installments, each being twenty-five per cent of said seventy-five per cent of such reserve, but to require the investment and deposit, semi-annually, of the aforesaid seventy-five per cent reserve on account of current business for the next preceding six months.

(c) It will be observed that Section 4 and Section 6, each makes an exception to the general rule hereinabove discussed, said exceptions being as follows.:

(1) Any company which shall prior to or after the taking effect of said act have loaned to its Texas policy holders, on the sole security of their policies, more than twenty-five per cent of the entire reserve of such company is required to invest in Texas securities, as defined in said act, only the remainder of the said seventy-five per cent of the reserve, or, in other words, seventy-five per cent of the reserve less the amount so loaned by such companies to Texas policy holders on the sole security of their policies.

But the provisions of said Section 4 do not in anywise relieve any company from the necessity of making the reports above mentioned, nor from making, as above set forth, investment and deposit of such residue of said seventy-five per cent reserve.

(2) Section 6 of this act extends to two years the time within

which certain companies which are referred to in this section must make the investments and deposits aforesaid, the companies so favored being companies organized and having their domiciles in States of this Union wherein on July 12, 1907, by the law of such home State, such company or companies are required to deposit with officers within the home State securities covering the entire reserve upon the business transacted in that State, and all other States, in such manner as to secure equally all policy holders of such company; such extension of time being conditioned, however, upon such company's showing to the Commissioner of Insurance, Statistics and History of this State the fact of such deposit in such company's home State.

But nothing in this Section 6 relieves any company of the duty of making, meanwhile, the reports as above set forth, or from the duty of making semi-annual investments and deposits after the expiration of said two year period.

Yours truly,

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#### FRANCHISE TAX LAW.

Takes effect ninety days after adjournment of special session. Will not affect corporations which have or have not paid their franchise tax for the year ending May 1, 1908.

AUSTIN, TEXAS, May 21, 1907.

*Hon. L. T. Dashiell, Secretary of State, Capitol.*

Dear Sir: We are in receipt of yours of the 18th enclosing a copy of the franchise tax laws passed at the Special Session of the Thirtieth Legislature. You submit the following inquiries:

1. When does said law take effect?
2. What effect will such law have upon those corporations who have already paid their franchise tax, for the year ending May 1, 1908?
3. What effect will said law have upon those corporations, who have not as yet, paid their franchise tax for the year ending May 1, 1908?

Replying to your first inquiry, you are advised that while the report of the Free Conference Committee passed the Senate by the necessary two-thirds vote to make the law effective, the original House Bill, as amended in the Senate, did not pass that body by the requisite two-thirds vote. The report of the Free Conference Committee being merely some amendments to the law, and not being a substitute entirely for a law which had already passed, we conclude that in order for the bill to become effective upon being approved by the Governor, it was necessary that the original bill, as amended in the Senate should have passed that body by a two-thirds vote of the members elected. Therefore, having failed to do so, it is our opinion that the law does not take effect until ninety days after the adjournment of the special session of the Legislature.

Replying to your second inquiry, you are advised that it is our opinion that the law will not affect those corporations who have al-

ready paid their franchise tax for the year ending May 1, 1908. While the Legislature has the authority to require corporations, which have already paid their franchise for a year, to pay the additional amount provided under this law, there is no provision of the act, which indicates that it was the purpose of the Legislature to do so. In fact, the context of the bill is conclusive evidence that the Legislature did not intend that corporations which had already paid their franchise tax for the year at the time this law was passed, should pay the increase provided in this law.

We also answer your third inquiry that the law will not affect those corporations which have not paid their franchise tax for the year ending May 1, 1908. The law will not become effective until long after the time of forfeiture of charters of those corporations, which failed to pay their franchise tax under the old law, and could not be made to apply to those corporations except in so far as the provisions of Section 10 are concerned. Under the provisions of this section, a foreign corporation whose right to do business has been forfeited, would have the right at any time before the 1st day of September, 1907, to pay the franchise tax and penalties due by it under the old law and have its right to do business revived, and under the provisions of Section 9, a domestic corporation, whose right to do business has been forfeited, would have until the 1st day of January next by paying all taxes and penalties due under the old law, to have its rights to do business revived.

Yours truly,

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#### TEXAS INVESTMENT COMPANY.

Is an incorporated joint stock company. Comes within the provisions of Article 479f and must make the deposit with the State Treasurer as required by said article.

AUSTIN, TEXAS. May 22, 1907.

*Hon. Sam Sparks, State Treasurer, Capitol.*

Sir: We have carefully considered your recent inquiry as to whether or not the Texas Investment Company of Houston, Texas, comes within the provisions of Chapter 19, Revised Statutes of Texas, Articles 749f-749i, inclusive, and in reply, beg to say:

The specimen installment contract submitted by said concern to you, and by you to us, shows that said concern is an incorporated joint stock company, called Texas Investment Company; that the contract is called an installment contract and also a certificate of participation; that such certificate upon its face entitles the bearer thereof, or, if the same be duly registered, then the registered holder thereof, to a participation interest in the sum mentioned in such certificate in all the property, both real and personal, of the Texas Investment Company, and in the profits from the operation thereof; and that such certificates are issued in consideration of an initial advance payment and of certain additional installment payments as set forth in said contract.

I am, therefore, of the opinion that said Texas Investment Com-

pany is within the terms and provisions of said Article 749f. and must make with the State Treasurer the deposit prescribed by said Article 749f.

I am further of the opinion that said Article 749g does not apply to said company, because it is not incorporated; but Article 749h does apply, and for any violation of the provisions and requirements of said Chapter 19 any and all officers, agents and representatives of such company, who are guilty of such violation are subject to criminal prosecution, as provided in said Article 749h.

The specimen contract and said letter to you are herewith returned.

Yours truly,

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### ORGANIZATION OF COUNTY—RECORDS.

Proper officers of newly organized county entitled to records of such county kept by officers of county to which newly organized county was attached.

AUSTIN, TEXAS, May 24, 1907.

*Hon. J. D. Brown, County Clerk, Gail, Texas.*

Dear Sir: We have your letter of recent date in which you ask "whether the county clerk of a county to which an unorganized county is attached should deliver the original books in which the instruments have been recorded that have been used only for instruments in that county or shall he make a complete transcript of all records for the newly organized county."

Replying to your question, I beg to say:

Revised Statutes, Article 787, is as follows:

"It shall be the duty of all officers of the county from which any new county has been created, or to which any such newly organized or reorganized county has been attached, and the duty also of all other persons who may have in their possession any books, records, maps or other property belonging to such newly organized or reorganized county to deliver the same to the proper officers of such newly organized or reorganized county within five days after such officers have been legally qualified as such, and any officer or person who shall wilfully fail to make such delivery upon demand made therefor, shall be guilty of a misdemeanor and punished as provided in the Penal Code."

The above quoted statute is in all respects the same as Article 674 of the Revised Statutes of 1879.

Under said Article 674 it was held by a Court of Civil Appeals in *Hooks et al. vs. Colley et al.*, 53 S. W. Rep., 56, that it was the duty of the county clerk of a county from which a newly organized county had been attached to deliver to the county clerk of the newly organized county any records which he has pertaining to that county.

As I understand your question it relates to no books or records whatever except such as have been used for the newly organized county.

I am of the opinion that under this statute all such books and

records must be delivered to the proper officers of such newly organized county.

Yours truly,

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LIQUOR LAW—BASKIN-M'GREGOR BILL.

Qualifications for securing license under new law. Act repeals law now in force. Parties having license unexpired when act becomes effective will have to, in order to continue in the business of liquor dealer, take out new license and execute new bond.

AUSTIN, TEXAS, May 25, 1907.

*Hon. J. W. Stephens, Comptroller of Public Accounts.*

Dear Sir: We are in receipt of yours asking for a construction of the act of the Thirtieth Legislature, known as the Baskin-McGregor Bill, submitting thereunder the following inquiries:

First.—Does the act repeal the law now in force regulating the sale of intoxicating liquors?

Second.—If so, what effect does said repeal have upon the license issued and bonds executed under the old law?

Third.—When said act becomes effective, will parties having license unexpired be required to secure new license, or can they continue to do business under the license held by them until same expires?

Fourth.—Can parties having license unexpired when this act becomes effective execute new bonds under the unexpired license?

Fifth.—What are the qualifications necessary in order for a party to secure license under this act?

Sixth.—Will you give me forms for the following blanks, viz.:

- (a) Application for permit to the Comptroller.
- (b) Petition to the county judge.
- (c) Notice by county clerk.
- (d) Permit by Comptroller.
- (e) License by county clerk.
- (f) Bond.

All statutes regulating the sale of intoxicating liquors are enacted in virtue of what is termed the police power of the State. The grant of the license to sell intoxicating liquors made by a State is no more than a permit to the licensee to engage in such traffic and continue in same so long as it is not forbidden by the authorities. Neither the State nor any of its agencies can surrender, or ever does surrender, the power to regulate and control the traffic in liquors, and any and all laws enacted modifying, in terms, a license to sell intoxicating liquors, or imposing additional burdens or restrictions upon the holder, or even revoking the privilege, are open to the constitutional objection of impairing the obligation of a contract. These principles being fully settled under the authorities, the right of the Legislature to repeal existing laws regulating the sale of intoxicating liquors, regardless of the effect upon existing licenses, can not be questioned.

Did the Legislature intend to repeal all laws now in force regulating the sale of intoxicating liquors?

Section 35 of the act provides that "all laws and parts of laws in conflict with this act are hereby repealed.

Where it plainly appears to have been the purpose of the Legislature to give expression in an act to the whole law on the subject, such act repeals, by necessary implication, all former laws, and where a new law covers the whole subject matter of an old one, and adds new offenses and prescribes different penalties, the former law is repealed by the new law. (Lewis' Sutherland on Statutory Construction, Vol. 1, paragraphs 246-252.)

If a statute embraced the essential provisions of an antecedent one on the same subject and formulated a new system, the intention that the new shall be a substitute for the old is manifest, although there be no expressed intention to that effect.

Commonwealth vs. Mann, 168 Pa. St., 290.

Lewis' Sutherland on Statutory Construction, Vol. 1, Sec. 255.

Etter vs. Missouri Pacific Ry. Co., 2 Tex. Civ. App., 58.

Dickinson vs. State, 38 Texas Crim. Rep., 472.

Harold vs. State, 16 Crim. Rep., 157.

United States v. Tynen, 11 Wallace, 88.

The law now in effect regulating the sale of intoxicating liquors is contained in Articles 3380 1-2 of the Revised Statutes, and Articles 5060a to 5060i, inclusive, of the Revised Statutes, and several articles of the Penal Code, Article 5060g being amended by the Act of 1901, page 314.

Section 1 of the act of the Thirtieth Legislature imposes a tax of \$375 to the State upon persons engaged in the sale of spirituous, vinous or malt liquors, or medicated bitters capable of producing intoxication, whether sold in quantities of one gallon or more, or one gallon or less, an increase of \$75 over the old law. It imposes a tax of \$62.50 upon persons engaged in the sale of malt liquors exclusively, which is an increase of \$50 over the old law. This section also provides that the commissioners court shall have power to levy a tax equal to one-half of the State tax, and that incorporated cities and towns shall have power to levy a tax equal to that levied by the county. Therefore, this section is an entire substitute for Articles 5060a and 5060b of the old law, and, therefore, repeals these two articles.

Section 2 of the act defines a retail liquor dealer, and Section 3 defines a retail malt dealer. These are additions to the old law.

Section 4 provides a penalty for engaging in the sale of spirituous or vinous liquors, capable of producing intoxication, in quantities of one gallon or less without taking out license as a retail liquor dealer.

Section 5 imposes a penalty for engaging in the sale of malt liquors, capable of producing intoxication, in quantities of one gallon or less, without taking out license as a retail malt dealer. These articles constitute a substitute for Article 411a of the Penal Code, and, therefore, repeal that article.

Section 6 of the act exempts wine growers, selling wine of their own production, from the provisions of the act, and otherwise regulates the business of such sales. This is a substitute for Article 5060i of the old law, and repeals that article.

Section 7 prohibits the carrying on of business at more than one place under the same license, and regulates the assignment and trans-



fer of license and the sale of same under execution. This is a substitute for Article 5060e of the old law, with several additions thereto, and, therefore, repeals that article.

Section 8 provides a forfeiture of the license upon conviction for selling, permitting to be sold, giving or permitting to be given, intoxicating liquors to a minor, or permitting a minor to enter and remain in his place of business, or permitting games prohibited by law to be played in or about the place of business, or renting a place of business for such purpose, or permitting prostitutes or lewd women to enter and remain in the place of business. This is an additional punishment, in so far as the sale of liquor to a minor is concerned, to that prescribed in Article 400 of the Penal Code as amended by the Act of 1897. This article is further amended by Section 19 of the act, and this section, together with that of Section 8, constitute a repeal of Article 400 of the Penal Code as amended by the Act of 1897.

Section 9 of the act regulates the initiative in procuring licenses to sell intoxicating liquors, providing that an application shall be made under oath to the Comptroller of Public Accounts for a permit to apply for license to engage in such business, and stating what the application shall contain. This is an entire substitute for Articles 5060d and 3381 of the Revised Statutes, and operates as a repeal of those articles.

Sections 10, 11, 12 and 13 prescribe further what shall be done in order to secure a license to sell intoxicating liquors, and are a substitute for and repeal of Articles 5060d and 3381 of the old law. These sections provide an entirely different method from that which has heretofore obtained in this State in procuring licenses to sell intoxicating liquors, the substance of the requirements being that persons shall file a petition with the judge of the county court, which petition shall have attached thereto the permit of the Comptroller and shall state that the applicant is a law-abiding, taxpaying male citizen of the State of Texas, over the age of twenty-one years, and has been a resident of the county wherein such license is sought for more than two years next before the filing of such petition, and that his license as a retail liquor dealer or retail malt dealer has not been revoked or forfeited within two years next before the filing of the petition. The place where such business is to be conducted shall be stated and described with reasonable certainty. If such place is in a block or square in which there are more residences than there are business houses, or in any block wherein there is a church or school, then said petition shall be accompanied with the written consent of a majority of the householders of the residences of such block or square. The petition shall be set for hearing by the county judge at a time not less than ten nor more than twenty days from the filing thereof. Notice of filing shall be given by the clerk of the county court by posting at the court house door a notice containing the substance of the petition. The petition shall remain on file with the clerk until acted upon by the county judge and opened to the inspection of the public. Any resident taxpaying citizen residing or owning property in the block or square where said business is to be conducted, or any county or district attorney, has a right to contest

the facts stated in such petition and applicant's right to obtain the license. Upon the hearing the truth or falsity of the facts alleged shall be determined by the county judge, and his judgment granting or refusing the license shall be recorded at length in a book kept for that purpose. If the license is granted the clerk shall furnish the applicant with a certified copy of the judgment. This must be exhibited to the tax collector at the time the license tax is paid. The tax collector's receipt for the license tax shall be presented to the county clerk, and, at the same time, the bond provided for in Section 16 of the act. If the bond is approved, and the receipt conforms to be judgment, the county clerk shall issue the proper license, under the seal of his office.

Section 14 of the act contains regulations not heretofore contained in any law of the State, prohibiting the opening of a place of business where intoxicating liquors are sold or the transacting of any business therein or therefrom after 12 o'clock midnight until 5 o'clock a. m. of each week day, and after 12 o'clock midnight Saturday until 5 o'clock a. m. on the following Monday. For a violation of this section, in addition to the fine imposed, the license may be revoked upon application of the county attorney.

Section 15 of the act provides for the bond of retail liquor dealers and retail malt dealers, and is an entire substitute for and repeal of Articles 5060g and 3380 of the old law.

Section 16, providing for the redemption of the license upon the death of the licensee, by his heirs, executors or administrators, is an addition not heretofore contained in any law of the State.

Section 17 provides that the county clerk shall make a statement of all licenses granted by him and return same to the Comptroller of Public Accounts. This is a substitute for and repeal of Article 5060f of the Revised Statutes.

Sections 18 and 18a, regulating the revocation of licenses issued under the provisions of this act, are additional regulations not heretofore contained in the law.

Section 19 is a substitute for and a repeal of Article 400 of the Penal Code.

Sections 20, 21 and 22 prescribe offenses against the law covering the same subject matter in part as articles now contained in the Penal Code, and are a repeal of those articles.

Sections 23, 24, 25 and 26 are regulations not heretofore contained in the law of this State.

Section 28, regulating the posting of licenses, is a substitute for and repeal of Article 3382 of the old law.

Sections 29, 30, 31, 32, 33 and 34 are additional regulations not heretofore contained in the law.

It will thus be seen that the act embraces the entire subject matter of the law now in force regulating the sale of intoxicating liquors, and it can not be questioned that it was the intent of the Legislature to formulate a new system which should be a substitute for the old.

The conclusion, therefore, is unavoidable that when this act becomes effective it operates as a repeal of the law now in force regulating the sale of intoxicating liquors.

Being a repeal of the old law, what is its effect upon licenses and bonds issued under the old law which will not have expired when the act becomes operative?

It may be contended that parties having licenses unexpired will have the right to continue to engage in the sale of intoxicating liquors until the expiration of these licenses without complying with the provisions of the new law.

A license to sell intoxicating liquors is neither a contract nor property, and any law imposing additional burdens or responsibilities upon the holders of unexpired licenses and subjecting their business to new restrictions or limitations can not be assailed as impairing the obligation of a contract or divesting vested rights. A license tax is a permit subject to the contingency that there may be changes in the laws adopted in the exercise of that power which will render his privilege less valuable or his responsibility more onerous, or which will revoke his privilege entirely. These licenses have neither the qualities of a contract or property, but are merely temporary permits to do what would otherwise be an offense against the general law. They form a portion of the internal police system of the State, are used in the exercise of its police powers, and are subject to the direction of the State government, which may modify, revoke or continue them as it may deem fit. If the State sees fit to burden the traffic with greater duties or responsibilities, or to revoke the licenses issued, it is not obliged to make an exception in favor of the holder of existing licenses, for such privileges remain at all times subject to public control as the exigencies or the interests of the community may require.

Black on Intoxicating Liquors, Secs. 127-128.

Metropolitan Board vs. Barrie, 34 New York, 659.

A license to sell liquor is only a permission to enjoy the privilege for a specified time, unless it be sooner abrogated. It is an exercise of the police power and does not include any contractual relations whatever.

Sprayberry vs. Atlanta, 13 S. E. Rep., 199.

LaCroix vs. Commissioners, 49 Conn., 591.

Brown vs. State of Georgia, 82 Ga., 224.

Powell vs. State, 69 Ala., 10.

Wheeler v. State, 64 Miss., 462.

Columbus City vs. Cutcomp, 61 Iowa, 672.

As was said by the Supreme Court of Indiana, in the case of Moore vs. City of Indianapolis:

“The enactment of a law placing restrictions upon the sale of intoxicating liquors, and requiring the payment of a specified sum of money, and that a license be obtained before the business of selling can lawfully be entered upon, is not to be regarded as a proposition on the part of the State to contract for privileges, or to sell indulgences, but rather as a public proclamation, announcing that the State regards the unrestricted sale of intoxicating liquors as prejudicial to the general welfare, and that in the exercise of its police power, the traffic has been placed under regulation and restraint. Those who engage in the traffic, after the enactment of such a law, must be regarded as having notice, from the beginning, that the power

of regulation is a continuing one, and that the State reserves to itself the right to deal with the subject as the special exigencies of the moment may require."

It is essential that the power to regulate should be a continuing one, to be exercised by the State as emergencies may require. This power is inherent in all governments, can not be abridged or weakened or its vigor impaired by any license issued.

If by authorizing a license for one year the State can deprive itself of the right to impose new restrictions upon the licensee during that period, the discretion of the Legislature could be bargained away from year to year, or for an indefinite period. It is upon this principle that a license may be changed or revoked, even though based upon a valuable consideration. Licenses granted under the old law, which will be repealed when this act goes into effect, are absolutely revoked upon the going into effect of this act. That the Legislature has authority to do this can not be questioned.

In the case of *Rowland vs. State*, 12 Ct. of Appeals, 418, the court had under consideration an amendment of Article 4665. This article imposed an occupation tax upon the selling of liquors at \$150. The defendants paid the tax and took out a license for a year. Prior to the expiration of the license the tax was increased to \$200. After the enactment of the new law the defendants continued to sell liquor under the license, refusing to pay the additional tax. They were prosecuted and convicted for pursuing the occupation of selling liquor without obtaining a license therefor. Judge Wilson, rendering the opinion, held that the Legislature, in the enactment of the new law, exercised its right and power to revoke the license under which the defendants were selling liquor, and that the act increasing the tax expressly repealed the law under which the license was issued and that its effect was to revoke the license of the defendants, and that such license was no longer a protection to them after the act took effect.

In the case of *Moore vs. City of Indianapolis*, it was contended that the city authorities had no power to enact an ordinance for increasing the license fee for selling liquors and making it applicable to unexpired licenses.

The Supreme Court of the State, in discussing this and other questions involved, said:

"When it is conceded, as it is, and must be, that the law regulating, or authorizing municipal corporations to regulate, and impose restrictions upon, the sale of intoxicating liquors, is an exercise of the police power of the State, then it follows inevitably that neither the State nor the municipality can, by any sort of contract, license, or permit, abdicate, embarrass or bargain away its right to exercise this power in such a manner as it may thereafter deem the public welfare requires."

I call your attention also to the following cases announcing the same principle, and holding that the repeal of a law under which a license was granted revokes the license.

*Commonwealth vs. Brennan*, 103 Mass., 70.

*Calder vs. Kurby*, 5 Gray, 597.

*Plueler vs. State*, 11 Neb., 547.

Fell vs. State, 20 American Rep., 83.

Ex Parte Lynn, 19 Court of App., 293.

Black on Intoxicating Liquors, Secs. 127, 128.

The Davis case (2 Appls., 425), decided by the Court of Appeals of this State, involved a conviction for keeping a disorderly house, the indictment being under Article 2027, Paschal's Digest. The defense relied on a license from the city authorities of the city of Waco. The charter of the city of Waco, under which the ordinance was passed, levying an annual license tax upon the keeper of a bawdy house of two hundred dollars, and defining a bawdy house, was granted by the special act of the Legislature of April 26, 1871. The general law, under which the indictment was found, was passed August 26, 1856. The first question decided by the court was that the special act, authorizing the city of Waco to license bawdy houses, being a junior act of the Legislature, would control over the general law, and, therefore, the city of Waco had the authority to issue the license. Article 233 of the General Ordinances of the city provided that "The City Council may, at any time, revoke any license issued under any ordinance on repayment of any amount which may have been paid by the holder of such license, after deducting the amount due on the time expired." The prosecution read in evidence an ordinance of the city, approved April 6, 1876, repealing all ordinances granting licenses to keep bawdy houses. The defendant had a license dated March 27, 1876, authorizing her to keep a bawdy house for one year from that date. The contention was that the city could not, by the repeal of the ordinance under which her license was issued, revoke the license until it expired. While the court stated that they thought that the mere repeal of an ordinance of the city for the issuance of the license did not affect its validity, we quote the following as the opinion of the court upon the identical question involved: "As Article 233 of the General Ordinances of Waco was in force, as appears from the testimony, when the licenses read in evidence by defendant were issued, the defendant had notice that the city could at any time revoke any license issued under any ordinance, on repayment of any amount which may have been paid by the holder of of said license, after deducting the amount due on the time expired. The city of Waco could have tendered defendant back the money paid for her license, less the amount due on the time expired, and formally have revoked her license; and, *had this been done by the corporate authorities of the city of Waco, defendant would have been liable to punishment, under the general law, for longer following the occupation of keeping a house of public prostitution in the county of McLennan.*"

This case is authority for the proposition that had the city of Waco followed the provision of her ordinance regulating the revocation of the license, the license could have been revoked prior to its expiration.

I am aware of the rule that "When statutes are repealed by acts which substantially retain provisions of old laws, the latter are not destroyed or interrupted in their binding force."

The case of Railway Company vs. Keller, 32 S. W. Rep., 847, involved the right of an individual to sue a railroad company under the act of 1891. The question was raised that this act was repealed

by the act of 1893. The court held that the latter act was simply an extension of the scope of the act of 1891, and that there was no intention on the part of the Legislature to interfere with the rights acquired under the provisions of the amended statute, the only material difference between the two cases being an extension of the scope of the first so as to include within its purview railway corporations operated by a receiver, manager or other person. Aside from the fact that I do not believe the principle involved in this case would apply to the question of a liquor dealer's license, should it apply I do not think it would affect the question involved, because the facts in that case are not identical, or substantially so, to the case we are now considering.

Note the following cases:

The State vs. Drake, 86 Texas, 329.

The State vs. Setterle, 26 S. W. Rep., 764.

The State vs. Williams, 30 S. W. Rep., 479.

The State vs. House, 30 S. W. Rep., 479.

The State vs. Marsden, 36 S. W. Rep., 627.

The four last cited cases simply adopt the decision of the Supreme Court in the Drake case, therefore, our construction of the Drake case will apply to them.

The only question involved in the Drake case was the liability of a party upon a liquor dealer's bond executed under the act of 1887. Suit was brought upon the bond in March, 1892, and judgment was rendered thereon on the 18th day of March, 1892. Pending the appeal, the law of 1893 was passed, regulating the sale of spirituous, vinous and malt liquors. The court said expressly in this case: "There is no conflict between the former and the latter law in reference to any matter affecting the question involved in this cause, and it is only such provisions of the former law as are in conflict with the latter that it declares repealed." An examination of the two statutes discloses that the conditions of the bonds were the same in the two cases; the penalties for violation of the conditions of the bonds were the same, and the method of enforcing the penalty for such infraction were the same, and it was upon this theory that the Supreme Court held that the act of 1893 did not repeal the act of 1887, and, therefore, suits which had begun under the act of 1887 could be prosecuted to final judgment after the passage of the act of 1893. No such conditions exist here. While the conditions of the bonds are practically the same, the penalty is radically different, and the method of enforcing the penalty is substantially changed. Under the old law, the penalty would be five hundred dollars; under the new law, the penalty is five hundred dollars; forfeiture of license and inability to secure other license for two years; under the old law, suit could be brought only by the party aggrieved or by the county or district attorney; under the new law, suit can be brought, in addition to the manner provided under the old law, by any person owning real property in the county.

The Supreme Court of New Hampshire, in the case of **Adams vs. Hackett**, 27 N. H., 289, laid down the doctrine that a liquor dealer's license was not revoked by the passage of an act which repealed the law under which it was issued, basing the opinion upon the theory

that the license gave vested rights. This decision, however, was overruled by the Supreme Court of the same State in the case of *State vs. Holmes*, 38 N. H., 225, wherein the court held that the license to sell spirituous liquors, granted under the act of 1849, was revoked and annulled by the repealing of that statute before the expiration of the time limited in the license.

The Missouri cases, *State vs. Andrews*, 26 Mo., 172, and *State vs. Andrews*, 28 Mo., 14, are not authority for holding that the act under consideration here does not revoke licenses issued under the law which it repeals. In these cases the defendant, under the provisions of an act of 1845, and amendments thereto of 1853, obtained a license as a grocer. By the second section of the act, a grocer was defined to be a person permitted to sell goods, wares, merchandise and intoxicating liquor in any quantity not less than a quart. The third section of the act, concerning grocers and dram shops, prohibited any grocer from selling intoxicating liquors in a less quantity than one quart, and from suffering them when sold to be drunk at his grocery or at any place under his control. In each case the defendant was indicted for selling one quart of whisky and permitting the same to be drunk at a place under his control, without having a dram shop keeper's license. After he secured his license as a grocer, which permitted him to sell intoxicating liquor, and before that license expired, the Revised Code of 1855 took effect, in which it was provided that no person should directly or indirectly sell intoxicating liquor in any quantity less than a gallon without taking out license as a dram shop keeper. Upon a trial of the case, the defendant offered in evidence his license as a grocer as a defense to the charge. In the first case, reported in 26 Mo., the following is in full the opinion of the court

"The defendant, if he was answerable under the indictment at all, was only answerable as a grocer, as there was no evidence whatever that he suffered the liquor sold to be drunk at the place of sale. He had a license as a grocer, dated 1st November, 1855, which authorized him to deal as such for the space of one year. This license was issued under the act entitled 'An Act concerning merchants and grocers,' approved 23rd February, 1853 (Sess. Acts, 1853, p. 111). As the party had thus purchased the privilege from the State of dealing as a grocer for the period of twelve months, we will not presume that the Legislature, by any subsequent act, intended to take away or affect this privilege. We must construe the act of 1855 as only applicable to licenses which were granted after it took effect and not to those granted under the act of 1853, which continued for twelve months. The other judges concurring, the judgment will be reversed."

In the second case, reported in the 28th Mo., the court held that while the Legislature could not revoke a license which had been sold and paid for, they could repeal a statute which punished a violation of the law under which it had been granted, and that the act of 1855, prohibiting the sale of intoxicating liquors without taking out the license as a dram shop keeper, repealed Section 3 of the act of 1845, punishing grocers for selling intoxicating liquors, and allowing them to be drunk on the premises. It did not affect the grocer's license

which had not expired. The following is from the opinion of the court:

“If one purchases from the Legislature the privilege of carrying on a business for a stated term, and at the time of the purchase there is a law regulating the exercise of the privilege and making the abuse of it penal, if that law is repealed whilst the right to exercise the privilege continues, how can its abuse be punished after the repeal of the law?”

The effect of the holding in this case is that while the license remained in force, the party engaging in business under the same could not be punished criminally for selling in violation of the license.

It should be noted as to these Missouri cases, that the sale of intoxicating liquors was only a portion of the business in which the party securing a license was authorized to engage.

The case of *Hirn vs. State of Ohio*, 1 Ohio St. Rep., p. 15, involves a similar question. Under the act of 1831 of that State, which was an act licensing and regulating taverns, a person who had license to run a tavern was authorized to sell intoxicating liquors. In fact, the court of that State had before it more than once the question as to what constituted a tavern, and it was finally determined in the case of *Curtis vs. State*, 5 Ohio Rep., p. 199, that no person was a keeper of a tavern who did not keep spirituous liquors for sale in his house of entertainment. After the party indicted had secured his license as a tavern keeper, an act was passed entitled: “An Act to restrain the selling of spirituous liquors.” This act was not a licensing act, but absolutely prohibited the selling or giving away of any spirituous liquors to be drunk in the place where sold, or in any quantity less than one quart, or to any person under the age of sixteen years. It contained a provision under Section 4 that all laws and parts of laws licensing the sale of spirituous liquors which were inconsistent with the provisions of the act, were repealed. See Acts of the Forty-ninth Assembly of Ohio, p. 87.

The court, in passing upon the question as to whether or not the passage of this act revoked the unexpired license of tavern keepers, said:

“The repealing clause affects nothing but the power to grant licenses in future after the law took effect. It repealed the authority in the law of 1831 to grant any more licenses to retail spirituous liquors, but nothing further. There is no language employed expressive of any intention to revoke or annul the unexpired licenses previously granted under it. The license was a privilege, an acquired right, which during its terms was not dependent upon the continuance of the law under which it had been granted. \* \* \* It is clear that the unexpired licenses were not expressly repealed or revoked by the act of 1851.”

In this case it was contended, upon the part of the State, that the license to keep a tavern did not carry with it the authority to retail spirituous liquors. In other words, that a licensed tavern keeper was not a license by the authority of law to retail spirituous liquors, but was merely favored by an exemption in the law from the penalties imposed on the rest of the community from retailing spirituous liquors. The court held that the distinction contended for was not



warranted, and that according to the true intent and meaning of the law of 1831 under which the tavern keeper was licensed, the license to keep a tavern carried with it and conferred the privilege of retailing spirituous liquors as clearly as if the same had been positively expressed. The case was decided in 1852. The Missouri cases were decided in 1858 and 1859, and the New Hampshire case in 1853.

The doctrine that the repeal of a law authorizing the sale of intoxicating liquors under license, by an act which absolutely prohibits the sale, does not revoke unexpired licenses, has long since been exploded, not only by the decisions of the courts of this State, but of all other States.

Ex Parte Lynn, 19 Ct. App., 293.

Fell vs. State, 20 Am. Rep., 83.

Brown vs. State, 82 Ga., 224.

Black on Intoxicating Liquors, paragraph 127, 182.

It would do violence to the intent of the Legislature to presume that they intended to apply the principle announced in the Missouri cases, viz.: That persons having licenses unexpired could continue to pursue the occupation of selling intoxicating liquors until the expiration of the license, but would not be subject to criminal prosecution for selling liquor in violation of the license.

Attention is directed to the following cases:

State vs. Mullenhoff, 74 Iowa, 271.

In this case the defendant was indicted and convicted for keeping a place for the selling of intoxicating liquors in violation of the law. He was a member of a firm doing business as druggists, composed of a registered pharmacist and himself. He was not a registered pharmacist. The firm held a permit to sell intoxicating liquors under a law in force prior to the taking effect of Chapter 83, Acts of the Twenty-first General Assembly. When the statute took effect the sales for which the defendant was indicted were made, the time had not expired for which the permit was limited according to its terms. He contended that his right to sell under the first permit was not affected by the repeal of the statute under which it was issued, and to support his position he relied upon a section of the code of that State which declared that: "The repeal of a statute does not affect any right which has accrued under or by virtue of the statute repealed." The court said:

"The permit in question was authority conferred by the statute in the exercise of the police power of the State which regulated the sale of intoxicating liquors. The State, by the permit, did not abandon its authority to forbid at any time the sales permitted, or change the condition upon which they may be made. If the law were otherwise, permits issued under Chapter 83, Acts Twenty-first General Assembly, which are indifferent as to time, would confer upon those holding them perpetual authority to sell intoxicating liquors. The district court rightly held, in the instructions, that its right to sell liquor for medicinal purposes depended upon compliance with Chapter 83, Acts of Twenty-first General Assembly.  
\* \* \* The latter statute must, therefore, control, and a permit issued under a prior repealed statute did not protect it."

McKinney et al. vs. The Town of Salem, 77 Ind., 213.

In this case the defendant was prosecuted for violation of a by-law of the town of Salem prohibiting the sale of intoxicating liquors without a license from the town authorities. He had a license from the county authorities which was unexpired at the time the act was passed authorizing the town authorities to regulate the sale of liquor. He contended that the license obtained from the county authorities could not be impaired by subsequent legislation. The court said:

"The granting of a license is not the execution of a contract, and the counsel for appellants are in error in assuming, as they do, that a license issued pursuant to a general law of the State is a contract. The enactment of a law regulating the liquor traffic is an exercise of the police power of the State. The police power is a governmental one, and permits obtained under laws enacted in its exercise are not contracts. In enacting laws for the regulation of the business of retailing liquors, a sovereign power is asserted, and its exercise does not confer upon any officer authority to make a contract which will abridge or limit this great and important attribute of sovereignty. Sovereigns may make contracts which, under our Constitution, will preclude them from impairing vested rights by subsequent legislation, but this result never follows the exercise of a purely police power. The right to legislate for the promotion and security of the public safety, morals and welfare, can not be surrendered or bartered away by the Legislature (citing several authorities). A license to retail liquor is nothing more than a mere permit; it is neither a contract nor a grant. The person who receives it takes it with the tacit condition and the full knowledge that the matter is at all times within the control of the sovereign power of the State."

Kresser vs. Lymon, 74 Fed., 765.

This was a case under the New York statute, approved March 23, 1896, which goes further than any statute so far as I have been able to ascertain, in making a liquor dealer's license property. It was contended in the case that the enforcement of the act would destroy and impair the license contract, and that the privilege conferred by the license was a property right of which a person could not be deprived without due process of law, and that his license secured under the act of 1892 was a contract investing him with a right to conduct his business as a retail dealer until the expiration of the license. The court held that it was beyond the power of the State, through its Legislature and administrative officers, to enter into a contract hampering the future action of the State in the exercise of its police power to regulate, restrict or prohibit the traffic in intoxicating liquors, and that a license to sell liquors granted prior to the going into effect of the act of 1896, did not constitute a contract between the State and the licensee, so as to make the latter act declaring the license void after June 30, 1896, and declaring the licensee, in common with all other dealers in liquors, to take out a liquor tax certificate and pay the tax, void as impairing the obligation of a contract, and depriving him of his property without due process of law.

The case of *Pleuler vs. State* involved a conviction for selling liquors without license therefor, pursuant to the act of February 28, 1881. The party indicted had secured license under a former law on January 1, 1881, for which he had paid \$100, and he had complied with all the provisions of the law in force at the time he secured the license. The contention was made that he had the right to pursue his occupation until his license expired. The court refused to allow the introduction as evidence of the license, under a prior statute which had been repealed. In the repeal of the act under which the license was granted, there was no saving clause preserving existing license privileges. The court had before it this question as expressed in the opinion, viz.:

“Was it the intention of the Legislature, by the repeal of the old law and the enactment of a new one to revoke unexpired licenses?”

Section 11 of the act provided that “all persons who shall sell or give away upon any pretext, malt, spirituous or vinous liquors, or any intoxicating drinks, *without having first complied with the provisions of this act and obtain a license* as herein set forth, shall, for each offense, be guilty of a misdemeanor.”

I quote the following from the opinion of the court, viz.:

“This act, as we have seen, went into operation on the 1st day of June 1881, and by the above provision the entire traffic is, by the most impressive language, absolutely prohibited, except by persons ‘having first complied with the provisions of’—not some other law, but of—‘this act.’ Now suppose, for instance, that the traffic had been prohibited as above without any provision for its legalization by the procurement of a license, would any one contend that effect could be given to an authority granted under the prior statute? Very clearly, not. So we say, that, the prohibition being absolute, except upon certain specified conditions, those conditions must be observed or the traffic is illegal. We see no escape from this.” (11 Neb., 576.)

The application of this decision is very forcible when it is recalled that it is provided in the act that no person shall directly or indirectly sell spirituous, vinous or malt liquors capable of producing intoxication, in quantities of one gallon or less, *without taking out a license as a retail liquor dealer*, or retail malt dealer; and it is further recalled that a retail liquor dealer is defined by the act to be a person or firm permitted by law, being licensed under the provisions of—not some other law, but, *of this act*. The decision is made more forcible when it is recalled that Section 15 provides that, “Any person or firm who shall sell any such liquors or medicated bitters in any quantity, to be drunk on the premises, without first giving bond as required by”—not some other law, but—“this act.”

The opinion of the court in the case last cited is in harmony with the following cases, laying down the same proposition, viz.:

*Commonwealth vs. Brennan*, 103 Mass., 70.

*Calder vs. Kurby*, 5 Gray, 697.

It might be noted, too, that the case of *Rowland vs. State*, 12 Court App., 418, is cited with approval by the Court of Criminal Appeals in the case of *Ex Parte Lynn*, 19 Court App., 293.

Referring to the case of *Brooks vs. The State*, 32 S. W. Rep.:

This was a suit for an occupation tax as a banker. The question as to whether or not, after securing a license, the party would be allowed to continue business under the license without complying with any new law passed during the interval, was not involved. In this case the party had paid no occupation tax at all. He was sued for the tax, and judgment rendered against him for \$270 for pursuing an occupation during the year beginning September 22. The statute in force at the time he began the pursuit of the occupation imposed by this tax upon him, but on September 20, 1907, the tax was reduced to \$50. He contended that he was entitled to the reduction. The court held that he was not, on the ground that as soon as he was engaged in his occupation the right of the State to the tax imposed under the law as it existed at that time became due, and that the statute imposing the tax for which judgment was rendered *was not repealed* by the Twenty-fifth Legislature, but amended.

Supporting this proposition, that parties pursuing an occupation are subject to any increase in the occupation tax made by a law passed prior to the expiration of their license, I cite the following cases, viz.:

Western Union Telegraph Co. vs. Harris, 52 S. W. Rep., 748.

State vs. Worth, 116 N. C., 1007.

Kelley vs. Dyer, 7 Lea (Tenn.), 180.

That the Legislature intended to exercise its power to revoke licenses in existence and bring all business under the provisions of this act after it becomes effective is manifest, not only from the repealing clause contained in Section 35, but from the other provisions of the act.

Section 2 defines a retail liquor dealer, and Section 3 defines a retail malt dealer.

Section 4 makes it an offense for any person to sell spirituous or vinous liquors capable of producing intoxication without taking out a license as a retail liquor dealer.

Section 5 makes it an offense for any person to sell malt liquors capable of producing intoxication without taking out a license as a retail malt dealer.

Each and every provision of the act regulating the sale of intoxicating liquors relates to retail liquor dealers and retail malt dealers as same are defined in Section 2 of the act, and no provision thereof would apply to any person engaged in the sale of intoxicating liquors unless he was a "retail liquor dealer" or "retail malt dealer" as defined by the act.

Article 10 of the Penal Code provides that:

"Words which have their meaning specially defined shall be understood in that sense, though it be contrary to their usual meaning."

Under this provision of our code, the provisions of Sections 2 and 3 of the act defining a "retail liquor dealer" and "retail malt dealer" would have to be applied to every other section of the act prescribing an offense against a "retail liquor dealer" and "retail malt dealer." As an instance clearly illustrative of my position, Section 8 provides that "any person or firm having license as a retail liquor dealer or a retail malt dealer, who shall be convicted

of selling or permitting to be sold, or giving or permitting to be given, any intoxicating liquors to a minor, \* \* \* shall, in addition to the punishment prescribed, forfeit his license as a retail liquor dealer or a retail malt dealer."

Sections 2 and 3 defining the persons made guilty of the offense under Section 8, as being persons "licensed under the provisions of this act," I do not think it could be seriously contended that any person other than one having a retail liquor dealer's license under the provisions of this act could have his license forfeited for selling liquor to a minor. This principle runs through the entire act, and the conclusion seems irresistible to me that when this act becomes effective, the penal provisions thereof punishing retail liquor dealers and retail malt dealers, apply only to those persons who have license as such, secured under the provisions of this act, and that these provisions would not apply to any person engaged in the sale of intoxicating liquors under a license secured under the old law.

Aside from this, the provisions of the act regulating the bond to be given are materially different from those under the old law. As an instance, it is provided that any person owning real property in the county may institute suit for the violation of the condition of the bond.

It is further provided that upon a judgment being rendered against the principal and his sureties on the bond for a violation of the provisions thereof the license shall be revoked and canceled.

There is another material change in the bond to the effect that where a minor is permitted to enter and remain, in good faith, with the belief that he was of age, that it is a defense to the suit.

Moreover, a party could not retain his old license and make the new bond, because the county clerk would not be authorized to approve and record a bond unless it is accompanied by the certified copy of the judgment of the county court granting the license under the provisions of this act; and it is expressly provided in Section 15 that any person who shall sell any intoxicating liquors without first giving the bond ("required by the act" should be guilty of a violation of the law.

Undoubtedly, Section 15 of the act is a repeal of Articles 5060g and 3380 of the old law regulating liquor dealers' bonds and suits for penalties thereunder.

Being a repeal of that act, the effect would be to obliterate the statute repealed as completely as if it had never been passed, and it would be considered as a law that never existed except for the purposes of those actions or suits which were not only commenced and prosecuted, but in which final judgments had been entered.

Van Inwagen vs. City of Chicago, 61 Ill., 34.

Washburn vs. Franklin, 35 Barb. (N. Y.), 600.

Todd vs. Landry (La.), 12 Am. Decs., 479.

The constitutional restraints upon interference with vested rights do not include claims to penalties imposed by law, payable to private individuals, whether the penalty accrues to them in the capacity of informers or otherwise, and a new law repealing an old law affects cases where the penalty has already attached as well as those which arise in the future.

**Wade on Retroactive Laws, Secs. 16-240.**

It is well settled that where a statute defining a crime or imposing a punishment therefor has been absolutely repealed, without a saving clause, the effect is to obliterate it as completely as if it had never been passed, and offenders against the repealed law can not be punished therefor even though indictments against them were pending at the time of its repeal.

Montgomery vs. State, 2 Crim. App., 618.

Wharton vs. State, 94 Am. Decs., 214.

Commonwealth vs. Cain, 77 Ky., 525.

Carlisle vs. State, 42 Ala., 523.

Heald vs. State, 36 Me., 62.

The same result follows the repeal of a statute authorizing penal actions.

Welch vs. Wadsworth, 79 Am. Decs., 236.

Pierce vs. Kimball, 23 Am. Decs., 538.

Oriental Bank vs. Freeze, 36 Am. Decs., 701.

As was said in the case of Pannell vs. Louisville Warehouse Tobacco Co., 68 S. W. Rep., 664:

“It is settled that in order to enter judgment for a penalty there must be a statute in force at the time authorizing the court to enter the judgment, and that if the act is repealed pending the action, the court is without power to give judgment, and the action must be dismissed.”

As was said by Judge Taney in the case of Maryland vs. B. & O. Railroad Co., 3 Howard, 534, “the repeal of the law imposing the penalty is of itself a remission.”

The repeal of an act, without any reservation of its penalties, prevents any valid judgment being pronounced for penalties, the law creating the penalty being at the time not in existence.

United States vs. Tynen, 11 Wallace, 88.

Norris vs. Croker et al., 13 Howard, 429.

When a statute is repealed, it ends all litigation under it, and if the judgment is not final; that is, if the action seeking to recover the penalty is not finally disposed of, the right to the penalty depending on the affirmance or reversal of the judgment, it must necessarily result in the dismissal of the action. The plaintiff's right of action was taken away by the repeal of the law on which it was founded. The mere fact that the party may be entitled to the benefits resulting from the prosecution of a penal action gives him no vested right to prosecute the action to a recovery, and the repeal of the law giving the right of action destroys his right to a recovery.

Speckert vs. City of Louisville, 78 Ky., 287.

When the Legislature repeals a statute giving a penalty, there are no subsisting statutes for courts to administer and no subsisting penalties to enforce. An attempt to enforce a penalty under a repealed statute would be a “fruitless pursuit of extinct rights and liabilities.”

Rude vs. Railway Co., 43 Wis., 154.

Where a statute imposing a penalty is repealed, such penalties can not afterwards be recovered.

Engle vs. Shurts, 1 Mich., 150.

Welch vs. Wadsworth, 30 Conn., 149.  
O'Kelley vs. Athens Mfg. Co., 36 Ga., 51.  
Railway vs. Adler, 56 Ill., 344.

In the case of *Etter vs. Missouri Pacific Ry. Co.*, 2 Texas App. (Civ.), 58, there was involved a penalty denounced under Article 4258 for an overcharge on passenger fare. After the suit was brought, the statute authorizing the penalty was repealed. It was contended that plaintiff's right to the penalty was an individual personal right which became vested when the injury was done, and the Legislature could not divest this right. The court held that the rule which inhibits the Legislature from interfering with vested rights means only such rights as spring from contracts from the principles of the common law. It does not mean or embrace transactions or rights growing out of a tort, or actions in their nature, *ex delicto*, for a penalty, and that, therefore, the penalty could not be recovered because the statute authorizing it had been repealed.

To the same effect, see *G., C. & S. F. Ry. Co. vs. Lott*, 2 Texas App. (Civ.), 63.

The case of *Long vs. Green & Co.*, reported in the 16th Texas Court Reporter, page 110, was an action to recover a penalty for breach of a liquor dealer's bond. After the suit was brought, local option was adopted in the county wherein the breach of the bond occurred. The plea in abatement was sustained, because the statute which authorized the recovery of the penalty had been repealed.

The court discusses many of the cases cited above, and held that the district court properly sustained the plea in abatement.

In the case of *Curran vs. Owens*, 15 W. Va., 208, which was a suit upon a liquor dealer's bond, brought under an act of the Legislature which was afterwards repealed, the court held that when the Legislature repeals an act, giving a right of action for penalties without a saving clause, that all rights to bring such suits are destroyed, and all suits pending must be dismissed and no further step towards judgment can be taken.

From the authorities cited above, we conclude that when the act becomes effective liquor dealer's bonds given under the old law will be of no force or effect, and that no action can be maintained thereon for any breach thereof occurring either prior to the time this act goes into effect or afterwards. The Legislature never intended that dealers in intoxicating liquors who had licenses unexpired at the time this act becomes effective should continue to pursue the occupation under a bond which would be of no force or effect and for breaches of which there would be no cause of action. Such a construction of the act would do violence to the purpose of its enactment, which is to make more rigid the regulation of the liquor traffic and more burdensome the pursuit of that business, and more responsible the obligations of the principal and sureties upon the bonds. I do not think the decision of the Supreme Court in *State vs. Drake*, 86 Texas, 329, and cases following it applicable. There was no such conflict between the statutes as is presented here, and no such manifest intention to repeal. But if the repeal does not go to the extent of pardoning infractions of the bond, we can not

resist the conclusion that it does go to the extent of requiring new bonds, and full compliance with all other provisions.

Answering your questions seriatim, you are advised:

First.—The act repeals the law now in force regulating the sale of intoxicating liquors.

Second.—The effect of such repeal is to revoke all licenses issued under the old law, regardless of whether they have expired or not, and to destroy the force and effect of all bonds executed under the old law.

Third.—When the act becomes effective, all parties desiring to pursue the business of retail liquor dealer or retail malt dealer, regardless of whether they have unexpired license under the old law or not, will be required to secure new license, and it would be in violation of this act for them to continue to do business until they have secured license under this act.

Fourth.—Parties having license unexpired when this act becomes effective can not execute new bonds under the old unexpired license, but will be required to secure license under this act and execute bonds under this act.

Fifth.—Before a party can pursue the occupation of a retail liquor dealer after this law becomes effective, the county judge of the county wherein he desires to pursue the occupation must find the following facts to be true:

(a) That the applicant is a law-abiding, taxpaying male citizen of the State of Texas.

(b) That he is over the age of 21 years.

(c) That he has been a resident of the county wherein he desires to pursue such business for more than two years next before the filing of such petition.

(d) That within the two years next before the filing of such petition he has not had any license as a retail liquor dealer or retail malt dealer revoked or forfeited.

(e) That he has never been convicted of a felony and served the term of such conviction.

Sixth.—As per your request, enclose herewith the following forms to be used by you under the act, viz.:

1. Application for permit from the Comptroller of Public Accounts.
2. Petition to be filed with the county judge.
3. Notice of filing of the petition to be posted by the county clerk.
4. Comptroller's permit to apply for license.
5. License to be issued by the county clerk.
6. Bond to be executed.

Yours truly,

NOTE.—This law was amended by the Thirty-first Legislature.



## DISTRICT JUDGES—EXCHANGE OF DISTRICT—AUTHORITY OF GOVERNOR TO APPOINT SPECIAL JUDGE.

AUSTIN, TEXAS, May 29, 1907.

*Governor T. M. Campbell, Capitol.*

Sir: I have carefully considered your questions relative to the rights of district judges to exchange districts or hold courts for each other, and the authority of the Governor to appoint a special district judge, and to designate a district judge in an adjoining district to exchange and try cases where the regular district judge is disqualified, and beg to advise you as follows:

Section 11 of Article 5 of the Constitution of Texas contains the following provision:

“No judge shall sit in any case wherein he may be interested, or when either of the parties may be connected with him, either by affinity or consanguinity, within such a degree as may be prescribed by law, or where he shall have been counsel in the case. \* \* \* When a judge of the district court is disqualified by any of the causes above stated, the parties may, by consent, appoint a proper person to try said case; or upon their failing to do so, a competent person may be appointed to try the same in the county where it is pending, in such manner as may be prescribed by law. And the district judges may exchange districts, or hold courts for each other when they deem it expedient, and shall do so when required by law.”

The following statutory provisions must also be considered in this connection:

Revised Statutes. Article 1069: “Whenever any case or cases, civil or criminal, are pending in which the district judge is disqualified from trying the same, no change of venue shall be made necessary thereby; but the judge presiding shall immediately notify that fact to the Governor, whereupon the Governor shall designate some district judge in an adjoining district to exchange and try such case or cases, and the Governor shall also notify both of said judges of such order, and it shall be the duty of said district judges to exchange districts for the purpose of disposing of such case or cases, and in case of sickness or other reasons rendering it impossible to exchange, then the parties or their counsel shall have the right to select or agree upon an attorney of the court for the trial thereof.” (Acts 1879, p. 1; 1897 S. S., p. 39.)

This statute seems not to have been amended since 1897.

Revised Statutes. Article 1108: “Any judge of the district court may hold courts for or with any other district judge, and the judges of the several district courts may exchange districts whenever they may deem it expedient to do so.” (Act May 11, 1846, p. 202.)

We find that in the foregoing constitutional provisions, and also in said statutory provisions, two subjects are treated, viz.:

First.—The appointment or selection of special judges to try cases when the regular judge is disqualified.

Second.—The exchange by district judges of districts.

It may be urged that the provisions of the Constitution for ex-

changing districts are supplemental to and complementary of those concerning special judges in cases wherein the regular judge is disqualified, and that, consequently, in such cases, three alternatives for supplying a judge to try the case are presented, the same being:

- (a) The parties may agree upon a special judge; or, failing that,
- (b) A special judge may be appointed as prescribed by law.
- (c) The disqualified judge may exchange districts with another district judge.

But while that construction has, to some extent, prevailed in practice, and apparently has the sanction of legislative construction, as shown in Revised Statutes, Article 1069, and may possibly be supported by the phraseology of this section of the Constitution, I am of the opinion that the sounder construction and the legal effect of the language employed in the Constitution is to draw a broad line of demarkation between, and to treat separately, the two subjects of *disqualification of district judges* and *exchange of districts*, and it may well be doubted whether there is any legal or valid connection between the disqualification of a judge and an exchange of districts, and whether such disqualification is or could be made by the Legislature a valid ground or reason for such exchange of districts.

Taking up these two subjects in their order, from a constitutional and then from a statutory standpoint, we find:

First. There exists three grounds for disqualification of a district judge, viz.:

- (a) Interest in the case.
- (b) Connection with one of the parties, by affinity or consanguinity, within such degree as may be prescribed by law.

The third degree is prescribed by law in R. S., Article 1068, as follows:

“No judge of the district court shall sit in any case wherein he may be interested, or where he shall have been of counsel, or where either of the parties may be connected with him by affinity or consanguinity *within the third degree.*”

- (c) Having been counsel in the case.

These grounds of disqualification apply, alike, to both criminal and civil cases.

Having prescribed grounds of disqualification, the Constitution next makes provision for another judge to try the case, whether it be criminal or civil; and here we find two methods prescribed, in the alternative, as follows:

- (a) The parties may, by consent, appoint a proper person to try the case; or,
- (b) Upon their failure to do so, a competent person may be appointed to try the case in the county where it is pending, in such manner as may be *prescribed by law.*

The provisions referred to in (a) concerning the right of the parties to select a special judge to try the case is complete in itself, without reference to any statute, and is self-operative. (*Parker County vs. Jackson*, 5 Texas Civil App., 37.)

The provisions referred to in (b), which are applicable to in-

stances in which the parties can not agree upon a special judge, are not self-operative, but send us to the statutes to see what, if any, procedure in such cases has been "provided by law."

Reverting, then, to the above quoted article (1069), which is the only statute which I have been able to find bearing on that point (except the hereinafter mentioned Act of 1879), and comparing same with the above quoted constitutional provisions, we find between the two an irreconcilable conflict as to the order of priority in which are to be exercised the rights of the parties to the case to select a special judge and the authority of the Governor to appoint a special judge to try the case, or to designate some district judge in an adjoining district to exchange and try such case.

The above quoted constitutional provisions insure to the parties to the case the right to agree upon a special judge to try the case, and that right exists in the first instance; it arises upon the disqualification of the regular district judge; it is prior and superior to any right or power which may be conferred by the Legislature upon the Governor to designate a special judge to try the case, or to direct an exchange of districts, if, indeed, that be permissible under the Constitution. On the other hand, it will be noted that Article 1069 attempts to transpost those rights, and, upon its face, subordinates to the authority of the Governor to direct an exchange of districts the rights of the parties to "by consent, appoint a proper person to try said case."

Because of this attempted transposition of rights and powers, said Article 1069 is, in my opinion, wholly inoperative and void, as in conflict with the Constitution. Outside of the Legislature itself, there exists no power or authority to rewrite or rearrange this statute in such manner as to harmonize it with the Constitution.

We are thus thrown back upon the statute as it existed prior to the amendment of 1897, S. S., page 39, and reflected in said Article 1069; or, in other words, to the Act of 1879, page 1 (8 Gammel, 1301), Section 1 of which contains the following provisions:

"That whenever any case or cases are called or pending, in which the district judge or the special judge chosen, as hereinbefore provided, shall be a party, or have an interest, or have been attorneys, or of counsel, or otherwise disqualified from sitting in and trying the same, no change of venue shall be made necessary thereby; but the parties or their counsel shall have the right to select and agree upon an attorney of the court for the trial thereof; and if the parties or their attorneys shall fail to select or agree upon an attorney for the trial of such case, at or before the time it is called for trial, or if the trial of the case is pending and the district judge should become unable to act, or is absent and a special judge is selected who is disqualified to proceed with the trial, and the parties fail to select or agree upon a special judge who is qualified at once, it shall be the duty of the district judge, or special judge presiding, to certify the fact to the Governor immediately, by telegram, mail, or otherwise, whereupon the Governor shall appoint a special judge, not so disqualified, to try the same. The evidence of such appointment by the Governor may be transmitted by telegram or otherwise. The special judge so appointed shall qualify

as provided in section first of this act, and such special judge shall proceed to the trial or disposition of such case immediately, if the trial is pending, otherwise when called or reached, as in other cases."

I am of the opinion that the above quoted constitutional provision which authorizes, in case of a failure of the parties to agree on a special judge, the appointment of a special judge in such case "in such manner as may be prescribed by law," must be held to apply to the statute last above quoted, and that, under it, the Governor has authority, in cases wherein the regular district judge is disqualified, to appoint a special district judge, subject to the conditions and under the circumstances and in the manner prescribed in that statute.

It is true that this statute recognizes the right of the counsel of parties to a case, as well as of the parties themselves, to select and agree upon a special judge, whereas, the Constitution limits that right to the parties themselves; but I am inclined to think that the words "or their counsel" may now properly be omitted from this statute in order to harmonize it with the foregoing constitutional provision.

Attention is also called to the fact that the statute last above quoted provides that the selection by the parties of the special judge shall be made from the "attorneys of the court," which language is more restrictive than that employed in the Constitution, there being in the Constitution nothing to so limit the choice of a special judge. It is perhaps unnecessary now to go into the question as to whether or not the Legislature has the power to impose this additional restriction beyond the express requirements of the Constitution, inasmuch as all practical difficulty upon this feature may be obviated by selecting the special judge from the "attorneys of the court" as prescribed by the statute.

Second. Upon the subject of exchange of districts, the above quoted constitutional provision is:

"And the district judges may exchange districts, or hold courts for each other, when they may deem it expedient, and shall do so when directed by law."

As we have seen, it is extremely doubtful whether disqualification is a constitutional or valid ground or reason for an exchange of districts; but even if, in cases of disqualification, the Constitution authorizes or permits district judges to exchange districts by agreement between themselves, the Constitution certainly does not expressly or specifically confer upon the Governor authority to direct such exchange, nor does it seem that district judges are "directed by law" to make exchanges in such cases, nor have I been able to find any statute which authorizes the Governor to direct such exchange, save and except the above quoted Article 1069, and that statute is inoperative in such instances, because:

(1) It is in conflict with the constitutional purpose and intent to keep separate, and treat differently, the two subjects of *disqualification of district judges* and *exchange of districts*.

(2) As above shown, it denies to the parties to the cause their

constitutional right of selecting, *in the first instance*, a special judge to try the case.

Whatever difference of opinion may exist with regard to (1) it seems clear that no valid or sufficient answer could be made to (2).

I am, therefore, of the opinion that neither the Constitution nor any valid statute authorizes the Governor to direct an exchange of judicial districts in any case or under any circumstances whatever; although as a matter of course (unless in case of disqualification) "the district judges may exchange districts, or hold courts for each other, when they may deem it expedient."

I am also of the opinion that under the terms of our Constitution the right to select a special judge to try a case, wherein the regular judge is disqualified, does not extend to the counsel or attorneys for the parties, but that right must be exercised by the parties themselves, or, failing that, the provisions of the above Act of 1879 will apply, as above stated.

However, if an exchange of districts be made, and the parties failing to assert their right of selecting a special judge and accept as a judge in the case a special judge appointed by the Governor or the judge of another district designated by the Governor to exchange districts and try the case, then, and in either such event, the parties will be estopped to question the right of such judge to try the case, and will have, in effect, agreed upon and appointed him as a special judge in the case.

Texas Central Railway Co. vs. Rowland, 22 S. W. Rep., 135.

Schultze vs. McLeary, 73 Texas, 94.

In view of the unsettled condition of the statutes upon the subjects herein discussed, I respectfully suggest the advisability of further legislation in the premises.

Respectfully,

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ESTATE OF DECEDENT—COMPTROLLER—DEPOSIT IN  
TREASURY.

Comptroller not authorized to issue warrant for money deposited in State Treasury in 1853 in settlement of estate of decedent, without suit and judgment.

AUSTIN, TEXAS, May 30, 1907.

Hon. J. W. Stephens, Comptroller of Public Accounts, Capitol.

Sir: We are in receipt from you of a letter from John T. Duncan, Esq., of LaGrange, Texas, of date May 28, 1907, addressed to you, which discusses an opinion addressed by me to you on the 27th inst., on the subject of issuance by you of a warrant pursuant to a judgment rendered by the district court of Fayette County, in cause No. 6045, R. C. Webb, et al. vs. State of Texas, awarding to plaintiffs \$140 deposited in 1853 by John Cooper as administrator of the estate of John Sorelle, deceased.

As I understand Mr. Duncan's letter, the principal points made by him are as follows:

First.—Said money was paid into the State Treasury in the settle-

ment of the estate of decedent, and the plaintiffs are the heirs at law of the children of said decedent who were entitled to said money.

Second.—That this matter no longer involves the settlement of the estate of a deceased person, said estate having been settled in 1853 by the payment of said money into the State Treasury.

Third.—That Chapter 27, of Title 39 of the Revised Statutes, embracing Article 2211, which gives to the county court of the county in which an estate was administered jurisdiction of an action for funds paid into the State Treasury in the settlement of such estate, was passed in 1876, which was long after the making of the deposit of said \$140 in 1853; hence, the provisions of said Chapter 27 do not apply in this case.

Fourth.—That the facts of this case are covered by the provisions of our laws on escheats, and that the first statute on that subject was passed in 1848; especial reference being to that portion of Revised Statutes, Article 1834, reading thus:

“And the same proceedings shall be instituted for the recovery of any money or property heretofore deposited with the Treasurer or Comptroller in accordance with the laws heretofore existing.”

The language here quoted follows the provisions conferring upon the district court jurisdiction of actions for the recovery of money paid into the State Treasury from escheated estates and prescribing the procedure in such cases, and, it must be admitted that a casual reading of the above quoted language, in the connection in which it is found, is calculated to impress one with the idea that there is merit in Mr. Duncan's contention.

But I am persuaded that a more careful study of the matter will dispel that illusion.

It must be remembered that the subject under treatment by the Legislature is that of escheats and it must be presumed that the above quoted language was used with reference to money or property deposited prior to the passage of that act with the Treasurer or Comptroller in accordance with pre-existing laws applicable to escheats.

So far as I have been able to find by an investigation of our statutes, and Gammel's and Raines' Indexes, the above quoted language is first found in the Acts of 1848, which does not purport to amend any former act on the subject of escheats. If there were any former act on that subject which provided for placing in the State Treasury money which had belonged to escheated estates it would seem clear that the above quoted provisions of said act of 1848 should be treated as applying to money so paid into the Treasury rather than to money paid into the Treasury in the settlement of estates of deceased persons as now provided by Revised Statutes, Chapter 27, Title 39.

But while I find no prior act on escheats, I do find the following constitutional provisions on the subject of escheats:

Constitution of Coahuila and Texas, Article 15 (1 Gammel, 424):

“All kinds of vacant property within its limits, and all intestate property without a legal successor, shall belong to the State.”

Constitution of the Republic of Texas, Section 1 of Schedule (1 Gammel, 1077):

“That no inconvenience may arise from the adoption of this Constitution, it is declared by this convention that all laws now in force in Texas, and not inconsistent with this Constitution, shall remain in full force until declared void, repealed, altered, or expire by their own limitation.”

Constitution of Texas of 1845, Article 13, Schedule (2 Gammel, 1299):

“All laws and parts of laws now in force in the Republic of Texas, which are not repugnant to the Constitution of the United States, the joint resolutions for annexing Texas to the United States, or to the provisions of this Constitution, shall continue and remain in force as the laws of this State, until they expire by their own limitation, or shall be altered or repealed by the Legislature thereof.”

I am of the opinion that under these constitutional provisions we are justified in assuming that the above quoted provisions of the Act of 1848, Revised Statutes, Article 1835, was intended to refer to money and property derived from escheats, and not to money paid into the State Treasury in the settlement of estates of deceased persons.

It should be remembered that the above quoted language, which is found in Section 16 of said Act of 1848, follows the provision in Section 15 of that act authorizing suit in the district court for the recovery of money “paid into the Treasury under this act.” In other words, Section 15 and 16, together, fix the jurisdiction and define the procedure for the recovery of money paid into the Treasury under the provisions of “this act”—an act which deals only with the subject of escheats—and the concluding portion of Section 16 merely extends the same provisions as to jurisdiction and procedure to money paid into the State Treasury before the passage of this act; meaning, of course, money paid in under existing laws or Constitutions, on the subject of escheats.

My construction of the statute here under consideration is supported by the fact that the caption to said Act of 1848 entitled it merely, “An Act to provide for vesting in the State escheated property;” no reference whatever being made to money or property paid into the State Treasury in the settlement of estates of deceased persons.

The effect, therefore, of the construction placed upon said statute by Mr. Duncan in his above-mentioned letter to you would, in my opinion, be to render that portion of said statute unconstitutional because not embraced in the caption of the act.

A construction which would render an act unconstitutional must be avoided if we can place upon it any reasonable construction which would render it constitutional.

Moreover, I am inclined to think that the construction of said statute for which Mr. Duncan contends would render it obnoxious to those provisions of the various constitutions of this State which have conferred upon the county courts jurisdiction in the settlement of estates of decedents.

I do not agree with Mr. Duncan in his conclusion that this matter ceased to be one involving the settlement of an estate of a decedent when the deposit in the State Treasury was made by the administra-

tor in 1853, my idea being that the matter will continue to involve, to some extent at least, the settlement of the estate of a decedent until the money belonging to said estate shall have reached the hands of the heirs of said decedent.

The fund has merely been held by the State as a deposit in trust for said heirs, and the essential character of the fund has not been changed or affected by the place of its deposit.

This view of the matter seems to have been adopted by the Legislature of Texas, inasmuch as Revised Statutes, Article 2211 reads as follows:

“In such case the person claiming such funds, or any portion thereof, shall institute his suit therefor, by petition filed in the county court of the county in which the estate was administered, against the Treasurer of the State, setting forth the petitioner’s right to such funds, and the amount claimed by him.”

Upon the whole, I adhere to the opinion heretofore given you in the premises.

To say the least of it, your authority to issue the warrant by virtue of the above mentioned judgment of the district court of Fayette County is very questionable, and I think you should resolve that doubt against the claimants and let them test the matter by mandamus in the Supreme Court, if they prefer that course rather than to obtain and present to you a judgment from the county court of Fayette County.

Mr. Duncan’s letter is herewith returned to you.

Yours truly,

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#### INSURANCE COMPANIES—LOANS.

Insurance company authorized to do a loan business in this State, only to the extent that it is incident to its insurance business. Corporation can not be formed for more than single purpose.

AUSTIN, TEXAS, May 31, 1907.

*Hon. R. T. Milner, Commissioner of Insurance, Capitol.*

Sir: We have received and carefully considered your recent letter in which you say:

“Several companies which have been doing a mortgage, as well as a life insurance business in this State, announce their intention of leaving the State early in July. Will it be proper for such companies to continue the mortgage business in this State without complying with the law as to the investment and deposit of the insurance reserve. Is there anything in the law to prevent such companies from buying mortgage loans and enforcing payment of same?”

“In many instances, life insurance companies have conducted their mortgage business through firms and mortgage companies and not through their life insurance agencies.

“If these companies withdraw from the State on account of the provision of the Robertson act, will they be permitted to engage in loaning money upon mortgages or other securities in this State?”

Your attention is respectfully called to the following provisions



of the Revised Statutes of Texas, relative to insurance companies, viz.:

“Article 3034. The capital stock of a company shall consist:

“1. In lawful money of the United States; or

“2. In the bonds of this State or any county or incorporated town or city thereof, or the stock of any national bank; or

“3. In first mortgages upon unincumbered real estate in this state, the title to which is valid and the market value of which is double the amount loaned thereon, exclusive of buildings, unless such buildings are insured in some responsible company and the policy or policies transferred to the company taking such mortgage.”

“Article 3035. The surplus money of a company over and above its paid up capital stock may be invested in or loaned upon the pledge of public stocks or bonds of the United States, or any of the States, or stocks, bonds, or other evidences of indebtedness of any solvent dividend paying corporation or in bills of exchange or other commercial notes or bills, except its own stock; provided, always, that the current market value of such stocks, bonds, notes, bills, or other evidences of indebtedness shall be at all times during the continuance of such loans at least twenty per cent more than the sum loaned thereon.”

“Article 3036. A company may vchange and re-invest its capital stock in like securities, as occasion may from time to time require.”

“Article 3096. Nothing in this title shall be construed to affect or in any way apply to mutual relief associations organized and chartered under the general incorporation laws of Texas, or which are organized under the laws of any other State, which have no capital stock, and whose relief funds are created and sustained by assessments made upon the members of said corporations in accordance with their several by-laws and regulations; \* \* \*

“And should any such benevolent organization refuse or neglect to make an annual report as above required, it shall be deemed an insurance company conducted for profit to its officers, and amenable to the laws governing such companies.

“Article 3096l. The paid-in capital stock of a home company shall consist in lawful money or bonds of the United States, or in bonds of this State, or any county or incorporated town or city thereof, or the stock of any national bank, or in first mortgages upon unincumbered real estate in this State, the title to which is valid, and the market value of which is double the amount loaned thereon, exclusive of buildings, unless such buildings are insured in some responsible company and the policy or policies transferred to the company taking such mortgage. The accumulations or surplus money of the company over and above its paid-in capital stock may be invested in or loaned upon the pledges of public stocks or bonds of the United States, or any county or school district, or incorporated city or town, or of any of the States, or stocks or bonds or other evidences of indebtedness of any solvent dividend-paying corporation, except its own capital stock, or in bills of exchange or other commercial notes or bills, or in the reserve values of its own policies, or in first mortgages upon unincumbered real estate situated in this State, the title to which is valid; provided, that the current mar-

ket value of such stock, bonds, mortgages, notes, bills or other evidences of indebtedness shall be at all times during the continuance of such loans at least twenty per cent more than the sum loaned thereon. The company may sell, change, or re-invest its capital stock or accumulations in like securities as occasion may from time to time require."

It will be observed that the loans which are contemplated by the above quoted statutes are wholly incidental to a regular insurance business within this State, no provision being made there in authorizing an insurance company to make loans within this State when such company is not actually engaged in carrying on a regular insurance business in Texas.

It has long been and is now the policy of this State, as reflected in its laws, to not authorize or permit the formation of a corporation for more than one single purpose; and while our general incorporation laws do, in several instances, authorize the creation of a corporation for more than one purpose, there is not to be found in the General Laws of this State governing the creation of corporations nor in our statutes which are applicable to insurance companies only, any authority for the organization of a domestic corporation for the joint purpose of carrying on both an insurance business and a loan business which is not incidental to and restricted to the statutory purposes and scope of an insurance business as indicated in the above quoted statutes.

It is also a well established principle that public policy forbids the issuance to a foreign corporation of a permit to transact in this State a business for the transaction of which a domestic corporation can not be organized and chartered under our own laws.

*Fowler vs. Bell*, 90 Texas, 150.

*Lytle vs. Custead*, 4 Texas Civil App., 292.

*Philadelphia Fire Association vs. New York*, 119 U. S., 110.

I am therefore of the opinion that no insurance company, whether foreign or domestic, can lawfully conduct, maintain or carry on within this State any loan business whatever which is not in fact incidental to and immediately connected with its insurance business within the scope and meaning of the foregoing statutes.

Consequently, if any insurance company which is now subject to the provisions of the Act of the Thirtieth Legislature of Texas, commonly known as the Robertson bill, concerning investments and deposits by insurance companies in this State, shall, because of said act, or for any other reason, withdraw from the State and cease carrying on within the State an insurance business, neither soliciting nor writing insurance upon the lives of citizens of Texas, nor maintaining within this State an office or agent for the collection of premiums upon policies of that character written prior to such withdrawal, nor doing anything which would constitute doing a regular insurance business within the State within the meaning of our laws, such company will, from and after the date of such withdrawal, be without authority of law to make loans in Texas, and no such company can thereafter continue or pursue a mortgage loan business in this State, and this, whether they make the investments and deposits prescribed by said Robertson act or not.

If a corporation is not authorized by law to conduct a loan business in Texas, it can not acquire that right by making the investments and deposits required by the Robertson act.

It is possible that some of the foreign insurance companies which are now doing business in Texas, and which are subject to the provisions of said Robertson act, were organized for the dual and co-ordinate purposes of conducting a loan business as well as an insurance business, and that their charters expressly authorize such companies to exercise such equal and co-ordinate and independent powers in their home States; and I think it probable that in such instances a foreign company having such charter might obtain in this State a permit to carry on a loan business wholly free from and entirely disconnected with any insurance business, but the determination of that question must, in each instance, rest upon the facts of the particular case as presented, upon application for such permit.

But if, from an inspection of the charter of such foreign company it appears that its right to conduct a loan business is wholly incidental to and necessarily connected with and dependent upon its right to carry on an insurance business, and an actual transaction of such insurance business, it is hardly probable that such company could obtain a permit to carry on in this State any loan business whatever.

However, I know of no law which would prevent or which seeks to prevent a foreign insurance company from investing outside of the State of Texas in mortgage loans upon property within this State and enforcing payment thereof through the courts of Texas.

Yours truly,

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PUBLIC LANDS—EASEMENTS—RETENTION BY STATE OR  
COUNTY OF RIGHT OF PUBLIC ROADS ACROSS LANDS  
SOLD OR PATENTED—CHAPTER XXX, ACT OF  
1884. REPEALED.

AUSTIN, TEXAS, June 5, 1907.

*Judge J. H. Phillips, County Judge of Moore County, Dumas, Texas.*

Dear Sir: I have your letter of the 28th ult., in which you ask whether Chapter XXX of the General Laws of 1884 has been repealed.

With the exception of the emergency clause, said act is as follows:  
Be it enacted by the Legislature of the State of Texas:

“Section 1. That from and after the passage of this act, whenever any school, university or asylum land or any land belonging to the State shall be sold or patented by the State each sale or sales shall be made and patents issued subject to the right of the State or county to public roads across such land so sold or patented, which right of way for roads whenever they may be laid out by proper authority in pursuance of law is hereby reserved through and across such lands without cost to the State or county except damages done to improvements on such lands.

“Section 2. If more than one road is laid out across any such

tract of land then the county is to pay to the owner of the land, for all roads subsequently opened in addition to damages to improvements what the land, taken for roads, costs the original purchaser."

I can not find that these statutory provisions were carried into or continued in force by the Revised Statutes of 1895, which provided in Final Title, Subdivision 4, "that all civil statutes of a general nature in force when the Revised Statutes take effect and which are not included herein, or which are not hereby expressly continued in force, are hereby repealed."

So far as I have been able to find, no portion of said Act of 1884 has ever been re-enacted.

I am, therefore, of the opinion that no portion of said Chapter XXX of the Acts of 1884 is now in effect.

Yours truly,

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INSURANCE—ROBERTSON INSURANCE ACT—SECURITY INVESTMENTS—TAXATION—SUGGESTIONS TO COMMISSIONER.

AUSTIN, TEXAS, June 5, 1907.

*Hon. R. T. Milner, Commissioner of Insurance, Capitol.*

Sir: Your letter of the 29th ult., enclosing one from W. T. Gilbert of New York City, counsel of the Provident Savings Life Assurance Society, of date May 24, 1907, addressed to Hon. George Clark, of Waco, has received our careful consideration.

In reply to your questions thus submitted, relative to the operation and legal effect of House Bill 112, passed by the Thirtieth Legislature of Texas, commonly known as the Robertson Insurance Bill, I beg to say:

First. Section 4 of said act is as follows:

"That insurance companies which have loaned, or which may hereafter loan, to Texas policy holders on the sole security of their policies more than twenty-five per cent of the entire reserve, shall only be required to invest in Texas securities the remainder of the said seventy-five per cent of the reserve."

Consequently, if upon the date on which the investment prescribed by this act is required to be made by an insurance company, such company shall then have outstanding in loans to its Texas policy holders on the sole security of their policies more than twenty-five per cent of the entire reserve, then, and in that event, such company will be required to invest in Texas securities only the remainder of the seventy-five per cent of the aggregate amount of the legal reserve set apart and apportioned to policies of life insurance written by such company on the lives of citizens of Texas.

Second. I am of the opinion that such policy loans will constitute "credits" of the corporation, and that they will also be subject to both State and local taxation in this State, unless there should be found in the particular case something to take it out of the operation of our statutes on taxation.

Revised Statutes, Article 5061, 5063, 5067 and 5068.

State vs. Fidelity & Deposit Co. of Md., 80 S. W. Rep., 546.

Jesse French Piano Co. vs. City of Dallas, 61 S. W. Rep., 942.

Metropolitan Life Ins. Co. vs. City of New Orleans, 27 Supreme Court Reporter, p. 499.

Your question upon this feature of the matter is an abstract one, which can hardly be answered more definitely. A specific and definite opinion upon the point involved can not be safely given except upon a full statement of the facts and circumstances involved in the particular case.

Third. Section 2 of said act provides that "said companies, respectively, invest said funds representing the said reserve in the purchase of not more than one building site and in the erection of not more than one office building in any city of this State having a population of more than twenty-five thousand inhabitants and in case of investment in such real estate the amount so invested may be treated as a part of the reserve required to be invested in Texas securities and property."

I am of the opinion that the law contemplates that in order to get credit for an investment of this character in a city having more than twenty-five thousand, the building site upon which the company is to be entitled to such credit, must be a site for an office building and that credit can not be given for a natatorium.

Fourth. Upon your question as to whether insurance companies should be required to deposit with your department evidence of their loans or merely to file a sworn statement in regard to such loans, I have to say that, as I understand the act under consideration, it places that matter within your discretion and authorizes you to prescribe and enforce such reasonable rules and regulations in the premises as you may deem necessary to protect the best interest of the State and fairly enforce the law.

In this connection I take the liberty of suggesting that as to policy loans you should at least require from the company making such loans an affidavit, to be made by one of its officers or its State agent, showing the name and address of each policy holder to whom such loan has been made, and his postoffice address, the date and amount of the loan, and the date of its maturity; and that in all cases of mortgage loans on real estate you should at least require that there be submitted to you for inspection the original opinion of the attorneys of the company upon which such loan was made, and also require that there be deposited in your office a copy of such opinion, verified by the affidavit of the custodian thereof, and also a detailed description of the loan, giving name and postoffice address of the borrower, the date and amount of note and mortgage, maturity of note, the rate of interest, and a specific reference to the record of such mortgage, such statement to be verified by the affidavit of an officer or State agent of the company reporting such loan.

And in all cases wherein you may deem it necessary or prudent to do so you should require such additional proofs and evidence of the facts involved as you may deem proper and sufficient in the particular case.

I also suggest that, in addition, you will probably find it ex-

pedient to require general statement, made under oath, from the company regarding its aforesaid loans.

Fifth. With regard to the rights of an insurance company to withdraw deposits which it may have made under the act mentioned, I beg to call your attention to the following provisions thereof:

“Section 3. That all bonds, stocks, mortgages and securities (except policies upon which loans may be made) in which the seventy-five per cent of the insurance reserve belonging, or apportioned to policies upon the lives of citizens of Texas, shall be invested as above provided, shall be by the company so investing deposited in the vaults of the Treasury of the State of Texas or with any National bank in this State designated and appointed by the Comptroller of Currency as a depository for moneys and funds belonging to the United States, or with any State bank or trust company or National bank in this State authorized and appointed by law as a depository for State moneys and funds, and the president of any depository in which any such securities are deposited shall forward to the State Treasurer quarterly, or whenever demanded by him, a statement of the character and amount of the securities so deposited and such securities shall at all times be subject to the payment of any money that may become due on any of such policies of insurance; provided, that no securities when deposited under the provisions of this act, shall be withdrawn without authority, in writing, from the State Treasurer.”

“Section 8. That any insurance company coming within the provisions of the act, or the stockholders thereof, may, in addition to the deposit required by this Act, at its or their option, deposit with the Treasurer of this State the capital stock or any part thereof, of such company, or securities covering such capital stock, and may, at their option, withdraw or substitute such stock or securities so voluntarily deposited; provided, that the substituted securities shall be approved by the Insurance Commissioner.”

“Section 11. It shall be the duty of the Commissioner of Insurance, Statistics and History of this State to cause the terms of this law to be enforced and the deposit hereby required to be made and kept up at all times, so that the same, together with any investment in real estate, as hereinbefore provided, shall at all times be equal to at least the amount of the reserve, as provided by this act. But the Commissioner of Insurance, Statistics and History may, in his discretion, permit the withdrawal of any of such securities and the substitution of other like securities in their stead, so that the required amount be kept on deposit,” etc.

It will be noticed that Section 3 expressly forbids the withdrawal of any securities when deposited under the provision of this act, unless written authority for such withdrawal be given in writing by the State Treasurer.

Inasmuch as other portions of the act provide for withdrawals of deposits under certain circumstances and for certain purposes, I construe the provisions of said Section 3, concerning withdrawal, as applicable to only such withdrawals as are expressly authorized by the terms of the act, and not as authorizing a withdrawal of

any deposit upon any other condition or under any other circumstances.

The deposits embraced in said Section 8 are not required by law, but are purely voluntary, the purpose of the Legislature being, primarily, to authorize the State Treasurer to receive the deposits therein mentioned as a basis upon which the company making such deposits may acquire and enjoy in other States certain rights and privileges which are restricted to companies making such deposits; and the company making such deposit may, whenever it may see fit to do so, substitute for such deposits other stock or securities, provided only that the substituted securities shall be approved by the Commissioner of Insurance, and may, at will, finally withdraw from the State Treasury any and all such original or substituted deposits made under Section 8 of said act.

Section 11 provides for substitution of securities in lieu of those previously deposited in conformity with the requirements of the provisions of said act other than those in Section 8 thereof. The requirement of law is that such substituted securities shall be like those originally deposited under the provisions of said act, except Section 8.

Except as stated above, I find in said act no provision for the withdrawal of deposits from the State Treasury or any of the other depositories designated by this act.

I am, therefore, of the opinion that, except as provided in Section 8 thereof, and except for purposes of substitution as aforesaid, no insurance company should be permitted to withdraw from the State Treasury or any other designated depository any deposit made in compliance with the terms and provisions of said act, even though the company which made such deposit should see fit to withdraw from and cease doing business in the State of Texas.

The Legislature may have intended that such deposits shall remain in the State Treasury for the protection of the company's policy holders; and, in any event, it is probable that neither the State Treasury nor any other designated depository, would, in the absence of clear statutory authority therefor, be authorized to surrender up such deposits which had been made pursuant to requirements of law.

Yours truly,

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#### LIQUOR LAW—BASKIN-McGREGOR BILL.

License under old law repealed upon going into effect of new law.

AUSTIN, TEXAS, June 7, 1907.

*Hon. Robert B. Green, San Antonio, Texas.*

Dear Sir: I am in receipt of your favor of the 4th, enclosing brief relative to the Baskin-McGregor liquor bill.

Your first proposition is that "An act may be expressly repealed and yet contract privileges and licenses be continued unless the same are revoked expressly." You cite the following cases:

Davis vs. State, 2 Appeals, 425.

State vs. Hirn, 1 Ohio, 15.

State vs. Andrews, 25 Mo., 172.

State vs. Andrews, 28 Mo., 14.

The Davis case decided by the Court of Appeals of this State, involved a conviction for keeping a disorderly house, the indictment being under Article 2027, Paschal's Digest. The defense relied on was a license from the city authorities of the city of Waco. The charter of the city of Waco, under which the ordinance was passed, levying an annual license tax upon the keeper of a bawdy house of two thousand dollars, and defining a bawdy house, was granted by the special act of the Legislature of April 26, 1871. The general law, under which the indictment was found, was passed August 26, 1856. The first question decided by the court was that the special act, authorizing the city of Waco to license bawdy houses, being a junior act of the Legislature, would control the general law, and, therefore, the city of Waco had the authority to issue the license. Article 233 of the general ordinances of the city provided that, "the city council may, at any time, revoke any license issued under any ordinance on repayment of any amount, which may have been paid by the holder of such license, after deducting the amount due on the time expired." The prosecution read in evidence an ordinance of the city, approved April 6, 1876, repealing all ordinances granting licenses to keep bawdy houses. The defendant had a license dated March 27, 1876, authorizing her to keep a bawdy house for one year from that date. The contention was that the city could not, by a repeal of the ordinance under which her license was issued, revoke the license until it expired. While the court stated that they thought that the mere repeal of an ordinance of the city for the issuance of the license, did not affect its validity, we quote the following as the opinion of the court upon the identical question involved:

"As Article 233 of the General Ordinance of Waco was in force, as appears from the testimony, when the licenses read in evidence by defendant were issued, the defendant had notice that the city could at any time revoke any license issued under any ordinance, on repayment of any amount, which may have been paid by the holder of said license, after deducting the amount due on the time expired. The city of Waco could have tendered defendant back the money paid for her license, less the amount due on the time expired, and formally have revoked her license; and, *had this been done by the corporate authorities of the city of Waco, defendant would have been liable to punishment, under the general law, for longer following the occupation of keeping a house of public prostitution in the County of McLennan.*"

It appears to me that instead of this being authority to sustain your contention, it is direct authority for the proposition that had the city of Waco followed the provisions of her ordinance regulating the revocation of the license, the license could have been revoked prior to its expiration.

Your second proposition is:

"When statutes are repealed by acts which substantially retain provisions of old laws, the latter are not destroyed or interrupted in their binding force."



The first case you cite under this proposition is *Railway Company vs. Keller*, 52 S. W. Rep., 847. This involved the right of an individual to sue a railroad company under the Act of 1891. The question was raised that this act was repealed by the Act of 1893. The court held that the latter act was simply an extension of the scope of the Act of 1891, and that there was no intention on the part of the Legislature to interfere with the rights acquired under the provisions of the amended statute, the only material difference between the two cases being an extension of the scope of the first so as to include within its purview railway corporations operated by a receiver, manager or other person. Aside from the fact that I do not believe the principle involved in this case would apply to the question of a liquor dealer's license, should you be correct in your contention that it does, I do not think it would affect the question involved, because the facts in that case are not identical or substantially so to the case we are now considering.

In further support of this proposition, you cite the following cases:

*The State vs. Drake*, 86 Texas, 329.

*The State vs. Setterle*, 26 S. W. Rep., 704.

*The State vs. Williams*, 30 S. W. Rep., 479.

*The State vs. House*, 30 S. W. Rep., 479.

*The State vs. Marsden*, 36 S. W. Rep., 627.

The four last cited cases simply adopt the decision of the Supreme Court in the *Drake* case, therefore, our construction of the *Drake* case will apply to them.

The only question involved in the *Drake* case was the liability of a party upon a liquor dealer's bond executed under the Act of 1887. Suit was brought upon the bond in March, 1892, and judgment was rendered thereon on the 18th day of March, 1892. Pending the appeal, the law of 1893 was passed, regulating the sale of spirituous, vinous and malt liquors. The court said expressly in this case:

"There is no conflict between the former and the latter law in reference to any matter affecting the question involved in this case, and it is only such provisions of the former law as are in conflict with the latter that it declares repealed."

An examination of the statute discloses that the conditions of the bonds were the same in the two cases; the penalties for violation of the conditions of the bonds were the same, and the method of enforcing the penalty for such infraction was the same; and it was upon this theory that the Supreme Court held that the Act of 1893 did not repeal the Act of 1887, and, therefore, suits which had begun under the Act of 1887 could be prosecuted to final judgment after the passage of the Act of 1893. No such conditions exist here. While the conditions of the bonds are practically the same, the penalty is radically different, and the method of enforcing the penalty is substantially changed. Under the old law, the penalty would be five hundred dollars; under the new law, the penalty is five hundred dollars, forfeiture of license and inability to secure other license for two years; under the old law, suit could be brought only by the party aggrieved, or by the county or district attorney; under

the new law, suit can be brought, in additions to the manner provided under the old law, by any person owning real property in the county.

The Supreme Court of New Hampshire, in the case of *Adams vs. Hackett*, 27 New Hampshire, 289, laid down the doctrine that a liquor dealer's license was not revoked by the passage of an act which repealed the law under which it was issued, basing the opinion upon the theory that the license gave vested rights. This decision, however, was overruled by the Supreme Court of the same State in the case of *State vs. Holmes*, 38 New Hampshire, 225, wherein the court held that the license to sell spirituous liquors, granted under the Act of 1849, was revoked and annulled by the repealing of that statute before the expiration of the time limited in the license.

The Missouri cases, *State vs. Andrews*, 26 Mo., 172, and *State vs. Andrews*, 28 Mo., 14, are not authority for holding that the act under consideration here does not revoke licenses issued under the law which it repeals. In these cases the defendant, under the provisions of an Act 1845, and amendments thereto, of 1853, obtained a license as a grocer. By the second section of the act, a grocer was defined to be a person permitted to sell goods, wares, merchandise and intoxicating liquor in any quantity not less than a quart. The third section of the act, concerning grocers and dram shops, prohibited any grocer from selling intoxicating liquors in a less quantity than one quart, and from suffering them when sold to be drunk at his grocery or at any place under his control. In each case the defendant was indicted for selling one quart of whisky and permitting same to be drunk at a place under his control, without having a dram shop keeper's license. After he secured his license as a grocer, which permitted him to sell intoxicating liquor, and before that license expired, the Revised Code of 1855 took effect, in which it was provided that no person should directly or indirectly sell intoxicating liquor in any quantity less than a gallon without taking out license as a dram shop keeper. Upon a trial of the case the defendant offered in evidence his license as a grocer as a defense to the charge. In the first case, reported in 26 Mo., the following is in full the opinion of the court:

“The defendant, if he was answerable under the indictment at all, was only answerable as a grocer, as there was no evidence whatever that he suffered the liquor sold to be drunk at the place of sale. He had a license as a grocer, dated 1st November, 1855, which authorized him to deal as such for the space of one year. This license was issued under the act entitled ‘An Act concerning merchants and grocers’, approved 23rd February, 1853 (Sess. Acts, 1853, p. 111). As the party had thus purchased the privilege from the State of dealing as a grocer for the period of twelve months, we will not presume that the Legislature, by any subsequent act, intended to take away or affect this privilege. We must construe the act of 1855 as only applicable to licenses which were granted after it took effect, and not to those granted under the Act of 1853, which continued for twelve months. The other judges concurring, the judgment will be reversed.”

In the second case, reported in 28th Mo., the court held that while the Legislature would not revoke a license which had been sold and paid for, they could repeal a statute which punished a violation of the law under which it had been granted, and that the Act of 1855, prohibiting the sale of intoxicating liquors without taking out the license as a dram shop keeper, repealed Section 3 of the Act of 1845, punishing grocers for selling intoxicating liquors, and allowing them to be drunk on the premises. It did not affect the grocer's license which had not expired. The following is from the opinion of the court:

"If one purchases from the Legislature the privilege of carrying on a business for a stated term, and at the time of the purchase there is a law regulating the exercise of the privilege and making the abuse of it penal, if that law is repealed whilst the right to exercise the privilege continues, how can its abuse be punished after the repeal of the law."

The effect of the holding in this case is that while the license remained in force, the party engaging in business under the same could not be punished criminally for selling in violation of the license.

It should be noted as to these Missouri cases, that the sale of intoxicating liquors was only a portion of the business in which the party securing a license was authorized to engage.

The case of *Hirn vs. State of Ohio*, 1 Ohio St. Rep., page 15, involves a similar question. Under the Act of 1831 of that State, which was an act licensing and regulating taverns, a person who had a license to run a tavern was authorized to sell intoxicating liquors. In fact, the court of that State had before it more than once the question as to what constituted a tavern, and it was finally determined in the case of *Curtis vs. State*, 5 Ohio Reports, p. 199, that no person was a keeper of a tavern who did not keep spirituous liquors for sale in his house of entertainment. After the party indicated had secured his license as a tavern keeper, an act was passed entitled: "An Act to restrain the selling of spirituous liquors." This act was not a licensing act, but absolutely prohibited the selling or giving away of any spirituous liquors to be drunk in the place where sold, or in any quantity less than one quart, or to any person under the age of sixteen years. It contained a provision under Section 4 that all laws and parts of laws licensing the sale of spirituous liquors, which were inconsistent with the provisions of the act, were repealed. See Acts of the Forty-ninth Assembly of Ohio, page 87. The court, in passing upon the question as to whether or not the passage of this act revoked the unexpired license of tavern keepers, said:

"The repealing clause affects nothing but the power to grant license in future after the law took effect. It repealed the authority in the law of 1831 to grant any more licenses to retail spirituous liquors, but nothing further. There is no language employed expressive of any intention to revoke or annul the unexpired licenses previously granted under it. The license was a privilege, an acquired right, which during its term was not dependent upon the continuance of the law under which it had been granted. \* \* \*

It is clear that the unexpired licenses were not expressly repealed or revoked by the Act of 1851."

In this case it was contended, upon the part of the State, that the license to keep a tavern did not carry with it the authority to retail spirituous liquors. In other words, that a licensed tavern keeper was not licensed by the authority of law, to retail spirituous liquors, but was merely favored by an exemption in the law from the penalties imposed on the rest of the community from retailing spirituous liquors. The court held that the distinction contended for was not warranted, and that according to the true intent and meaning of the law of 1831, under which the tavern keeper was licensed, the license to keep a tavern carried with it and conferred the privilege of retailing spirituous liquors as clearly as if the same had been positively expressed. The case was decided in 1852. The Missouri cases were decided in 1858 and 1859, and the New Hampshire case in 1853.

The doctrine that the repeal of a law authorizing the sale of intoxicating liquors under license by an act which absolutely prohibits the sale, does not revoke unexpired licenses; has long since been exploded, not only by the decisions of the courts of this State, but of all other States.

Ex Parte Lynn, 19 *Crt. App.*, 293.

Fell vs. State, 20 *Amer. Rep.*, 83.

Brown vs. State, 82 *Ga.*, 224.

Black on Intoxicating Liquors, paragraphs 127-182.

It would do violence to the intent of the Legislature to presume that they intended to apply the principle announced in the Missouri cases, viz.: That persons having licenses unexpired, could continue to pursue the occupation of selling intoxicating liquors until the expiration of the license, but would not be subject to criminal prosecution for selling liquor in violation of the license.

Attention is directed to the following cases:

State vs. Mullenhoff, 74 *Iowa*, 271.

In this case the defendant was indicted and convicted for keeping a place for the selling of intoxicating liquors in violation of the law. He was a member of a firm doing business as druggists, composed of a registered pharmacist and himself. He was not a registered pharmacist. The firm held a permit to sell intoxicating liquors under a law in force prior to the taking effect of Chapter 83, Acts of the 21st General Assembly. When the statute took effect and the sales for which the defendant was indicted were made, the time had not expired for which the permit was limited according to its terms. He contended that his right to sell under the first permit was not affected by the repeal of the statute under which it was issued, and to support his position he relied upon a section of the Code of that State which declared that: "The repeal of a statute does not affect any right which has accrued under or by virtue of the statute repealed." The court said:

"The permit in question was authority conferred by the State in the exercise of the police power of the State which regulated the sale of intoxicating liquors. The State, by the permit, did not abandon its authority to forbid at any time the sales permitted,

or change the condition upon which they may be made. If the law were otherwise, permits issued under Chapter 83, Acts Twenty-first General Assembly, which are indifferent as to time, would confer upon those holding them perpetual authority to sell intoxicating liquors. The district court rightly held, in the instructions, that its right to sell liquor for medicinal purposes depended upon compliance with Chapter 83, Acts of Twenty-first General Assembly. \* \* \* The latter statute must, therefore, control, and a permit issued under a prior repealed statute did not protect it."

McKinney et al. vs. The Town of Salem, 77 Ind., 213:

In this case defendant was prosecuted for violation of a by-law of the town of Salem prohibiting the sale of intoxicating liquors without a license from the town authorities. He had a license from the county authorities which was unexpired at the time the act was passed authorizing the town authorities to regulate the sale of liquor. He contended that the license obtained from the county authorities could not be impaired by subsequent legislation. The court said:

"The granting of a license is not the execution of a contract, and the counsel for the appellants are in error in assuming, as they do, that a license issued pursuant to a general law of the State is a contract. The enactment of a law regulating the liquor traffic is an exercise of the police power of the State. The police power is a government alone, and permits obtained under laws enacted in its exercise are not contracts. In enacting laws for the regulation of the business of retailing liquors, a sovereign power is asserted, and its exercise does not confer upon any officer authority to make a contract which will abridge or limit this great and important attribute of sovereignty. Sovereigns may make contracts which, under our Constitution, will preclude them from impairing vested rights by subsequent legislation, but this result never follows the exercise of a purely police power. The right to legislate for the promotion and security of the public safety, morals and welfare, can not be surrendered or bartered away by the Legislature. (Citing several authorities.) A license to retail liquor is nothing more than a mere permit; it is neither a contract nor a grant. The person who receives it takes it with the tacit condition and the full knowledge that the matter is at all times within the control of the sovereign power of the State."

Kresser vs. Lymon, 74 Fed. Rep., 755.

This was a case under the New York statute, approved March 23, 1896, which goes further than any statute so far as I have been able to ascertain, in making a liquor dealer's license property. It was contended in the case that the enforcement of the act would destroy and impair the license contract, and that the privilege conferred by the license was a property right of which a person could not be deprived without due process of law, and that his license secured under the Act of 1892 was a contract investing him with a right to conduct his business as a retail liquor dealer until the expiration of the license. The court held that it was beyond the power of the State, through its Legislature and administrative officers, to enter into a contract hampering the future action of the State in the ex-

ercise of its police power to regulate, restrict or prohibit the traffic in intoxicating liquors, and that a license, to sell liquors, granted prior to the going into effect of the Act of 1896, did not constitute a contract between the State and the licensee, so as to make the latter act declaring the license void after June 30, 1896, and declaring the licensee, in common with all other dealers in liquors, to take out a liquor tax certificate and pay the tax, void as impairing the obligation of a contract, and depriving him of his property without due process of law.

The case of Pleuler vs. State, involved a conviction for selling liquors without license therefor, pursuant to the Act of February 28, 1881. The party indicted had secured license under a former law on January 1, 1881, for which he had paid \$100, and he had complied with all the provisions of the law in force at the time he secured the license. The contention was made that he had the right to pursue his occupation until his license expired. The court refused to allow the introduction as evidence of the license, under a prior statute which had been repealed. In the repeal of the act under which the license was granted, there was no saving clause preserving existing license privileges. The court had before it this question as expressed in the opinion of the court, viz.: "Was it the intention of the Legislature, by the repeal of the old law and the enactment of a new one to revoke unexpired licenses?" Section 11 of the act provided that:

"All persons who shall sell or give away upon any pretext, malt, spirituous or vinous liquors or any intoxicating drinks, *without having first complied with the provisions of this act, and obtain a license as herein set forth, shall, for each offense, be guilty of a misdemeanor.*"

I quote the following from the opinion of the court, viz.:

"This act, as we have seen, went into operation on the 1st day of June, 1881, and by the above provisions the entire traffic is, by the most impressive language, absolutely prohibited, except by persons 'having first complied with the provisions of'—not some other law, but of—'this act.' Now suppose, for instance that the traffic had been prohibited as above without any provision for its legislation by the procurement of a license, would any one contend that effect could be given to an authority granted under the prior statute? Very clearly, not. So we say, that, the prohibition being absolute except upon certain specified conditions, those conditions must be observed or the traffic is illegal. We see no escape from this." (11 Neb., 576.)

The application of this decision is very forcible when it is recalled that it is provided in the act that no person shall directly or indirectly sell spirituous, vinous or malt liquors capable of producing intoxication, in quantities of one gallon, or less, *without taking out a license as a retail liquor dealer, or retail malt dealer*; and it is further recalled that a retail liquor dealer is defined by the act to be a person or firm permitted by law, being licensed under the provisions of—not some other law, but, *of this act*. The decision is made more forcible when it is recalled that Section 15 provides that,

"Any person or firm who shall sell any such liquors or medicated

bitters in any quantity, to be drunk on the premises, without first giving bond as required by"—not some other law, but,— "this act." etc.

The opinion of the court in the case last cited is in harmony with the following cases, laying down the same proposition. viz.:

Commonwealth vs. Brennan, 103 Mass., 70.

Calder vs. Kurby, 5 Gray, 697.

It might be noted too that the case of Rowland vs. State, 12 Court Appeals, 418, is cited with approval by the Court of Criminal Appeals in the case of Ex Parte Lynn, 19 Court App., 293.

I think the case of Rowland vs. State, 12 App, 418 announces the doctrine which prevails in this State upon the question here involved. This case was decided in 1882, and the opinion is by Judge Willson. At that time Article 4665, Revised Statutes, fixed the State occupation tax for selling liquors in quantities of one quart, and less than five gallons, at \$100. Defendants, in 1880, paid this tax and took a license to pursue this occupation for the period of one year from that date.

In 1881, prior to the expiration of the license, the Legislature passed an act increasing the occupation tax to \$200. The defendants continued to sell liquor under their old license, refusing to pay the additional tax and take out a license under the new statute. They were prosecuted and convicted under Article 110 of the Penal Code, for pursuing the occupation without obtaining a license therefor. The fine under this article was not less than the amount of the tax nor more than double that amount. The fine imposed upon the defendants was the full amount of tax under the new law, to-wit: \$200. The same contention was made there as is now made—that the license obtained under the previous law protected them from the operation of the new law during the time covered by their license. The act increasing the tax repealed the law under which the old license was issued. The court, in deciding the question, said:

"We think, therefore, that the effect of the act of March 11, 1881, was to revoke the license of the defendant, and that such license was no longer a protection to them after that act took effect. We are of the opinion that the judgment of conviction is correct, and it is accordingly affirmed."

Judge Hurt dissented from the opinion in this case, but his dissent has not been followed by the courts of this State.

Again, it is material to consider the effect of the new act upon bonds issued under the old law. Undoubtedly, section 15 of the new act is a repeal of Article 5060g and 3380 of the old law regulating liquor dealers' bonds and suits for penalties thereunder. Being a repeal of that act, the effect would be to obliterate the statute repealed as completely as if it had never been passed, and it would be considered as a law that never existed, except for the purpose of those actions or suits which were not only commenced and prosecuted, but upon which final judgment had been entered.

It is well settled that where a statute defining a crime or imposing a punishment has been repealed, without a saving clause, the effect is to obliterate it as completely as if it had never been

passed, and offenders against the repealed law can not be punished therefor, even though indictments against them were pending at the time of its repeal.

Montgomery vs. State, 2 Crim. App., 618.

Wharton vs. State, 94 American Decisions, 214.

Commonwealth vs. Cain, 77 Ky., 525.

Carlisle vs. State, 42 Ala., 523.

Heald vs. State, 36 Me., 62.

The same result follows the repeal of a statute authorizing penal actions.

Van Inwagen vs. City of Chicago, 61 Ill., 34.

Washburn vs. Franklin, 35 N. Y., 600.

Welch vs. Wadsworth, 79 Amer. Dec., 236.

Pierce vs. Kimball, 23 Amer. Dec., 538.

Oriental Bank v. Freeze, 36 Amer. Dec., 701.

Wade on Retro-active Laws, paragraphs 16-240.

Maryland vs. B. & O. Ry. Co., 3 Howard, 634.

United States vs. Tynen, 11 Wallace, 88.

Norris vs. Croker et al., 13 Howard, 349.

Etter vs. M. P. Ry. Co., 2 Texas App. (Civ.), 238.

G., C. & S. F. Ry. Co. vs. Lott, 2 Texas App. (Civ.), 63.

Curran vs. Owens, 15 W. Va., 208.

Long vs. Green & Co., 16 Texas Ct. Rep., 110.

A critical examination of the authorities cited above forces me to conclude that when the act becomes effective liquor dealers' bonds given under the old law will be of no force or effect and that no action can be maintained thereon for any breach thereof occurring either prior to the time this act goes into effect or afterwards.

I do not think the case of State vs. Drake applicable. There was no such conflict between the statutes as was presented here and no such manifest intention to repeal.

I can not subscribe to the proposition that a license to sell intoxicating liquors in Texas is property to the extent that the Legislature can not pass a law revoking it. While it is true that the statute under consideration, as well as the statute heretofore existing, authorized the assignment or transfer of a license to sell liquor, the provisions concerning such transfer or assignment were such as to show clearly the intent of the Legislature to make a license a personal trust, which implied special confidence in the license. The provisions of the act under consideration vest a license with more property qualification than any heretofore passed, and at the same time tend more strongly to the conclusion that the Legislature looks upon the licensee as a trustee than have prior laws upon this subject. Under no circumstances can the license be delivered up to the authorities and the unearned portion thereof refunded as long as it is in the hands of the original licensee. This can only be done when it is sold under execution or mortgaged, or when the original licensee dies. If it is assigned by the original licensee the assignee can not engage in the business thereunder without complying with each and all of the provisions of the act.



Evidently, the policy of this State is to consider the license to sell intoxicating liquors as merely a permission to do an act which would otherwise be illegal. It has not that element of property in it which makes it valuable to an assignee, unless he complies with the law as did the original licensee, and while it is invested with the quality of being assigned or transferred or mortgaged, the conditions surrounding such assignment, transfer or disposition are such as not to invest it with the status of property such as the deprivation thereof would be in violation of any constitutional provision.

It has never been my contention that the intent of the Legislature would not control in the construction of the act, and the attempt to impute to this department, not upon your part, but upon the part of other interested persons, a determination to disregard the intention of the Legislature in the construction of the act, is unwarranted by any act upon my part, or that of any other member of this department.

The intent of the Legislature is the law, and it is our purpose to arrive at that intent. I quite agree with the rules quoted by you as to the construction of law, but contend that the application of those rules, with those of equal dignity and force, sustain the construction of the act which I have given it.

Referring to the case of *Brooks vs The State*, cited by you, this was a suit for an occupation tax as a banker. The question as to whether or not, after securing a license, the party would be allowed to continue business under the license without complying with any new law passed during the interval, was not involved. In this case the party had paid no occupation tax at all. He was sued for the tax, and judgment rendered against him for \$270 for pursuing an occupation during the year beginning September 2nd. The statute in force at the time he began the pursuit of the occupation imposed this tax upon him, but on September 20, 1897, the tax was reduced to \$50. He contended that he was entitled to the reduction. The courts held that he was not, on the ground that as soon as he engaged in his occupation the right of the State to the tax imposed under the law as it existed at that time became due, and that the statute imposing the tax for which the judgment was rendered *was not repealed* by the Twenty-fifth Legislature, but amended.

Supporting this proposition, that parties pursuing an occupation are subject to any increase in the occupation tax made by a law passed prior to the expiration of their license, I cite you the following cases, viz.:

*Western Union Telegraph Co. vs. Harris*, 52 S. W. Rep., 748.

*State vs. Worth*, 116 N. C., 1007.

*Kelley vs. Dyer*, 7 Lea. (Tenn.), 180.

Referring to your proposition that the act is not different from previous laws in that it designates who is a retail liquor dealer and a retail malt dealer, I direct your attention to the provisions of Article 10 of the Penal Code, providing that:

“Words which have their meaning specially defined, shall be

understood in that sense, though it be contrary to their usual meaning."

Under this provision of our Code, the provisions of Sections 2 and 3 of the Act defining a "retail liquor dealer" and "retail malt dealer" would have to be applied to every other section of the act prescribing an offense against a "retail liquor dealer" and "retail malt dealer." As an instance clearly illustrative of my position, Section 8 provides that:

"Any person or firm having license as a retail liquor dealer or a retail malt dealer, who shall be convicted of selling or permitting to be sold, or giving or permitting to be given away intoxicating liquors to a minor \* \* \* shall, in addition to the punishment prescribed, forfeit his license as a retail liquor dealer or a retail malt dealer."

Sections 2 and 3 defining the persons made guilty of the offense under Section 8, as being persons "licensed under the provisions of this act," I do not think it could be seriously contended that any person other than one having a retail liquor dealer's license under the provisions of this act could have his license forfeited for selling liquor to a minor. This principle runs through the entire act, and the conclusion seems irresistible to me that when this act becomes effective, the penal provisions thereof punishing retail liquor dealers and retail malt dealers, apply only to those persons who have license as such, secured under the provisions of this act, and that these provisions would not apply to any person engaged in the sale of intoxicating liquors under a license secured under the old law. No person has ever contended so far as my knowledge goes, that persons licensed under the old law should have applied to them the penalties of the old law in so far as offenses are concerned, and that persons licensed under the new law should have applied to them the offenses denounced under the new law; the contention being, as I understand it, that while persons may pursue their occupation under their old license, they would be subject to the penal provisions of the new law in so far as offenses are concerned, but to the provisions of the old law in so far as penalties for breach of the bond is concerned.

I do not think either contention is sound. I think the authorities cited herein show conclusively that when this act becomes effective no suit can be maintained upon a liquor dealer's bond executed under the old law for a breach occurring prior to the time this act becomes effective, or afterwards. I am as firmly convinced that the penal provisions of the new law will not apply to those persons engaging in the business under license secured under the old law.

If I am wrong in my contention, it is better that the court say so in the beginning, in order that all persons may be advised of their rights.

If the Legislature intended, as the position taken by others assumes, that a liquor dealer in one end of the block pursuing his occupation under an old license who sells to a minor should pay a penalty of \$500, the suit to be brought by the county or district attorney, and that another liquor dealer in the same block pur-

suing his occupation under a license granted under the new law, selling the same kind of liquor to the same minor, should pay a penalty of \$500 and have his license forfeited and not be able to secure another license for two years, the suit brought by either the county or district attorney, or any person owning real estate in the county, we are forced to the conviction that the court should say so and not this department.

Again, if the Legislature intended that a man engaged in the business under the old license should pursue his occupation without regulation, a conclusion which we think is irresistible if your theory is correct, and that another person pursuing the same business in the same block should be subject to all the regulations of the new act, we are convinced that the courts should say so, and not this department.

It is more in harmony with the intention of the Legislature, we think, keeping in view the object of the new statute, that there should exist a possible cessation of the business for a few days than that one man should be under one regulation and one under another, and the possibility that some be under no regulation at all.

We have given the matter our careful and earnest consideration, and the conclusion reached is after careful study of all the decisions of all the States, which we have been able to find upon the subject.

We hold to the conclusion, heretofore reached in our advice to the Comptroller.

Yours truly,

#### LUNATIC ASYLUM—SUPERINTENDENT.

Furnishing of house and repairs thereto construed as part of cost of maintenance of said institution.

AUSTIN, TEXAS, June 8, 1907.

*Mr. A. S. Phelps, Member Board of Managers, State Lunatic Asylum, Austin, Texas.*

Dear Sir: I have your letter asking for a construction of the appropriation bills of 1905 and 1907, respectively, relative to allowance to the Superintendent of the State Lunatic Asylum at Austin, and in reply I have to say:

I have not before me a copy of the appropriation bill passed by the Thirtieth Legislature, and therefore can not undertake to construe it; hence what follows applies to only the appropriation bill of 1905, passed by the Twenty-ninth Legislature at its First Called Session, pages 468-470.

The first item in that portion of said act which applies to said State Lunatic Asylum is as follows: "Salary of Superintendent, provided he shall receive provisions not to exceed in value five hundred dollars per year, and fuel, lights, water, and housing for himself and family.

For years ending August 31, 1906.	August 31, 1907.
\$2,000.00	\$2,000.00

I answer your questions as follows:

1. The words "housing for himself and family" must be construed

in the light of the fact that when this matter received consideration at the hands of the Legislature, as evidenced by the enactment of said appropriation bill, the State owned, at said institution, a furnished house which was in use as a place of residence for the Superintendent and his family. I construe said act to mean that it was the purpose of the Legislature to continue that status, as it then existed, at the expense of the State, as a part of the general cost of maintenance of said institution, embracing cost of repairs to said house and its furnishings, but not including the cost of "washing material to keep such house in clean condition."

I find in said act nothing which entitles the Superintendent to "a servant or servants to do the cooking and house cleaning for the residence of said Superintendent," except is so far as such services can be rendered by the employees who are specifically enumerated in and provided for by said provision of said appropriation act without detriment to said institution and with due regard to and without interference with their regular duties in said institution.

2. The word "housing" as used in said act comprehends and includes a house, premises and appurtenances reasonably suitable for a place of residence for the Superintendent and his family and the furniture and furnishings thereof substantially of the character and kind then owned by the State and used for that purpose at said institution.

3. The word "provision" as used in said act embraces any and all articles of food for the Superintendent and his family not produced or manufactured by said institution, but purchased by the Board of Managers. By the terms of said act it is the duty of the Board of Managers of said institution to furnish to the Superintendent, for himself and family, annually without cost to him, such provisions of an aggregate value of not more than five hundred dollars; in addition to which said Superintendent should be permitted, without charge therefor, to have and use for himself and family, as may be required by them, any and all other articles of food which may be produced or manufactured by the institution, such as vegetables, milk and ice.

4. Said act requires that meat, which may be purchased for said institution, and furnished to the Superintendent for the use of himself and family, shall be charged against his allowance of five hundred dollars per annum for provisions; and I am of the opinion that it would be proper to so charge same at the price which the State pays therefor delivered at said institution.

Yours truly,

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ANTI-PASS LAW—ADJUTANT GENERAL OF TEXAS—STATE RANGERS.

Adjutant General not a member of State Rangers; therefore not within the exemption from anti-pass law. State Rangers exempt.

AUSTIN, TEXAS, June 12, 1907.

*Adjutant General J. O. Newton, Capitol.*

Sir: Responding to your inquiry of the 11th inst., as to whether

or not the railway companies of Texas will be permitted to issue free passes to the Adjutant General of Texas after July 12, 1907. I beg to say:

On that date Senate Bill No. 8, which is commonly known as the Anti-Pass Bill, which was passed by the Thirtieth Legislature of Texas, will become effective. It seems clear that under its provisions the Adjutant General is not one of the excepted classes to whom free railroad passes may be issued, unless it be under the exemption found in Section 2 of said act, which permits the issuance of passes to "State rangers." The Act of the Twenty-seventh Legislature providing for the organization known as the "Ranger Force," approved March 29, 1901, declares in Section 2 that "The 'Ranger Force' shall consist of not to exceed four separate companies of mounted men, each company to consist of not to exceed one captain, one first sergeant and twenty privates, and one quartermaster for the entire force."

Section 3 of that act provides that "the pay of officers and men shall be as follows: Captains, one hundred (\$100) dollars each per month; sergeants fifty (\$50) dollars each per month, and privates forty (\$40) dollars each per month."

Neither the law which created the "Ranger Force," nor the regulations for the government and control of that organization as set forth in General Orders No. 62, dated July 3, 1901, and attached to your letter of inquiry, which the Governor and Adjutant General have caused to be made, pursuant to Section 13 of said Act of 1901, designates or recognizes the Adjutant General as a member or constituent portion of said "Ranger Force."

I am of the opinion that the above-mentioned exemption, which allows of the issuance of passes to the "Ranger Force," applies to only the members of that force, as defined by the act creating it, and that such exemption does not include the Adjutant General.

There is more or less force in the suggestion that inasmuch as the Adjutant General is, under the Governor, the commander of the "Ranger Force," the above-mentioned exemption clause should be construed to embrace him, thereby extending to him the right to receive and use railroad passes; but the question of policy involved is one for the Legislature alone to determine, and as I understand the language of the statute under consideration, which sought to carefully restrict the issuance and use of railroad passes, it manifests a clear intent upon the part of the Legislature to grant that right and privilege only in instances and to classes of persons coming clearly within the exceptions therein enumerated. Since the Adjutant General is not clearly within the enumerated exceptions, I think it should be held that they do not extend to him.

Yours truly,

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#### AUDITOR LAW — SELECTION AND APPOINTMENT OF AUDITOR—COUNTY TREASURER—COUNTY WARRANTS.

Provisions of Act of Thirtieth Legislature mandatory. Auditor must be appointed. County treasurer Collin County not authorized after July 12th to pay any county warrant.

AUSTIN, TEXAS, June 12, 1907.

*Judge John Church, County Judge of Collin County, McKinney, Texas.*

Dear Sir: We have your letter of the 3rd inst., concerning the appointment of a county auditor in Collin County and in reply beg to say:

From your letter we understand that Collin County has a population of more than forty thousand according to the last United States census, and that it has only two judges, a county judge and a district judge.

You ask if the provisions of Section 12 of the county auditor's law will stop the county treasurer from paying warrants, if, for any cause, the county auditor be not appointed. The original act providing for county auditors, found in Chapter 161, page 381, of the General Laws of 1905, made its provisions applicable to only counties having therein a city with a population of twenty-five thousand and over according to the last United States census; but House Bill No. 489, which was passed by the Thirtieth Legislature and which will become effective on July 12, 1907, so amended said original act as to provide for the appointment of a county auditor "in any county of this State having a population of forty thousand inhabitants or over, or having therein a city with a population of twenty-five thousand or over, according to the last United States census."

I assume, therefore, that the provisions of the county auditor's law, as so amended, will be operative in Collin County on July 12, 1907.

Section 2 of said statute is as follows:

"Immediately upon the passage of this act the county judge shall convene a special meeting of the judges of the county and district courts or court having jurisdiction in the county, who shall jointly appoint the auditor, a majority vote ruling. The action shall then be reported by the county judge to the commissioners court in regular or special session, which shall have said appointment entered upon the minutes of said court."

It will be noted that this statute makes no express provisions for succession in office of county auditor.

Section 1 of said act provides that he "shall hold his office for a term of two years and until his successor is appointed and qualified"; but nowhere does the act prescribe when, how or by whom subsequent county auditors shall be appointed.

Consequently, if there exists authority, except in the first instance after the passage of the act, for the appointment of a county auditor, it must grow out of the construction of the statute as a whole, either taken alone or in connection with the Constitution of Texas, there being found in the act no subsequent provisions for such subsequent appointments. However, I am of the opinion that it is not necessary to work out a conclusion upon that feature of the law in the case here presented for consideration, inasmuch as the first election of a county auditor of Collin County, under the terms and provisions of said statute, as so amended, is yet to occur; the evident intention of the Legislature being to apply its provisions to Collin County for at least two years. I am of the opinion

that, immediately upon the taking effect of said amendment, it will be the duty of the aforesaid judges to elect a county auditor of Collin County in accordance with the provisions of said statute as so amended.

Section 12 of said statute provides that "all warrants on the county treasurer, except warrants for jury service, must be countersigned by the county auditor." I am of the opinion that this provision of the law is mandatory and must be complied with, and, with the exception of warrants for jury service, the county treasurer of Collin County will not on or after July 12, 1907, be authorized to pay any county warrant whatever, which shall not have been countersigned by the county auditor of that county.

It is true that as the law was originally enacted, it was intended to be applicable in only counties having more than two judges, and that in extending the operation of the law to certain other counties the Legislature did not amend the portion of the law which provides for the election of a county auditor in such manner as to forestall a tie vote of judges in the election of a county auditor; but I am of the opinion that this apparent oversight on the part of the Legislature will not render abortive its effort to apply the wholesome provisions of the law to other counties.

In this connection attention is called to the fact that the amendment of 1907 made less onerous the qualification of a county auditor, thereby rendering it easier than before for the judges having the authority to appoint to find a person qualified under the law to accept and fill the position of county auditor. The law as it stands is not incapable of enforcement, since it is possible, in contemplation of law, for the judges to agree upon a suitable person to fill the position named, and I am of the opinion that the aforesaid inhibition against payment by the county treasurer of warrants not countersigned by the county auditor should be enforced pending disagreement by said judges in the election of a county auditor.

You also say, "We have a lady applicant; please say, if she is otherwise eligible, will her sex prohibit us from selecting her?"

Section 4 of said statute provides that "the auditor shall within twenty days of his appointment, and before he enters upon the duties of his office, make a bond with two or more good and sufficient sureties, in the sum of five thousand dollars, payable to the county judge or his successors in office, conditioned for the faithful performance of his duties, to be approved by the commissioners court." This requirement for a bond is inconsistent with the idea that a county auditor may be a married woman, since she is under the well-recognized disabilities of coverture; but a single woman, who is otherwise qualified, is, in my opinion, eligible to election to the office of county auditor.

Steusoff vs. State, 80 Texas, 428.

Huff vs. Cook, 44 Iowa, 639.

State Ex Rel. Crow vs. Hostetter, 59 S. W. Rep., 270.

Yours truly,

## DEPOSITORY LAW—COUNTY TREASURER.

Not permissible for county funds to be withdrawn from county depository and placed with county treasurer for convenience in the payment of jury scrip, school teachers, etc.

AUSTIN, TEXAS, June 12, 1907.

*Mr. K. Hall, County Treasurer of Dallas County, Dallas, Texas.*

Sir: You have today stated to me, orally, that if it is permissible under the law, it is the desire of the commissioners court of Dallas County and yourself, as county treasurer of that county, that there shall be withdrawn from the county depository of said county and placed in your hands five hundred dollars of the county's money, to be held and used by you in making payment outside of banking hours and particularly upon Saturday evenings of warrants drawn in favor of jurors and school teachers, the purpose being for you, in turn, to cash such warrants at the county depository and afterwards to draw your checks upon the county depository for the amounts of such warrants when presented to you for that purpose; the idea being that in this manner the fund in your hands may be, from time to time, replenished and maintained, thereby obviating great inconvenience to holders of such warrants, who frequently have occasion to present same for payment when the county depository is not open for business. You ask if this can be done under the provisions of the county depository law, passed by the Twenty-ninth Legislature, and approved May 1, 1905.

I am of the opinion that your question must be answered negatively. The terms and provisions of said statute are clearly inconsistent with the operation of such a plan.

Said depository law requires in Section 24 that upon the approval of the bond of the depository it shall be the duty of the county treasurer "to transfer to said depository all the funds belonging to said county, and immediately upon the receipt of any money thereafter to deposit the same with said depository to the credit of said county."

Section 29 of said act provides that "it shall be the duty of the county treasurer, upon the presentation to him of any warrant drawn by the proper authority, if there shall be money enough in the depository belonging to the funds upon which said warrant is drawn and out of which the same is payable, to draw his check as county treasurer upon the county depository in favor of the legal holder of said warrant and to take up said warrant and to charge same to the fund upon which it is drawn. The whole framework of the law concerning county depositories is constructed upon the theory that payment of warrants is to be made as above indicated and not otherwise.

It is true that an exception is found in that portion of Section 29 which provides that "in case any bonds, coupons or other indebtedness of any county by the terms thereof are payable at any particular place other than the treasury of the county, nothing herein contained shall prevent the commissioners court of any such county from causing the treasurer to place a sufficient sum at the place where such debts shall be payable at the time and place of their



maturity"; but this exception merely confirms the rule as above announced.

Yours truly,

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PUBLIC LANDS—SUIT FOR CONFIRMATION—JUDGMENT—  
RECOVERY—UNSURVEYED VACANT LANDS NOT  
DISCLOSED, ETC.—PREFERENCE RIGHT OF  
NINETY DAYS, ETC.

AUSTIN, TEXAS, June 13, 1907.

Hon. John J. Terrell, Commissioner of the General Land Office,  
Austin, Texas.

Dear Sir: We have carefully considered your letter submitting the following questions, and beg to answer same as hereinafter shown, viz.:

"1. Whether or not in a suit brought by claimants under the act approved August 15, 1870, entitled 'An Act to ascertain and adjust certain claims for land against the State, situated between the Nueces and Rio Grande Rivers,' in which suit the claim of plaintiffs was rejected, and the only judgment rendered in said cause was a judgment of dismissal of plaintiff's said suit on motion of the State's counsel for want of evidence to sustain plaintiffs' claim for confirmation of their title, and that plaintiffs, and their security on their cost bond pay all the costs to be taxed and providing that execution thereon might issue, is such a recovery of land by the State as is contemplated by that provision of the act approved April 15, 1905, entitled 'An Act to provide for the sale and lease of the public free school and asylum lands, and to charge certain fees incident thereto, and to temporarily suspend the sale and lease of said lands, and declaring an emergency,' which is as follows:

"\* \* \* provided, that lands heretofore or hereafter recovered by the State from claimants holding or claiming same under Spanish or Mexican titles shall be considered as vacancies disclosed by the official maps.' (See Sec. 8, near middle of page 165 of said Act of April 15, 1905. Exhibit 'A' hereto attached is a copy in full of said judgment.)"

Said judgment is the identical judgment which was affirmed by the Supreme Court of Texas on December 8, 1885, in *Noberto Garza et al. vs. The State of Texas*, 64 Texas, 670.

I am of the opinion that this question should be answered negatively.

And even if it should be held that the land involved in that judgment was *recovered by the State* within the meaning of the above quoted statutory provisions, the ninety days within which the preference right might have been exercised have already elapsed.

"2. Has anyone who possesses the necessary qualifications the right, by complying with the requirements of the law, to purchase without the condition of settlement any of the unsurveyed vacant

tracts of school land if the vacancy of the tract or tracts sought to be purchased is not disclosed by the official maps in use in the Land Office at the time the application for the survey of same is filed? (See Section 8, near top of page 165 of said Act of April 15, 1905.)”

As I understand this statute, the words “unsurveyed vacant tracts not disclosed” mean unsurveyed vacant tracts not *disclosed as vacancies*.

The purpose of the statute is to authorize the Commissioner to sell for cash and without condition of settlement and improvement all unsurveyed vacant tracts not disclosed as vacant land by the official map in use in the Land Office at the date of the filing of application to purchase such land. If such maps disclose such vacancy the applicant is not to be permitted to buy without condition of settlement and improvement; but if such maps do not disclose such vacancy, such applicant is to be permitted to buy without such condition.

“3. Does said Act of April 15, 1905, give a preference right to the owner of an enclosure or enclosures on a survey that was distinctly delineated as a survey on the official map in use in the Land Office on February 23, 1900, to purchase that portion of the vacancy within his enclosure and the owner of the improvements on said survey the preference right to purchase 160 acres on which his improvements are situated should the survey be recognized by the Commissioner as a vacancy? (See Section 8, near bottom of page 165 of said Act of April 15, 1905.)”

The portion of the statute here under consideration is as follows: “Should the survey not be disclosed by the official maps in use in the Land Office on February 23, 1900, but should be recognized by the Commissioner as a vacancy, the owner of the enclosure or improvements should be notified and given ninety days from the date of such notice to purchase that portion of the vacancy actually within his enclosure, and the owner of the improvements shall have the same preference right to purchase not to exceed 160 acres on which his improvements are situated.” etc.

The purpose of these statutory provisions is to give to the owner of an enclosure or improvements a preference right to purchase, if the “vacancy” was *not disclosed as a vacancy* by the official maps in use in the Land Office on February 23, 1900. This is indicated by the fact that in the next preceding sentence of the statute the surveyor is required to give the name and postoffice address of such owners, in order that they may be notified preliminary to the exercise by them of the preference right here given them, respectively.

The words *should the survey not be disclosed by the official map* refer to the *survey made for the applicant* under the provisions of the foregoing portions of Section 8 of said act; but it is a *vacancy* rather than the boundaries of a survey that must “not be disclosed.”

To hold that the statute requires, as a condition for the exercise of the preference right, merely that the *survey made for such applicant* must not be disclosed by the maps in use in the General

Land Office on February 23, 1900, would be absurd, because the act plainly contemplates that such survey for such applicant is to be made after the taking effect of this Act of 1905, and, therefore, necessarily after, and not before, February 23, 1900. But no such trouble will ensue if it be held that it is *the vacancy* and not the *survey for the applicant* which is to be tested out by and which must not be shown upon the maps in use in the Land Office on February 23, 1900.

The true construction of the above-quoted language is perhaps brought out by the following punctuation thereof: "Should the survey not be disclosed by the official maps in use in the Land Office on February 23, 1900 (but should be recognized by the Commissioner), as a vacancy," etc.

It seems probable that the true meaning of this paragraph might properly be expressed thus: "Should the survey made for the aforesaid applicant by the county surveyor of the county in which the land lies be found by the Commissioner of the General Land Office (upon comparison by the Commissioner of such field notes that the official maps which were in use in the General Land Office on February 23, 1900), to be upon land which was not *disclosed as a vacancy* by the aforesaid official map, but should the land embraced in such survey so made by such county surveyor for such applicant be afterward recognized by the Commissioner *as a vacancy*, the owner of the enclosure or improvements shall be notified and given ninety days from the date of such notice to purchase," etc.

Having thus undertaken to answer fully the abstract questions propounded by you, I deem it proper to add this:

From personal conversation with you and your Chief Clerk, Mr. J. T. Robison, and Judge L. D. Brooks, I learn that the foregoing questions were submitted with special reference to certain applications heretofore filed by clients of Judge Brooks to purchase certain lands in Hidalgo County which are embraced within the boundaries of a tract of land delineated upon a map which was in use in the General Land Office on February 23, 1900, and thereon marked "Los Ejidos," a blue print of which you have furnished me.

Assuming that the foregoing constructions of said statute are correct, there remain, therefore, as applied to the facts of the actual case before you these issues:

1. Do not the official maps in use in the Land Office on February 23, 1900, *disclose as a vacancy* the land which is embraced in the surveys made for said applicants; or, in other words, do not said maps indicate, by the very use of the words "Los Ejidos" that the said tract which was so marked on said maps was *vacant land*, although said tract was *delineated*, with definite boundaries, upon said map?

2. Whether or not the lands embraced in the surveys made for said applicants were *disclosed as a vacancy* upon the official maps in use in the Land Office at the time applications for such surveys were filed?

Consequently, the material question involved is, did the official

Land Office maps aforesaid *disclose as a vacancy* the lands embraced in the surveys which were made for said applicants?

It seems probable that were it not for the fact that the maps aforesaid show the entire tract under consideration to be marked "Los Ejidos," the conclusion would be that the lands embraced in the surveys made for said applicants are not *disclosed as vacancies* by said maps; but since the name given to said tract upon said maps means "the commons," can it not be said that this is equivalent to a declaration upon the face of the maps that said lands are vacant lands?

From the decision of the Supreme Court in the Garza case, *supra*, it appears that these lands were granted to Reynosa Vieja, a town lying just across the Rio Grande from Los Ejidos and in Old Mexico.

I have not had opportunity for running out to a conclusion the inquiry thus suggested, and do not deem it advisable to await such opportunity in view of the disposition of this matter which is hereinafter suggested.

In studying your questions I find a map now in use in the Land Office showing said Los Ejidos tract to be marked "1-749." Reference to this file shows that a survey of said tract was made in 1879 by Dougherty, county surveyor, the recital in the field notes thereof being that the survey was made pursuant to a decree of confirmation rendered by the district court of Travis County confirming a grant made by decree of date October 13, 1836, to the great number of claimants who are named in said field notes.

Quaere: Do the records of the district court of Travis County sustain these recitals and show such confirmation?

This is probably not the title or claim upon which the Garza suit, *supra*, was instituted.

It seems probable that said survey of 1879 was made pursuant to Section 8, Article 14 of the Constitution of Texas, which allowed until January 1, 1880, in which to complete surveys and plats and make returns to the General Land Office of field notes of surveys confirmed under the Act of August 15, 1870, page 201 (6 Gammel, 375).

That act authorized suits for confirmation of titles to lands lying between the Nueces and the Rio Grande, and below a line drawn from the northern boundary of Webb County to Moros Creek, which would embrace the land in controversy.

I am informed by Judge Brooks that the lands which are embraced in the applications made by his clients, and in the surveys made thereunder, are occupied by Mexican claimants, and I am also informed that they protested in the General Land Office against the approval of the field notes of said surveys, basing their opposition upon the assertion that they, the said Mexican claimants were in possession of the lands under and by virtue of some degree of confirmation. Since that contention could not reasonably be made under the decision of the Supreme Court in the Garza case, *supra*, the contention of said claimants is corroborative of the above mentioned recitals in said Dougherty field notes of 1879.

There seems to be need here for determining the facts concerning said reported confirmation by the district court of Travis County and the legal effect of the said survey and field notes of 1879. What is the present status of said survey and field notes in the General Land Office?

Upon the whole, I beg to suggest that if, upon full investigation and consideration of said reported confirmation and said survey and field notes of 1879, there be found nothing rendering such action inadvisable, the best course to be pursued in this matter may be for us to institute in the district court of Travis County a suit in behalf of the State against said Mexican claimants for the entire Los Ejidos tract, thereby testing out the title and the right to the possession of all of said lands.

And it may be found advisable to make the applicants represented by Judge Brooks parties to that suit.

Yours truly,

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#### ANTI-PASS LAW—OFFICERS OF PENITENTIARY SYSTEM.

Officers of penitentiary system do not come within exemption from provisions of anti-pass law.

AUSTIN, TEXAS, June 13, 1907.

*Hon. Benton McMillan, Financial Agent Texas State Penitentiaries, Huntsville, Texas.*

Dear Sir: You have submitted for our consideration a contract of date September 18, 1906, between the superintendent and financial agent of the Texas State penitentiaries and the Trinity & Brazos Valley Railroad Company, and have requested an opinion from this department upon the question whether or not under this contract and Senate Bill No. 8, which was passed by the Thirtieth Legislature, and is commonly known as the "Anti-Pass Bill," the officers of the penitentiary system may avail themselves of the privilege of free transportation, as set forth in Article 4 of said contract.

Said contract is one hiring to said railway company one hundred male convicts for two years beginning January 1, 1907.

Said Article 4 fixes the hire of each such convict at \$1.25 per day, and further provides:

"As a further consideration moving to the parties of the first part, the party of the second part agrees to transport over its own line of railroad free of charge to the parties of the first part, all supplies of every kind intended for the use of the men or the guards while at work under this contract; and also to transport free of charge such officers of the penitentiary system of this State as may be required to visit or inspect said convicts, which shall include annual transportation for three commissioners, superintendent, two assistant superintendents, financial agent, assistant financial agent, auditor and two inspectors."

The above-mentioned statute will become effective on July 12, 1907. Its general purpose and effect is, among other things, to pro-

hibit railway companies from giving, furnishing or supplying free transportation of persons or supplies except to certain enumerated classes of persons and in certain enumerated classes of cases.

I am of the opinion that the contract submitted by you embraces neither supplies nor persons falling within any of the exemptions prescribed by the statute, and that, consequently your question must be answered negatively.

I am further of the opinion that the question submitted by you based upon said contract, raises no issue as to the impairment of the obligation of a contract. Said contract never conferred any personal right or privilege upon any of the officers or persons embraced by the terms of said Article 4. The right to free transportation of supplies was for the benefit of the State alone, and the right to free transportation of individuals was not for the personal benefit of any of the individuals embraced in such provisions for free transportation; and by the terms of said anti-pass bill, the State, in its sovereign capacity, and as one of the real contracting parties, has, in effect, waived all such rights in its own behalf, and has forbidden its aforesaid agents and employees to claim, demand or exercise any right or privilege set forth in said Article 4.

Said contract is herewith returned to you.

Yours truly,

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#### ANTI-PASS LAW—COUNTY JUDGE—PEACE OFFICERS.

County judge not a peace officer within meaning of law, therefore not exempt from provisions of anti-pass law.

AUSTIN, TEXAS, June 13, 1907.

*Hon. F. Stevens, County Judge, Aransas County, Rockport, Texas.*

Dear Sir: We have your letter of 10th instant, in which you ask us to advise you "whether or not county judges come within the exception in the anti-pass law permitting railroads to issue passes to peace officers charged with the execution of criminal processes?"

Senate Bill No. 8, passed by the Thirtieth Legislature, and commonly known as the "Anti-Pass Law," contains the following exemption clause, under which your question arises, viz.:

"Also the State rangers, sheriffs or other bona fide elective peace officers whose duties are to execute criminal processes, provided that if any such railroad or transportation company shall grant to any sheriff a free pass over its lines of railroads, then it shall issue like free transportation to each and every sheriff in this State who may make to it written application therefor, and provided further, that said sheriffs and other peace officers above mentioned using such free passes or transportation shall deduct the money value of the same at the legal rate per mile from any mileage account against the State and litigants earned by them in executing processes when such pass was used or could have been used."

Section 15 of Article 5 of the Constitution of Texas provides that the county judge "shall be a conservator of the peace."

In *Jones vs. State*, 65 S. W. Rep., 92, the Court of Criminal Appeals of Texas held that the defendant, who was a county judge, was entitled to carry a pistol by reason of the fact that he was a county judge, and, therefore, a peace officer within the meaning of the statute against unlawfully carrying arms, the opinion of the court being based upon the above-mentioned constitutional provision. It is also true that said anti-pass law is a penal statute. Nevertheless, I am of the opinion that the county judge does not clearly come within the exemptions set forth in the above-quoted portion of said anti-pass law. A county judge, to a limited extent, and for some purposes, is a peace officer; but he is hardly so within the meaning of the statute here under consideration.

It will be noted that the statute employs many words of limitation, and does not throw the exemption open to all peace officers. The exemption under consideration extends to only bona fide elective peace officers, *whose duties are to execute criminal processes*. This language implies that the Legislature meant only elective officers whose principal duties are to execute criminal processes. This view of the matter is further supported by the fact that the statute requires that the peace officer who avails himself of the privilege of this exemption and who uses a free pass shall deduct the money value of the same at the legal rate per mile from any mileage accounts against the State and litigants earned by them in executing processes when such pass was used or could have been used."

The question presented by you is by no means free from difficulty, but considering the statute as a whole, I am of the opinion that unless and until the courts shall decide otherwise it should be held that county judges are within none of the exemptions prescribed by said anti-pass law, and will not be permitted to receive and use free railroad transportation.

Yours truly,

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ANTI-PASS LAW—UNITED STATES MARSHALS AND  
UNITED STATES ATTORNEYS.

United States marshals and their deputies, and United States attorneys and their assistants, not within exemption from provisions of anti-pass act.

AUSTIN, TEXAS, June 13, 1907.

*Hon. Lock McDaniel, United States Attorney, Houston, Texas.*

Dear Sir: I have your letter of the 11th inst., requesting from this department an opinion as to whether or not United States Marshals and their deputies, and United States Attorneys and their assistants, are within the exemptions prescribed by Senate Bill No. 8, which was enacted by the Thirtieth Legislature of Texas, and is commonly known as the anti-pass bill.

Replying, I beg to say that I am of opinion that your question

should be answered negatively. The statute expressly exempts certain Federal officers, but not those mentioned by you.

Among the exemptions set out in said statute, I find the following: "Also the State rangers, sheriffs or other bona fide elected peace officers whose duties are to execute criminal process," etc. I am inclined to think that with the exception of the Federal officers especially enumerated the exemptions provided should be held to apply to State and county officers in contradistinction to officers of or under the United States government.

In any event, the officers embraced in your question are clearly not within the terms of the above quoted portion of said act, since they are not "elective" officers.

Yours truly,

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#### ANTI-PASS LAW—NOTARY PUBLIC.

It will be unlawful, after July 12, 1907, for a notary public, even though he be in the employ of a railway company, to travel upon a free railroad pass.

AUSTIN, TEXAS, June 13, 1907.

*Mr. Edward W. Smith, Notary Public, Colorado, Texas.*

Dear Sir: Replying to your inquiry of the 31st ult., I beg to say that under the provisions of Senate Bill No. 8, enacted by the Thirtieth Legislature, and commonly known as the anti-pass bill, I am of the opinion that, "except employees operating trains when in the actual discharge of their duties as such," it will be unlawful, on and after July 12, 1907, for a notary public, who is then also an employe of a railway company, to travel upon a free railroad pass.

Yours truly,

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#### MEDICAL BILL—PHYSICIAN—MANNER OF OBTAINING LICENSE FOR THE PRACTICE OF MEDICINE.

AUSTIN, TEXAS, June 15, 1907.

*Mr. Claud Gray, District Clerk, Johnson City, Texas.*

Dear Sir: In yours of the 7th inst., you ask if under the medical bill, passed by the Thirtieth Legislature, a physician, who has been practicing under a license issued by a district board of medical examiners in 1897, being a Texas Medical Board, will be required to stand an examination before the new board, or will he be entitled to a verification license.

Section 6 of the act contains the following provisions: "Within one year after the passage of this act, all legal practitioners of medicine in this State, who, practicing under the provisions of previous laws, or under diplomas of a reputable and legal college of medicine, have not already received license from a State Medical Examining Board of this State, shall present to the Board of Medical Examiners for the State of Texas, documents or legally certified transcripts of documents, sufficient to establish the existing license heretofore issued by previous examining boards of this State, or ex-



emption existing under any law, and shall receive from said board verification license, which shall be recorded in the district clerk's office in the county in which the licentiates may reside. \* \* \* It is especially provided that those whose claim to State licenses rests upon diplomas from medical colleges, recorded from January 1, 1891, to July 9, 1901, shall present to the State Board of Medical Examiners satisfactory evidence that their diplomas were issued from bona fide medical colleges of reputable standing, which shall be decided by the Board of Medical Examiners before they are entitled to a certificate from said board."

Section 7 provides that all applicants not licensed under the provisions of Section 6, must pass an examination before the Board of Medical Examiners, established by the act.

Section 15 provides that all certificates issued by any board of medical examiners of the State under any former law, shall be and continue in full force and effect for one year after the act takes effect; and further provides that any person who may be practicing medicine within the State under the provisions of existing laws, or any exception thereto, when the act takes effect may continue to practice for one year thereafter without compliance with the provisions:

Under Section 15 of the act, all persons who have complied with the provisions of laws existing at the time the act becomes effective, are authorized to practice medicine for one year, but not longer, without complying with the provisions of this act. After the expiration of one year the provision above quoted construed with previous laws to which it refers, classifies the practitioners as follows:

1. Those who were exempted from the provisions of previous laws.
2. Those who are practicing without diplomas under the provisions of previous laws, but who did not receive from one of the State Medical Examining Boards of this State under the act of 1901 a license, but whose authority to practice is a certificate of a district medical board under previous law.
3. Those who are practicing under a diploma of a reputable and legal college of medicine, recorded prior to January 1, 1891, but who failed to secure a license from one of the State Medical Examining Boards of the State, under the act of 1901.
4. Those who received upon examination a license from one of the State Medical Examining Boards of the State, under the act of 1901.
5. Those whose claim to a State license issued by a State Medical Board under the act of 1901, rests upon diplomas from medical colleges recorded from January 1, 1891, to July 9, 1901.

As to the first class, your attention is directed to the provision of Section 8, Act of Twenty-seventh Legislature, 1901, which exempted entirely from compliance with its provisions those who were practicing medicine in Texas prior to January 1, 1885. This class of practitioners are required within one year after the act becomes effective to present to the Board of Medical Examiners documents or certified transcripts of documents sufficient to establish their exemption. I take it, that this exemption may be established by affidavit of the practitioner, together with the affidavit of other persons, having personal knowledge of the fact that he was practicing medicine in Texas prior to January 1, 1885.

As to the second class, attention is directed again to provision of Section 8, Act of 1901, which exempted from the operation of that act those who began the practice of medicine in the State after January 1, 1885, who had complied with the provisions of the laws of the State, regulating the practice of medicine in force prior to July 9, 1901. This class was not required to secure from either of the State Medical Examining Board a license. The laws in force prior to that time are contained in the Rev. Stats. of 1895, Article 3777, etc., and Article 438, etc., of the Penal Code. These provisions of the Revised Statute of 1895 and of the Penal Code, were brought forward from the Revised Statutes of 1879 and consisted of the acts of 1875, 1876 and 1879, with an amendment of 1887 in one particular. Under the law, as it then existed, a person was entitled to practice medicine, either on a certificate of a board of medical examiners of any district of the State, of which there were several at that time, or a diploma from some reputable medical college, which had been recorded in the office of the district clerk of the county in which the practitioner offered to practice. Of this class there is a sub-class, consisting of those who had diplomas recorded after January 1, 1891. These were required, under the act of 1901, to present satisfactory evidence that their diplomas were issued by bona fide medical colleges of respectable standing and to receive from one of the medical boards, created by the act of 1901, a certificate. Many practitioners coming under the sub-class did not comply with the provision of the act of 1901 and secure a certificate from one of the State Medical Examining Boards.

In order for this class, not the sub-class, to comply with the provisions of the act, they must within one year after the act becomes effective, present to the Board of Medical Examiners the valid and existing license issued by the district board of medical examiners with evidence of record thereof, or documents, or legally certified transcripts of documents, sufficient to establish the existence and validity and record of such license. The sub-class will be considered as class 5 in this opinion.

As to the third class, being those practicing under diplomas of medical colleges recorded prior to January 1, 1891, in order to comply with the act, they must within one year from the time it becomes effective, present to the Board of Medical Examiners the valid and existing diploma and evidence of record thereof or document or legally certified transcripts of documents, sufficient to establish the existence and validity and record of such diploma. Those whose diplomas were recorded after January 1, 1891, and prior to July 9, 1901, will be considered in the fifth class in this opinion.

The fourth class, in order to comply with the provisions of the act, are only required to have registered by district clerk of the county of their residence, the license issued by State Board. If the license is based upon diplomas recorded after January 1, 1891, and prior to July 9, 1901, they come within the fifth class in this opinion.

The fifth class, regardless of whether they have secured license from one of the State Medical Examining Boards or not, and regardless of the fact that the diploma has been recorded, as provided under previous laws, will be required, in addition to presenting the Board of Medical Examiners documents or legally certified transcripts of

documents, sufficient to establish the existence and validity of such diploma and record thereof, to present to said board satisfactory evidence that their diplomas were issued from bona fide medical colleges of reputable standing.

The law requires that verification license shall be issued to each of the classes mentioned above, except the fourth, upon their compliance with the provisions of law as indicated above. This must be done within one year from the 12th day of July, 1907. A fee of 50 cents must be paid by all practitioners to the board for the verification license.

The party to whom you refer comes within the second class.

Yours truly,

#### COUNTY SCHOOL FUND—DEPOSITORY LAW.

It is duty of commissioners court to deposit with county depository proceeds of sale of county school land, and, if necessary, require depository to give additional bond for protection of county.

AUSTIN, TEXAS, June 20, 1907.

*Judge W. B. Chauncey, County Judge, Hartley County, Channing, Texas.*

Sir: Replying to your letter of the 18th inst., as to proper disposition to be made of proceeds of sale of four leagues of school lands belonging to Hartley County, pending investment of such proceeds, and the right of the county depository to receive and hold such money, pending such investment thereof, I beg to say:

Section 22 of the county depository law (Acts 1905, page 392) makes it the duty of the commissioners court "to select as the depository of all the funds of the county the banking corporation, association or individual banker, offering to pay the largest rate of interest per annum for said funds."

Section 22 of said act provides that "as soon as said bond (meaning the bond of the county depository) be given and approved by the commissioners court, an order shall be made and entered upon the minutes of such court, designating such banking corporation, association or individual banker as a depository of the funds of said county until sixty days after the time fixed for the next selection of a depository: and, thereupon, it shall be the duty of the county treasurer of said county, immediately upon the making of such order, to transfer to said depository all the funds belonging to said county, and immediately upon the receipt of any money thereof to deposit the same with said depository to the credit of said county."

It is clear, therefore, that all funds belonging to the county must be deposited in the county depository: and this is true of proceeds of school lands belonging to the county, pending investment thereof, as provided by the Constitution and laws of this State.

But, while it is the purpose of the law to require that all monies belonging to the county shall be thus placed in the county depository, the law also contemplates that the county shall be fully protected by a bond or bonds, with ample security. Upon that feature, said statute contains the following provisions:

"Section 23. Within five days after the selection of such depository, it shall be the duty of the banking corporation, association or individual banker, so selected, to execute a bond, payable to the county judge and his successors in office, to be approved by the commissioners court of said county and filed in the office of the county clerk of said court with not less than five solvent sureties who shall own unencumbered real estate in this State not exempt from execution under the laws of this State, of as great value as the amount of said bond; said bond shall in no event be for less than the total amount of revenue of such county for the entire two years for which the same is made."

The remaining portion of this section authorizes the acceptance of other securities in lieu of such real estate, and prescribes the condition of the bond, etc.

"Section 31. If the commissioners court shall at any time deem it necessary for the protection of the county, it may require any depository to execute a new bond, and if said new bond be not filed within five days from the time of the service of a copy of said order upon said depository, the commissioners court may proceed to the selection of another depository in the manner provided for the selection of a depository at the regular time for such selection."

Under the foregoing statutory provisions, the commissioners court unquestionably has the right, whenever it may deem it necessary for the protection of the county, to require the county depository to execute a new bond of the same amount in lieu of its old bond, in order that the county may be protected by a solvent bond in the amount of the old bond; and I am of the opinion that in order to afford adequate protection to the county and to carry out the probable intention of the Legislature in enacting this statute, it should be held that whenever the commissioners court may deem it necessary for the protection of the county, it may require of the county depository a "new bond" in addition to its bond theretofore given, although such old bond may be entirely solvent.

The case presented by you illustrates the importance to the county of a construction of this law which will authorize the commissioners court to require such additional bond, the \$17,712 recently paid over to the county being proceeds of a vendors' lien note given for Hartley County school lands, which note was drawn payable at the option of the purchaser within twenty years from its date, and the amount of the original bond of the county depository having been fixed by the commissioners court without reference to the payment of said land note, said court having no notice, when the amount of said original bond was fixed that said land note would be paid off within the two years covered by such original bond.

You state that three of the county commissioners and yourself gave checks on the bank of Channing to three other banks for a fourth, each, of said \$17,712, and that the bank of Channing refuses to pay said checks, claiming the right to hold the money until investment thereof by the commissioners court.

Assuming that the bank of Channing is the county depository of Hartley County, and that it has given bond as provided by law, it is clearly within its rights under the statute in declining to honor said

checks and pay out said money for the purpose of deposit in other banks, pending lawful investment thereof. If the commissioners court considers the bond of the county depository insufficient for any reason to protect the interest of the county, it should require of the county depository such new and additional bond as will in its judgment amply protect the county's interest; and if such bond be not given within the time prescribed by Section 31 of said act, the commissioners court should proceed to the selection of another county depository, as set forth in said Section 31.

Yours truly,

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CONSTRUCTION OF STATUTES—PLACES OF AMUSEMENT  
—BASEBALL PARK.

Baseball construed to be such game as not to be prohibited from being played on Sunday.

AUSTIN, TEXAS, June 20, 1907.

*Hon. Chris. L. Knorr, County Attorney, Corsicana, Texas.*

Dear Sir: I am in receipt of your telephone message, in which you ask if the opening of a baseball park on Sunday is prohibited under the provisions of Article 199 of the Penal Code. The provisions of this article, in so far as they are material, are as follows:

"Any proprietor of any place of public amusement \* \* \* who shall permit his place of public amusement to be opened for the purpose of public amusement on Sunday, shall be fined not less than twenty dollars and not more than fifty dollars. The term 'place of public amusement' shall be construed to mean circuses, theaters, variety theaters and such other amusements as are exhibited, and for which an admission fee is charged; and shall also include dances at disorderly houses, low dives and places of like character, with or without fees for admission."

If a baseball park is a place of public amusement within the provisions of this article, it must come within the meaning of the term "such other amusements as are exhibited and for which an admission fee is charged." The article specifies as places of public amusement the following:

"Circuses, theaters, and variety theaters." The specification of these places are followed by the general clause: "such other amusements as are exhibited and for which an admission fee is charged."

The rule of construction is, that when there are general words following particular and specific words, the former must be confined to things of the same kind. The rule is very applicably stated in the case of *Gundling vs. Chicago*, 48 L. R. A., 230, as follows:

"When general words follow an enumeration of particular things, such words must be held to include such things or objects as are the same kind as those specifically enumerated." (See also *Lewis' Sutherland on Statutory Construction*, Vol. 2, Paragraphs 422-434.)

Following this rule of construction, which is well established by the authorities, you are advised that the general term "such other amusements as are exhibited and for which an admission fee is charged"

can not include any amusement other than that of the same kind as the specific words preceding, viz, "circuses, theaters and variety theaters."

Baseball not being an amusement similar in any respect to those specified in the statute, it does not come within the general terms following such a specification, and it is therefore not within the meaning of Article 199.

Yours truly,

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#### ANTI-PASS LAW—EXEMPTIONS.

Law exempts persons actually employed on sleeping cars, express cars, linemen of telegraph and telephone companies, news boys employed on trains, railway mail service employees, etc. United States postal clerks not exempt.

AUSTIN, TEXAS, June 20, 1907.

*Mr. J. A. Stephens, County Clerk of Howard County, Big Springs, Texas.*

Dear Sir: Replying to your recent inquiry relative to Senate Bill No. 8, passed by the Thirtieth Legislature, and commonly known as the anti-pass law, I beg to say that said statute exempts from its provisions, concerning railroads, among others, "persons actually employed on sleeping cars, express cars, linesmen of telegraph and telephone companies, newsboys employed on trains, railway mail service employees," etc.

I am of the opinion that this exemption does not apply to United States postal clerks who are not employed in the railway mail service.

Yours truly,

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#### ANTI-PASS LAW—ATTORNEY FOR RAILROAD— POSTMASTER.

Postmaster who is also local attorney for railroad company not entitled to free transportation, the office of postmaster held to be a public office, and not within the exemptions named by said law.

AUSTIN, TEXAS, June 20, 1907.

*Messrs. Morris & Haskell, Stockdale, Texas.*

Gentlemen: We are in receipt of your letter of the 14th inst., in which you say:

Our Mr. B. G. Haskell, of the firm of Morris & Haskell, of Stockdale, Texas, is the local attorney for the Galveston, Harrisburg & San Antonio Railroad and he is also postmaster of this town. Will you please to advise us if under the anti-pass law, as passed by the last Legislature, the office of postmaster is such public office within the meaning of the anti-pass law as to bar Mr. Haskell from holding the office of local attorney for said railroad, practicing in courts of record and receiving for his services a reasonable annual salary."

One of the purposes of the statute to which you refer was to prevent the issuance and use of free railroad transportation, with certain exceptions, which are set forth in the statute.

Among such exceptions concerning railroads are "attorneys who appear in courts of record to try cases, and who receive a reasonable annual salary." However, the statute contains the further provision that "no person who holds any public office in this State shall at any time during their term of office be entitled to any such free pass or transportation, privilege or franks or substitute for fare or charge from any railway or other company mentioned in Section 1 of this act, except employees operating trains when in the actual discharge of their duties as such and the officers hereinbefore exempted." I am unable to find in said statute anything which would prohibit a local attorney for a railroad company, practicing in courts of record and receiving for his services a reasonable annual salary, from holding the office of postmaster, or vice versa. But inasmuch as I find in the act nothing to place the postmaster within the exemptions prescribed by the act, I am of the opinion that a postmaster is within the class of public officers falling within the inhibition of the above quoted portion of the statute, and that a postmaster can not, on and after July 12, 1907, when said statute will become effective, lawfully receive and use free transportation upon a railroad, although such postmaster may, at the time, be such an attorney for a railroad company.

Yours truly,

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ANTI-PASS LAW—ASSISTANT QUARTERMASTER GENERAL.

Held not to be within the exemptions of said law.

AUSTIN, TEXAS, June 21, 1907.

*General J. O. Newton, Adjutant General, Capitol.*

Sir: In reply to your letter of the 17th inst., asking whether the railway companies of Texas will be permitted to issue free passes to the Quartermaster General after July 12, 1907, I beg to say:

Senate Bill No. 8, passed by the Thirtieth Legislature and commonly known as the anti-pass law, will become effective on July 12, 1907. Said statute exempts "State Rangers" from its operation, and permits them to receive and use free railroad transportation; and it is under this exemption alone, if any, that the Assistant Quartermaster General may claim the privilege of receiving and using free railroad transportation.

It will be noticed that this exemption is to "State Rangers," and not to the "Ranger Force," the term which is employed in the act of 1901 (General Laws of the Twenty-seventh Legislature, page 41), which provides for the organization of that force. The words "State Rangers" are, in a sense, and it may be that they should be construed and held to be, more explicit and more restrictive than the words "Ranger Force" as used in said act of 1901.

Section 2 of that act provided that "the 'Ranger Force' shall con-

sist of not to exceed four separate companies of mounted men, each to consist of not to exceed one captain, one first sergeant, and twenty privates, and one quartermaster for the entire force."

And Section 4 of said act provided that "the Governor shall appoint a quartermaster for this force, who shall discharge the duties of quartermaster, commissary and paymaster, and shall rank and receive the pay of a captain."

It is obvious that the act creating the "Ranger Force" makes the quartermaster thereof a constituent member of that force.

But Section 33 of Chapter 194 of the General Laws of 1905, entitled "An Act to define and provide for organizing and disciplining the militia" provides that the Assistant Quartermaster General "shall perform the duties of quartermaster, commissary and paymaster of the 'Ranger Force,' and such other duties as may be required of him by the Governor or the Adjutant General."

It thus appears that the Assistant Quartermaster General, who performs the duties of quartermaster, commissary and paymaster of the "Ranger Force," has those duties imposed upon him *ex-officio*, and the officer charged with those duties is no longer a constituent member of the "Ranger Force," as he was under said act of 1901 providing for its organization.

The general rule is that where the statute denounces certain things, and exempts certain classes of individuals from the operation of the law, he who would claim exemption must bring himself clearly within one of the exemptions. It is extremely doubtful, to say the least of it, whether the Legislature intended, by the use of the words "State Rangers," to exempt from the operation of the anti-pass law the Assistant Quartermaster General of the militia, merely because he is, under the militia law, required to perform the duties of quartermaster, commissary and paymaster of the "Ranger Force;" and I am of the opinion that, under the general rule above stated, it should be held, until and unless it should be otherwise decided by the courts, that he is not within the exemptions of the anti-pass law, and consequently will not, under that act, be permitted to receive and use free transportation upon any railroad within this State.

Against this view it may be urged that the duties of the Assistant Quartermaster General, in connection with the "Ranger Force," are such as to sometimes call him into the field with the "State Rangers," and that, therefore, he should be held to be a "State Ranger" within the terms of this anti-pass law; but the same argument applies as well, although perhaps in fewer instances, to the Adjutant General and to the Governor; and as to them, the argument could hardly be sustained.

Taken as a whole, the anti-pass law evidences an intention upon the part of the Legislature to carefully limit and restrict the privilege of receiving and using free railroad transportation, and I consider it more in consonance with that intention, as indicated throughout said act, to hold as above indicated than to hold otherwise.

Yours truly,



## ANTI-PASS LAW—DEPUTY SHERIFF.

Deputy sheriff is not an elective officer, consequently not within the exemptions from the operation of the law.

AUSTIN, TEXAS, June 21, 1907.

*Mr. F. A. Hardin, Deputy Sheriff, Oakwoods, Texas.*

Dear Sir: Your letter of the 17th inst., addressed to Hon. L. T. Dashiell, Secretary of State, has been referred to this department for reply.

I am of the opinion that inasmuch as a deputy sheriff is not an elective officer, he is not within the exemptions prescribed by Senate Bill No. 8, passed by the Thirtieth Legislature, and commonly known as the anti-pass law, and consequently can not, on or after July 12th, 1907, when said statute will become effective, legally accept, or use free railroad transportation.

Yours truly,

## ANTI-PASS LAW—SCHOOL TRUSTEE.

School trustee of either a common or independent school district held to be a public officer within the terms of said statute.

AUSTIN, TEXAS, June 21, 1907

*Hon. R. B. Cousins, State Superintendent of Public Instruction, Capitol.*

Sir: We have carefully considered your recent inquiry as to the effect of Senate Bill No. 8, passed by the Thirtieth Legislature and commonly known as the anti-pass law, and in reply beg to say:

This statute will become effective on July 12, 1907.

It provides, among other things, "that no persons who holds any public office in this State shall at any time during their term of office be entitled to any such free pass or transportation, privilege or franks or substitute for fare or charge over any railroad or other company mentioned in Section 1 of this act, except employees operating trains when in the actual discharge of their duties as such and the officers hereinbefore exempted."

I am of the opinion that a school trustee, in either a common school district or an independent school district, is a public officer within the terms of this statute.

*Kimbrough vs. Barnett, 93 Texas, 301.*

*Hendrick vs. State, 49 S. W. Rep., 705.*

School trustees are not among the officers who are specifically exempted from the operation of said statute.

I am, therefore, of the opinion that, with the exception of "employees operating trains when in the actual discharge of their duties as such," said school trustee can not, on or after July 12, 1907, lawfully receive and use free railroad transportation on any railroad within this State.

Yours truly,

ANTI-PASS LAW—COUNTY ATTORNEY—LOCAL ATTORNEY  
FOR RAILROAD.

County attorney, who is also local attorney for railroad, not entitled to ride on free pass.

AUSTIN, TEXAS, June 22, 1907.

W. W. Crook, Esq., County Attorney of Waller County, Hempstead, Texas.

Dear Sir: I am in receipt of your letter, in which you ask:

"Where a county official by a contract made and entered into with a railroad company on the 1st of January, 1907, to represent them as their legal attorney for one year from the date of contract, the consideration being an annual pass issued January 1, 1907, and other valuable considerations, can he, under the new law hold his official office as county attorney and at the same time carry out his contract with the railroads?"

Senate Bill No. 8, passed by the thirtieth Legislature and commonly known as the anti-pass law, prohibits, in general terms, the use of free railroad passes, but prescribes certain exemptions, including "employees" as defined in the act, which term as defined in said act includes "attorneys who appear in courts of record to try cases and who receive a reasonable annual salary;" but the exemption provisions are followed by the words "provided further that no persons who hold any public office in this State, shall at any time during their term of office be entitled to any such free pass or transportation, privilege or franks or substitute for fare or charge over any railroad or other company mentioned in Section 1 of this act, except employees operating trains when in the actual discharge of their duties as such and the officers hereinbefore exempted." County attorneys are not specifically exempted from the operation of this statute.

I am of the opinion that in the case stated by you the county attorney may, under the anti-pass law, continue to represent the railroad company as its attorney, except in State cases, but that he can not, on or after July 12, 1907, upon which date said law will take effect, lawfully use free transportation upon any railroad within this State.

Yours truly,

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ANTI-PASS LAW—SCHOOL TRUSTEE.

School trustee, whether of a common school district, independent school district, city or town, is a public officer, and therefore not within the exemptions of said law.

AUSTIN, TEXAS, June 27, 1907.

Mr. E. W. Link, President Board of Trustees, Palestine Public Schools, Palestine, Texas.

Sir: In reply to your recent inquiry, I have to say:

Senate Bill No. 8, passed by the Thirtieth Legislature, and com-

monly known as the anti-pass law, will become effective on July 12, 1907.

It provides, among other things, "that no persons who hold any public office in this State shall at any time during their term of office be entitled to any such free pass or transportation, privilege or franks, or substitute for fare or charge over any railroad or other company mentioned in Section 1 of this act, except employees operating trains when in the actual discharge of their duties as such and the officers herein before exempted.

I am of the opinion that every school trustee, whether of a common school district, an independent school district, or a city or town, is a public officer within the terms of this statute.

Kimbrough v. Barnett, 93 Texas, 301.

Hendricks vs. State, 49 S. W. Rep., 705.

State vs. Catlin, 84 Texas, 48.

McCormick vs. Pratt, 17 L. R. A., 243; and cases cited in notes.

School trustees are not among the officers who are specifically exempted from the operation of the provisions of said statute relating to railroad companies.

I am, therefore, of the opinion that, with the exception of "employees operating trains when in the actual discharge of their duties as such," none of the school trustees referred to above can, on or after July 12, 1907, lawfully receive and use free railroad transportation on any railroad within the State of Texas.

Yours truly,

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INSURANCE—ROBERTSON INSURANCE ACT—TEXAS FARM  
MORTGAGE COMPANY—CONSTRUCTION OF  
WORDS "DOING BUSINESS."

AUSTIN, TEXAS, June 29, 1907.

*Hon. R. T. Milner, Commissioner of Insurance, Capitol.*

Sir: We are in receipt of your letter of the 26th ult., enclosing a letter written by S. C. Dunham, president of the Travelers' Insurance Company of Hartford, Conn., calling for an opinion upon a question arising under House Bill No. 112, which was passed by the Thirtieth Legislature of Texas, and is commonly known as the "Robertson Insurance Bill."

The question upon which you ask our opinion is whether or not, under the facts so presented, said insurance company will be held to be "doing business" in the State of Texas within the meaning of said statute.

Mr. Dunham thus states the course of the business between the insurance company and the Texas Farm Mortgage Company, a corporation organized under the laws of this State, having its principal office at Dallas:

"The Farm Mortgage Company makes loans from its own resources, taking a note and mortgage to itself. These securities are offered by letters written in Dallas to The Travelers' Insurance Company. The securities so offered are examined in Hartford

and if found acceptable by the finance committee of the Travelers' Insurance Company, a check or draft drawn upon a bank in New York is transmitted for them through this office to the Texas Farm Mortgage Company in Dallas, in which city such checks or drafts are deposited for collection."

This statement of facts, thus presented by Mr. Dunham, is very meager, and upon same it is difficult to predicate a reply of much practical force or value.

From the correspondence attached to your letter I understand the facts to be that each such transaction between the insurance company and the mortgage company is a separate and isolated sale, made and consummated in Hartford, Conn., of notes and mortgages upon Texas property, taken by a Texas Mortgage Company, upon its own behalf and responsibility, and not in any wise in behalf of said insurance company, and that the mortgage company merely invests its own money in such securities, and offers them upon the market for sale at the best price obtainable, and not pursuant to any pre-existing arrangement or binding agreement between itself and such insurance company, and that there is no undisclosed connection between the mortgage company and the insurance company.

I am of the opinion that in transacting such business in the manner hereinabove indicated, said insurance company will not, by reason thereof, be doing business in Texas within the meaning of the above-mentioned statute, and that said insurance company may, without obtaining a permit to do business in Texas, lawfully make such purchases of such notes and mortgages in manner and form as above indicated, and bring and maintain actions thereon in the courts of this State.

However, I deem it proper to say in this connection, that I am further of the opinion that any material change in the facts presented might make a very different case, constituting the transactions involved *doing business in Texas* within the meaning of said statute, and depriving the insurance company of the privilege of bringing and maintaining such actions in the court of this State except upon allegation and proof that at the date of the purchase of such notes and mortgages such insurance company held a permit to do business within this State.

Upon an issue of that character the inquiry might extend to and embrace, not only the entire course of business between the companies, including all such transactions between them, but also the original design and purpose of the organization of the mortgage company, with reference to the course of business to be maintained between it and the insurance company; and I am of the opinion that if the proof should show that in such transactions, or any of them, the mortgage company was acting as agent for the insurance company, or if the insurance company had any material interest in such loans, otherwise than as such bona fide purchaser thereof, it must necessarily be held that such insurance company was then through and by virtue of such transaction of transactions doing business in Texas within the scope and meaning of said Robertson insurance bill.

Yours truly,

## ANTI-PASS LAW — MAYOR — NOTARY PUBLIC — RESIGNATION OF.

Either mayor or notary public is a public officer within the meaning of said act, consequently not within its exemptions.

AUSTIN, TEXAS, July 1, 1907.

*Mr. Earl Connor, Mayor, Eastland, Texas.*

Dear Sir: We have your letter of recent date, concerning the effect and operation of Senate Bill No. 8, passed by the Thirtieth Legislature and commonly known as the "Anti-pass Law," and in reply beg to say:

I note that you say that you are mayor of Eastland, and that you are also a notary public. Said statute provides, among other things, "that no persons who hold any public office in this State shall at any time during their term of office be entitled to any such free pass or transportation, privilege or franks or substitute for fare or charge over any railroad or any other company mentioned in Section 1 of this act, except employes operating trains when in the actual discharge of their duties as such, and the officers hereinbefore exempted." Neither mayor nor notaries public are among the officers so specifically exempted.

Consequently, with the exception of "employees operating trains in the actual discharge of their duties as such," neither mayors nor notaries public can, on or after July 12, 1907, when said statute will become effective, lawfully use free railroad transportation upon any railroad within this State. I do not know of any legal reason why you should not continue while mayor to act as an attorney for a railroad company on a salary.

In reply to your question as to how you can get rid of the office of notary public, I beg to suggest that you may do so by tendering to the Governor of Texas your written resignation of that office, and acceptance thereof by him.

Yours truly,

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 ANTI-PASS LAW—CITY ATTORNEY.

City attorney is a public officer within meaning of said act, therefore does not come within its exemptions.

AUSTIN, TEXAS, July 1, 1907.

*Hon. S. P. Saddler, Gatesville, Texas.*

Dear Sir: We have your letter of the 30th ult., in which you ask whether, under the provisions of the anti-pass law, enacted by the Thirtieth Legislature, a city attorney may lawfully use transportation supplied to him under a contract with a railroad company for his professional services.

Said statute provides:

"That no persons who hold any public office in this State shall at any time during their term of office be entitled to any such free pass or transportation, privilege or franks or substitute for fare or

charge over any railroad or any other company mentioned in Section 1 of this act, except employees operating trains when in the actual discharge of their duties as such and the officers hereinbefore exempted."

City attorneys are not among the officers so exempted.

I am, therefore, of the opinion that under said statute, and with the exception of "employees operating trains when in the actual discharge of their duties as such," city attorneys can not, on or after July 12, 1907, on which date said statute will become effective, lawfully use such railroad transportation.

Yours truly,

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STATE HEALTH OFFICER—SURGEON GENERAL OF THE  
NATIONAL GUARD.

AUSTIN, TEXAS, July 2, 1907.

*Adjutant General J. O. Newton, Capitol.*

Sir: I have given careful consideration to your recent letter in which you say:

"Please advise whether or not, in your opinion, paragraph 5, Art. 3410, R. S. 1895, stating that the State Health Officer is ex-officio surgeon general of the Texas National Guard still holds good. Your attention is called to Section 16 and Section 36, Pars. 1 and 7, new militia law, 1905; and Pars. 1-7-24, G. O. No. 1, A. G. O. 1903, and G. O. No. 10. Par. 7, A. G. O. 1906."

Revised Statutes, 3416, Par. 5, provides:

"The State Health Officer shall be ex-officio surgeon general, and shall have the rank of colonel."

This statutory provision appears to have been carried forward into the Revised Statutes of 1895 from Chapter 16 of the General Laws of 1889, page 12.

It will be noted, from the connection in which the above-quoted language is found, that it refers, not to the Texas National Guard, but to the Volunteer Guard as it existed by law down to 1903.

In Chapter 131, page 206, of the General Laws of 1903, the Twenty-eighth Legislature passed an act entitled "An Act to provide for the organization of the militia and the Texas National Guard," etc., which was perhaps intended as a complete revision of the laws concerning the militia.

Section 3 of said act is as follows:

The militia of this State shall be divided into two classes to be known and designated as: (1) The reserve militia; (2) Texas National Guard.

Section 72 of said act was as follows:

"All laws and parts of laws in conflict with the provisions of this act are hereby repealed."

I find in said act no express mention of a surgeon general. Without going into details, it will perhaps be sufficient for present purposes to say that this Act of 1903 does contain provisions which appear to be inconsistent with the above-quoted portion of R. S. 3410.

The militia law passed by the Twenty-ninth Legislature, entitled "An Act to define and provide for organizing and disciplining the militia," etc. (Chap. 104, page 187, General Laws of 1905), was also probably intended to be a complete revision of the militia laws of this State, the purpose being to bring the laws of this State concerning the militia into harmony with the acts of Congress upon that subject. From said law of 1905, I quote the following:

"Sec. 2. The militia of this State shall be divided into two classes, the active and reserve militia. The active militia shall consist of the organized and uniformed militia forces of this State, which shall be known as the Texas National Guard; the reserve militia shall consist of all those liable to service in the militia, but not serving in the Texas National Guard."

"Sec. 16. The Governor is hereby authorized and it shall be his duty to prescribe such regulations as he may see fit for the organization of the Texas National Guard, and he shall, from time to time, as he may deem for the best interests of the service, change such regulations, which shall be in accordance with this act, and conform as near as practicable to the organization of the regular army of the United States. He may, at any time for cause deemed good and sufficient by him, muster out of the service or reorganize any portion of the Texas National Guard or the reserve militia, or discharge any officer or enlisted man thereof, and he shall have full control and authority over all matters touching the militia forces of this State, its organization, equipment and discipline."

Your attention is called to the full power here conferred upon the Governor in the matter of the *organization* of the Texas National Guard:

"Sec. 34. All officers in the military service of this State shall be appointed and commissioned by the Governor at his discretion, and no one shall be recognized as an officer, unless he shall have been duly commissioned and shall have taken the oath of office."

"Sec. 36. \* \* \* No person shall be commissioned unless he shall possess the additional acquirements herein prescribed for the particular office to which he is to be commissioned.

"A general officer, at the time of his appointment, must be an officer above the grade of captain in the military service of this State; and must have been, for six successive years immediately preceding his appointment, a commissioned officer in such service, or he must have had previous service as a commissioned officer in the militia service of this State or of the United States, or both, for nine years."

Under the above-mentioned Act of 1903, General Orders No. 1, dated July 1, 1903, issued by the Adjutant General, by command of the Governor, concerning the organization of the Texas National Guard, direct that there shall be "a medical department," and that "general officers will be appointed by the commander-in-chief" (the Governor).

And General Orders No. 10, dated July 2, 1906, issued by the Adjutant General, by order of the Governor, direct that "the med-

ical department" will consist of "one surgeon general with the rank of colonel," etc.

Upon consideration of the above-mentioned statutes, in their entirety, and especially the provisions thereof herein before quoted, and the practical construction which has been placed thereon by the Governor and Adjutant General, as reflected in said general orders, I am of the opinion that the above quoted portion of R. S., Art. 3410, designating the State Health Officer as ex-officio surgeon general of the volunteer guard of this State is no longer in force and has no legal application whatever to the present militia establishment of this State, and that the appointment of a surgeon general of the Texas National Guard must be held to be governed by the provisions of said Act of 1905 and the orders of the Governor pursuant to authority and power conferred upon him by that statute.

Yours truly,

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#### ANTI-PASS LAW—TRANSFER COMPANY.

Transfer company held to be common carrier and transportation company, and subject to its operation and effect, including both penalties and exemptions.

AUSTIN, TEXAS, July 3, 1907.

*Mr. I. C. Baker, District Attorney, San Antonio, Texas.*

Dear Sir: We are in receipt of your letter asking for a construction of Senate Bill No. 8, which was passed by the Thirtieth Legislature, and is commonly known as the "Anti-pass Law," to which letter is attached a communication from the president of the Carter-Mullaly Transfer Company, setting forth the facts involved and the concurring opinions of two attorneys of said transfer company to the effect of said statute in the premises.

Said statement of facts is as follows:

"This company is a private corporation, chartered under Art. 642, Sec. 10, R. S., and has for its purpose 'the establishment and maintenance of a line of stages.' Under our corporate powers we are engaged in the conveyance of passengers and baggage in this city, and especially the transfer of passengers and baggage between railroad stations in this city. A portion of this business is done by virtue of an agreement and arrangement between this company and the various railroads entering this city, by which arrangement this company takes charge of all through passenger business of the various railroads to the extent of transferring passengers and their baggage from one station to the other in this city. This arrangement contemplates the handling of all through traffic for the various railroad lines in this city, whether such business be State or interstate. To illustrate, if a person in New Orleans should purchase a ticket from that city via S. P., I. & G. N. and Mexican National to the City of Mexico, when he purchased such ticket he would pay the initial carrier for a transfer from the G. H. & S. A. Ry. station in this city to the I. & G. N. station in this city, and on this ticket there would be a coupon good over



this company's line between the stations named and upon his arrival in this city we would take charge of the passenger and transfer him from one station to the other, detaching from his ticket the transfer coupon, which coupon would be redeemed from this company by the G., H. & S. A. Ry. Co. We are also under contract with the United States government to carry all through mail from each depot in this city to whatever other depot in this city the ultimate destination of the mail might require, and to carry all mail in and out of San Antonio to and from the postoffice in this city, and to and from the railroad stations in this city, and in this connection we might say that the Attorney General of the United States decided that under our corporate powers we had the right to make this contract and to perform this service for the National government. In short, we are the connecting link for this city on all through passenger traffic and the United States mail from one railroad to another."

Upon the question thus presented for our consideration, I beg to say that, while not agreeing with the attorneys for said transfer company upon all the propositions laid down in their said opinions, I nevertheless fully concur in the conclusion therein announced.

In other words, I am of the opinion that, under the facts as so shown, said transfer company is a chartered common carrier and transportation company within the meaning of said statute, and that, as such, it is subject to its operation and effect, including both penalties and exemptions.

Yours truly,

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#### INTANGIBLE TAXES—COUNTY BOARD OF EQUALIZATION.

County board of equalization without power or authority to reduce the amount of intangible taxes certified by the State Tax Board.

AUSTIN, TEXAS, July 3, 1907.

*Judge R. D. Doak, County Judge of Armstrong County, Claude, Texas.*

Dear Sir: Replying to your inquiry of the 1st instant, I beg to say that, under the provisions of the intangible tax act passed by the Thirtieth Legislature, a county board of equalization is without authority or power to reduce the amount of intangible taxes certified by the State Tax Board.

Yours truly,

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#### ANTI-PASS LAW—CITY COUNCILMAN.

City councilman is not one of the officers exempted from operation of said anti-pass law.

AUSTIN, TEXAS, July 3, 1907.

*Mr. J. P. Coon, City Attorney, Terrell, Texas.*

Dear Sir: Replying to your letter in which you say:

"One of our city councilmen, W. P. Allen, is assistant treasurer

of the Texas Midland, and I want to know if the fact that he is city councilman will prevent him from accepting and riding on free transportation on the Texas Midland Railroad."

Senate Bill No. 8, which was passed by the Thirtieth Legislature and is commonly known as the anti-pass law, which will become effective on July 12, 1907, contains the provision that "no persons who hold any public office in this State shall at any time during their term of office be entitled to any such free pass or transportation, privilege or franks or substitute for fare or charge over any railway or other company mentioned in Section 1 of this Act, except employees operating trains when in the actual discharge of their duties as such and the officers hereinbefore exempted."

A member of a city council is, in my opinion, a public officer within the meaning of this statute. (*McCormick vs. Pratt*, 17 L. R. A., 243, and note.)

A city councilman is not one of the officers who are expressly exempted from the operation of said anti-pass law.

I am, therefore, of the opinion that under said statute, and with the exception of "employees operating trains when in the actual discharge of their duties as such," a city councilman can not, on or after July 12, 1907, lawfully use free railroad transportation over any railroad within this State. The fact that such person is assistant treasurer of a railroad company is immaterial, if he is also a public officer.

Yours truly,

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ANTI-PASS LAW—MEMBER BOARD OF MANAGERS SOUTHWESTERN INSANE ASYLUM.

Said officer is a public officer within meaning of said law, and can not lawfully use a free pass on any railroad within this State.

AUSTIN, TEXAS, July 8, 1907.

*Dr. T. T. Jackson, Member Board of Managers Southwestern Insane Asylum, San Antonio, Texas.*

Sir: We have carefully considered the inquiries set forth in your letter, in which you say:

"I have the honor to inquire, first, if under the anti-pass law, which has recently been passed by the Thirtieth Legislature, it would be legal or proper for a physician and surgeon, who is in the bona fide employ of the hospital department of a railroad (receiving a stipulated monthly salary), to hold the position of director to one of the eleemosynary institutions of the State, as for instance, the Southwestern Insane Asylum, while at the same time he is receiving as a part of his compensation an annual free pass over the lines owned and operated by the railroad by which he is employed.

"Second. Can a man when employed and enjoying a privilege of a pass hold any other State office?

"I desire to know because I am a member of the Board of Directors of the Southwestern Insane Asylum."

Replying, I have to say:

Some of the statutory provisions bearing upon this subject are as follows:

"R. S., Article 88. The general control, management and direction of the affairs of the Texas Asylum for the insane shall be vested in boards of managers, to be styled the board of managers of the lunatic asylums, subject only to such rules and regulations as may be prescribed by the Legislature. \* \* \*

"R. S., Article 89. The Governor shall appoint for each lunatic asylum a board of managers, consisting of five members, who shall hold their office for two years, or until their successors are appointed and qualified. \* \* \* The board of managers shall be appointed by the Governor by and with the advice and consent of the Senate."

"R. S., Article 90, prescribes the compensation of the members of said board.

"Article 93. The members of the said board of managers \* \* \* shall have the general direction and control of all the property and business of the asylums, in accordance with the requirements of law, and in all those cases not provided for by law, they shall have such direction and control of the property and business of the asylum according to the by-laws, rules and regulations of the asylums. \* \* \*"

Article 94. The board of managers shall have power—

1. To make all necessary by-laws and regulations not inconsistent with the Constitution and laws of this State, for the government of their institutions, officers, employees and inmates, and for the admission of visitors.

2. To determine the salaries and wages of all officers and employees of the asylums.

3. To discharge, upon the recommendation of the superintendent, any officer, employee or patient in the asylums.

4. Upon the nomination of the superintendents, to appoint the assistant physician, steward, matron and apothecary to the asylums.

5. To examine the accounts and vouchers of the superintendents and to reject or approve the same as they may deem right and proper.

6. To exercise a careful supervision over the general operations and expenditures of the asylums, and to direct the manner in which their revenues shall be disbursed. \* \* \*

Senate Bill No. 8, which was passed by the Thirtieth Legislature and will become effective on July 12, 1907, contains the following provisions relative to free railroad passes:

"No persons who hold any public office in this State shall at any time during their term of office be entitled to any such free pass or transportation, privilege or franks or substitute for fare or charge over any railway or other company mentioned in Section 1 of this act, except employees operating trains when in actual

discharge of their duties as such and the officers herein before exempted."

I am of the opinion that the members of the Board of Managers of the Southwestern Insane Asylum are public officers within the meaning of said last-mentioned statute.

Kimbrough vs. Barnett, 93 Texas, 301.

McCornick vs. Pratt, 17 L. R. A., 243; and cases cited.

They are not among the officers who are expressly exempted from the effect of said Senate Bill No. 8.

My conclusion is that under the provisions of said statute, with the exception of "employees operating trains when in the actual discharge of their duties as such," a member of the Board of Managers of the Southwestern Insane Asylum can not, on or after July 12, 1907, lawfully use a free pass or free transportation upon any railroad within this State.

Yours truly,

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#### ANTI-PASS LAW--STREET RAILWAY COMPANY.

A chartered street railway company is chartered transportation company and is subject to the operation and effect of said law, including its penalties and exemptions.

AUSTIN, TEXAS, July 11, 1907.

*Hon. I. C. Baker, District Attorney, Thirty-seventh Judicial District,  
San Antonio, Texas.*

Dear Sir: We have your letter of the 8th inst., containing the following inquiry:

"Is a street railway company, using electricity as a motive power, authorized by Section 2 of the anti-pass act to grant and exchange free passes to the same extent as a steam or interurban railway company, and to in addition transport free of charge police officers and firemen, with the consent of the city authorities? Or is the pass list of a street railway company limited to police officers and firemen, so that such a company can not transport free of charge its officers, employees, etc., or any other person mentioned in Section 2 as being authorized to receive and use transportation?"

Your questions refer to Senate Bill No. 8, which was passed by the Thirtieth Legislature and which will become effective on July 12, 1907.

Section 1 of said act seeks to prohibit certain corporations and persons from giving free passes, franks, etc., and from discriminating in rates, etc.

Section 2 prescribes certain exemptions from the effect of the provisions of Section 1. From Section 2 I quote the following:

"That the provisions of Section 1 of this Act shall not be held to prohibit any steam or electric or interurban railway company or chartered transportation company \* \* \* or the officers, agents or employees thereof from granting free or exchanging free passes, franks, privileges, substitute for pay or other thing herein prohibited, to the following persons:"

Following this is an enumeration of those who are exempted from the inhibition set forth in Section 1. I also find in Section 2 the following: "Provided further, that nothing in this act shall prohibit any street railway company from transporting free of charge police officers and firemen in any city where said company is authorized so to do by any ordinance or authority from the city council of any such city: provided, however, that no person or persons, beneficiaries of free transportation herein permitted, shall ride on a free pass or enjoy free transportation to or from any political convention or on any political errand."

Your question seems to place emphasis on the use of electricity as a motive power. As I understand the statute, the word "electric," as used in the clause "no steam or electric or interurban railway company or chartered transportation company," in said Section 2, is probably not broad enough to embrace a street railway company, in view of the fact that electric railway companies and street railway companies are treated separately by this act, and especially so in that portion of Section 1 which is as follows: "That if any steam or electric railway company, street railway company, interurban railway company or other chartered transportation company \* \* \* shall knowingly haul or carry any person or property free of charge or give or grant to any person firm, association of persons, or corporation, a free pass, frank, a privilege or a substitute for pay." etc.

I am of the opinion that a chartered street railway company is a "chartered transportation company" within the meaning of this statute, and that all chartered street railway companies are subject to the operation and effect of this statute, including both penalties and exemptions as therein set forth and defined.

The words "chartered transportation company," as used in the above quoted portion of Section 2, even when construed without reference to any other portion of the act in question, seem comprehensive enough to necessarily include chartered street railway companies, and I have no doubt that the construction here adopted is correct, in view of the fact that in the above quoted portion of Section 1, street railway companies are expressly recognized and treated as "chartered transportation companies." This view of the matter is further strengthened by the fact that the caption of the act reads thus: "An Act to prohibit railway companies, street railway companies, interurban railway companies, or any other chartered common carrier or transportation companies," etc.

It will be noted that the caption denominates chartered street railway companies, chartered common carriers or transportation companies.

Construing the act as a whole, I think there is no escape from the conclusion above stated; and it follows, I think, that such conclusion applies to all chartered street railway companies, regardless of the motive power by which their cars are operated.

And being within the operation and effect of this statute, as to both penalties and exemptions prescribed therein, all of the exemptions and exceptions which are applicable to steam railroads or to interurban railroads are, in my opinion, applicable as well

to all chartered street railways; and, in addition thereto, chartered street railway companies may, under the above quoted proviso found in Section 2, lawfully transport free of charge police officers and firemen in any city wherein said company is authorized so to do by an ordinance or authority from the city council of said city. These added exemptions, which are applicable to street railway companies only, appear to have been inserted in the statute for the benefit of such cities as may have heretofore duly authorized or which may hereafter duly authorize the street railway company to transport its police officers and firemen in such cities free of charge.

Yours truly,

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ANTI-PASS LAW—LOCAL SURGEON—COUNTY HEALTH OFFICER.

AUSTIN, TEXAS, July 17, 1907.

*Dr. Taylor Hudson, Belton, Texas.*

Dear Sir: We have your letter of the 14th inst., in which you say:

“First. I am local surgeon for the G. C. & S. F. R. R. and as such hold a pass.

“Second. I am county health officer of Bell County, appointed by the commissioners court on a salary. Now, will my office as county health physician forfeit the use of the pass as local surgeon?

“The pass is not given as county health officer, but as local surgeon.”

In reply, I beg to say that Senate Bill No. 8, commonly called the anti-pass law, was passed by the Thirtieth Legislature and is now effective, provides “that no person who holds any public office in this State, shall at any time during their term of office be entitled to any such free pass or transportation, privilege or franks or substitute for fare or charge over any railway or other company mentioned in Section 1 of this act, except employees operating trains when in the actual discharge of their duties as such, and the officers herein before exempted.”

County health officers are not among the officers expressly exempted by this statute, and, consequently, with the exception of “employees operating trains when in the actual discharge of their duties as such,” can not lawfully accept or use free railroad transportation within this State.

Yours truly,

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ANTI-PASS LAW—LOCAL SURGEON—CITY HEALTH OFFICER.

AUSTIN, TEXAS, July 17, 1907.

*Joseph Greer, M. D., Alvin, Texas.*

Dear Sir: We have your letter of 14th inst., in which you say:

“I am ‘local surgeon’ for the Santa Fe at Alvin, and have a pass.

I have recently been elected city health officer for Alvin. Can I legally accept the position and ride on the pass?"

Replying to your inquiry, I beg to say that the anti-pass law provides "that no persons who hold any public office in this State, shall at any time during their term of office be entitled to any such free pass or transportation, privileges or franks or substitute for fare or charge over any railway or other company mentioned in Section 1 of this act, except employes operating trains when in the actual discharge of their duties as such, and the officers hereinbefore exempted."

A city health officer is not among the officers who are expressly exempted by this statute, and with the exception "employees operating trains when in the actual discharge of their duties as such," can not legally accept and use free transportation upon any railroad in this State; and the rule here stated would not be varied or affected by the fact that such city health officer is also a surgeon in the employ of a railway company.

Yours truly,

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ANTI-PASS LAW—LOCAL SURGEON—EMPLOYEE.

AUSTIN, TEXAS. July 17, 1907.

*Mr. E. I. Hill, County Attorney of Bell County, Belton, Texas.*

Dear Sir: We have your letter to this department concerning the proper construction and effect of the anti-pass law, which was enacted by the Thirtieth Legislature, in which you quote the definition of the term "employee" as set forth in that statute, and ask:

"Under this definition would a physician or surgeon, who has a contract with a railway company to represent it locally by which he is paid fees for his services in each particular case, but is paid no salary, be entitled to a pass over its line of road?"

"Is he an employe of said company within the meaning of this act, or must he be a salaried physician before the exemption applies to him?"

I am of the opinion that to constitute a surgeon an employee of a railroad company, within the meaning of this anti-pass statute, he must have with such railroad company a bona fide contract for his professional services as surgeon for a fixed and definite period of time and for a valuable consideration, other than railroad transportation, by way of compensation for such services.

I am further of the opinion that such contract may fix the compensation upon the basis of a definite salary or upon the basis of a scale of fees set out in the contract, or upon the basis of the reasonable value of the services to be rendered, the amount of such reasonable compensation to be agreed upon subsequently, or recovered upon a quantum meruit.

I regard it as essential that the employment of the surgeon be for a regular and continued service.

In *Louisville, Evansville & St. Louis Railway Company vs. Wilson*, 138 U. S., page 505, Mr. Justice Brewer said:

“The term ‘officers and employees,’ both alike, refer to those in regular and continual service.

“Within the ordinary acceptation of the terms, one who is engaged to render service in a particular transaction is neither an officer nor an employee. They imply continuity of service, and exclude those employed for a special and single transaction.”

Yours truly,

ANTI-PASS LAW—ELECTIVE PEACE OFFICERS—CITY  
MARSHAL—DEPUTY SHERIFF—OFFICES  
OF EMOLUMENT.

AUSTIN, TEXAS, July 17, 1907.

*T. J. Burkett, Esq., City Marshal, Shriner, Texas.*

Dear Sir: We have your letter of 12th inst.

You ask “whether or not a city marshal elected by the voters of an incorporated town is entitled to use a free pass on the railroads, under the anti-pass law.”

This statute expressly exempts from its provisions “elective peace officers whose duties are to execute criminal processes;” hence, elective city marshals may legally use free railroad transportation.

You also ask “if he is so entitled, could said city marshal hold an appointment as deputy under the sheriff of the county in which his town is located at the same time without invalidating his pass?”

In this connection I beg to call your attention to the following provisions of Article 16 of the Constitution of Texas:

“Section 33. 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 prescribed in this Constitution.”

“Section 40. 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.”

Said anti-pass law provides “that no persons who hold any public office in this State, shall at any time during their term of office be entitled to any such free pass or transportation, privilege or franks or substitute for fare or charge over any railway or other company mentioned in Section 1 of this Act, except employees operating trains when in the actual discharge of their duties as such, and the officers hereinbefore exempted.”

It is clear that under the provisions of this statute, a deputy sheriff, not being among the officers expressly exempted by said statute from its provisions, can not legally use free railroad transportation within this State, even though he could legally be both deputy sheriff and city marshal at the same time.

But I am of the opinion that the Constitution of this State does not permit one person to be both city marshal and deputy sheriff at the same time.



The Supreme Court of Texas has held that "the deputy sheriff is an officer known to the law, and as such, his official acts are to be regarded as valid."

Townes vs. Harris, 13 Texas, 511.

See also: Miller vs. Alexander, 13 Texas, 505.

Davis vs. Rankin, 50 Texas, 279.

Herndon vs. Reed, 82 Texas, 647.

McCormick vs. Pratt, 17 L. R. A., 246, and cases cited.

Yours truly,

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### PHARMACY LAW.

AUSTIN, TEXAS, July 19, 1907.

*J. F. Taylor, M. D., Briggs, Texas.*

Dear Sir: I am in receipt of yours of the 12th, and while it has been the uniform custom of this department to decline to give opinions to persons other than the officers of the State, the question you ask involves the construction of an act of the recent Legislature, which has not been printed, and hence parties are not able to secure information from the local county officers, I have decided to give you the information desired.

Section one of the new pharmacy law, which became effective July 12, 1907, makes it unlawful for any person, not licensed as a pharmacist, to conduct or manage any pharmacy, drug or chemical store, apothecary shop or other place of business for the retailing, compounding or dispensing of any drug, chemical or poison, or for the compounding of physicians' prescriptions, or to keep exposed for sale at retail any drugs, chemicals or poisons, except as otherwise provided in the act. It is also made unlawful for any person not licensed as a pharmacist or assistant pharmacist within the meaning of the act to compound, dispense or sell at retail any drug, chemical, poison, or pharmaceutical preparation upon the prescription of a physician or otherwise, or to compound physicians' prescriptions, except as an aid to or under supervision of the person licensed as a pharmacist. It is also made unlawful for any owner or manager of a pharmacy or drug store, or other place of business, to cause or permit any other than a person licensed as a pharmacist or assistant pharmacist, to compound, dispense or sell at retail any medicine or poison, except as an aid to or under the supervision of a person licensed as a pharmacist or assistant pharmacist, to compound, dispense or sell at retail any medicine or poison, except as an aid to or under the supervision of a person licensed as a pharmacist. To the unlawful acts mentioned above, there are the following exceptions, viz:

(1) A person is authorized to engage in the business of conducting or managing a pharmacy, drug or chemical store, or a place for compounding, retailing or dispensing physicians' prescriptions as proprietor and owner, provided he has in his employe to conduct same someone who is a licensed pharmacist.

(2) It is not unlawful for a legally registered practitioner of medi-

cine or dentistry to compound his own prescriptions or to supply his patients such medicine as he may deem proper.

(3) It is not unlawful for a person to deal exclusively in the wholesale business of selling drugs, if he is a licensed pharmacist, or if he keeps in his employ at least one person who is a licensed pharmacist.

(4) It is not unlawful to sell at retail non-poisonous domestic remedies or patent or proprietary preparations, when sold in unbroken packages, or poisonous substances which are sold exclusively for use in the arts or for use as insecticide, when such substances are sold in unbroken packages bearing a label having plainly printed upon it the name of the contents and the word "poison" and the names of at least two readily obtainable antidotes.

The act makes four classes, viz:

(1) Persons heretofore registered by district boards of pharmaceutical examiners.

(2) Proprietors and employees of proprietors who are actively engaged in the preparation of physicians' prescriptions and compounding and vending of medicines in towns of less than 1000 inhabitants and proprietors and employees of proprietors who shall become so engaged during the next five years.

(3) Those who shall hereafter desire to be licensed as pharmacists, and

(4) Those who shall hereafter desire to be licensed as assistant pharmacists.

The first class are required to present to the new board of pharmacy proof of their registration by district boards under the old law and pay to said board the sum of one dollar, when they are entitled to a certificate of registration as licensed pharmacists from the new board. This must be done within ninety days from and after the first meeting of the board, or the person will be required to pay the same fee as in original registration, viz, \$5.

The second class are exempt from examination and are entitled to receive a certificate of registration, which shall entitle them to practice pharmacy in towns of 1000 inhabitants or under, but are required to register and pay to the State Board of Pharmacy the sum of \$1. This must be done within ninety days from and after the first meeting of the board, and a failure to do so will require the payment of the same fee as in original registration, viz, \$5.

The third class are required to file with the secretary or board an application upon blanks furnished by the board duly verified under oath, setting forth his name and age and the place or places at which and the time spent in the study of the science and art of pharmacy, and the experience in the compounding of physicians' prescriptions which the applicant has had under the direction of a legally licensed pharmacist. He is required to appear at the time and place designated by the board and submit to an examination. He must be not less than 21 years of age and must have been licensed as an assistant pharmacist for not less than two years prior to his application: or must present satisfactory evidence that he is a graduate of a reputable school or college of pharmacy, or that he has had four years' practical experience in pharmacy under the instruction of a pharmacist and must pass a satisfactory examination under the direction of the board. If

he has attended a reputable school or college of pharmacy, the actual time of attendance at such school or college may be deducted from the time of experience required, but in no case shall less than two years' experience be required. A fee of \$5 must be paid when application is filed. If he fails to pass a satisfactory examination, he may be re-examined without cost at any subsequent meeting of the board within six months.

The fourth class must also make application under oath, setting forth his name and age and the time spent in the study of science and the art of pharmacy, and the experience he has had in pharmacy, and must appear at the time and place designated by the board and submit to an examination. He is required to be not less than eighteen years of age and shall have a sufficient preliminary general education and shall have not less than two years' experience in pharmacy and pass a satisfactory examination. If he has attended a reputable school or college of pharmacy, the actual time of attendance at such school or college may be deducted from the time of experience required. A fee of \$2.50 must be paid when application is filed.

A license issued by the board entitles the party to practice for a period of two years from the date of the license. The board may refuse to grant a license to persons guilty of a felony or gross immorality or addicted to the use of alcoholic liquors or narcotic drugs to such an extent as to render him unfit for practice.

License to practice as pharmacist or assistant pharmacist in this State may be issued without examination to persons who have been legally registered or licensed as pharmacists or assistant pharmacists in other States or foreign countries; provided that the applicant for such license must present satisfactory evidence of qualification equal to those required of licentiates in this State, and that he was registered or licensed by examination in such other State or foreign country, and that the standard of competency in such other State or foreign country accords similar recognition to the licentiates of this State. Such applicants must pay the same fees as required of other applicants for license, viz, pharmacists \$5, assistant pharmacists \$2.50.

Certificates to practice as pharmacists or assistant pharmacists and license to conduct drug stores in towns of not more than 1000 inhabitants and all renewals of such certificates and licenses shall be conspicuously exposed in the pharmacy or drug store or place of business where the party does business. Every licensed pharmacist or assistant pharmacist must within thirty days preceding the expiration of his license file with the board an application for a renewal thereof, accompanied by a fee of \$1. If any pharmacist or assistant pharmacist fails for a period of sixty days after the expiration of his license to make application for a renewal, his name must be erased from the register of licensed pharmacists or assistant pharmacists, and in order to become again licensed he is required to pay the same fee as in the case of original registration.

The act requires that the name of the responsible manager of every pharmacy, drug or apothecary shop, shall be conspicuously displayed outside such place of business. The board shall consist of five persons licensed as pharmacists, who are actively engaged in the practice of pharmacy, and shall have been so engaged for the past five years. The

board must be appointed on or before September 1st, and they shall hold their office for two years and until their successors are appointed and qualified. No person who is connected with any school or college of pharmacy shall be appointed on said board and no two members of the board shall reside in the same county. The persons appointed are required within thirty days after their appointment and annually thereafter to meet and organize by the election of a president, secretary and treasurer. They are required to take the oath of office prescribed by the Constitution for State officers and file same in the Secretary of State's office. The board is required to hold meetings for the examination of applicants at least once in four months and such additional meetings as may be necessary. The regular meetings shall be held on the third Tuesdays in January, May and September of each year in such cities or places as said board may select most convenient for applicants. Due notice of such meeting shall be given by publication in such papers as may be selected by the board thirty days in advance of such meetings. Three members shall constitute a quorum for the transaction of all business. One member of the board may issue a temporary certificate upon satisfactory proof that the applicant is competent, but such certificate shall be null and void after the first meeting of the board, next after same is granted, and no more than one temporary certificate shall ever be granted to any one person. Heavy penalties are provided for practicing in violation of the act. The board as yet has not been appointed and the Governor has until September 1 to appoint same.

Yours truly,

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LIFE INSURANCE COMPANY—REVOCAION OF POWER OF  
ATTORNEY FOR SERVICE.

AUSTIN, TEXAS, July 22, 1907.

*Hon. R. T. Milner, Commissioner of Insurance, Capitol.*

Sir: We have carefully considered the letter from Mr. A. S. Thweatt, Chief Clerk and Acting Commissioner, upon the subject of your duty in connection with the filing in your office of revocation of powers of attorney heretofore filed by insurance companies, and appointment of a substitute agent for service, said letter being as follows:

"Many retiring life insurance companies are attempting to revoke the former appointment of attorney for service filed in this department for the year ending December 31, 1905, embraced in a resolution of the company, as contemplated in Article 3064, Revised Statutes, substituting therefor other attorneys.

"I beg to enclose herewith the revocations of the attorney for service for the Penn Mutual Life Insurance Co. of Philadelphia, and for the Mutual Life Insurance Company of New York, both appointing Maurice E. Locke of Dallas, Texas, as attorney for service in fact.

"Will you be kind enough to advise this department whether the former resolution of this company appointing attorney for service can be revoked? If such appointment can be revoked, whether the documents appointing attorney in fact are in due form and in ac-

cordance with the law? Can this department receive and file a revocation of the original appointment of attorney for service in this State? You must realize that, under the resolution making the original appointment of attorney for service, every agent of the company becomes such attorney, as per Article 3064, Revised Statutes. As these companies are attempting to file revocations in this department, I would be pleased to have you make investigation as to the law relative to this matter and advise this department as early as possible."

Replying to this inquiry, I beg to say:

The statute under which the original powers of attorney were filed is as follows:

"Article 3064. Such company shall also file with the Commissioner a power of attorney under its corporate seal for all of its agents and officers or representatives in this State, authorizing such agents, officers and representatives, and each of them, to accept service of any civil process for and in behalf of such company, and consenting that the service of any civil process upon any such agent, officer or representative in the State in any suit or proceeding in which such company is a party, shall be taken and held to be valid, and waiving all claims of error by reason of such service. Said power of attorney shall be embodied in a resolution duly adopted by such company, and shall be signed by the president, manager or secretary thereof; and all of the persons named in said power of attorney shall be residents of this State, and the full name and residence of each shall be stated."

Neither this statute nor any other of which I have knowledge expressly requires or authorizes you to receive and file in your office any revocation of any such power of attorney, or any new power of attorney designating or appointing any new agent for service, under the circumstances and conditions referred to in Mr. Thweatt's letter.

The evident purpose of the above quoted statute was to provide effectual and convenient means for obtaining service upon insurance companies doing business in this State, by means of service upon its agents in any portion of the State where such agent resides.

Such was the statute when, as I understand the facts, these insurance companies voluntarily left the State, and if the claims of such companies be true, as I presume they are, absolutely ceased doing business in Texas, for the avowed purpose of avoiding the operation and effect of a law which was enacted by the Thirtieth Legislature of Texas, commonly known as the Robertson Insurance Act.

The above mentioned insurance companies now propose to revoke all their powers of attorney heretofore in force and on file in your office, under which each company had, not only one, but many agents, in different parts of the State, and in lieu thereof to substitute, respectively, new powers of attorney, under which, respectively, each such company will have in Texas not many agents for service, as heretofore, but only one; and, instead of being under the broad and comprehensive provisions for agencies for service set forth above in Revised Statutes, Article 3064, this one new agent for service is to be expressly limited by the terms of said respective new powers of attorney, which the insurance companies now propose to file, to agency for service in only such cases as grow out of business transacted in

Texas by such company prior to the date upon which such company ceased doing business in Texas as aforesaid.

Under these conditions and circumstances, and in the absence of statutory authority expressly requiring or authorizing you to do so, I have to advise that in all such cases you refuse to accept or to file any such revocation of such old powers of attorney, or any such new powers of attorney, thus leaving the status of affairs as made up by the insurance companies themselves through and by their own voluntary withdrawals from the State of Texas, and leaving the rights of those who may desire to bring suits against such insurance companies unprejudiced by any official action upon your part, and relegating the whole matter to the courts for determination.

In *United States Life Insurance Company vs. Ross*, 102 Federal Reporter, 722, the United States Circuit Court of Appeals, Fifth Circuit, held that after cancellation of the contract of employment between the insurance company (which was a "level premium" company, and, therefore, under the operation of said Revised Statutes, Article 3064), and its State manager, and after the insurance company had, in writing, notified the Commissioner of Insurance of the State of Texas that such contract of employment had been cancelled and that neither such former State manager nor any of the sub-agents working for him longer represented that insurance company in any way, and in the absence of designation and appointment by the insurance company of a new agent for service within the State, service upon such former manager of notice to take depositions in a pending suit was valid service upon the insurance company; the court holding that, under such circumstances, the agency for service continued after the termination of such contract of employment.

The court also said:

"It will hardly be contended that the plaintiff in error could now revoke the authority of the Honorable Commissioner Jefferson Johnson to accept or receive service of legal process binding on the company without at the same time appointing some other attorney by whom such service could be accepted, or on whom service could be made. In the nature of the case, the appointee, while still alive, and capable of being reached, must continue to be competent to have such service made on him until a successor is appointed, and has qualified by acceptance. Therefore the fact that the agreement between the plaintiff in error and J. W. Harris terminated, according to its terms, on the 9th day of September, 1897, does not necessarily involve or affect that representative capacity in which he was authorized to accept service of legal process, or at least to have service made upon him agreeably to the terms of the statutes of Texas for the protection of the citizens of Texas, who held policies of insurance issued by the plaintiff in error, then doing business under and subject to the terms of its permission in this State."

Now, Revised Statutes, Article 3064 says nothing about constituting the Commissioner of Insurance the agent of the insurance company for service, and it appears from the report of this case that said company continuously had in its employ at least one other agent in Texas; yet the decision of the court and the letter quoted therein from the

then Commissioner of Insurance seemed to proceed upon the idea that such insurance company was not required by law to have more than one duly appointed agent for service in Texas, even though it had various agents in this State, a theory which probably resulted from confusing Revised Statutes, Article 3064 with other statutes of this State requiring another class of insurance companies to appoint the Commissioner of Insurance such agent for service.

This very confusion emphasizes the fact that the proper construction of the statute here under consideration has not been thoroughly worked out in the courts.

It is true that the view expressed by the then Commissioner of Insurance and by the opinion of the court perhaps carry an intimation that had the insurance company in that case executed and filed a power of attorney in proper form designating and appointing an attorney for service, in lieu of its former State manager an agent for service prior to the service of the above mentioned notice of the taking of depositions, it would have protected the company, rendering of no effect the service of such last mentioned notice upon its former State manager; but the case was decided upon the fact that no such power of attorney had been filed; hence such intimations are not entitled to great weight, especially in view of such apparent confusion of statutes.

Moreover, the facts there involved were materially different from those here presented by you—that being a case in which the insurance company sought to cancel powers of attorney to numerous agents, but not to all of its agents in Texas without filing any new power of attorney whatever, and the cases presented by you being cases wherein each of the above mentioned insurance companies seeks to revoke all powers of attorney heretofore given by it, respectively, to any of its agents within this State, substituting in lieu thereof, a power of attorney to only one, and that one an entirely new and different agent for service.

In *Northwestern National Life Insurance Company vs. Blasingame*, 85 S. W., 819, a Texas district court held that service upon a discharged agent of an insurance company constituted valid service upon the company; but, upon appeal, the decision was controlled by other questions.

In *Sparks vs. National Hasonic Acc. Ass'n.* (CC) 73 Fed., 277, it was held: "When, by the statutes of a State, an insurance company transacting business in such State is required to file with a designated officer of that State a written appointment of such officer as the person upon whom process against such company may be served, such officer becomes, from the fact of its so transacting business therein, the representative of the company, with regard to the service of such process, irrespective of whether such appointment has been so filed or not."

Whether an insurance company has wholly ceased to do business in a State or not is sometimes a very nice and far-reaching question, very difficult to determine.

Under all the facts and existing circumstances, I think your action in these and in all similar cases should be governed by the conclusion which I have hereinabove set forth.

In view of that conclusion, it may be immaterial whether any of the said new powers of attorney is in proper form or not; but I will add that, in my opinion, aside from the attempted limitation restricting agencies for service to cases growing out of business transacted within this State prior to the withdrawal of such company from Texas none of said new powers of attorney comply with the requirement of said Article 3064, and all of them are, consequently, insufficient in any event; and for that reason, if for none other, I think you should decline to receive and file any of them.

Said new powers of attorney are herewith returned to you.

Yours truly,

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ANTI PASS LAW—DIRECTOR OF STREET RAILWAY  
COMPANY.

AUSTIN, TEXAS, July 23, 1907.

*R. E. L. Roy, Esq., County Attorney of Tarrant County, Fort Worth, Texas.*

Dear Sir: I am in receipt of your letter asking the following question:

“Will you please advise at your earliest convenience, whether or not a director of a street railway corporation, who is paid by the company for his services as such director a price for his services per meeting, is such an officer or employee of the company as comes within the meaning of Section 2 of the anti pass law, and can he or not ride on a pass?”

In reply I beg to say:

The statute to which you refer is Chapter 42 of the General Laws of the Thirtieth Legislature (1907).

Section 1 of said Act prohibits certain companies therein enumerated, including street railway companies, from giving free transportation, etc.

Section 2 contains the following provisions:

“That the provisions of Section one (1) of this act shall not be held to prohibit any steam or electric or interurban railway company or chartered transportation company or sleeping car company or the receivers or lessees thereof or persons operating the same, or the officers, agents or employees thereof from granting free or exchanging free passes, franks, privileges, substitute for pay or other thing herein prohibited, to the following persons: The actual bona fide employees of any such companies and the dependent members of their immediate families. The term employee shall be construed to embrace the following persons actually employed and engaged in the service of any of such companies, including its officers \* \* \* and provided further that no persons who hold any public office in this State shall at any time during their term of office be entitled to any such free pass or transportation, privilege or franks, or substitute for fare or charges over any railway or other company mentioned in Section 1 of this act, except employees operating trains when in the actual discharge of their duties as such and the officers hereinbefore exempted.”



In my opinion a director of any of the corporations which are within the exemptions prescribed by said statute is an "officer" of such corporation within the scope and meaning of said statute, regardless of whether he receives any compensation for his services as such director or not; and, as such officer of the corporation, may legally accept and use free transportation over the lines of any such exempted corporation, unless he holds a "public office."

Construing the above quoted provisions of the statute together I think it clear that no public officer, except certain ones who are specifically enumerated in this statute and exempted from its provisions, can legally use such free transportation, even though he be a director in one or more such exempted corporations, unless such director be also an employee actually employed in his duty of operating trains.

Yours truly,

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STATE TREASURER—SECURITY DEPOSITS—LIFE INSURANCE COMPANIES—INSURANCE COMMISSION.

AUSTIN, TEXAS, July 24, 1907.

*Hon. Sam. Sparks, State Treasurer, Capitol.*

Sir: We are in receipt of your inquiry as follows:

Acting under the Robertson bill, two Texas life insurance companies have sent to this department bonds and other security to be placed here as their capital stock. Please advise me under what conditions I am to accept these securities. If whether or not they should have the approval of the Insurance Commissioner."

From your statement I understand that you refer to voluntary deposits under Section 8, of Chapter 170, of the General Laws of the Thirtieth Legislature (1907), p. 318, which is as follows:

"That any insurance company coming within the provisions of this act, or the stockholders thereof, may, in addition to the deposit required by this act, at its or their option, deposit with the Treasurer of this State the capital stock or any part thereof, of such company, or securities covering such capital stock, and, may, at their option, withdraw or substitute such stock or securities so voluntarily deposited; provided, that the substituted securities shall be approved by the insurance commissioner."

In reply, I beg to say that we are of the opinion that under the foregoing statutory provisions, when considered in connection with other laws under which no such "securities covering such capital stock" can become a part of the capital stock of such insurance company upon its original incorporation and organization unless approved by the Commissioner of Insurance, and which make it the duty of that officer to enforce all the insurance laws of this State, it becomes and is your duty, as State Treasurer, to decline to accept for deposit in the State Treasury, as such voluntary deposit under said Section 8, any securities whatever which shall not have been approved by the Commissioner of Insurance.

Yours truly,

## IRRIGATION DISTRICTS—COMMISSIONERS COURT—NAVIGABLE STREAMS.

AUSTIN, TEXAS, July 26, 1907.

*Hon. W. F. Fokes, Sherwood, Texas.*

Dear Sir: I have your letter of the 3rd inst., in which you state as follows:

“Having under consideration in this county the organization of an irrigation district, under the provisions of the Acts of the Twenty-ninth Legislature, page 235, the following questions relative to the application of said act have arisen, and in order that a petition for the creation of such a district could be intelligently passed upon by the commissioners court, I respectfully submit them to you for your opinion.

## “STATEMENT.

“The land to be irrigated adjoins on each side Spring Creek, the field notes of the surveys on either side calling for the ‘bank of the river.’ None of the surveys cross the creek, and none call for the middle of the stream. It is not a navigable stream, though the bed of the river is more than 30 feet wide. Under the provisions of prior irrigation laws there are several companies which have dams in the river and canals therefrom to irrigate their lands adjoining the creek, and who would be within the limits of the proposed irrigation district.

“Question 1.—The surveys on either side calling simply to the ‘bank of the river,’ to whom does the stream belong? If it belongs to the State would the adjoining land owners, or an irrigation district organized under the provisions of said act of the Twenty-ninth Legislature have the right to condemn said creek and its water for irrigation purposes? If no right, under the circumstances, of condemnation exists, could such irrigation district proceed to construct dams at any point desired in the river (without regard to adjoining land owners, except to compensate them for any dams or ditches destroyed), under the provisions of the concluding clause of Section 45 of the act?

“Question 2.—If the stream belongs to the State could a municipal corporation of exceeding 1000 inhabitants, organized under the provisions of Title 18 of the Revised Statutes, condemn the land on either side of the head of the creek, and then construct a dam and pipe the water to said municipal corporation for water works purposes? Could said municipal corporation acquire such right of use of the water if it injuriously affected or destroyed the irrigation works of the lower riparian owners? If the riparian owners were organized into an irrigation district under said act of the Twenty-ninth Legislature and such irrigation district condemned the land on each side of the head of the stream and constructed a dam across same for irrigation purposes, could a municipal corporation thereafter condemn the same away from the irrigation district for public water works purposes?

“Question 3.—It will be noticed that Section 31 of said act providing for the issuance of bonds, recites that 5 per cent of the

total amount of bonds shall be due in 21 years, etc. Through some error the words "at the expiration of twenty-three years, seven per cent," are omitted from this section. The section thus provides for the maturity of 93 per cent only of the bonded indebtedness. Does this error invalidate the section in its entirety? If not, what construction would be placed upon the law as to the maturity of said 7 per cent of the bond issue?"

To which, I advise:

1. The surveys on either side of the stream calling simply to the "bank of the river," the stream belongs to the State of Texas. The adjoining land owners would not have a right to condemn the creek for private purposes, but if an irrigation district were organized comprising a section of the creek and the district lying on both sides of the creek, in the organization of the irrigation district, the body of the stream could and would necessarily have to be appropriated to public use as a part of the irrigation district without any condemnation proceedings, as condemnation proceedings would not be necessary to appropriate the land belonging to the State. (Irrigation Law, 1905, Sec. 45.)

2. The stream belonging to the State, a municipal corporation, organized under the General Laws, exceeding 1000 inhabitants would not be authorized to condemn the land on either side of the head of the creek and construct a dam and pipe the water to said municipal corporation for water works purposes, if, before such action, there had been created an irrigation district under the irrigation law: and especially so, if, in so doing, the construction of such dams and the piping of the water of such stream would destroy the irrigation district below, unless the municipal corporation should be given express statutory authority to so appropriate the water of said stream. In other words, the municipal corporation would have to be given additional legislative authority in order to enable it to appropriate the water of said stream and thereby destroy the irrigation district formed below, when such irrigation district, when so formed, under the irrigation law, is as much a municipal corporation as the city or town incorporated under the General Law; and without additional legislative authority expressly conferred the city or town would have no right to destroy the riparian rights of another municipal corporation. (2nd Ed. Amer. & Eng. Enc. of Law, Vol. 10, p. 1093, Subd. 6, and authorities there cited.)

If the riparian owners were organized into an irrigation district under the irrigation act, such irrigation district could condemn the land on each side of the head of the stream and construct a dam across the same for irrigation purposes, provided no prior action had been taken in this regard by the city or town; and after the irrigation district had so appropriated the head of the stream, then the municipal corporation (city or town), could not, under the law as it now stands, condemn the head of the stream and appropriate it away from the irrigation district, unless, as above stated, there were express legislative authority for so doing.

3. In Section 31 of the irrigation act the clause omitted, "at the expiration of 23 years, 7 per cent," is evidently a clerical error in enrolling the bill, and I do not think it affects its validity and this

clause should be read into the act, as the same provision expressly provides for the maturity of the entire 100 per cent of the bonded indebtedness.

4. In the construction of an irrigation district all dams, ditches and irrigation works constructed for irrigation purposes may be included in an irrigation district and appropriated by the district for the municipal purposes authorized for such districts, whether such canals, ditches and dams are owned by private individuals or by corporations. (Irrigation Law, 1905, Sections 16, 17, 45 and 53.)

Yours truly,

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ANTI PASS LAW—MEMBER OF LEGISLATURE—RAILWAY  
CONDUCTOR.

AUSTIN, TEXAS, July 29, 1907.

*Hon. Charles A. Graham, Hillsboro, Texas.*

Dear Sir: Replying to your letter of 27th inst., asking for a construction of the new anti-pass law, Chapter 42 of the General Laws of the Thirtieth Legislature, I beg to say:

In Section 2 of said act it is provided that "no persons who hold any public office in this State shall at any time during their term of office be entitled to any such free pass or transportation, privilege or franks, or substitute for fare, or charge over any railway or other company mentioned in Section One (1) of this act, except employees operating trains when in the actual discharge of their duties as such and the officers hereinbefore exempted."

You will observe that the exception of "officers hereinbefore exempted," and except "employees operating trains when in the actual discharge of their duties as such," it is by this act made illegal for any public officer during his term of office to use free railroad transportation within this State.

Neither a member of the House of Representatives of the Legislature of Texas nor a member of any school board is among the "officers hereinbefore exempted"; and I am of the opinion that the other above quoted exception, which is the only other provision of this statute which permits a public officer to use free railroad transportation, is so rigid in its phraseology as to necessarily preclude the idea that under it a public officer may use free railroad transportation in any instance or under any circumstances or conditions, except that of an employee operating a train when in the actual discharge of his duty as such operator.

As I understand this statute it makes it illegal for a member of the Legislature, who is also a railroad conductor, to ride free upon a railroad train when not actually engaged in the performance of his duties as such conductor, even though it be in going from one place to another to enter upon the discharge of such duties, or in returning from the discharge of such duties as conductor to his home at a place other than that at which his run as such conductor begins or ends.

Yours truly,

FISH LAW—CHAPTER 78, PAGE 161, ACTS THIRTIETH  
LEGISLATURE, REPEALS CHAPTER 75, PAGE 164  
OF SAID ACT.

AUSTIN, TEXAS, July 30, 1907.

*Hon. J. W. Humphrey, County Attorney, Emory, Texas.*

Dear Sir: We are in receipt of yours of the 27th relative to the fish laws passed by the Thirtieth Legislature. This body passed two acts, one being Chapter 75, page 154, which was approved by the Governor, April 5th with the emergency clause and became a law April 5th. The other is Chapter 78, page 161, which was approved by the Governor April 6, 1907, without the requisite vote to make it immediately effective and therefore it became a law July 12th.

Each of these acts purports to amend Chapter 153 of the Acts of the Twenty-fifth Legislature, as amended by the Twenty-sixth, Twenty-seventh, Twenty-eighth and Twenty-ninth Legislatures. In fact, the caption and the enacting clause of the two acts are identical, with the exception that the caption of Chapter 75 contains this provision, not contained in the caption of Chapter 78, namely:

“Also regulating the sale and shipment of fish and declaring an emergency.”

Neither act refers to the other. The general offenses denounced are the same in each act. In fact, the difference between the acts is as follows:

“Chapter 78 exempts from the provisions of Section 2 the counties of Bowie and Cass, which are not exempted under Chapter 75. Chapter 75 exempts the counties of Collin, Denton, Ellis, Franklin, Fayette, Henderson, Hunt, Jasper, Montague, Palo Pinto and Rains, which are not exempted under Chapter 78. Chapter 78 contains the qualification of the exemption as to Gregg, Harrison and Rusk Counties, in so far as the waters of Sabine River are concerned, the following, which is not contained in Chapter 75, namely:

“Except that portion of Harrison County lying north of the Texas and Pacific Railway from the State line to Marshall and that portion of said county east of the Texas and Pacific Railway from Marshall to the Marion County line.”

Chapter 75 contains the following provision, which is not contained in Chapter 78, namely:

“It shall be unlawful for any person to sell or offer for sale, ship or offer to ship, any game fish, including white perch, trout or bass taken from any of the fresh water lakes and streams of Marion, Harrison and Cass Counties.”

In so far as your particular county is concerned, it was exempt under Chapter 75, but it is not exempt under Chapter 78.

The general rule of construction is:

“That all consistent statutes which can stand together, though enacted at different dates, relating to the same subject, are construed together as though they constituted one act. This is true whether the acts relating to the same subject were passed at different dates separated by long or short intervals at the same session or on the same date. They are all to be compared, harmonized if possible, and if not susceptible of a construction which will make all of their

provisions harmonize, they are made to operate together so far as possible, consistently with the evident intent of the latest enactment. Sutherland on Statutory Construction, Vol. 2, Paragraph 443."

It is to be presumed that different acts passed at the same session of the Legislature are imbued by the same spirit and actuated by the same policy and they should be construed each in the light of the other. *Houston & Texas Ry. Co. vs. The State*, 95 Texas, 507.

In our opinion, this rule of construction can not be applied to the two acts in question. One was passed the day after the other became effective. They cover the same subject matter and it can not be presumed that the Legislature intended that each should stand, because it is impossible to harmonize the provisions of the two acts, so as to make each stand perfect and whole or to make both effective. Therefore, we resort to the other equally well established rule of construction, that where the latter of two acts covers the whole subject matter of the earlier one, not purporting to amend it, and plainly shows that it was intended to be a substitute for the earlier act, such latter act will operate as a repeal of the earlier one though the two are not repugnant.

Amer. & Eng. Enc. of Law, Vol. 26, p. 731.

*Sternan vs. The State*, 21 Texas, 734.

*Harold vs. The State*, 16 Texas, 157.

*Stebbins vs. The State*, 22 Texas, 32.

I direct your special attention to the Harold case cited above, wherein the Court of Criminal Appeals held that the act of 1883 for the protection of wool growing repealed Article 694 of the Penal Code. The court in passing upon this question said, "If a subsequent statute be not repugnant in all its provisions to a prior one, yet, if the latter statute was clearly intended to prescribe the only rules which should govern, it repeals the prior one. So a subsequent statute revising the subject matter of the former one and evidently intending as a substitute for it, although it contains no express words to that effect, must operate to repeal the former to the extent to which its provisions are revised and supplied, and when a statute is revised or one act framed from another, some parts being omitted, the parts omitted are not revived by construction but are to be considered as annulled."

We think this rule can be fully applied to the two statutes in question. Chapter 78 revised the subject matter of Chapter 75, and although it contains no express words to show that there was an intent to repeal Chapter 75, it was evidently intended as a substitute for it. Some parts of Chapter 75 are omitted from Chapter 78 and some parts are added in Chapter 78, which were not contained in Chapter 75, especially in so far as exemption from the general provisions of the acts are concerned. Therefore, the omitted parts of Chapter 75 can not be revised by construction, but are to be considered as annulled.

The Supreme Court of Arkansas has held that where a new act covers the whole subject matter of an old act and embraces new provisions not contained in the old act, it repeals the old act, though it contains no reference thereto.

*Woods vs. The State*, 1 S. W. Rep., 709.

The Supreme Court of Kansas has held that a latter statute, which covers the entire subject matter of a prior one and embraces new and different provisions, plainly indicating that it was intended as a substitute therefor, will without any express declaration to that effect, operate as a repeal of the former statute.

*State vs. Studt*, 1 Pac. Rep., 635. (See also the following case announcing the same proposition:

*Bracken vs. Smith*, 39 N. J., Equity, 169.

Beg leave to advise, therefore, that it is the opinion of this department that Chapter 78, page 161, Acts of the Thirtieth Legislature, repeals Chapter 75, page 154, Acts of the same Legislature and is the act to be looked to in so far as regulating the taking of fish is concerned, totally disregarding Chapter 75.

Yours truly,

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LIQUOR LAW—BASKIN-McGREGOR BILL.

AUSTIN, TEXAS, July 30, 1907.

*Judge J. H. Jones, Mason, Texas.*

Dear Sir: We are in receipt of yours of the 27th, and in reply you are advised that a block or square within the meaning of the Baskin-McGregor bill must be construed to mean the territory bounded by the main streets of the city or town. Block and square are synonymous terms and mean the portion of the city enclosed by streets, whether occupied by buildings or composed of vacant lots.

See the following cases:

*Frazier vs. Ott*, 30 Pac. Rep., 793.

*City Street Improvement Co. vs. Laird*, 70 Pac. Rep., 916.

*Ottawa vs. Barney*, 10 Kan., 270.

The word is defined by the dictionary to mean "a square or portion of a city enclosed by streets, whether occupied by buildings or not."

Judge Brewer, in referring to this definition, said:

"We are well satisfied with the definition in taking it as our guide in this decision. It follows as a matter of course that the word 'square' is synonymous with the word 'block.'"

In the case of *Olfson vs. The City of Topeka*, 21 Pac. Rep., 219, the Supreme Court of Kansas said:

"That although a square be cut into blocks by an alley running through it, yet these blocks are not in fact to be considered blocks as that term is synonymous with squares."

Call your attention also to the following cases:

*State vs. Deffes*, 44 La. Ann., 164.

*Todd vs. Kankee R. R.*, 78 Ill., 530.

*Harrison vs. The People*, 63 North Eastern, Rep., 191.

Following the rules laid down in the above decisions you are advised that a block in your city, within the meaning of the Baskin-McGregor law, must be construed to mean those portions of the city enclosed between streets as they now exist. The fact that an alley may run through a block does not affect the question. It

includes the entire portion between the streets, regardless of the alley.

Yours truly,

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ANTI PASS LAW—AS APPLIED TO RURAL TELEPHONE SYSTEMS.

AUSTIN, TEXAS, July 31, 1907.

*C. A. Sweeton, Esq., County Attorney of Hopkins County, Sulphur Springs, Texas.*

Dear Sir: We have your letter of recent date which is as follows:

“In our country there are quite a number of rural telephone systems, established by the farmers for their own convenience. These different systems have been giving to each other free service as a matter of accommodation and for the purpose of enabling the people to get a better and more extended service.

“A committee of these gentlemen called on me this morning and requested that I write you for an opinion to ascertain whether or not under the ‘anti-pass law,’ passed by the recent Legislature, these systems would be prevented from giving this free service to each other.

“You understand none of these systems are operated for profit, but it is a free service. The people in each community buy their own phones and erect their own lines. Every man who has a phone has free service over that line. They have connected these different systems in a way that they have a complete service through out the county, free of cost to any man who owns a phone on any system.

‘Now the question is: Can these different systems give to each other this free service without violating the law?’”

In reply, I beg to say that, in my opinion, even though it should be held that Chapter 42 of the General Laws of the Thirtieth Legislature, commonly known as the anti-pass law, applies to unincorporated telephone companies and associations of persons owning and operating telephone lines for profit, said statute nevertheless has no application whatever to telephone systems owned, operated, conducted and managed in the manner set forth in your letter, inasmuch as they are not operated for profit, nor for the use of the public generally for compensation.

However, if any of said “systems” is thrown open to public use and a charge made for service thereon, a different case is thereby presented, and in that event what I have written above will not apply.

Truly yours,

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COUNTY AUDITOR—BOND OF—COMMISSIONERS COURT—  
COUNTY TREASURER.

AUSTIN, TEXAS, August 1, 1907.

*Hon. W. W. Upshaw, County Treasurer, Belton, Texas.*

Dear Sir: In your letter of the 30th ult., you state:

“The county judge of Bell County and the district judge, who is



a resident of Bell County, has appointed a county auditor for Bell County who has made bond as such. The commissioners court of this county has not approved the bond of said auditor, but has postponed action thereon until the next regular term of said court (the second Monday in August). Now, in the absence of an auditor, will I be authorized to receive any moneys coming to Bell County or to authorize the payment of county warrants until the county auditor qualifies according to law?"

It does not appear from your letter whether or not the newly appointed county auditor has made the official oath required by law in connection with the execution of his official bond. Of course, if he has not taken the official oath as prescribed by law, he has not yet qualified as such auditor and can not until he so qualifies, perform the duties of such officer. If, however, he has taken the oath of office and subscribed the same and filed it with his bond, he has qualified as such county auditor. Unless the commissioners court should raise some question as to the sufficiency in the terms of the bond or the solvency of the sureties, the auditor has qualified and should enter upon the duties of his office at once. As I understand from your statement, the auditor's bond is executed and filed with the commissioners court and no objection made as to the form of the bond or the solvency of the sureties. If I am correct in this statement and the auditor has subscribed the necessary oath, there is nothing left for him to do but to proceed in the discharge of his duties as he has fully qualified as such officer.

The formal approval of the bond by the commissioners court is not necessary to make his appointment effective.

Ramsey vs. People, 197 Ill., 572.

Meachum on Public Officers, Secs. 311, 312, 313.

When the commissioners court receives the bond from the county auditor and the same remains in their possession with no act of disapproval and no objection raised to such bond, in my judgment, his appointment becomes operative from the time the bond is so deposited.

As said in the case of Ramsey vs. People, supra. "Where an official bond is executed and delivered to the proper representative of the government, it becomes obligatory upon the party signing it, unless it is disapproved by such representative. The latter's mere non-action does not deprive the officer of the power to act as such."

So if the county auditor has deposited his bond with the county commissioners court and they have simply postponed their action thereon to some future term, it does not deprive the county auditor of the right to proceed at once to act as such auditor.

Throop on Public Officers, Section 184.

Kingsland vs. Herell, 1 Texas App. Civ., Sec. 738.

Wright vs. Leath, 24 Texas, 24.

Poer vs. Brown, 24 Texas, 34.

Oglesby vs. State, 73 Texas, 858.

This is, therefore, to advise you that in my opinion, if the county auditor has qualified as far as is within his power, that he should proceed to act under the county auditor's law, and you should act in the discharge of your duties in accordance therewith and you would

therefore not be authorized to pay out any money on warrants drawn upon the county treasurer, except as authorized by the auditor's law.

Truly yours,

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COUNTY AUDITOR—COURT STENOGRAPHER—COMMISSIONS OF.

AUSTIN, TEXAS, August 3, 1907.

*Mr. George L. Fearn, County Auditor, Dallas, Texas.*

Dear Sir: In reply to your inquiry of the 2nd inst., as to whether court stenographers and county auditors are required to take out a commission, I beg to refer you to Chapter 22 of the General Laws of 1907, First Called Session, passed by the Thirtieth Legislature, page 501, which reads in part as follows:

"The Secretary of State, besides other fees that may be prescribed by law, is authorized and required to charge for the use of the State the following fees: \* \* \* for each commission to every officer elected or appointed in this State, a fee of \$1. \* \* \*

"Any official who refuses or fails to take out a commission shall not be entitled to receive or collect, either from the State or from individuals, any fee or fees, or any sums of money, as fees of office or compensation for official services, and it shall be unlawful for the Comptroller of Public Accounts, any county commissioners court, any county auditor or any other person whose duty it is to approve claims or accounts of public officials to approve or to pay any claim or account in favor of any and all such officers who have failed or refused to take out and pay for their commission as officials as required by this act. \* \* \*"

I therefore answer your question affirmatively.

Yours truly,

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ANTI-PASS LAW.

Peace officer can ride on freight train, with permission of crew, without violating anti-pass law, etc.

AUSTIN, TEXAS, August 5, 1907.

*T. C. Hutchings, Esq., County Attorney Titus County, Mount Pleasant, Texas.*

Dear Sir: We have your letter of 31st ult., in which you say:

"Please advise me if an elective peace officer would violate the anti-pass law on riding on a freight train with permission of train crew without paying fare and not having any transportation."

Replying to this inquiry, I have to say the statute to which you refer makes, among others, the following exemptions:

"Also the State rangers, sheriffs or other bona fide elective peace officers, whose duties are to execute criminal processes, provided that if any such railroad or transportation company shall grant to any sheriff a free pass over its line of railroad, then it

shall issue like free transportation to each and every sheriff in this state who may make to it written application therefor, and provided further, that such sheriffs and other peace officers above mentioned using such free passes or transportation shall deduct the money value of the same at the legal rate per mile from any mileage accounts against the State and litigants earned by them in executing process when such pass was used or could have been used."

From this you will see that the law permits bona fide elective peace officers to ride free upon a railroad by permission of the railroad company.

That being true, the law is not concerned whether such officers have issued to them and ride upon "passes" or whether they merely ride without such "passes" or "transportation" and without paying fare, that being a mere matter of regulation by the railroad company of its own affairs and the making and enforcement by the company of rules and regulations for the observance of its employees in handling its railroad trains.

I answer your question negatively.

Yours truly,

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#### CORPORATIONS—FORFEITURE OF RIGHT TO DO BUSINESS FOR NON-PAYMENT OF FRANCHISE TAX.

Condition precedent to reinstatement should be the payment of not less than five dollars per month.

AUSTIN, TEXAS, August 9, 1907.

*Hon. H. M. Little, Chief Clerk and Acting Secretary of State.*

Sir: In response to your oral request of this date for an opinion upon the legal effect of Section 10 of Chapter 23, page 502, of the General Laws of the First Called Session of the Thirtieth Legislature, as applied to the case of the Calculating Yard Stick Company, whose right to do business was forfeited in 1903 for non-payment of the franchise tax required by law, I beg to say:

I am of the opinion that the provisions of said Section 10 should be construed and held to mean that the tax and penalties therein mentioned should be calculated, in the case of this corporation, for the period of time between said date of forfeiture of its right to do business and the date upon which it may have its right to do business revived in accordance with the provisions of said Section 10; such calculation to be made under the Act of 1897, page 142, from the date of such calculation down to the taking effect of the Act of 1905, page 23, and under said Act of 1905 from the date upon which it became effective down to the date of revival.

It is clear that under said Act of 1897 the penalty is five dollars per month or fractional part thereof.

It is not so clear as to what is meant in the provisions of the Act of 1905 by the words "tax and penalties due by it, together with an additional amount of five per cent of such tax (in no case

REPORT OF THE ATTORNEY GENERAL.

ss than five dollars) for each month or fractional part of which shall have elapsed after such forfeiture." The difficulty here is in determining whether the words "in no case s than five dollars" are applicable to the aggregate amount e amount for each month.

se above quoted provisions from the Act of 1905 were to dered by themselves alone, apart from the history of legis- pon the subject, and without regard to the construction as been placed upon them by the Secretary of State, the onstruction would appear to me to be that the words "in to be less than five dollars should be held to mean that irectly the purpose of the Legislature that the entire amount ty to be paid by the corporation as a condition precedent atement should not be less than five dollars, rather than minimum amount should be five dollars per month or frac- ert thereof.

ver, the fact that the law of 1897 fixes the penalty at five per month or fractional part thereof militates somewhat the construction above set out, the argument being that 1 as a legislative purpose to change the rule is not made ly clear in the Act of 1905 it should be presumed that no nge was intended.

informed by you that the Department of State has uni- onstrued the Act of 1905 as requiring a corporation seek- statement to pay a penalty of not less than five dollars th or fractional part thereof. Ordinarily courts will not a construction which has been placed by the head of an e department upon a statute with the enforcement of e is charged, unless that construction be clearly wrong; view of the ambiguous language found in said Act of 1905, oted, I am not prepared to say that you should overturn edent above mentioned. Upon that feature I merely state s without further suggestion.

bove-mentioned ambiguity in the Act of 1905 appears to n effectually eliminated by Section 9 of the Act of 1907, he latter act the words "in no case to be less than five dol- unquestionably refers to the aggregate amount of tax and rather than to the amount for each month.

ttorney for the above-mentioned corporation urges with ess and with some force, that said Section 10 of the Act is somewhat ambiguous and that it should be construed l to mean that said corporation should be permitted to elf of the privilege of reinstatement set out in said Section r without paying any penalty, or upon payment, in ad- ) its franchise taxes, of penalties for the entire period of ce said date of forfeiture calculated under the provisions ns 8 and 9 of the Act of 1907.

t say that I can not concur in that view. His first con- rests upon the proposition that the entire Act of 1907 all prior franchise tax laws, but provides for no penalty applicable to this corporation, in view of the fact that to do business has long since been forfeited.

That proposition addresses itself to my mind as sound; but, in my opinion, it furnishes a conclusive reason in support of the construction which I have herein above given to said Section 10. For the very reason that this Act of 1907 prescribes no penalty which is fairly applicable at this time to this corporation, we must, in order to give any meaning or effect whatever to the words "and the penalty thereon as provided by law," found in said Section 10, construe said words as referring, in chronological order, to the various statutes above mentioned.

His second contention is based upon the theory that when this proposed reinstatement shall be attempted, after the Act of 1907 shall have become effective on August 10, 1907, and on or before September 1, 1907, there will then be in force and effect no other statute which provides either a penalty for non-payment of a franchise tax or any mode of reinstatement of corporations whose rights to do business shall have been forfeited prior to the taking effect of said Act of 1907.

I think the objection which I have urged to the first applies also to the second contention.

Furthermore, it is evident that Section 10 deals with subjects of legislation which are entirely different from those embraced in Sections 8 and 9, and, to meet the requirements of such cases, an entirely new and different method and plan of procedure is here introduced into the statute. The provisions found in Sections 8 and 9 are not in any sense applicable, from either an equitable or a legal standpoint to the subjects of legislation embraced in Section 10. The penalties prescribed in Sections 8 and 9 are for future failures to comply with law, while the penalties treated of in Section 10 are required to be paid for antecedent violations of pre-existing franchise tax laws. The evident purpose of Section 10 is to give to the class of subjects therein treated, whose rights to do business shall have been forfeited and who shall have failed to have such rights reinstated prior to the taking effect of this Act of 1907, a permissive right to be reinstated upon the books of the Secretary of State, on or before September 1, 1907, conditioned, however, upon prior payment of such franchise taxes as the particular corporation would have had to pay since the date of the forfeiture of its right to do business, had it continued in good standing, together with the statutory penalties as fixed by laws in force from time to time, consecutively and chronologically, during that period.

Yours truly,

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#### BANKING DEPARTMENT.

Account for stationery for said department should be paid out of general revenues.

AUSTIN, TEXAS, August 9, 1907.

*Hon. J. W. Stephens, Comptroller of Public Accounts, Capitol.*

Sir: In connection with an account of Tobin's Book Store, of date July 1, 1907, for \$8.16, for certain stationery billed to "Bank-

ing Department," and approved by Hon. R. T. Milner, Commissioner, you have, through your warrant clerk, Mr. Wilkins Harper, requested of this department an opinion as to whether said account should be paid out of the State bank examination fund created by Chapter 10, pages 489-520, of the General Laws of the First Called Session of the Twenty-ninth Legislature, or out of the General Revenue.

Upon the face of the account it seems to be for supplies for general use by the Superintendent of Banking and his office force in carrying into effect the provisions of the State banking law found in Chapter 10, there being nothing upon the face of the account to indicate that the supplies therein mentioned were for the exclusive use of the bank examiners mentioned in said chapter.

It is true that we find in Section 39 of said statute the following provision:

"Payment for salary to the examiner, and for other expenses under this act, to be made upon the certificate of the Superintendent by warrant of the Comptroller upon the State Treasurer," and that this language, taken by itself, is, in one sense, broad enough to include any and all expenses of any and every character whatever under any of the provisions of this statute; but, in my opinion, that is not the fair and reasonable construction which should be placed upon the above quoted language when read in connection with the other portions of the statute and in connection with other laws concerning the maintenance of the Department of Agriculture, Insurance, Statistics and History, of which the Superintendent of Banking is by this statute made an integral part. For instance, the General Appropriation Act of 1905, which was enacted at the same called session which enacted the banking statute here under consideration, made a specific appropriation of five hundred dollars for the year ending August 31, 1906, and a like amount for the year ending August 31, 1907, for "salary of Commissioner as Ex-officio Superintendent of Banking," and also made specific appropriations for salaries of the clerks in that department, other than bank examiners, who are handling the banking business of the department, and similar appropriations were also made by the General Appropriation Act of 1907 for salaries of the Superintendent of Banking and clerks in what is to be known as the Department of Banking, Insurance, Statistics and History.

Two Legislatures have thus indicated that they did not understand that the words "and for other expenses under this act," found in Section 39 of said Chapter 10, embrace these items, although the items for extra salary of the Ex-officio Superintendent of Banking are unquestionably for expenses made necessary by said banking act, and some of the items for salaries of such clerks are, perhaps, in the same category.

Another view of the matter is that, as I am informed by the Superintendent of Banking, in no event can the collections which this statute authorizes to be made from banks for examining fees be made sufficient to meet all expenses of every kind enumerated under this act, a fact which we may well suppose was anticipated

by the Legislature; and we can hardly believe, unless forced to do so by the language employed in the Statute, that the Legislature would pass a law making it necessary to incur such additional expense and at the same time require all such expenses should be met out of a fund which they could foresee would be inadequate for that purpose.

In this connection, it should be remembered that no provision is made by this act for the payment of any money into said State bank examination fund other than that to be collected from banks under the provisions of Section 39. That section provides:

“The expense of every general or special examination shall be paid by the bank examined, in such amount as the Superintendent shall certify to be just and reasonable; provided, said expense shall be paid in proportion to capital stock as follows, etc. \* \* \*

“Permanent surpluses shall be reckoned in estimating these fees the same as capital stock, the aggregate sum collected from the banks of the State being reckoned upon a basis to cover the entire expense of the examination of banks, traveling expenses of the Superintendent and examiners, the reports required by this act, and a sufficient time for the office work required by the examiner to prepare necessary reports to the Superintendent. \* \* \*”

Construing these provisions together, it seems clear that this statute contemplates that the banks should pay not only the cost of the actual examination mentioned in Section 39, but also all the other items of expense enumerated in that section; but nowhere does the act provide that such banks are to pay any other items of expense.

Moreover, the above quoted words “and for other expenses under this act” are used by the Legislature, not in connection with the portions of the statute which fix fees or provide revenues, but in a sentence which appears to have been designed solely and merely by way of directing the method of disbursing funds.

It seems unreasonable to suppose, unless driven to that conclusion by the context that had the Legislature intended that all expenses incurred pursuant to or in consequence of this banking act should be paid out of the State bank examination fund it would have so declared, directly and specifically, in an independent paragraph or sentence, and not incidentally, in a subordinate clause following a mere direction as to detail in the disbursement of a particular fund.

It will be observed that the words “for other expenses under this act” immediately follow the words “payment for salary to the examiners,” and I am of the opinion that the words “other expenses should be construed and held to mean “*other expenses of Superintendent and examiners,*” such as hotel bills, telegraph bills, etc., incurred in or about the examination of banks.

When so construed the difficulties above suggested disappear and a consistent purpose and intention upon the part of the Legislature becomes apparent.

My conclusion is that the above-mentioned account should be paid out of general revenues.

Yours truly,

## PERMANENT SCHOOL FUND—SHELBY COUNTY.

Board of education not authorized to buy bonds from vendee of county when said county had no authority to dispose of said bonds.

AUSTIN, TEXAS, August 10, 1907.

*Hon. J. W. Stephens, Comptroller of Public Accounts, Capitol.*

Dear Sir: I have before me a certificate of the county judge of Shelby County, Texas, and an order of the commissioners court of said county to the effect that that county has invested its permanent school fund in bonds of the State of Texas to the amount of \$5200, drawing five per cent interest, and due July 1, 1909, and it appears from the certificates of the county judge that such bonds have been sold by that county to J. B. Oldham, of Dallas, Texas, who proposes to sell the bonds to the State School Board of Education for the benefit of the University funds, and I am requested by you to advise the Board of Education if such bonds can legally be purchased by the State for the purposes mentioned.

The permanent school funds of the counties of the State are derived from the sale of the school land granted by the State to the several counties of the State for educational purposes, and such funds may 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.

These funds are held by the counties alone as a trust fund for the benefit of the public schools of such counties.

Constitution, Art. 7, Sec. 6.

Bell Co. vs. Alexander, 22 Texas, 350.

Milam Co. vs. Botemen, 54 Texas, 153.

Fannin County vs. Riddle, 51 Texas, 360.

As these bonds are held by the counties as a trust fund for the benefit of the public schools for such counties, the question arises as to whether Shelby County has a right to sell the State bonds held by it before the maturity of such bonds and reinvest the funds arising from such sale in such other securities as may be provided by the commissioners court of such county. In other words, has the commissioners court of Shelby County, acting as trustees for the school interests of the county, the right to change the investment which it now has in the bonds of the State to such other bonds as may be purchasable by the commissioners court with the funds arising from the sale of such State bonds?

The general rule is, trustees have no power to change the investment of trust funds without express authority so to do.

Perry on Trusts, Secs. 459, 466.

Fannin Co. vs. Riddle, 51 Texas, 360.

The laws upon this subject are strictly construed and trustees are never allowed to change an investment of trust funds unless their authority to do so is clear and unquestioned.

3 Abbott on Municipal Corporations, Secs. 1068 and 1082.

Applying this rule to the right of Shelby County to sell the bonds referred to in my judgment she would have no such right without express statutory authority.

This conclusion is strengthened by the fact that there has here-



tofore been passed by the Legislature of the State of Texas a law to the following effect:

“That any county at any time having its school funds derived from the sale of its county school lands invested in the bonds of the United States, of this State or of any county, shall have the authority to sell these bonds when in the opinion of the county commissioners court it shall be deemed for the best interest of the fund and invest the proceeds in its own or any other county bonds duly and lawfully issued.

“Such sale and reinvestment shall be made only when the proceeds of the sale can be reinvested in such county bonds bearing the same or a greater rate of interest or having the same or a longer time to run before their maturity, and no commission shall be paid to the county judge or any other officer for making such sale or reinvestment.”

Acts of the Twentieth Legislature, Chapter 140, pages 134, 1887.

The passage of this law clearly indicates that the Legislature before the enactment of such law decided that counties had no such authority as is sought to be exercised in this instance by Shelby county, and they therefore deemed it necessary in order for counties to so exercise such authority to pass the acts referred to.

This act was never brought forward in the Revised Statutes of 1895 and has never been re-enacted.

The act not having been brought forward in the Revised Statutes of 1895, and never having been re-enacted, the same appears to have been repealed by the adoption of the Revised Statutes of 1895. Section 4, Final Title R. S. 1895, reads as follows:

“That all civil statutes of a general nature in force when the Revised Statutes take effect and which are not included herein or which are not hereby expressly continued in force, are hereby repealed.

It, therefore, occurs to me that Shelby County being without legislative authority to sell bonds in which she has invested her permanent school funds, the Board of Education, of course, is without authority to purchase the same from a vendee of Shelby County, for the reason that Shelby County having sought to exercise an authority she did not possess has not parted with the title to same and is without power to part with such title.

Yours truly,

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STATE HEALTH OFFICER—QUARANTINE STATION AT  
GALVESTON—PAYMENT FOR PLANS AND  
SPECIFICATIONS OF ARCHITECTS.

AUSTIN, TEXAS, August 12, 1907.

*Dr. William M. Brumby, State Health Officer, Capitol.*

Sir: Press of work in this department has prevented earlier final reply to your letter of June 21, 1907, in which you say:

“I enclose herewith an account against this department from the firm of Dodson & Scott, architects. This firm drew the plans and

specifications for the erection of a quarantine station at Galveston. I also enclose the appointment, which embraces the contract, copy of the bond which is now on file in the office of the Secretary of State, and letters bearing on the subject.

In the year 1901 the Legislature made an appropriation of \$15,000 for the erection of a quarantine station at Galveston, and Dodson & Scott were appointed by Governor Joseph D. Sayers as architects to draw up the plans and specifications for and to superintend the erection of said building. Dodson & Scott accepted the appointment, made bond for the necessary amount, filed same with the Secretary of State and in every way complied with the provisions of the contract. They (Dodson & Scott) completed said plans and specifications and filed them with the Secretary of State about July 18, 1902.

After Dodson & Scott were appointed to draw the plans and specifications for said building the United States government claimed the present site of the quarantine station which necessitated changing the proposed site to a place across the channel where the water was seven feet deep. The change was also made for the reason that the location across the channel was a more suitable place for the building. This change increased the cost of erection to \$20,000 as the work would have to be carried on from boats. This change of location was made under instruction from the State Health Officer, Dr. George R. Tabor.

Owing to the increase in cost of erection, caused by changing the site of the building, it was never built, but the plans and specifications were completed in accordance with the articles of agreement.

Under the articles of agreement Dodson & Scott were to receive 5 per cent of the contract price of the building for drawing the plans and specifications and for supervising the erection of the building, one-half of which was to have been paid them when they filed the plans and specifications in the office of the Secretary of State, and the remaining half was to have been paid them when the building was completed.

They have put in their bill for 3 1-2 per cent of the contract price, as that is the customary charge made by all architects for drawing plans and specifications for this kind of work *without supervision*.

When they filed the plans and specifications they did not receive the first installment of 2 1-2 per cent, to which they were entitled under the articles of agreement. This fact is verified by the books of this office and also the books of the Comptroller's office.

1. I wish to know if this account can be paid out of the \$15,000 which was appropriated for that purpose, the work having been done, accepted and filed with the Secretary of State prior to the expiration of the two years for which the appropriation was made.

2. Should they be paid 3 1-2 per cent of the contract price, which charge is apparently customary for drawing plans and specifications without supervision, or

3. Are they only entitled to be paid the first installment of 2 1-2 per cent of the contract price?

In this connection I might state that I think this claim is a just one, as the firm did the work in good faith and as the plans and specifications were accepted. They were put to considerable expense in going to and from Austin and Galveston securing the necessary data for their use in preparing the plans. I also think this claim is a just one as the Twenty-ninth Legislature made an appropriation of \$50,000 from the fees collected at Galveston for the erection of such a building, and in the event the work had been carried out these same plans would have been used."

Attached to your letter are the following papers:

(1) An account which is verified by affidavit and which is stated thus:

"The State of Texas

To Dodson & Scott Dr.

1902

August. To plans, details and specifications for Quarantine Building at Galveston, Texas, 3 1-2 per cent on \$20,000, the lowest bid received to build it .....\$700 00"

(3) Letter from Dr. George R. Tabor, former State Health Officer, dated June 3, 1907, addressed to Walker.

(4) Letter from Messrs. Dodson & Scott, of date June 7, 1907, addressed to you, and "Exhibit A" thereto attached.

(5) Letter from Messrs. Dodson & Scott, of date June 18, 1902, addressed to Dr. George R. Tabor.

(6) Letter from W. C. Dodson, of date July 8th, 1902, addressed to Dr. George R. Tabor.

(7) Letter from Messrs. Dodson & Scott, of date May 1, 1902, addressed to Dr. George R. Tabor.

(9) Letter from Dr. George R. Tabor, of date April 21, 1902, addressed to Messrs. Dodson & Scott.

(10) Letter from Dr. George R. Tabor, of date April 8, 1902, addressed to Messrs. Dodson & Scott.

(11) Letter from Dr. George R. Tabor, of date April 2, 1902, addressed to Messrs. Dodson & Scott.

(12) Letter from T. A. Fuller, of date March 5, 1902, addressed to Dr. George R. Tabor.

(13) Letter from Governor Joseph D. Sayers, of date March 27, 1902, addressed to Messrs. Dodson & Scott.

(14) Letter from Dr. George R. Tabor, of date March 27, 1902, addressed to Messrs. Dodson & Scott.

(15) Copy of bond of Dodson & Scott, of date April 25, 1902.

The appropriation in question was made by the Second Called Session of the Twenty-seventh Legislature in the following language:

"For building one iron frame screw pile for quarantine officer's residence at Galveston, \$15,000."

The act making said appropriation contains the following provisions:

All buildings for the erection and equipment of which appropriations have been made under this act, and all improvements

of and repairing of any public buildings, shall be erected and made under the direction, management and supervision of honest and competent architects, who shall be appointed by the Governor and whose fees or salary shall be deducted from the respective appropriations made for such purposes; and it shall be unlawful for the Comptroller of Public Accounts to issue any warrants on the treasury, and for the treasurer to pay any such warrants for the erection of any of the public buildings herein provided for, or for any such improvements of or repairing to any public building, except upon an itemized statement of such expenditures, approved by the Governor with his written approval thereon, which itemized statement shall be filed and kept by the Comptroller for public inspection; and provided further, that a duplicate certified copy of the plans, specifications and estimates used in the erection or improvement of any of said buildings shall be filed with and kept by the Secretary of State in his office for public inspection; and provided further, that any appropriation made under this act for the erection of new buildings and improvement of old buildings and the purchase of machinery and equipments shall be withheld by the Governor if in his opinion the condition of the treasury will not warrant the expenditure of any such sum or sums."

From an inspection of the above-mentioned papers it appears that you are in error in saying that under the articles of the agreement with the architects, one-half of their compensation was to be paid to them upon the filing by them of plans and specifications in the office of the Secretary of State.

Answering your specific questions in the order in which they are submitted, I beg to say:

First. I am of the opinion that if the services of the architects in drawing plans and specifications were rendered and copies of said plans and specifications filed in the office of the Secretary of State, all within two years from the date upon which said appropriation became effective, the amount of their account when properly approved by the proper authorities for payment may lawfully be paid out of said appropriation.

Second. In as much as the contract for the building was never let it is manifest that the changed conditions require that instead of being paid according to the literal terms of the contract for their services as architects in drawing plans and specifications and in supervising the work, said architects should be paid upon the basis of what is equitable, fair, reasonable and customary for their services in drawing plans and specifications in the absence of the letting of a contract for the building and in the absence of the actual construction of the building and the supervision by them of that work as originally contemplated in the agreement between the Governor and the architects.

I am of the opinion that the word "appoint" as used in the above quoted portion of said appropriation act was used in the sense of *employ*, and that it is clearly within the contemplation of that paragraph and of the appropriation act as a whole that the amount of compensation of the architects should be fixed by the Governor; and I think that by fair implication, and under all the facts

of this case, the Governor now has authority to agree with said architects upon an amount which shall be accepted by them in full compensation for services rendered in the premises and in full satisfaction of all demands by them under the agreement between the Governor and themselves pursuant to which said plans and specifications were drawn, and that when said amount shall have been so fixed and the account of said architects shall have been approved in said amount by the Governor and by the State Health Officer, it will be lawful for the Comptroller of Public Accounts to issue a warrant accordingly.

It appears from the above-mentioned papers that the contract for the contemplated building was never let, and I am of the opinion that by reason of this fact when taken in connection with the further fact that the appropriation was for only \$15,000, there is presented no legal reason for computing the compensation of the architects upon \$20,000, the amount of the lowest bid as a base.

It seems to me that said compensation should, rather, be computed upon \$15,000, the amount of the appropriation.

However, the amount of such compensation is a matter which is addressed to the discretion of the Governor; and, in fixing such amount he will doubtless consider the fact that the architects were perhaps at the time ready, able and willing to fully perform their part of the agreement by supervising the work of construction.

Third. My views upon your third question appear above.

Yours truly,

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#### CORPORATIONS—FOREIGN.

Permit to do business should not be granted by Secretary of State until percentage of stock prescribed by our law for domestic corporations has been subscribed and paid in.

AUSTIN, TEXAS, August 13, 1907.

*Hon. L. T. Dashiell, Secretary of State, Capitol.*

Sir: I am in receipt of your letter of recent date in which you submit the following question:

“Can a corporation chartered under the laws of another State which has not had subscribed and paid in the percentage of stock prescribed by our law for domestic corporations, obtain a permit to do business in the State of Texas?”

If you adopt the rule of issuing permits to foreign corporations in such instances that rule will doubtless prove an open door to the evasion of those provisions of Chapter 166, pages 309-313 of the General Laws of 1907, which require that “the stock holders of all private corporations created for profit with an authorized capital stock under the provisions of Chapter 2, Title 21, Revised Statutes of the State, shall be required in good faith to subscribe the full amount of its authorized capital stock, and to pay fifty per cent thereof before said corporation shall be chartered.”

I regard it as against public policy for a permit to be issued to a foreign corporation under such circumstances.

I am therefore of the opinion that unless and until the courts

shall hold otherwise, you should decline to issue a permit in any and all such instances.

Yours truly,

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LIFE INSURANCE COMPANIES—CAPITAL STOCK—LIVE-  
STOCK INSURANCE COMPANIES.

AUSTIN, TEXAS, August 13, 1907.

*Hon. R. T. Milner, Commissioner of Insurance, Capitol.*

Dear Sir: We are in receipt of your inquiry of yesterday made through your chief clerk, Mr. A. S. Thweatt, concerning the proportionate amount of capital stock of a proposed life insurance company which must be paid up before such company may obtain a charter, which inquiry was accompanied by your letter of 1st inst. to Mr. J. A. Brown, of Houston, Texas, and letter of date August 12, 1907, addressed to you by Messrs. Campbell & Wren, of Houston, Texas.

In response, I beg to say I am of the opinion that your question is controlled by the provisions of Title 58 of the Revised Statutes of Texas, and that if such proposed company has a paid up capital stock of not less than one hundred thousand dollars the law does not require that one-half of its entire authorized stock shall be actually paid in.

In this connection I beg to call your attention to the fact that in Chapter 150, pages 291 to 293 of the General Laws of 1907, the Thirtieth Legislature amended Subdivision 46 of Revised Statutes, Article 642, so that it now reads as follows:

“Subdivision 46. For the organization of fire, marine, life and live stock insurance companies; provided, that such live stock insurance companies may be organized with an authorized and paid up capital stock of not less than ten thousand dollars; and provided further, that all insurance companies mentioned in this subdivision shall be in all other respects subject to and shall comply with all of the provisions of Title 58, of the Revised Statutes of Texas, and any and all laws supplementary to or amendatory thereof.”

I think that the legal effect of this amendment is to require that with the exception that a live stock insurance company may be organized with an authorized and paid up capital stock of not less than ten thousand dollars, any of the insurance companies mentioned in Subdivision 46 shall conform to the requirements of said Title 58, and that such compliance is all that is required.

The above mentioned papers are herewith returned to you.

Yours truly,

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COUNTY COMMISSIONERS—COMMISSIONS OF.

AUSTIN, TEXAS, August 14, 1907.

*Mr. O. A. Seward, County Clerk, Washington County, Brenham, Texas.*

Dear Sir: We have your letter of the twelfth instant, in which you say:

"I am informed that your office has held that the clerks of commissioners courts were not permitted to issue warrants to officers unless said officers had procured a commission from the Secretary of State. If such is the ruling—does it include county *commissioners*—as well as all other elective officers—please reply at your early convenience—and *cite me the law.*"

In reply I beg to answer your questions affirmatively, and to cite you to Chapter 22, page 500 of the General Laws of the First Called Session of the Thirtieth Legislature, which contains the following provisions:

"Article 2439a. Any official who refuses or fails to take out a commission shall not be entitled to receive or collect, either from the State or from individuals any fee or fees, or any sum or sums of money, as fees of office, or compensation for official services, and it shall be unlawful for the Comptroller of Public Accounts, any county commissioners court, any county auditor or any other person whose duty it is to approve claims or accounts of public officials to approve or to pay any claim or account in favor of any and all such officers who have failed or refused to take out and pay for their commission as officials as required by this act; and the Secretary of State shall, from time to time, as such commissions are issued by him, furnish a list thereof to the Comptroller of Public Accounts and the county commissioners court and the county auditor with the name of the county in which such officers reside and of the district judge.

Yours truly,

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BOARD OF MEDICAL EXAMINERS—OSTEOPATHS—ELIGIBILITY OF ON SAID BOARD—DRUGGISTS AND PHARMACISTS—REQUIREMENTS OF PRACTITIONERS DISCUSSED.

AUSTIN, TEXAS, August 15, 1907.

*Hon. Board of Medical Examiners, Austin, Texas.*

Gentlemen: We are in receipt of yours of the 15th submitting the following questions for our decision, viz.:

"1. Please advise us as to the eligibility on this board of Osteopaths. (See Section 1 One-Board Medical Bill.)

"2. Would those men who qualified under previous laws by the registration of diplomas and then afterwards obtained licenses from the three State boards, or any of the three State boards, be required to get a verification license under the existing law?

"Also render a complete construction of Section 6 as a whole.

"3. Please render an opinion on the construction of the last four lines of Section 10.

"4. Can Section 13 be so construed as to prohibit counter-prescribing by druggists and pharmacists?"

You are advised as to the first question:

Section 1 of the Medical Act provides that the Board of Medical Examiners shall consist of eleven men learned in medicine, legal and active practitioners in the State of Texas, who shall have resided and practiced medicine in this State under a diploma from a legal

and reputable college of medicine of the school to which said practitioner shall belong for more than three years prior to their appointment.

An answer to your inquiry depends upon what is meant by "medicine" and "practiced medicine" and "college of medicine" as used in Section 1.

Section 1 contains also the following provision: "The word 'medicine' as used in this section, shall have the same meaning and scope as given to it in Section 13 of this act."

Section 13 provides that persons shall be regarded as practicing medicine within the meaning of this act, "who shall treat or offer to treat any disease or disorder, mental or physical, or any physical deformity or injury by any system or to effect a cure thereof and charge, therefor, directly or indirectly, money or other compensation."

I understand that this definition of "practicing medicine" includes within its terms that class of practitioners known as Osteopaths. Being included within the definition of the term, they are eligible to be appointed upon the Board of Medical Examiners.

Replying to your second question, you are advised that those practitioners who secured from either of the State Medical Examining Boards, under the Act of 1901, a State license upon a diploma which was registered prior to January 1, 1891, are not required to secure verification license from the new board. Neither are those practitioners who secured license from one of the State Medical Boards, under the Act of 1901, upon a diploma which was registered after July 9, 1901, required to get a verification license.

Those practitioners who secured license from either of the State Medical Examining Boards, under the Act of 1901, upon a diploma which was registered between January 1, 1891, and July 9, 1901, are required to present to the new board documents or legally certified transcripts of documents sufficient to establish the existence and validity of such diploma and the proper record thereof, and, in addition thereto, are required to satisfy the Board that the diploma was issued from a bona fide medical college of reputable standing, and receive from the board a verification license.

It is only this class of practitioners, viz.: those whose license from one of the State Medical Examining Boards under the Act of 1901, was issued upon a diploma recorded between January 1, 1891, and July 9, 1901, that are required to secure a verification license under the new law. Those having a certificate from one of the State Boards, under the Act of 1901, which is not based upon a diploma registered between the dates, January 1, 1891, and July 9, 1901, and those who secured such State license upon examination, or upon reciprocity, are not required to secure verification license, with this exception, that if the reciprocity license was based upon a diploma recorded between the dates, they will be required to present to the new Board the documents establishing validity and record of diploma, and, in addition, evidence that same was issued by a college of reputable standing, and secure verification license.

Further endeavoring to make my construction of the law clear, beg to advise as follows:



First. Those persons who were practicing medicine prior to 1885, if their right to practice depends entirely upon the fact that they were practicing prior to that date, are required to present to the new Board evidence to establish the fact that they were practicing prior to this date. This may be done by affidavits as the Board may direct. A verification license must be issued to all this class.

Second. Those whose right to practice depends upon diplomas recorded from January 1, 1885, to January 1, 1891, are required to present to the new Board evidence satisfactory to establish the existence and validity of such diplomas and proper record thereof, and receive from the Board verification license.

Third. Those whose right to practice depends upon diplomas recorded between January 1, 1891, and July 9, 1901, are required to present to the new Board evidence sufficient to establish the existence and validity of such diplomas and the proper record thereof, and, in addition, satisfactory evidence that such diplomas were issued from bona fide medical colleges of reputable standing. This must be done regardless of the fact that such practitioners may have secured from one of the State Boards, under the Act of 1901, a license, if such license was issued upon such diploma.

Fourth. Those whose right to practice depends upon certificates issued by district boards between January 1, 1885, and July 9, 1901, are required to present to the new Board evidence sufficient to establish the existence and validity of such certificates and the proper record thereof, and receive from the new Board verification license.

Fifth. Those whose right to practice is based upon an examination before one of the Boards, under the Act of 1901, are not required to secure verification license; neither are those whose certificates are based upon reciprocity, unless such reciprocity had for its basis a diploma recorded between January 1, 1891, and July 9, 1901.

Replying to your third question you are advised that the last four lines of Section 10 make it unlawful for persons to sell on the streets, or other public places, remedies which they recommend for the cure of diseases, unless such person so selling are either licensed druggists or physicians qualified to practice medicine under the provisions of this act.

Replying to your fourth question, you are advised that a druggist can not treat any disease or disorder, by prescription or otherwise, unless he has a license to practice medicine under the provisions of this act.

Truly yours,

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ANTI PASS LAW—SUPERANNUATED MINISTERS OF  
GOSPEL.

Superannuated ministers may, with consent, of transportation company, ride at half rate.

AUSTIN, TEXAS, August 17, 1907.

*Mr. Dwight L. Lewelling, County Attorney Dallas County, Dallas, Texas.*

Dear Sir: In your letter of the 5th inst., you request our opinion, generally and specifically, as to the proper construction and legal

effect of the following portion of Section 2, Chapter 42, of the General Laws of the Thirtieth Legislature of Texas, commonly known as the anti-pass law:

“Provided that nothing in this act shall prevent any such companies, the receivers or lessees thereof, or the officers, agents, or employees from granting to ministers of religion, reduced rates of one-half (1-2) the regular fare.”

The specific question submitted by you refers to Reverend R. W. Thompson, of Dallas, a superannuated preacher of the Methodist Episcopal Church, South, and is, in substance, as follows:

Can a superannuated minister drawing no salary as such, but who travels in the interest of and collects money for the building of houses for worn out ministers receive the benefit of the reduced railroad rates provided for in said Section 2?

In reply, I beg to say:

The first inquiry which here suggests itself is, what companies are embraced by the words “any such companies”?

Whatever difficulty may exist in determining whether this reference extends to all companies mentioned in Section 1 of said act or not, it is clear, I think, that it does extend to and embrace all companies enumerated in said Section 2, or in the language employed in that section, “any steam or electric or interurban railway company or chartered transportation company or sleeping car company.”

Your question relates particularly to the giving of reduced rates by railway companies, and such companies are specifically and unquestionably within the above quoted statutory enumeration, and are included in the term “any such companies.”

The inquiry which next presents itself, in order, is what patrons of railroad companies are within this statutory exemption and, consequently, permitted by law to receive favors from such railroad companies in the form of railroad transportation at half the usual rate or fare.

Now, in the economy of Methodism, a superannuated preacher is one who because of advancing years is relieved from the arduous labors of the regular itineracy, but who nevertheless continues to maintain his status as a member of the annual conference to which he belongs, and who retains his license and his full responsibility to the constituted authorities of his church as a minister of religion in good standing; and these facts, in my opinion, bring him clearly within the above defined statutory exemptions, rendering it perfectly legal for him to purchase and to use half-fare transportation upon any railroad within this State.

It frequently happens that, as in this particular instance, the superannuate devotes more or less of his time to charitable, benevolent and even strictly ministerial work; but I regard it as wholly immaterial, insofar as this statute is concerned, whether he does any of these things or not.

This construction of the law is strengthened by the fact that this same Section 2 thereof, in prescribing an exemption in favor of attorneys in the employ of railroad companies, uses the language “general attorneys and attorneys who appear in courts of record to try cases and who receive a reasonable annual salary.”

In bold contrast is the exemption in favor of "ministers of religion" without words of restriction or limitation relating to the character of his services or to his compensation.

The language of the statute, as I understand it, is broad in its sweep; and I am of the opinion that, regardless of the particular church or denomination to which a minister may belong, the question whether he is or is not permitted by law to purchase and use half-fare railroad transportation must turn solely upon the issue of whether he is or is not in fact recognized as a minister of religion in good standing by the regularly constituted ecclesiastical authorities to which he owes allegiance.

If, when tested by this criterion, he is a minister of religion, he may, by consent of the railroad company, lawfully ride at half rate; otherwise he may not.

I understand this to be the intent and meaning and the legal effect of said statute.

Yours truly,

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ANTI PASS LAW—CITY MARSHALL—ELECTIVE PEACE OFFICERS.

AUSTIN, TEXAS, August 22, 1907.

*Mr. J. W. Reid, City Marshal, Uvalde, Texas.*

Dear Sir: Under recent date you ask:

"Can I, city marshal, and therefore a peace officer elected by the people at a general election, and also assessor and collector of the city of Uvalde, ex-officio, ride on a railway pass, as coming under the exemptions of the anti-pass law?"

In reply, I beg to say that, in my opinion, your question should be answered affirmatively.

Yours truly,

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LOCAL OPTION—"RICE NUTRINE."

Violation of local option law to sell "rice nutrine," same as "ino," "uno," etc., without first having paid tax prescribed by law.

AUSTIN, TEXAS, August 22, 1907.

*Hon. J. W. Stephens, Building.*

Dear Sir: We are in receipt of yours, enclosing communication issued by one or more brewers of this State in words and figures as follows:

"To All Our Customers:

"Since the non-intoxicating malt liquor law tax of \$3000 for State and county purposes was passed, and we saw that we were not going to get a decision from the Court of Appeals in the "Hiawatha" and "Frosty" test cases from Orange County—the case being put off by Judge Davidson, who heard it, until the meeting of the Court of Criminal Appeals at Tyler in October—we went to work and prepared a new drink made from Rice, which we call "Rice Nutrine."

This beverage being prepared from the raw cereal, rice, it is not a violation of the said law to sell it.

“‘Rice Nutrine’ is manufactured and fermented with yeast and is very much like beer in taste and appearance. The alcoholic contents is about two per cent and it can not produce intoxication, and we guarantee it in that respect. Like all other fermented beverages it is taxed by the United States Government, which assesses a tax of \$20 per year on fermented liquor. We consider this beverage perfectly safe to handle in so far as molestation from the officers is concerned.”

You desire to be advised as to whether or not the sale of the decoction, designated therein as rice nutrine, would subject the party selling same to the tax imposed under the act of the Thirtieth Legislature, page 212, Section 1.

This act provides that in local option territory persons, firms, associations or persons and corporations selling at retail non-intoxicating malt liquors, such as “Uno,” “Ino,” “Frosty,” “Tin-Top,” and “Tee-totle,” and all other such liquors will pay an annual State tax of \$2000.

An answer to your inquiry depends upon the question of fact as to whether “rice nutrine is a non-intoxicating malt liquor.” The statute designates by name several of these non-intoxicating malt liquors and contains the general provision “and all other such liquors,” the intention being to cover liquors of a similar character designated by any name, in order to prevent avoiding the result of the legislation by simply changing the name of the bottle.

As was said by the Court of Appeals of the Indian Territory in discussing a case which involved the introduction into that territory of a decoction styled “Rochester Tonic” in violation of a statute which prohibited the sale in such territory of any vinous, malt or fermented liquors:

“It suddenly dawned on the minds of gentlemen engaged in the manufacture of the forbidden products that the health of the people of this country was such that they stood in need of some kind of health restorative and tonic. Hence, the country was filled with such decoction as “Rochester Tonic,” “Vegetable Bitters,” “Malt Nutrines” and numberless other pretended health restoratives. The result of the legislation was only to change the labels on the bottles. The proof in this case shows that the beer sold by the defendant was at one time introduced and sold in this country under the name of “Malt Ale,” but the name I suppose was too suggestive. Hence, we now have “Rochester Tonic,” but it is simply a change in name to suit the change in law.” (U. S. vs. Cohn, 52 S. W. Rep., 38.)

I think the suggestions brought by the court in the above case very applicable to the matter under consideration—“it is simply a change in name to suit the change in law.”

Malt liquor is defined to be “an alcoholic liquor prepared by fermenting an infusion of malt.” (Webster’s Dictionary.)

“It is a general term for an alcoholic beverage produced merely by the fermentation of malt as opposed to those obtained by the distillation of malt or mash.” (Century Dictionary and Encyclopedia.)

Malt is defined to be "barley or other grain steeped in water and dried in a kiln, thus forcing germination until the saccharine principle has been evolved." (Webster's Dictionary.)

Malt is also defined as follows:

"Grain in which, by partial germination, arrested at the proper stage by heat, the starch is converted into saccharine matter, the unfermented solution of the latter being sweet wort of the brewer. By the addition of hops, and the subsequent process of cooling, fermentation and clarification, the wort is converted into porter, ale or beer. The alcoholic fermentation of the wort without the addition of hops, and distillation, yield crude whisky. Barley is the grain most used for malting in the manufacture of beer; but wheat, rye and other grains are usually malted for whisky." (Century Dictionary and Encyclopedia.)

These definitions have been followed by the courts.

U. S. vs. Bucournau, 54 Fed. Rep., 138.

Alfred vs. State, 89 Ala., 112.

Tinker vs. State, 90 Ala., 647.

Black on Intoxicating Liquors, par. 6.

It would be immaterial whether rice or other grain is used to produce the malt, and immaterial whether the fermentation is produced by the use of hops or yeast.

It is the process through which the alcoholic beverage is evolved which fixes its character as malt liquor, regardless of the grain used or the product used to produce the fermentation.

Aside from this the fact that the retailer of same is required by the United States government to pay a tax of \$20 per year stamps it as malt liquor as understood by the officers of that government. This tax is not on fermented liquor, as stated in the communication, but is upon "retail dealers in malt liquors."

(See Subdivision 4 of Section 3244, U. S. Statute, Federal Statutes Annotated, Vol. 3, page 615.)

Moreover, the communication discloses that this decoction is manufactured as a substitute for those upon the sale of which the tax is directly levied by the act of the Legislature and the description of same contained therein stamps it as a malt alcoholic beverage, as that term is commonly understood and defined by the courts and other authorities.

You are advised, therefore, that it is our opinion that it would be a violation of the provisions of the act to sell this decoction in local option territory without paying the occupation tax imposed thereunder.

Yours truly,

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SHERIFF.

Entitled to \$2 per day for attendance upon court.

AUSTIN, TEXAS, August 23, 1907.

Hon. H. P. Jordan, District and County Clerk, Brady, Texas.

In your letter of the 12th inst., you make the following inquiry:

"Is the sheriff entitled to \$2 per day for each day the court is in

session, that is, from the day the court is convened until the day the court is adjourned and minutes signed, regardless of whether the court might be trying civil and criminal cases or attending to probate matters and where the sheriff might be needed at any time and though during the time probate matters were being attended to he might not be called on to perform any duty; the court transacting its business as to probate matters principally in the clerk's office, but the sheriff or his deputy being present in the court house and ready and willing to do any duty that he might be called on to perform, though possibly for two or three days at a time and possibly longer there would be no business whatever attended to by the court?

"Now the question is:

"Would the sheriff be entitled to his pay of \$2 per day while the court was in session, whether there was any business transacted every day or only on a part of the days in which the court was in session?"

If, as stated in your inquiry, the sheriff or his deputy were at all times during the term of the court present in the court or in the court house at his office, ready and willing at all times to answer a summons of the court to attend its sessions, then I would answer your inquiry in the affirmative; that is, that the sheriff is entitled to his \$2 per day for the entire term the court was in session.

R. S., Article 4900, reads as follows

"Each sheriff shall attend upon all district, county and commissioners courts of his county."

The latter part of Article 2460 reads as follows:

"For every day a sheriff or his deputy attends the district or county court, he shall receive \$2 a day, to be paid by the county, for each day that the sheriff by himself or a deputy shall attend said court."

You will, therefore, observe from the provisions of Article 4900 that the law expressly requires a sheriff to attend all sessions of the district and county courts of his county. He can not fail or refuse to attend the sessions of such courts without failing to discharge his official duties. In other words, the law places him constructively in attendance upon all the sessions of the county and district courts and Article 2460 provides his compensation for such attendance.

It, therefore, occurs that if it is the sheriff's duty to attend all the sessions of the county and district court and made so by express provision of the statute and he holds himself in readiness to attend such sessions, either in person or by deputy, ready and willing at all times to respond to a call from the court, that his services were needed, then I think he would be entitled to his compensation as provided in Article 2460. Of course, he would not be entitled to his compensation during a temporary suspension of business, though the terms of court had not ended, as if the court shall take a recess for a few days or any number of days during which time the court would not be open for the transaction of any business; but if there were no recess or no suspension of the business of the court, or if the sheriff was subject to call and liable to be called at any hour of any day during the term, then he would be entitled to his per diem from the time the court opened until the term closed.

La Salle County v. Milligan, 143 Ill., 321.

Torbet vs. Hale County, 131 Ala., 143.

Miller vs. Boone County, 5th Ind., 225.  
 People vs. Saratoga County, 45 N. Y. App., 42.  
 Yours truly,

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WAREHOUSES—CONVICT BONDS.

Manager or owner of, must receive a certificate from the county clerk and execute bond to the State of Texas.  
 Not necessary to have judge's endorsement to make bond of a convict a valid obligation against sureties.

AUSTIN, TEXAS, August 23, 1907.

*Hon. James M. Taylor, County Attorney, Burnet, Texas.*

Dear Sir: In your letter of the 21st inst., you state:

"1. Suppose that the man who runs or manages a warehouse is not the owner. Will he have to give bond to the State of Texas or to give bond to the owners or will he have to give bond at all and will the owners have to give the \$5000 bond to the State of Texas?"

"2. Under Section 7 of said act it states that no public warehouse man shall issue warehouse receipts against his own property. Can the manager or the man who runs the public warehouse issue a receipt against his own property, for instance where the man who is appointed to run the same is a farmer and has cotton of his own, can he issue a receipt against his own property?"

"3. With reference to convict bonds the law says that the county judge must approve the same and file the same with the county clerk. Is this provision mandatory with reference to both clauses or merely a directory, and does approving mean only the words written as usual and can any acts of the county judge constitute approval? For instance, where the county judge accepted a bond properly signed by principal and sureties and the same delivered to him and he orders the sheriff to turn the man out of pail and he informs the man how much will have to be paid monthly and he informs the man that he is releasing him on said bond, and if the bond is not paid as it becomes due, can the county judge order that a copeas profine be issued against the party and have him re-arrested?"

To which I reply:

1. That Section 2, Chapter 87 of the General Laws of the Twenty-sixth Legislature of Texas reads as follows:

"That the owner, proprietor, lessee or manager of any public warehouse, whether an individual, firm or corporation, before transacting any business in such public warehouse shall procure from the county clerk of the county in which the warehouse or warehouses are situated a certificate that he is transacting business as a public warehouse man under the laws of the State of Texas, which certificates shall be issued by said clerk upon a written application setting forth the location and name of such warehouse or warehouses and the name of each person, individual or a member of the firm interested as owner or principal in the management of the same, or if the warehouse is owned or managed by the corporation the names of the president, secretary and treasurer of such corporation shall be stated, which application shall be received and filed by such clerk and preserved

in his office and the said certificate shall give authority to carry on and conduct a business of a public warehouse within the meaning of this act and shall be revocable only by the district court in the county in which the warehouse or warehouses are situated upon a proceeding before the court on complaint by written petition of any person, setting forth the particular violation of the law, and upon process, procedure, and proof, as in other civil cases. *The person receiving a certificate* as herein provided for, shall file with the county clerk granting same, a bond payable to the State of Texas, with good and sufficient surety, to be approved by said clerk, in the penal sum of \$5000, conditioned for the faithful performance of his duty as a public warehouse man, which said bond shall be filed and preserved in the office of said clerk."

You will therefore observe from the provisions of this section of the law, that the manager, owner, proprietor or lessee must receive a certificate from the county clerk and must execute his bond to the State of Texas.

There is no law requiring a manager to give a bond to the owners and the owners to give a bond to the State of Texas, but the manager himself must execute a bond to the State of Texas.

2. A manager, owner, lessee or proprietor of a public warehouse is not authorized and can not legally issue warehouse receipts against his own property, and the manager, owner or lessee of such warehouse being a farmer raising his own cotton furnishes no exception to the rule, and he can not issue warehouse receipts against his own property. (Acts of the Twenty-seventh Legislature, Chap. 87, Sec. 7.)

3. With reference to convict bonds, I do not think it is necessary for the county court to endorse on such bonds his approval in order to make the bond a valid obligation against the sureties, but if the bonds are accepted and the persons discharged, then the sureties upon such bonds are liable for the amount thereof, though there may not be any formal acceptance by the county judge of such bonds.

I do not think, however, that on default in the payment of such bond the court has the right to order the re-arrest of the defendant because the bond has been accepted in lieu of the person of the defendant and the defendant is discharged and the county's only remedy, in my judgment, is a suit upon the bond against the sureties for its collection when default has been made thereon.

Yours truly,

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#### COUNTY CLERK—FEES OF.

County clerk entitled, for recording papers required or permitted by law to be recorded, not otherwise provided for, including certificate and seal, for each 100 words, 10 cents.

AUSTIN, TEXAS, August 23, 1907.

*Mr. Sam C. Johnson, County Clerk, Paris, Texas.*

Dear Sir: We are in receipt of yours of the 16th inst., asking to be advised as to whether or not you are entitled to charge for recording deeds ten cents per hundred words for the deed and the certifi-



cates of acknowledgment thereto and in addition fifty cents for the certificate of record and seal thereof which you make after record of the deed.

The statute provides as follows:

“Recording of papers required or permitted by law to be recorded, not otherwise provided for, including certificate and seal, for each 100 words ten cents.”

The compensation allowed you is for recording papers required or permitted by law to be recorded and you can charge 10 cents per one hundred words for recording such things only as you are required or permitted by law to record. In other words, the labor for which you are allowed the compensation is recording the paper. You are required to record the deed and the certificates of acknowledgment thereto, and if it has been recorded in any other county and it contains a certificate of record from the clerk of the other county, this you are required to record; but your certificate of record placed on the deed after it is recorded is no part of the recording which you do and for which the compensation is allowed. The compensation is for the recording and includes the certificate and seal. If the words “including certificates and seal” were not contained in this item of cost, you would be entitled to charge for such certificate and seal the sum of fifty cents as is especially provided for in another item of the cost bill of the county clerk, namely:

“Each certificate to any fact or facts contained in the records of his office with certificate and seal, when not otherwise provided for, fifty cents.”

The certificate of record and seal, in so far as the deed is concerned, is otherwise provided for in the item of cost, first referred to herein, by being included in the labor which you are required to perform in the recording of the deed, the compensation for which is ten cents for each one hundred words for the recording of paper.

You are advised, therefore, that you can neither charge fifty cents for the certificate and seal, neither can you charge ten cents per hundred words for the certificate and seal, because such certificate and seal is no part of your record of the deed.

I do not understand that this question was directly determined in the proceeding in Harrison County, to which you refer, my understanding of that case being that the mandamus was refused because there was no testimony that there has been any tender of any amount for the recording of the deed.

I return the letter enclosed.

Yours truly,

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#### MEDICAL LAW—PATENT MEDICINES.

A person traveling through the country selling patent medicines, and offering to treat and cure diseases, will be required to secure license to practice medicine.

AUSTIN, TEXAS, August 26, 1907.

*T. C. Hutchings, Esq., Mount Pleasant, Texas.*

Dear Sir: Replying to yours of the 24th, you are advised that under the new medical law the party would be authorized to peddle

patent medicines which he buys without securing a license to practice medicine or pharmacy. It is only where a party sells such patent medicines "on the streets or other public places" and then only when he sells "remedies which he recommends for the cure of disease."

This provision would not apply to a peddler of patent medicines. We would not be understood as holding, however, that a person can treat or offer to treat any disease or disorder by traveling around through the county and using patent medicines which he recommends for the cure of the disease or the disorder which he offers to treat without being required to secure license to practice medicine.

Section 13 expressly provides that a person shall be regarded as practicing medicine if he treats or offers to treat any disease or disorder, mental or physical or any physical deformity or injury by any system or method, or to effect cures thereof, or charge therefor.

Therefore, if a person traveling around through the county offers to treat any disease or disorder and effect cures thereof, he will be required to secure license to practice medicine, although he may treat such disease or disorder by the use of patent medicines which he sells.

Yours truly,

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OFFICIAL STENOGRAPHER—FEES OF.

Required to take out commission before authorized to accept fee.

AUSTIN, TEXAS, August 26, 1907.

*Mr. Hugo R. Burnaby, Beaumont Texas.*

Dear Sir: I find that in my reply to yours of the tenth of June, which was referred to me by Mr. Hawkins, to whom it was originally referred, on last Saturday, that I did not answer specifically some of the questions propounded by you in the copy of the opinion sent to you. This was due to the haste with which we sometimes are compelled to dispose of accumulated business in the office.

Your first question is as follows:

(1) In Section 6 appears the following (in criminal cases):

"Whenever the State and defendant can not agree as to the testimony of any witness, then and in such event so much of the transcript of the stenographer's report with reference to such disputed fact or facts shall be inserted in the statement of facts as is necessary to show what the witness testified to in regard to the same \* \* \* Provided, that the amount of \$5 a day allowed by this act shall be in full compensation to said stenographer for any and all criminal cases.

"Under provision of this nature can defendant's counsel order the stenographer to hunt all over his notes, write up pages and pages of disputed evidence and bills of exception, etc., and pay him nothing?"

The stenographers' bill passed by the Thirtieth Legislature, page 509, has separate provisions as to a statement of facts in civil cases

and in criminal cases. Section 5 applies to civil cases exclusively and section 6 to criminal cases. Under the provisions of Section 6, counsel for a defendant can not require a stenographer to go through his notes and transcribe for him pages of testimony without compensation. If a defendant's counsel, prior to the time there has been a bona fide effort to agree upon a statement of facts, desires copy of any portion of the transcript he will be required to pay the fee for same to the district clerk in order that same may be paid to the stenographer. It is only after there has been a disagreement as to the testimony of any witness between the defendant's counsel and the State's counsel, that the stenographer can be required to transcribe the testimony of that particular witness, and I think he could not be required to do so until ordered to do so by the district judge after the disagreement as to the testimony of the particular witness. The labor imposed upon the stenographer transcribing the testimony of a witness about which there is a disagreement is in making up the statement of facts for the appeal. He can not be required to do so merely for the convenience of the defendant's counsel.

- Your third question, which can be more logically answered following the above than the second, is as follows:

“(3) In Section 15 appears the following: ‘Provided, however, that nothing in this act shall be construed as preventing parties to suits from preparing statement of facts on appeal independent of the official stenographer.’ Under this provision can attorneys employ outside stenographic experts and ignore the official stenographer altogether?”

Under the provisions of Section 15, which repeals the acts of the Twenty-eighth and Twenty-ninth Legislatures, the attorneys in a case can prepare a statement of facts to submit to the court independent of the official stenographer, the provisions being as is quoted in your inquiry. Of course, in the preparation of such statement of facts, the stenographer can not be required to transcribe for either party any portion of the transcript. The entire labor must be performed by the counsel independent of any gratuitous labor on the part of the stenographer. Of course, the counsel can employ a stenographer to transcribe any portion of the record, or to take and transcribe the statement of facts, which they propose to prepare and submit to the judge, or they can employ a third party to perform their stenographic labor in the preparation of the statement of facts. Neither is there anything in the act to prohibit either party to the suit or any attorney in the case from employing a stenographer to take down the testimony and proceedings of the court during the trial of the case for their own convenience and information, and if the parties desire to prepare their statement of facts independent of the official stenographer, the private stenographer employed to transcribe the testimony can be employed by the parties to prepare the statement of facts under the provisions of Section 15. In other words, there is nothing in the act to prevent parties from using the services of the private stenographer in any way they see proper either in civil or criminal cases.

Under the provisions of Section 5 if either party in a civil cause requests the stenographer to make a duplicate statement of facts, the

party making the request is required at the time to deposit with the district clerk the compensation provided for in Section 8 consisting of ten cents per folio for the original copy and five cents per folio for the carbon copy. If the request is made of the stenographer this cost must be paid, although the statement prepared by the stenographer is not the one which is finally approved by the judge as the statement of facts. This act does not require as did the acts which it repealed that the stenographer file a copy of the statement of facts with district clerk.

Your second question is as follows:

“(2) The closing words of Section 8 are: ‘Provided the total compensation to such stenographer shall not exceed twenty-five hundred dollars per annum.’ Under this proviso, if a man earns \$1000 say, in one year, and the next year he earns \$4000, does he have to refund \$1500 to the State as a bonus for having worked extra hard the second year, or do you construe this as to be prorated over the term of appointment?”

You are advised as to this that Section 8 contains the provision copied in this inquiry, to the effect that the total compensation of the stenographer shall not exceed \$2500 per annum. This must be construed to refer to each current year, and although the stenographers fees may not amount to \$2500, if they amount to more than this the next year, more than \$2500 can not be retained so as to apply to any year in which there was a deficiency. The bond of the stenographer in Section 3 contains the condition that he will pay over to the county in which the service is performed all moneys coming into his hands in excess of the maximum amount allowed him under this act.

In reply to your fourth question, I beg to advise you that stationery supplies used by official stenographers in course of work is not a legitimate charge payable by the county commissioners.

I also call your attention to the fact that under the act of the Thirtieth Legislature, all official stenographers are required to take out a commission before they will be authorized to accept any fee.

Yours truly,

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#### STATE DEPOSITORIES.

Where there are two depositories in same city or town their rights are equal, each having been selected as a depository of one or more thirty-firsts of the State funds to be deposited by officers within a particular senatorial district.

AUSTIN, TEXAS, August 26, 1907.

*Hon. Sam Sparks, State Treasurer, Capitol.*

Sir: You request from this department an opinion upon the question presented to you by a letter from the cashier of the Union Bank & Trust Company, of Dallas, from which the following is an excerpt:

“I wish to call your attention to that part of Section 3, in which it states, ‘And thereupon, the Treasurer shall select and designate, with the approval of the Comptroller and Attorney General, one of such banks or banking institutions as a depository of the State for each Senatorial District.’ In Section 19 it further states that ‘De-

positories which are awarded under that section shall receive not more than 2-31 of such districts that have no depositories.

"I do not know how this is construed by you, but it seems to us that under these two sections that we are the depository for this Senatorial District, and the tax collectors of Rockwall and Dallas Counties are required to remit to us the State deposits, and the Gaston National Bank is a depository at large, receiving deposits from those senatorial districts which have no depository, and from the State Treasurer himself."

Responding to your request, I beg to say:

I understand the facts to be that the Union Bank & Trust Company qualified as State depository pursuant to your original call for bids, which was made under Section 2 of Chapter 164 of the General Laws of the Twenty-ninth Legislature, providing for a system of State depositories, and that, subsequently, the Gaston National Bank of Dallas qualified as a State depository under the provisions of Section 19 of said statute as amended by Chapter 90 of the General Laws of 1907, Thirtieth Legislature, and that both of said institutions are now duly qualified and acting State depositories.

The issue is: what are the relative rights of said State depositories to deposits of tax collectors and other officers charged with the duty of remitting State funds and residing within the Sixth Senatorial District within which both of said State depositories are located?

I note your correspondent says that Section 19 states that "depositories which are awarded under that Section, shall receive not more than 2-31 of such districts that have no depositories."

I can not find these above quoted words in either the original statute of the amendment of 1907, nor do I find in either language which should, in my opinion, be so construed.

The general purpose of the amendment of 1907 was threefold: first, to authorize the State Treasury, in the event of a failure to secure as many as thirty-one State depositories under his first call for bids, to make, by letters, a second call for bids before advertising in the daily papers for bids to become State depositories; second, to reduce from \$50,000 to \$25,000 the minimum amount of capital stock which a bank or banking institution must have to make it a qualified bidder to become a State depository; and, third, to provide for the application of interest from deposits in State depositories.

It does not appear to have been the purpose of said act of 1907 to change the original statute of 1905 providing for State depositories in any of its bearings, or in its effect, upon the question of what State depository is the proper place of deposit in any instance.

Section 9 of said original act of 1905 provides that "all tax collectors in the State of Texas, and all officers charged with the duty of remitting to the State Treasurer State funds shall, after the passage of this act, instead of remitting said funds to the State Treasurer, as is now required by law, cause the same to be remitted to or deposited with the nearest State depository:" and I am of the opinion that these words of the statute control the question submitted by you and that it should be held that the proper place of deposit in any any given instance is that State depository which is nearest to the

office of the officer making such deposit, regardless of whether such state depository is located in the same senatorial district or not.

It is true that in said original statute, and in said amendment thereof, may be found certain language which, when loosely read, and which, when construed without reference to the above quoted provisions of said Section 9, might suggest that the purpose of the statute was to establish a State depository in and for each of the thirty-one senatorial districts of the State and to require that all such statutory deposits within a particular senatorial district shall be made in the State depository selected and designated for that particular senatorial district; but I think that a careful reading of the statute as a whole will dispel that illusion.

My conception and understanding of the law is that the Legislature intended that the State funds should be distributed with substantial equality in State depositories, one of which should be located in each senatorial district, as far as that might be found practicable under the system of bidding prescribed in the statute, but that the recognition by the statute of senatorial district boundary lines extends no further than the mere location of State depositories under the first and second calls by the State Treasurer by means of letters, not even including the calls by that officer by advertisements in daily papers for bids to become State depositories, and that for all subsequent purposes, and in all other respects, the boundary lines of senatorial districts are no further recognized, the effect being to practically wipe out and ignore all such boundary lines in the location of State depositories under the third and final call by the State Treasurer for bids made by advertisements in the daily papers, and in determining the proper place of deposit of said funds by officers charged with the duty of making such deposits.

There remains, perhaps, the further question as to which is the proper State depository in cases where there are two duly qualified and acting State depositories in the same city or town.

Upon this phase of the question it is my opinion that in such instances such State depositories have equal rights in the premises, and that, perhaps in any event, and certainly unless otherwise directed by the State Treasurer, the officer who is charged by law with the duty of making deposit of said funds may exercise his own judgment or suit his own convenience or preference in the premises and may legally make deposits in either or both such State depositories.

While the law contemplates that the deposits in the various State depositories throughout the State shall be substantially equal in amount at any given date, it will perhaps be found, in practice, that such equilibrium can be best maintained by direct transfer of said funds from one State depository to another, upon the order of the State Treasurer, rather than by an attempt to further control the place of original deposit.

If it were to be held that the State depository which was first to qualify in a particular senatorial district is entitled to receive all such deposits of all officers residing in that senatorial district, to the exclusion of any and all other State depositories within that district, serious inconvenience might, and probably would, result in many cases.

For instance, suppose that under your first call by letters for bids, a bank in the town of Rockwall had been first in the Sixth Senatorial District to become a State depository and that no bank in Dallas became such depository under either your first or second call by letter for bids, and that, as is the case, a Dallas bank, and none other in the Sixth Senatorial District, and none other nearer to Dallas than Rockwall, became a State depository under your call for bids made by advertisement in the daily papers pursuant to said act of 1907.

Under such circumstances, upon the theory set forth in the above quoted letter from your correspondent, the Rockwall bank would still be entitled to claim and receive all deposits from the tax collector of Dallas County, regardless of the proximity of the Dallas bank; while under my construction of this statute no such inconvenience would result.

In this connection, I deem it proper to say that the words "nearest State depository," as here employed, save reference to a depository in some city or town other than that in which the officer making the deposit has his office, rather than to the relative distances from the county court house of two State depositories which happen to be located in the same city or town.

As above indicated, I am of the opinion that where there are two State depositories in the same city or town their rights are equal, each such depository having been selected as a depository of one or more thirty-firsts of the State funds rather than as the exclusive depository of all State funds to be deposited by officers within a particular senatorial district, and said State depository which was first to qualify being presumed to have done so, in contemplation of the aforesaid effect of the statute.

Yours truly,

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CHARTERED TRANSPORTATION COMPANIES—OFFICERS  
OF.

May exchange free transportation with officers of another transportation company.

AUSTIN, TEXAS, August 28, 1907.

*W. C. Oliver, Esq., District Attorney, Houston, Texas.*

Dear Sir: I have your letter of recent date, which is as follows:

"There is located in this city headquarters of one or more chartered transportation companies, whose charters are granted under the General Laws of the State of Texas, and while they are not recognized as common carriers by the Railroad Commission of Texas, yet they are recognized by the Interstate Commerce Commission and comply with its rules and regulations, and I desire to know whether or not, under the circumstances, it is the opinion of your department that these chartered transportation companies have the right, under the anti-pass law, to exchange transportation, not only between themselves, but with regular railroad corporations. For instance: could the Beaumont & Great Northern Transportation Company give trans-

portation to officials of the Santa Fe Railroad Company and receive in return from the Santa Fe, transportation for its officials? I have noted your opinion addressed to Hon. J. E. Wiley, at Quanah, Texas, but do not think that it answers my inquiry on account of the fact that the Acme, Red River & Northern is organized under the railroad laws, while the transportation companies to which I refer are organized under the General Laws and that chapter of same which gives them the right of incorporating for the purpose of transporting goods, wares and merchandise or anything of value."

By way of reply to your inquiry, I enclose copy of an opinion which I gave on July 3, 1907, to District Attorney I. C. Baker, of San Antonio, concerning the effect of Chapter 42 of the General Laws of the Thirtieth Legislature, to which you refer, upon chartered transportation companies.

Supplementing same, I beg to say that in my opinion any chartered transportation company may lawfully exchange free transportation over its own lines with any other chartered transportation company for free transportation over its lines, the privilege or exemption under the statute extending to and embracing any and all persons to whom either such company could legally issue free passes over its own lines.

I answer your question affirmatively.

Yours truly,

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#### ANTI-PASS LAW—LETTER CARRIERS.

AUSTIN, TEXAS, August 31, 1907.

*Mr. S. B. Strong, Postmaster, Houston, Texas.*

Dear Sir: By way of reply to your inquiry as to the effect of Chapter 42 of the General Laws of the Thirtieth Legislature, commonly known as the anti-pass law, upon the question of free transportation of letter carriers in the employ of the United States government over the lines of an electric street railway, I enclose herewith copy of an opinion which I gave, on June 24, 1907, to General A. S. Roberts, Assistant Superintendent of the Railway Mail Service, which was published in the daily press at the time, and which I suppose met your eye.

The proper answer to your question is dependent upon whether or not such letter carriers are employees of the railway mail service.

If they are, they may legally accept and use such free transportation; if not, it will be illegal for them to do so.

Without undertaking to pass upon the fact involved, I will say that it is my understanding that such letter carriers are not employees of the railway mail service.

The contracts which you sent us are herewith returned.

Yours truly,



ANTI-PASS LAW—TRAFFIC ACROSS RIO GRANDE RIVER  
BRIDGE.

AUSTIN, TEXAS, August 31, 1907.

*Messrs. Juan A. Valls, District Attorney, and Juan V. Benavides,  
County Attorney, Laredo, Texas.*

Gentlemen: In reply to your inquiries as to the effect of Chapter 42 of the General Laws of the Thirtieth Legislature, commonly known as the anti-pass law, upon traffic over the International bridge across the Rio Grande at Laredo, I beg to say that, in my opinion, the provisions of said statute have no application whatever to said bridge or to the traffic crossing it.

Yours truly,

## PUBLIC SCHOOL LANDS—ASSIGNMENT OF LEASE.

AUSTIN, TEXAS, August 31, 1907.

*Hon. J. J. Terrell, Commissioner of the General Land Office, Aus-  
tin, Texas.*

Sir: We have received and carefully considered your letter of the 21st inst., which is as follows:

“I would thank you for an opinion in regard to the right of the assignee of a lease to purchase school land under Section 5, Act of 1907, under the following conditions:

“W. T. Robinson, who has never purchased any school land from the State since April 19, 1901, has transferred a lease to H. G. Ross, Number 34691, made for five years from September 18, 1902, which is the only lease assigned by Mr. Robinson to anyone. Mr. Ross filed his assignment, dated August 1, 1907, properly acknowledged, on August 7, 1907, in this office, on August 20, 1907, which is less than sixty days prior to the expiration of this lease. Would Mr. Ross be permitted to purchase land out of this lease under the above conditions?

“The assignee is permitted to purchase four more sections, this lease being in El Paso County.”

Upon careful consideration of the act of May 16, 1907, Chapter 20 of the General Laws, First Called Session of the Thirtieth Legislature, I beg to say that, in my opinion, your question should be answered negatively.

Yours truly,

## ANTI-PASS LAW—TELEGRAPH AND TELEPHONE COMPANIES—SPECIAL RATES.

Not necessary that special rate of telegraph or telephone company, if such companies are authorized to make special rates, be approved by Railroad Commission.

AUSTIN, TEXAS, September 6, 1907.

*Hon. O. B. Colquitt, Building.*

Dear Sir: Yours of July 12th has just been referred to me for attention and advice.

You submit the following inquiry:

"The telegraph companies have for years given what is known as the newspaper or press rates, being a special rate lower than that accorded to the public for all persons using the facilities of the telegraph company. In order to protect the telegraph company and the users of these special rates from prosecution under Senate Bill No. 8, known as the anti-pass act, is it necessary to procure the approval of the Railroad Commission of Texas of these special telegraph rates before they can be lawfully used?"

You are advised that it is not necessary that any special rate of a telegraph or telephone company, if such companies are authorized to make any such special rates, be approved by the Railroad Commission. Section 2 of the act contains the following proviso:

"Provided further, that nothing in this act shall be construed to prohibit any such companies, their receivers or lessees or officers, agents or servants from making special rates for special occasions or under special conditions, but no such rate shall ever be made without first obtaining authority from the railroad Commission of Texas."

A construction of this proviso depends upon what companies are included in the term "such companies."

Section 1 of the act specifies certain companies subject to the provisions of the act, as follows:

Steam or electric railway company, street railway company, interurban railway company, or other chartered transportation company, express company, sleeping car company, telegraph or telephone company."

Section 2, in excepting from the provisions of the act certain things done by certain companies, selects from the list of companies made subject to the provisions of the act the following, namely:

"Steam or electric or interurban railway company or chartered transportation company or sleeping car company."

This section exempts the companies last above named from the provisions of the act in certain particulars, and the proviso copied above refers to these companies only and does not include or refer to all of the companies subject to the provisions of the act. This section in its several portions deals with most of the companies subject to the provisions of the act. The first portion of the section, being that which contains the proviso referred to above, deals only with steam or electric or interurban railway companies or chartered transportation companies or sleeping car companies. Later on in the section street railway companies are dealt with, also express companies and also telegraph and telephone companies, but the proviso refers only to the companies which are being dealt with in the particular portion of the section in which it occurs, namely, steam or electric or interurban railway companies or chartered transportation companies or sleeping car companies.

It is worthy of note that in addition to the term "chartered transportation company" contained in Section 1, there is specifically mentioned telegraph and telephone companies. Therefore, telegraph and telephone companies are not included within the term "chartered transportation company" as contained in Section 2.

It will be noticed also that in addition to the term "electric or interurban railway company" there is contained in Section 2 a specific mention of street railway companies. Therefore, street railway companies are not included in the term "electric railway companies" contained in Section 2.

We doubt if the Legislature intended to require any company, other than those already under the jurisdiction of the Railroad Commission, to apply to it for special rates made for special occasions or under special conditions; but the wording of the act is such as to require us to construe it to mean that each of the companies mentioned in the first portion of Section 2 must apply to the Railroad Commission for making special rates for special occasions or under special conditions; but within the specification of the companies which must make such application is not included either telegraph companies or telephone companies or street railway companies or express companies.

Yours truly,

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ANTI-PASS LAW—EFFECT UPON PRE-EXISTING CONTRACTS—DALLAS FAIR PARK MINIATURE RAILWAY.

Anti-pass law not intended to abrogate contracts made prior to its enactment, valid and legal when made, and unperformed at time law became effective.

AUSTIN, TEXAS, September 6, 1907.

*Hon. Allison Mayfield, Chairman of the Railroad Commission, Capitol.*

Dear Sir: We are in receipt of yours of the 20th enclosing copy of a letter from Mr. Clinton P. Russell, of Dallas, Texas, a stockholder in the Fair Park Miniature Amusement Railway. Mr. Russell asks for an interpretation of the anti-pass law. I take the following from his communication:

"In the fall of 1906 we entered into a contract with the Texas & Pacific Railway by which we allowed them to place certain advertising on our cars, for which they were to give us 1500 miles of mileage. The service of advertising was duly performed by us in the month of October, 1906, and early in the spring of 1907 mileage tickets were issued to us; there being three equal owners, 500-mile tickets were issued to each of us and the ticket I received was marked good until December 31, 1907. I made no use of mine until a few days ago I wished to go to Texarkana, and was advised by the general passenger agent of the road, Mr. E. P. Turner, in person, that such transportation was invalid at the present time on account of the anti-pass law."

You ask to be advised upon the question.

It involves a construction of the act very important in its nature, affecting, as it does, private rights of many individuals created under contracts valid when made, and entered into without anticipation of the passage of the law, and with bona fide intention on the part of all parties to the contract, that the same would be performed.

I do not think the constitutional question of the impairment of the obligation of contracts by the passage of the law is involved, for the reason that I have reached the conclusion that the Legislature did not intend the act to be retrospective or to impair the obligation of any bona fide contract lawfully made prior to its enactment. The general rule is, that, except in the case of remedial statutes and those which relate to procedure in the courts, an act of the Legislature will not be so construed as to make it operate retrospectively, unless the Legislature has explicitly declared its intention that it should so operate, or unless such intention appears by necessary implication from the nature and words of the act so clear as to leave no room for a reasonable doubt on the subject.

The reason for this rule is the general tendency to regard retrospective legislation as dangerous to liberty and private rights, on account of its liability to unsettle vested rights and to disturb the legal effect of prior transactions. Again, it ought never to be presumed that the Legislature intended to pass a retrospective law if the words of the act would admit of any other meaning, because such acts are exceedingly liable to abuse. When the Legislature designs that a statute should operate upon past transactions, as well as upon future transactions, its intention in that regard is generally expressed by apt words. The courts uniformly refuse to give to statutes such operation if such construction would injuriously affect vested rights or impair the obligation of existing contracts, unless they are compelled to do so by language so clear and positive as to leave no room to doubt that such was the intention of the Legislature. These rules are so well settled that it is useless to cite authority. The Legislature has not explicitly declared that the act should be retrospective, neither is there anything in the act from which it can be implied clearly, beyond a doubt that such was its intention.

Therefore, the only question which arises is, did the Legislature intend to abrogate or impair previously made contracts based on valuable and legitimate considerations?

There is nothing in the act which, even by implication, could be construed as establishing any intention on the part of the Legislature to abrogate or affect contracts made prior to its enactment founded upon a valuable consideration and legal at the time they were made. Neither is there anything in the act to indicate that it was the policy of the Legislature to annul any such contracts. A construction which would impute such policy can not be justified upon anything contained in the act, but, on the contrary, would impute to that body the wanton infliction of an unnecessary wrong.

The case of *Motley vs. L. & N. Ry. Co.*, 150 Fed., 406, involved

a contract made by the railroad company with E. L. Motley and wife, whereby a release of a claim for damages was made upon consideration that the company should issue free passes to said Motley and wife during their lives. Upon the passage of the Interstate Commerce Act in 1906 the railroad company refused to issue any further passes over its railroad to the parties, and suit was brought to compel specific performance of the contract. This act provided that no common carrier should directly or indirectly issue or give any interstate free ticket, free pass or free transportation to passengers, except to its employees and their families.

The Federal Court of Kentucky, through Judge Evans, in construing the act relative to the pre-existing contract, held that Congress did not intend to agridge such contracts.

The court of Appeals of New York, in the case of Dempsey vs. New York Central & Hudson River Ry. Co., 146 N. Y., 290, held that a contract made with a party, a public officer, upon a consideration of an annual salary and free transportation was not impaired or abrogated by the passage of a constitutional provision that no public officer should directly or indirectly ask, demand, accept receive or consent to receive any free pass. While the decision of this case was based upon the proposition that the pass upon which the officer rode was not a "free pass," and he was in no sense a gratuitous passenger, and while the distinguishing feature of the case was that the plaintiff was a public officer whose duty to the public was limited and defined by his contract with the railroad company, the principles announced therein can not be said to be wholly inapplicable to our statute. In fact, I think the principle announced, in so far as the pass being part consideration of the contract is concerned, is sound.

But waiving the question as to whether or not a pass given in pursuance of a contract made is "free" transportation, it is evident that the Legislature did not intend by this act to affect any pre-existing contract or abrogate any portion of the consideration of such contract, regardless of whether it was money paid or transportation issued.

You are, therefore, advised that the anti-pass law is not intended to abrogate or affect any of the terms of a contract made prior to its enactment, valid and legal when made and unperformed at the time the law became effective. However, contracts based upon transportation as part consideration could not be made after the act became effective.

It is not proper for this department to pass upon whether or not any statement of facts brings a contract within the terms announced.

Yours truly,

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#### ANTI-PASS LAW—TELEPHONE COMPANIES.

Law applicable to individuals, joint stock association, company or partnership, the same as a corporation.

AUSTIN, TEXAS, September 7, 1907.

*Hon. C. F. Spencer, County Attorney, Montague, Texas.*

Dear Sir: We are in receipt of yours relative to the Citizens' Telephone Company, submitting a statement of facts relative to the proposed organization of the Company, from which it appears that it is a joint stock company and not a corporation. The plan is that each member shall take ten dollars in stock and have free use of the line to the extent that he will not be required to pay any monthly rental or call fees at the time the call is made, and in case the fees collected from others are insufficient to keep up the line, the members would be assessed a sufficient amount to pay the shortage. The company proposes to rent boxes by the month and charge for calls to be applied to paying the expenses of operating. While there is a statement that the company is not organized with a view of profit, yet it appears that charge will be made for the use of the line and rental charge for the use of the 'phone.

This department has held that the anti-pass law did not apply to individuals or joint stock associations or other character of persons except corporations, but after a more mature consideration we have reached the conclusion that this is not a proper construction of the act. The act is intended to regulate the business done, and not the persons who may happen to be engaged in the business. Therefore, it would apply to an individual or a joint stock association or a company or a partnership engaged in business as well as a corporation.

Under the statement of facts submitted by you the plan would be unlawful in so far as granting free use of the line is concerned to the stockholders. Since the passage of the anti-pass law free use of the line to others than those excepted from the provisions of the anti-pass act is unlawful, and a stockholder is not amongst the exceptions.

There is no provision of the law which would prevent a notary public from holding office in such an organization, but by being a notary public he could not accept free use of the lines, although he may be entitled to such free use under some other provision of the anti-pass law. The fact that he is a public officer would defeat his right to free transportation.

Yours truly,

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CITY DEPOSITORY.

City depository should be corporation, firm, co-partnership or individual engaged in the banking business.

AUSTIN, TEXAS, September 7, 1907.

*Mr. William Broyles, Palestine, Texas.*

Dear Sir: Your favor of the 30th ult., calling my attention to a ruling of my assistant, Mr. Sluder, as to who could bid for city funds under the act of the last Legislature, approved April 5, 1907, and appearing on page 132 of the General Laws of that Legislature, was received some days since.

I owe you an apology for not replying earlier, but constant engagements in my office have prevented my giving your letter consideration earlier. After very careful consideration of the matter, I am of the opinion that Mr. Sluder was correct in his holding.

So much of the statute as bears upon this question is as follows:

"The city council of every city in the State of Texas incorporated under the general laws thereof, or incorporated under special charter at its first regular meeting after this act shall take effect and at its regular meeting in July of each year thereafter, is authorized to receive sealed proposals for the custody of the city funds from any banking corporation, association or individual banker doing business within the city that may be desired to be selected as the depository of the funds of the city."

The intention of the Legislature, I think, is clear that the depository authorized by law should be a corporation or a firm or a copartnership or an individual engaged in the banking business.

The word "association" in my opinion means a firm or copartnership of persons engaged in the banking business and this is borne out by the words immediately following the words "association or individual banker," the proper interpretation being that it should be an individual banker or more than one individual, such as a firm engaged in like business.

Yours truly,

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ANTI-PASS LAW—LOGGING ROADS—NOT APPLICABLE TO.

AUSTIN, TEXAS, September 7, 1907.

*Hon. O. B. Colquitt, Commissioner, Building.*

Dear Sir: We are in receipt of yours of the 6th enclosing communication from Mr. Eli Weimer, secretary and auditor of the Angelina & Nueces River Railroad Company, asking to be advised relative to the points raised therein.

If we understand the facts this road is what is ordinarily known as a logging road used exclusively for the private convenience of saw mills in the matter of hauling logs to the mill and lumber to the railroad.

This department has heretofore held that, because of the fact that such roads are chartered under the laws of this State authorizing the incorporation of a railroad company, that it comes within the meaning of the term "transportation company" mentioned in the anti-pass bill, and, therefore, comes within the provisions of the bill.

After further consideration of the matter we have reached the conclusion that this opinion is wrong. The Legislature evidently did not intend the act to apply to those companies whose business was exclusively private as is most of the railroad companies commonly known as logging roads. The object of the act was to regulate the issuance of free transportation and prevent discrimination as to those public service corporations engaged in doing business for the public generally, and was not intended to affect private

enterprises, although they may be incorporated as railroad companies.

You are therefore advised, relative to the inquiry submitted, that if the railroad company referred to in your letter is what is commonly known as a logging road, not recognized by the Railroad Commission and not assumed to be within the jurisdiction of the Railroad Commission, that the anti-pass law does not apply to it.

Yours truly,

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#### FEEES OF OFFICERS—DISTRICT CLERK.

Fees of clerk for making copies, certificates, etc.,<sup>2</sup> should be accounted for under fee bill.

Fees taxed in suits for taxes brought by a city are not to be accounted for under fee bill.

AUSTIN, TEXAS, September 10, 1907.

*Mr. Andrews Coy, Jr., District Clerk Bexar County, San Antonio, Texas.*

Dear Sir: We have received and carefully considered your letter of the 5th inst., in which you say:

"I would most respectfully ask the opinion of your office upon the following points relating to fees of district clerks under the fee bill:

"Should all copies, certificates, etc., made by me be accounted for under the fee bill? In other words, costs not taxed in a case where one wants a copy made from the record, are these fees to be accounted for or are they ex-officio?"

"Second. Are fees taxed in suits for taxes brought by the city to be accounted for under the fee bill, or are they ex-officio fees as are fees collected in State tax suits?"

In answer to the first question, I beg leave to advise that in my opinion all such fees as mentioned therein are to be accounted for under the fee bill and are not ex-officio.

Article 2495c, Revised Statutes, reads thus:

"The maximum amount of fees of all kinds that may be retained by any officer mentioned in this article (which includes clerks of the district court) as compensation for services shall be as follows:"

The phrase "fees of all kinds," embraces every kind of compensation allowed by law to a clerk of the district court unless excepted by some provision of the statute.

(See *Ellis County vs. Thompson*, 95 Texas, 29.)

Article 2456, Revised Statutes, reads as follows:

"The clerk of the district court shall receive in addition to the fees herein allowed, for the care and preservation of the records of his office, keeping the necessary indexes, and other labor of the *like class*, to be paid out of the county treasury on the order of the commissioners court, such sum as said commissioners court shall determine."

And it is further provided by Article 2495h that:

"It is not intended by this chapter that the commissioners court



shall be debarred from allowing compensation for *ex-officio services* to the county officials not to be included in estimating the maximum provided for in this act, when in their judgment such compensation is necessary; \* \* \* provided, further, the fees allowed by law to district and county clerks, county attorneys and tax collectors in suits to collect taxes shall be in addition to the maximum salaries fixed by this act."

Article 2495m, Revised Statutes, excepts certain fees of sheriffs from the operation of the law. The exceptions are so definite, that, by implication, all fees not mentioned in the exceptions are excluded therefrom and thereby within the requirements of the act.

Answering the second question, it is my opinion that fees taxed in suits for taxes brought by the city are not to be accounted for under the fee bill.

By Article 2495h of the Revised Statutes, it is expressly provided that:

"The fees allowed by law to district and county clerks, county attorneys and tax collectors in suits to collect taxes shall be in addition to the maximum salaries fixed by this chapter."

It will be observed that the statute makes no distinction between fees taxed in suits brought by a city and those brought by the State, and I see no reason why any such distinction should be made. This view is strengthened by the provisions of the Act of 1897, providing for the collection of delinquent taxes. Article 5232k of said act reads as follows:

"Any incorporated city or town or school district shall have the right to enforce the collection of delinquent taxes due it under the provisions of this chapter."

Yours truly,

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CRIMINAL—COUNTY ATTORNEY—SPECIAL—FEES OF—  
JUSTICE OF THE PEACE.

In counties having no regular county attorney, and district attorney resides in another county, justice of the peace has authority to appoint prosecuting attorney, who is allowed the same fees that would be allowed under the law to county attorney.

AUSTIN, TEXAS, September 11, 1907.

Hon. Mar Blum, County Judge, Gillespie County, Fredericksburg, Texas.

Dear Sir: We have received and carefully considered your letter of the sixth instant, in which you say:

"In counties having no regular county attorney and the district attorney residing in another county, has the justice of the peace authority to appoint a county attorney pro tem. in case where the defendant pleads guilty, and is such county attorney pro tem. entitled to the regular fee of \$5, in cases where the defendant pleads guilty and where said attorney pro tem. takes no other action, than to write the complaint. For instance, say there are ten cases to be disposed of, and in each case the defendant pleads guilty, has the jus-

tice of the peace authority to appoint a county attorney pro tem. in each of the ten cases, and would the attorney pro tem be entitled to the regular fee if he writes the complaint only, but takes no further action. The commissioners court of this county wishes to obtain your opinion in this matter and has requested me to write to you."

I am of the opinion that the question you ask should be answered in the affirmative.

Article 1131 of our Code of Criminal Procedure provides that where a defendant pleads guilty to a charge before a justice, the fee allowed the attorney representing the State shall be five dollars. Article 38 of said Code of Criminal Procedure reads as follows:

"Whenever any district or county attorney shall fail to attend any term of the district, county, or justice court, the judge of such court or such justice may appoint some competent attorney to perform the duties of such district or county attorney, who shall be allowed the same compensation for his services as are allowed the district or county attorney. Said appointment shall not extend beyond the term of the court at which it is made, and shall be vacated upon the appearance of the district or county attorney."

The power of the court to make such an appointment, on the contingencies mentioned in said Article 38, is unrestricted, except that the appointment can not extend beyond the term of the court then current, and it would be competent for the court to make such appointment for each day of the term or for each case in which the State was interested.

See *State vs. Manlove*, 33 Texas, 798.

Yours truly,

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COMMISSIONERS COURT—ROAD AND BRIDGE FUND OF COUNTY.

Commissioners court not authorized to divide the road and bridge fund of the county among the four commissioners precincts; and should they do so, they are not authorized to issue scrip on credit of precinct which has its funds exhausted.

AUSTIN, TEXAS, September 11, 1907.

*Hon. W. R. Butler, County Judge, Belton, Texas.*

Dear Sir: In your letter of the 7th inst., you ask the following questions:

"1. Has a commissioners court in this State the authority and power to order and cause to be kept the road and bridge fund of its county, derived from the general tax of 15c on \$100 of property, as four funds instead of one fund—the four funds to be known as Road and Bridge Fund No. 1, 2, 3, and 4, respectively; each commissioners precinct having its road and bridge fund separate from the other commissioners precincts,—the road and bridge money set aside, apportioned or transferred to commissioners precinct No. 1, constituting road and bridge fund No. 1, etc., and to require that scrip issued for road and bridge work be issued against

the road and bridge fund of the commissioners precinct in which the expense occurred and that it be paid out said road and bridge fund and no other; and that it be registered against the road and bridge fund, against which it was drawn, if there be no money in said fund to pay the scrip when issued?

“2. Has the commissioners court the authority to create debts and claims against the road and bridge funds of its county for ordinary and current work and expenses on the roads and bridges in excess of the current revenues of the county for road and bridge purposes of said year. Or has the court or any of its members the authority and power to create debts against the road and bridge funds of the county in any amount they deem proper without regard to the income for said purposes? Is there any limit provided by law to the debts the court may create against the county for road and bridge work (ordinary work) in any given year?”

To which I reply:

1. That Revised Statutes, Article 858, provides: “The Commissioners court shall have power to cause such other accounts to be kept, creating other classes of funds, as it may deem proper, and require the scrip to be issued against the same and registered accordingly.”

I do not think this provision of the statute authorizes the commissioners court to divide the road and bridge funds of the county among the four commissioners precincts, designating the same as road and bridge fund No. 1, 2, 3, and 4. Neither do I think that if the commissioners court should divide up the road and bridge fund of the county as suggested that they would then be authorized, in case the fund of one precinct should be exhausted, to issue scrip against such precinct and against such fund and thereby create a debt against that precinct, the payment of which to be postponed until such a time as the fund for that particular precinct should be replenished by another apportionment of the road and bridge fund of the county.

If this could be done, the road and bridge funds of the county could be apportioned among the four commissioners precincts, and notwithstanding the fact the condition of the roads and bridges in one precinct might make it necessary to expend the entire road and bridge fund of the county in such precinct, that precinct would have to confine its expenditures to the apportionment made and make such improvements as the funds, together with its credit, would authorize: at the same time there might be to the credit of the other precincts of the county an abundance of funds which were not needed and not being expended in such other precincts. The courts would not sanction this course, and if there should be such a division made and scrip issued against the fund of one commissioners precinct which had already exhausted its proportionate part of the road and bridge fund, and if there were at that time funds to the credit of the other commissioners precincts of the county unexpended, the courts would require a payment of such scrip out of the funds to the credit of the other precincts, notwithstanding the division of the funds among such precincts.

Clark & Courts vs. San Jacinto Co., 18 Civ. App., 204.

Revised Statutes, Article 4759, provides: "The commissioners court shall see that the road and bridge fund of their county is judicially and equitably expended on the roads and bridges of their county, and, as nearly as the condition and necessity of the roads will permit, it shall be expended in each county commissioners precinct in proportion to the amount collected in such precinct."

In other words, according to the provision of the statute just quoted, the commissioners court is authorized and it is their duty to expend the road and bridge fund of the county according to their judgment as the necessities and conditions require. If the necessities and conditions are such as to require it, the commissioners court would be authorized and it would be its duty to expend any part or all of the road and bridge fund for any particular year in any one or two precincts of such county, in utter disregard of the proportionate part which had been collected from each commissioners precinct. To give effect to this provision of the statute it would be utterly useless to have the road and bridge fund divided up among the precincts and then under Article 859, Revised Statutes, be constantly transferring the fund from one precinct to another as the commissioners court would certainly have the right to do.

I am therefore of the opinion that in construing Articles 858 and 4759, that it is not contemplated and the commissioners court are not authorized to create four funds out of the road and bridge fund of their county, placing the same to the credit of each precinct and authorizing scrip to be issued against the fund of such precinct after the fund for such precinct had been exhausted.

2. The commissioners court is authorized to levy a tax not to exceed 15 cents on the \$100 valuation of property for roads and bridges of the county and they are also authorized by a majority vote of the qualified property taxpaying voters of the county to levy an additional 15 cents on the \$100 valuation of property for the further maintenance of the public roads.

Therefore, without a vote of the people they are authorized to levy a tax not to exceed 15 cents on the \$100 valuation of property each year for the construction and maintenance of the roads and bridges of the county, and they are not authorized to go beyond that in their expenditures.

Constitution, Article 8, Section 9, as amended in 1889.

Revised Statutes, Article 1538.

Revised Statutes, Article 5050.

Yours truly,

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#### CRIMINAL—FEES OF COUNTY ATTORNEY CAN NOT BE REMITTED TO DEFENDANT.

No reason why county attorney could not lawfully make gift of his fee in criminal case to defendant after accounting for same under fee bill.

AUSTIN, TEXAS, September 14, 1907.

*Andrew J. Britton, Quitman, Texas.*

Dear Sir: I have received and carefully considered your letter of the 13th inst., in which you say:

"May a man who has been appointed city marshal of a town incorporated under the General Laws, and qualified as such city marshal, be legally appointed by the sheriff, as a deputy sheriff. That is, may a man hold two offices, that of city marshal and deputy sheriff at both and the same time?"

"Wood County not being under the fee bill, do you think I could lawfully give my fees in a criminal case to the parent of the defendant. A widow in this county has a son 17 years old who has been convicted of a misdemeanor, and his mother had the fine and costs to pay, and the lady being worthy I am inclined to pay her back my fee of ten dollars, if in doing this I do not violate the law myself. I will appreciate your opinion on these two questions."

I am of the opinion that the first question propounded by you should be answered in the negative. Section 40 of Article 16 of our 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."

In my opinion deputy sheriffs and city marshalls are officers within the meaning of the constitutional provision above quoted. Our statutes provide that every deputy sheriff "shall, before he enters upon the duties of his *office*, take and subscribe to the oath of office prescribed by the Constitution, which shall be endorsed on his appointment, together with the certificate of the officer administering same, and such appointment and oath shall be recorded in the office of the county clerk and deposited in said office." Revised Statutes, Article 4896.

The statute requires the deputy to take the same oath required of the sheriff, faithfully to discharge the duties required of him by law. It will thus be seen that the office of deputy sheriff is recognized by statute, and it has been held by our courts that the deputy sheriff is recognized as an officer known to the law.

See *Towns vs. Harris*, 13 Texas, 512.

*State vs. Brooks*, 42 Texas, 66.

*Davis vs. Rankin*, 50 Texas, 286.

*Herndon vs. Reed*, 82 Texas, 652.

Our statutes in regard to city marshals provide that, "The marshal of the city shall be *ex-officio* chief of police, and may appoint one or more deputies, \* \* \*. He shall have like power with the sheriff of the county to execute the writ of search warrant. \* \* \* He shall receive a salary or fees of *office*, or both, to be fixed by the city council. The marshal shall give bond for the faithful performance of his duties as the city council may require, \* \* \* ." Revised Statutes, Article 407.

Article 43 of our Code of Criminal Procedure reads as follows: "Who are Peace Officers.—The following are 'peace officers': The sheriff and his deputies, constable, the marshal, constable or policeman of an incorporated town or city, and any private person specially appointed to execute criminal process." (See *Newburn vs. Durham*, 32 S. W. Rep., 112.)

It is held that officers are none the less civil officers under the State because their functions are confided to the administration

of city affairs; since their powers and duties are defined by act of the Legislature. *State vs. Valle*, 41 Mo., 31.

If an incumbent of an office is appointed or elected to another which is incompatible with his office, his acceptance of and qualification for the latter office vacates the former office.

*State vs. Brinkerhoff*, 66 Texas, 45.

*Biencourt vs. Parker*, 27 Texas, 558.

Answering the second question propounded by you, I beg to advise that, under our statutes, it is illegal for any officer to remit any fee that may be due under the law fixing fees. See Revised Statutes, Article 2495f. It is also contrary to public policy for a public officer to assign his unearned compensation given him by law. *National Bank vs. Fink*, 86 Texas, 304.

But I see no reason why you could not lawfully make a gift of your fee in a criminal case to the parent of the defendant, after accounting for same under the fee bill.

I sincerely thank you for your kind expressions and appreciation of my efforts to get rid of a lot of freebooters who have been operating in this State for years, and if I could only have time to complete my work along this line I would believe that I had been of some service to our people.

Yours truly,

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CONSTRUCTION OF STATUTES—GAME LAWS—CONFLICTING AS TO SEASON FOR HUNTING, ETC.

AUSTIN, TEXAS, September 17, 1907.

*Mr. R. W. Lowrance, Chief Deputy Game Warden, Capitol.*

Dear Sir: We have received and carefully considered your letter of the 10th instant, in which you say:

“This department desires a written opinion upon the subject, ‘Is it unlawful to shoot wild duck before the first day of November?’

“Also, when does the turkey season open and close, according to Section 9, page 280, General Laws of Texas, Acts Thirtieth Legislature?”

I am of the opinion that the first question propounded by you should be answered in the negative; provided, of course, no more than twenty-five of said ducks are killed in any one day, and provided further they are not killed by any means otherwise than by an ordinary gun capable of being held to and shot from the shoulder.

Answering your second question, I beg leave to advise that, in my opinion, wild turkeys may be killed in the period of time embraced between the first day of November and the first day of April each year. It will be observed that Section 9 of the act referred to by you provides that “it shall be unlawful to kill any wild turkey in the period of time embraced between the first day of April and the first day of December of each year, or more than three wild turkeys in the period of time embraced in the months of December, January and February of each year.”

Said section further provides that "it shall be unlawful for any person to kill, trap or ensnare \* \* \* any wild Mongolian or English pheasants, *wild turkey* or any prairie chicken in the period of time embraced between the first day of February and the first day of November of each year."

The clause of said Section 9 first above quoted fixes as the open season, or period when wild turkeys may be killed, the months of December, January, February and March, and the clause of said section last above quoted fixes as said open season the months of November, December and January of each year. It will be noted that the killing of wild turkeys is not prohibited under the first clause during the months of December, January, February and March; nor under the second clause during the months of November, December and January. Both clauses permit them to be killed during the months of December and January. These two months are common to both. The killing of wild turkeys during the month of November is prohibited under the first clause of said section, but permitted under the second, and the killing of said turkeys during the months of February and March is prohibited under the second clause, but permitted under the first. This being true, and the act in question being a penal statute, I am of the opinion that all of the months embraced in both clauses of the section in which the killing of wild turkeys is permitted should be taken together as constituting the open season. I do not think a person could be punished for an act prohibited under one clause of the section, but perfectly lawful under another.

It must be admitted that the section of the act under consideration is ambiguous, and it is a principle of criminal law and a rule upon property owned by the United States Government, which of construction that no person be adjudged guilty of an offense unless it be created and promulgated in terms which leave no reasonable doubt of their meaning. See *Schooner Enterprise*, Fed. Cas. No. 4499.

It is also a familiar rule of law that if a statute is ambiguous, the construction adopted should be that most favorable to the accused. See *Commonwealth vs. Martin*, 17 Mass., 349; *Lewis' Sutherland Statutory Construction*, Sec. 354.

Those who contend that a penalty may be inflicted must show that the act distinctly expressed that under the circumstances it has been incurred. They must fail if the act is equally capable of a construction that would and one that would not inflict a penalty. See *Diekinson vs. Fletcher*, L. R., 9, C. P., 7; *The Gauntlet*, L. R., 4, P. C., 191.

Yours truly,

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SHERIFF—PUBLIC BUILDINGS—COURT HOUSE AND JAIL—  
COMMISSIONERS COURTS.

Duty of commissioners court to see that jails of county are kept clean;  
sheriff custodian of jail of his county.

AUSTIN, TEXAS, September 18, 1907.

*Mr. D. C. Burkes, Sheriff, Bell County, Belton, Texas.*

Dear Sir: We have received and carefully considered your letter of the 7th inst., in which you say:

“Under the instructions of the State Health Officer, as sheriff of Bell County, I am required to have the jail painted twice a year on the inside and whitewashed once every month, etc. Is this a charge against the county, and is the commissioners court authorized to pay for same? Now, under the law, I am supposed to have charge of the courthouse, and we have a janitor whose duties it is to keep clean all the courthouse except offices occupied by the various county officers. Is it my duty to see that the sanitary requirements as laid down by the State Health Officer are carried out in court house, and is it the duty of the janitor to keep clean the various offices occupied by the several officers in the court house?”

I am of the opinion that the first question propounded by you should be answered in the affirmative. Our statutes authorize the State Health Officer to prepare rules and regulations governing the proper disinfection and sanitation of public buildings. (See Revised Statutes, Art. 4342b, Secs. 1 and 2.)

Article 3137, Revised Statutes, provides that it shall be the duties of the commissioners courts of the counties to see that the jails of their respective counties are kept in a clean and healthful condition, and Article 3133 of said statutes makes the sheriff the custodian of the jail of his county.

Answering the next question propounded by you, I am of the opinion that it is your duty, as sheriff, to see that the sanitary requirements as laid down by the State Health Officer are carried out in the court house. (See R. S., Art. 3835.)

I am further of the opinion that it is your duty as sheriff to see that the entire court house, including all the offices therein, are kept in a clean and sanitary condition.

Yours truly,

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#### DELINQUENT TAXES—SALE OF LOTS FOR TAXES.

State is estopped from asserting lien for taxes for years prior to year for which suit was brought for taxes.

AUSTIN, TEXAS, September 18, 1907.

*Hon. Max K. Myer, Assistant County Attorney, Ft. Worth, Texas.*

Dear Sir: We are in receipt of your letter of the 16th inst., in which you say:

“I desire your opinion on the following stated facts: Lot No. 9, Block P, Rosedale Addition, was sold in order to satisfy taxes for the year 1905 to W. F. Jones. At the time of said sale taxes for the years 1901, 1902, 1903 and 1904 were unpaid. One Carlock purchased the lot from the owner and also gets deed from Jones, the purchaser at tax sale. Carlock now claims that the State is



estopped from collecting taxes for the years prior to 1905. I take the position that when he passed on the title to said lot, he had notice that taxes were due on said lot, and as suits were pending for the collection of taxes on said property for every year, he purchased *lis pendens*."

Answering the question propounded by you, I beg leave to advise that in my opinion the State can not assert any lien against the property in question for taxes due prior to the year 1905. The fact that suits were pending against said property for the years 1901, 1902, 1903 and 1904 would not affect the title of the purchaser at the tax sale who purchased under a judgment foreclosing the lien for the year 1905. Even if the pending suits had ripened into judgments, the rule would be the same. It is well settled in this State that one holding several liens upon the same property can have but one foreclosure and the purchaser takes title against the liens not foreclosed, although knowing of such other liens. (See *Vieno vs. Gibson*, 85 Texas, 434.)

It has been held that where a city having a tax judgment on certain lots for certain years recovered another judgment for taxes for both prior and subsequent years and causes the entire property to be sold without reserve under the last judgment, it was bound by the action of its officers in making such sale and that the purchaser took the property free from any lien under the first judgment whether he knew it or not. (*City of Houston vs. Bartlett*, 68 S. W. Rep., 730.)

This was a decision by the Court of Civil Appeals, but in which the Supreme Court refused a writ of error, thereby making it the decision of said court.

I quote the following from the opinion of the court in the above case:

"The acts of the city attorney of the city of Houston in procuring a judgment in favor of said city foreclosing lien by the city upon the property in controversy and ordering the sale of the whole of said property without any reservation in favor of any pre-existing incumbrance and in procuring the sale of said property under said judgment, must be considered the acts of the city of Houston and are conclusive and binding upon the city. It is well settled that a purchaser at a sale made under a judgment of this kind acquires all of the title of both the plaintiff and defendant in the judgment and takes the property discharged of all liens in favor of the plaintiff, regardless of whether or not such purchaser has notice of unsatisfied liens in favor of plaintiff which were not foreclosed or in any way sought to be protected by the judgment under which the sale was made."

The lien of the State upon the property in question for all taxes due prior to the rendition of the judgment of 1905 was extinguished by the sale under said judgment and the State's security by its lien upon said property was exhausted, but no unpaid taxes were released or extinguished and same are still due and may be collected from the delinquent.

In *McFadden vs. Goff*, 32 Kan., 415, the court said:

"A valid tax deed extinguished and destroys all other titles and

liens existing or based upon anything existing at the time of the levying of the tax, upon which the tax deed is founded."

In *Robbins vs. Barron*, 32 Mich., 36, the court said:

"A tax title, if valid, destroys and cuts off all liens and incumbrances previously existing against the land."

The Supreme Court of Illinois in the case of *Law vs. Tax Collector*, 116 Ill., 244, held that where the State sells land in satisfaction of a tax judgment, it can not defeat the purchaser's title by a re-sale of the same land for taxes, which were due and owing when the judgment was rendered and which might have been included in it.

Yours truly,

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PUBLIC SCHOOL LAND—WHEN DOES SCHOOL LAND BECOME PRIVATE LAND.

AUSTIN, TEXAS, September 18, 1907.

*Hon. J. J. Terrell, Commissioner of the General Land Office, Austin, Texas.*

Sir: We have received and carefully considered the letter addressed to this department by J. T. Robison, Acting Commissioner, of date September 9, 1907, which is as follows:

"On March 31, 1902, C. M. Rice purchased a tract of school land in Liberty County as a home. He proved his three years' residence, paid out the land and obtained patent on July 5, 1906.

"In January, 1907, Mr. Rice purchased from the State three sections as additional land to his formerly proved-up patented home tract.

"These last tracts were sold to him upon the theory that his home tract was private land and that he would have to live there three more years as required under Article 4218fff, Chapter 129, Act of 1897. Mr. Rice's application for these three tracts recited the fact that his home tract was private land. When does school land become private land? See *Smithers vs. Lowrance*, 15 Texas Ct. Rep., 953. The expression in this case on this subject is the view this department has taken on the same subject.

"Mr. Rice now desires to pay out and obtain patent on this last purchase and claims that he has the right to do so without further residence as provided in another statute referred to in the case of *Schwarz vs. McCall*, 57 S. W. Rep., 31. See Art. 4218f, Chap, 129, Acts of 1897."

In response to this inquiry, I beg to say:

From said communication it does not appear whether said purchaser Rice was or was not in January, 1907, when he made application to purchase said three additional sections, an actual resident upon his proved-up and patented home section.

I am of the opinion that if he was not then an actual settler upon his said home tract, it should be held, in view of the decision in *Schwarz vs. McCall*, 57 S. W. Rep., 31, that he was not entitled to purchase said three additional sections; but if he was then an

actual settler upon his said proved-up and patented home section he was entitled to purchase said three additional sections and same should be patented to him whenever he completes payment therefor

In reply to your inquiry as to when school land becomes private land, I beg to say that the expression "private land" is somewhat flexible and susceptible of various meanings according to the facts of the particular case. In one sense school land becomes private land as soon as it is purchased from the State and before full payment to the State therefor has been made, although the legal title to the land remains in the State until full payment of the purchase money. In another sense such land remains and may be properly termed "school land" until same has been finally paid out and patented. In still another sense any and all lands sold by the State as school land will forever remain school land, as a matter of designation and description. (*Roberson vs. Sterrett*, 96 Texas, 180.) The term "private lands" is also applicable to patented lands which were never school lands.

From the above quoted statement of facts it appear that in the case here under consideration the purchaser Rice bought his proved-up and patented home sections from the State as school land, and said section remains "school land" in contradistinction to "other land" as used in R. S., Art. 4218fff.

I am of the opinion that this case is controlled by the provisions of R. S., Art 4218f.

In connection with the statement that "Mr. Rice's application for these three tracts recited the fact that his home tract was private land," I beg to suggest that I think it would be proper and perhaps advisable for you to require said purchaser to make and file in your office an affidavit showing the actual facts involved, including the fact that his home section was purchased from the State as school land, and, if that be the fact, that at the date of the purchase by him of the three sections of additional lands he was actually residing upon his said paid out and patented home tract of school land, and to correct his applications for the additional lands accordingly. *Nesting vs. Terrell*, Commissioner, 97 Texas, 22; *Ratliff vs. Terrell* Commissioner, 96 Texas, 525.

Yours truly,

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LIQUOR DEALER—LICENSE—REFUND OF UNEARNED  
PORTION OF LICENSE FEE.

AUSTIN, TEXAS, September 18, 1907.

*Geo. L. Glass, Esq., Tax Collector, Houston, Texas.*

Dear Sir: We are in receipt of your letter of the 9th inst., in which you say: "I have the following case:

"A takes out a license as a retail liquor dealer, operates under it for thirty days, sells it to B. B, wishing to surrender the license and recover from the State the unearned eleven months thereof, brings it to me and demands a return of the State tax for that

period, and also the county tax. Under this law shall I take up the license and return him the money, or shall I take up the license, forward the same to the Comptroller, to whom I have already sent the license tax, and then have the Comptroller draw his warrant on the treasurer for such tax, and mail the warrant to me for delivery?"

I beg leave to advise that in the case stated by you, B would not be entitled to have any part of the license tax refunded to him. The statute provides that a purchaser under execution or mortgage of such license shall have the right to surrender it to the State, county or city and receive therefor the pro rata unearned portion of such license. It does not authorize any other person to recover the unearned portion of the license. See Chapter 138, Section 7, Acts of the Thirtieth Legislature, page 259.

However, no appropriation was made by the Legislature out of which the refunds provided for in Sections 7 and 16 of said act might be made, and without such appropriation there can be no recovery of any unearned portion of license.

Yours truly,

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#### PUBLIC WEIGHERS—FARMERS' UNION COTTON WEIGHER.

Statute does not prohibit person engaged in storing cotton for customers, but who does not transact business as factor or commission merchant, from weighing same for his customers.

AUSTIN, TEXAS, September 18, 1907.

*Hon. C. F. Gibson, County Attorney, Rusk, Texas.*

Dear Sir: We have received and carefully considered your letter of the 16th instant, in which you say:

"At Alto, in this county, there is a public cotton weigher, duly elected and qualified. The Farmers' Union has a chartered warehouse and employs a weigher, but will accept weights of the public weigher. I would like to have your opinion as to whether this is a violation of Art. 578, P. C."

I am of opinion that the question propounded by you should be answered in the negative. Our statute does not prohibit a person engaged in storing cotton for customers, but who does not transact business as a factor or commission merchant, from weighing same for his customers. The expression "any factor, commission merchant or other person or persons" in the article of the statute referred to by you means persons engaged in similar occupations or employment as factors and commission merchants. See *Galt vs. Holden*, 75 S. W. Rep., 569-570, and authorities there cited.

Yours truly,

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#### PUBLIC WEIGHER—WAREHOUSEMAN.

Act not intended to prevent ginners, warehousemen, etc., from weighing cotton for their customers, or for farmers offering produce for sale.

AUSTIN, TEXAS, September 18, 1907.

*Hon. J. D. Barker, County Judge, Fisher County, Roby, Texas.*

Dear Sir: We have received and carefully considered your letter of the 11th instant, in which you say:

"Does the certificate issued by the clerk under title 108a, paragraph 2, confer the right upon the warehouseman to charge for weighing all cotton, etc., that is put into said warehouse? Especially at a place where there is a public weigher?"

Answering the question propounded by you, I am of the opinion that our statute—Article 4314, R. S.—is not intended to prevent ginners or warehousemen from weighing cotton for their customers or farmers offering produce for sale from having it weighed by the purchasers or by any person who may be willing to weigh it; and the words "other person or persons" mentioned in the statute means other of the same class as factors and commission merchants. See *Whitfield vs. Terrell Compress Company*, 62 S. W. Rep., 118, 119; see also *Calt vs. Holden*, 75 S. W. Rep., 570.

Yours truly,

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WAREHOUSE.

Not in violation of law for Farmers' Union to weigh own cotton or employ weigher.

AUSTIN, TEXAS, September 19, 1907.

*Mr. R. L. Witt, Sweetwater, Texas.*

Dear Sir: We have received and carefully considered your letter of the 13th instant, in which you ask:

"We have a cotton storage warehouse owned and operated by an incorporated body of farmers. We want to know if it is a violation of law for us to weigh our own cotton or to weigh cotton at all?"

I am of opinion that the question propounded by you should be answered in the negative. Our statute does not prohibit a person engaged in storing cotton for customers, but who does not transact business as a factor or commission merchant, from weighing same for his customers. The expression "any factor, commission merchant or other person or persons," mentioned in Article 4314, Revised Statutes, means persons engaged in similar occupations or employment as factors and commission merchants. See *Calt vs. Holden*, 75 S. W. Rep., 569, 570, and authorities there cited.

Yours truly,

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PUBLIC WEIGHER.

Not in violation of law for man who operates a gin to have a man in town where there is a public weigher to weigh cotton.

AUSTIN, TEXAS, September 19, 1907.

*Hon. Eugene A. Thompson, City Attorney, Royse, Texas.*

Dear Sir: We have received and carefully considered your letter of the 14th instant, in which you ask:

“Is it a violation of the law for a man that operates a gin to have a man to weigh cotton in a town where there is a public weigher? Can an oil mill hire a man to weigh cotton seed where there is a regular elected weigher?”

I am of opinion that the questions propounded by you should be answered in the negative. Our statute does not prohibit a person engaged in storing cotton for customers, but who does not transact business as a factor or commission merchant, from weighing same for his customers. The expression “any factor, commission merchant or other person or persons” in the article of the statute—Art. 4314, R. S.—means persons engaged in similar occupations or employment as factors and commission merchants. See *Galt v. Holden*, 75 S. W. Rep., 569-570, and authorities there cited.

Yours truly,

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#### PUBLIC WEIGHER—WAREHOUSE.

Manager of warehouse can weigh cotton and charge for same in town where there is a public weigher.

AUSTIN, TEXAS, September 19, 1907.

*Mr. R. A. Turner, Grapevine, Texas.*

Dear Sir: We have received and carefully considered your letter of the 16th inst., in which you ask:

“Kindly advise me by return mail if warehouse managers can weigh bale cotton for the public and charge for same in a town where there is a regular elected public weigher.”

I am of opinion that the question propounded by you should be answered in the affirmative. Our statute does not prohibit a person engaged in storing cotton for customers, but who does not transact business as a factor or commission merchant, from weighing same for his customers. The expression “any factor, commission merchant or other person or persons” mentioned in Art. 4314, R. S., means persons engaged in similar occupations or employments as factors and commission merchants. See *Galt vs. Holden*, 75 S. W. Rep., 569, 570, and authorities there cited.

Yours truly,

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#### CONSTRUCTION OF STATUTES.

Appropriation bill considered in connection with anti-nepotism bill.  
Faculty of University not affected by act.

AUSTIN, TEXAS, September 19, 1907.

*Hon. D. F. Houston, President of the University of Texas, Austin, Texas.*

Dear Sir: We have received and carefully considered your letter of the 18th inst., in which you say:

“A proviso in the appropriation bill passed by the Thirtieth Leg-

islature makes it unlawful for 'the head of any department of this State, for the support of which any money is appropriated by this act, to approve any claim, or for the Comptroller of this State to draw any warrant for the payment of any claim for money appropriated by this act, or for the treasurer of this State to pay any money appropriated by this act for services performed after this act takes effect to any person employed in any of the departments of the State government who may be related within the third degree of consanguinity or affinity to the head of the department who has the power in whole or in part to make such appointment, and any person violating this provision of this act, upon conviction thereof, shall be punished by the law passed at the present session prohibiting nepotism.'

"I desire to know whether, under this proviso, money may be paid to a professor in the State University who is related to the third degree of affinity to a member of the Board of Regents.

"It seems to me that, under the following statement of facts, the proviso would not interfere with such payment:

"1. Professors are appointed for an indefinite period.

"2. The professor in question was appointed for an indefinite period some years prior to the appointment of the regent to whom he is related within the third degree of affinity. Therefore, the said regent had nothing to do with the appointment of the said professor."

I beg leave to advise that, in my opinion, the question propounded by you should be answered in the affirmative. A critical examination of the anti-nepotism act, in connection with the appropriation bill referred to the same, forces me to the conclusion that the section of the appropriation act quoted by you does not apply to the Board of Regents of the State University, nor to the chairman of said Board. It will be noted that said appropriation act makes it unlawful for "the head of any department of this State, for the support of which money is appropriated by this act, to approve any claim, or for the Comptroller of this State to draw any warrant for the payment of any claim for money appropriated by this act, or for the State Treasurer of this State to pay any money appropriated by this act for the services performed after this act takes effect to any person employed in any of the departments of the State government, who may be related within the third degree of consanguinity or affinity to the head of the department who has the power in whole or in part to make such appointment."

In adopting this act I think it is clear that the Legislature was dealing with the heads of the departments of the State government, such as the Secretary of State, State Treasurer, Comptroller of Public Accounts, Commissioner of the General Land Office, etc., and was not dealing with the public school trustees, *officers and managers of the State University*, the State normal schools, the eleemosynary institutions, etc. This view is strengthened by a reference to the act defining and prohibiting nepotism.

Section 1 of said act provides that "hereafter it shall be unlawful for any executive, legislative, ministerial or other judicial officer

of this State to appoint or vote for the appointment of any person related to him by affinity or consanguinity within the third degree to any clerkship, office, position, employment or duty in any department of the State, district, county, city or municipal government of which such executive, legislative, ministerial or judicial officer is a member, when the salary, wages, pay or compensation of such appointee is to be paid for out of public funds or fees of office," and Section 4 of said act reads as follows: "Under the designation executive, legislative, ministerial or judicial officer as mentioned herein, are included the Governor, Lieutenant Governor, Speaker of the House of Representatives, Railroad Commissioner, all the heads of the Departments, of the State Government, judges of all the courts of this State, mayors, recorders and aldermen of all incorporated cities and towns, public school trustees, officers and boards of managers of the State University, and its several branches, State normals, the penitentiaries and eleemosynary institutions, members of the commissioners court and all other officials of the State, district, county, cities or other municipal subdivisions of the State."

It will be observed that the appropriation act under consideration does not in terms mention the Board of Regents and the officers of the State University; but only "the head of the department who has the power in whole or in part to make such appointment," and that said Section 4 of the anti-nepotism act, above quoted, mentions both specifically. It is a general rule of construction that for the purpose of arriving at the legislative intent all acts on the same subject matter are to be taken together and examined in order to arrive at the true result. All acts in *para materia* are to be taken together as if they were one law.

Now, when the two acts under consideration are taken together and compared, the conclusion is reached that if the Legislature, in adopting the appropriation act, above quoted, had intended that it should apply to the State University it would have expressed that intention in the act. Besides, this<sup>1</sup> being a penal statute, it can not be extended by implication to either persons or things not expressly brought within its terms.

See *People vs. Peacock*, 98 Ill., 172.

*Foster vs. Rhoads*, 19 John., 191.

*Sutherland on Stat. Const.*, Sec. 350.

This department has made the following ruling in respect to the selection by school trustees (and the same would apply to the Regents of the State University) of teachers.

A school trustee who is related by consanguinity or affinity within the third degree to such teacher, can not vote for or in any manner participate in the election of such teacher. This disqualification, however, of one of such trustees does not disqualify the other member of the Board; and if the Board, or a sufficient number of them, constituting a quorum and not so disqualified elect such teacher, such election is a valid election, and the person so elected is not disqualified from accepting the office.

Yours truly,



## LOCAL OPTION.

Precincts that were dry prior to county local option election, even though the county as a whole should vote against local option, would remain so after county election.

AUSTIN, TEXAS, September 21, 1907.

*Hon. S. W. Porter, Sherman, Texas.*

Dear Sir: We have received and carefully considered your letter of the 17th instant, in which you say:

"This is the fourth year that Grayson County has been under county prohibition. Prior to that time every precinct in the county, except Nos. 1 and 2, was prohibition, that is, they had voted in favor of local option. The pro campaign committee are contending before the people that if the county should go wet at this election that the whole county, including the precincts that were dry before the county went wet, will also be wet. We would like to have your opinion and construction of the local option law on this point in this county."

Upon the facts stated by you I beg leave to advise that in my opinion, if Grayson County should vote against prohibition at the coming local option election, the precincts that were prohibition territory prior to the time of county prohibition would still remain so. When local option is in force in a precinct by virtue of an election held therein, a subsequent election held for the entire county resulting against prohibition does not repeal local option in such precinct. (See *Aaron vs. State*, 29 S. W. Rep., 267; *Ex Parte Elliott*, 72 S. W. Rep., 837, also *Ex Parte Fields*, 86 S. W. Rep., 1022.)

The law in force in the given territory will stand as the provisions were at the time it was voted into operation. It takes the vote of the people of a given territory to put it into operation, and it takes the vote of the same people to end its operation. For instance, where the law of prohibition is put into operation in a justice precinct, the only way to repeal that law would be by a vote of that people within that prescribed territory.

Yours truly,

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COUNTY ATTORNEY—FEES OF OFFICE—SALARY.

Not authorized to pay traveling expenses of deputy out of fees over and above his one-fourth excess fees.

Prior to enactment of fee bill county officers retained all fees.

AUSTIN, TEXAS, September 21, 1907.

*Hon. Dwight L. Lewelling, County Attorney, Dallas, Texas.*

Dear Sir: We have received and carefully considered your letter of the 4th inst., in which you say:

It is absolutely necessary in the prosecution of criminal cases in Dallas County for one deputy in my office to make frequent trips out into the country. Necessarily in making these trips he goes

as an official to represent the State in the trial of criminal cases. The question is, whether I can out of the general fees of the office pay this man's expenses, such as railroad fare, etc., or any item of such expense, such amounts to be charged up on the books to expense of such trips, and taken from the excess fees, and not from my individual salary. My idea is that after all salaries allowed by law are paid such expenses as this should be deducted from the excess, and that then I would be entitled to one-fourth of the remainder and the county to three-fourths as the statute provides. In other words, I do not think this expense is properly chargeable to my individual account either on salary or excess."

I am of the opinion that the question propounded by you must be answered in the negative. I have searched in vain to find some statute or authority authorizing the county attorney to pay the railroad fare, or other like expense, of his deputies under the circumstances stated by you out of the excess fees of office, other than his one-fourth part thereof. That the county officers are not entitled to any allowance except upon some statutory provision can not be questioned. (See *Robinson vs. Smith County*, 33 T. C. A., 251.)

Before the enactment of the statute commonly known as the "Fee Bill," the county officers received and appropriated to their own use all fees derived from the performance of their official duties, and their interests would have been best served by leaving the law as it was. Under the present statute, however, the business of the officers named in the act is placed strictly on the basis of a public service, and the fees are treated as a part of the public revenue to be received by the officer and accounted for as directed. So marked is this feature of the law that the officer can not remit a fee. (See Chapter 5, Acts 1897, Sec. 14.) Even the authority to determine the number and pay of deputies is placed with the county judge.

In my opinion, the items of expense mentioned by you must be paid out of your individual account, either salary or excess. (See *Ellis County vs. Thompson*, 66 S. W. Rep., 48.)

Yours truly,

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PUBLIC SCHOOL LAND—CONSTRUCTION OF STATUTES—  
FORFEITURE, ETC.

Act of 1907 does not repeal Act of 1905.

AUSTIN, TEXAS, September 24, 1907.

*Hon. John J. Terrell, Commissioner of the General Land Office,  
Austin, Texas.*

Sir: We are in receipt of your letter of the 20th inst., which is as follows:

"From September 1, 1905, to August 10, 1907, sales of school land were made under the Act of April 15, 1905. Under this act sales were made out of leases as well as in the open market, and

certain provisions made for placing the land back on the market when the title failed for certain causes.

"On August 10, 1907, School Land Act of May 16, 1907, became effective. This contained some provisions relative to the failure of title and the land again being on the market. I will thank you to advise me if, in your opinion, this Act of May 16, 1907, repealed the provisions of the Act of April 15, 1905, so as to have the effect of placing forfeited land purchased under either act on the market at once, or do the provisions of the former statute remain in effect so as to require the fixing of a future date when the land will be subject to sale, that is, thirty or ninety days according to cause of forfeiture. See Section 4 of former act and Section 6e of latter act; also the case of Bood vs. Terrell, 17 Texas Court Reporter, 324."

Replying to the foregoing, I have to say that upon a careful consideration of your inquiries and of the several statutes to which you refer, I am of the opinion that the purpose and legal effect of the above-mentioned Act of May 16, 1907, is to provide for *ipso facto* forfeitures in the cases mentioned in said Act of 1907, whether such sales occurred under it or under said Act of 1905, and, without the intervention of or any action whatever by the Commissioner of the General Land Office, to immediately place upon the market for sale all lands so forfeited.

Yours truly,

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#### COMMISSIONERS COURT—ROAD SUPERINTENDENTS.

Commissioners, sitting as a court, can not appoint themselves road superintendents.

AUSTIN, TEXAS, September 26, 1907.

Hon. W. E. Hall, County Auditor, Belton, Texas.

Dear Sir: In your letter of the 21st inst., you ask the following question:

"The commissioners court of this county have four road superintendents under Chapter 6, Article 4763, etc.; they have appointed each commissioner road superintendent of his precinct and allow them a salary not to exceed \$400 per annum. Title 97, Chapter 1, Article 4712, constitutes each commissioner supervisor of his precinct, and says he shall receive \$3 per day for not more than ten days.

"Now, can the commissioners court appoint each other road superintendent and are they entitled to have their warrants audited?"

In reply thereto, I wish to call your attention to the fact that the provisions of Title 97, Chapter 6, clearly indicate that if the commissioners court act under that chapter they should appoint one road superintendent for their county or one superintendent for each commissioner's precinct, each of whom is required to enter into a bond and subscribe to an oath of office. (Art. 6765.)

If the commissioners court selected a road superintendent for the

county, his salary is to be fixed by the commissioners court in counties less than 15,000 inhabitants at an amount not to exceed \$1000 and in counties of more than 15,000 inhabitants at an amount not to exceed \$1200.

If the commissioners court see proper to select precinct commissioners, such precinct commissioners in counties less than 15,000 inhabitants shall receive a salary fixed by the commissioners court not to exceed \$300 per annum, and in counties of over 15,000 inhabitants a salary not to exceed \$400 per annum. (Art. 4767.)

You will observe that the provisions of this entire chapter treats with the subject of the commissioners court selecting the county and precinct road superintendents and have no application to the compensation allowed by law to the commissioners themselves in their supervision of the public roads of the county.

Title 97 Chapter 1, Article 4712, by its provisions constitute the county commissioners supervisors of public roads in their respective counties and each commissioner is required to supervise the public roads within his commissioners precinct once each year; and the same article also provides that each commissioner for the supervision of his roads shall receive therefor \$3 per day for the time actually employed in the discharge of his duties, which compensation is to be paid out of the road and bridge fund of the county; and it also provides that no commissioner shall receive pay for more than ten days in each year.

It, therefore, appears from your letter that your county commissioners, under the provision of law which constitutes them supervisors of the public roads of their respective precincts, are operating under that article as to the supervision of their public roads, and have fixed their compensation under the provisions of Chapter 6 of that title. As they are operating in supervising the roads of their respective precincts under Title 97, Chapter 1, they should look to that chapter for authority or a rule in fixing their compensation. If they operate or seek to exercise the authority given by Chapter 6 of that title, they must employ or appoint road superintendents, as provided for in that chapter. The road superintendents alone are authorized to draw the salary provided for in that chapter, and this chapter does not provide that the commissioners court shall appoint themselves road superintendents under that chapter.

Yours truly,

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#### ROADS—BONDS.

Authority of county, or subdivision thereof, to issue bonds for the improvement of roads of county or subdivision, etc. Constitution requires that two-thirds vote be taken, and the statute enacted pursuant to this provision of Constitution is silent upon question of what vote will be necessary—two-thirds is necessary.

AUSTIN, TEXAS, September 27, 1907.

*Hon. Eugene Dabney, County Judge, Comanche, Texas.*

Dear Sir: In conversation with you over the 'phone yesterday I understood you desired to know whether or not a county election

held for the purpose of improving the public roads of the county, under Chapter CXXXIV, page 249 of the Acts of the Regular Session of the Thirtieth Legislature, was necessary to be carried by two-thirds majority vote in order to authorize the county to issue bonds for such purpose.

Confirming what I stated to you over the 'phone, in reply thereto I wish to call your attention to Article 3, Section 52 of the Constitution of the State, as amended by a vote of the people at the general election held November 8, 1904, a part of which amended section reads as follows:

"Provided, however, that under legislative provision any county, any political subdivision of the county, any part of adjoining counties, or any political subdivision of the State, or any defined district now or hereafter to be described or defined within the State of Texas, and which may or may not include towns, villages or municipal corporations, upon a vote of *two-thirds majority* of the resident property taxpayers voting thereon, who are qualified electors of such district or territory to be affected thereby, in addition to all other debts, may issue bonds or otherwise lend its credit in any amount not to exceed one-fourth of the assessed valuation of the real property of such district or territory."

You will observe that in the Act of the Thirtieth Legislature above referred to, which act was evidently intended to put into force the road provision of the constitutional amendment above quoted, does not anywhere provide for the kind of vote necessary to authorize the issuance of such bonds, but simply provides:

"Section 2. Upon the petition of fifty or a majority of the resident property taxpaying voters of any or any political subdivision of any county, in this State, to the county commissioners court of such county, such court shall have the power and it is hereby made its duty at any regular or special session thereof, to order an election to be held in such county or political subdivision thereof, to determine whether or not the bonds of such county or of such political subdivision thereof, shall be issued in any amount not to exceed one-fourth of the assessed valuation of real property of such county or political subdivision, for the purpose of constructing, maintaining or operating macadamized, graveled or paved roads and turnpikes, or in aid thereof."

The constitutional provision herein quoted requiring a two-thirds majority vote in order to issue bonds for the purposes mentioned makes it, in my judgment, unnecessary for such character of vote to be specified in the act of the Legislature passed under that amended provision of the Constitution. As the constitutional provision expressly provides a two-thirds majority vote and the act of the Legislature provides for an election, it seems very clear that the omission in the legislative act to prescribe the character of vote was simply an oversight, and especially does this appear when the caption of the bill refers to a two-thirds vote. At any rate, I think the constitutional provision is binding and that the act of the Legislature referred to is sufficient to put it into operation and give it force and effect.

You are, therefore, advised that in order for your county to is-

sue the series of bonds referred to for the purposes mentioned, under the act of the Legislature and the provisions of the Constitution herein quoted, that such election must be carried by a two-thirds majority vote of the taxpaying voters of the county.

Yours truly,

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#### LOCAL OPTION—PRECINCTS.

Any subdivision of a county which has adopted local option, before the same is abrogated in said subdivision, majority of votes for abrogation in identical territory is necessary.

AUSTIN, TEXAS, October 3, 1907.

*Hon. J. J. Bishop, County Attorney, Athens, Texas.*

Dear Sir: As I understand your letter, you desire an opinion by this department upon the following facts:

Commissioner's precinct No. 4 is composed of justices' precincts Nos. 5 and 7, and said commissioner's precinct embraces no other territory than these two justices' precincts. A local option election was held in justices' precinct No. 5 on March 10, 1906, resulting against local option. Justices' precinct No. 7 has been under local option since 1883. A local option election was held in commissioner's precinct No. 4 on June 9, 1906, which election resulted in favor of prohibition. This last election was declared void by the Court of Criminal Appeals in the case of *Ex Parte Randall*, 98 S. W. Rep., 870.

Question: "Under Chapter 8, Section 2 of the Acts of the First Called Session of the Thirtieth Legislature, does not the election as held in said commissioner's precinct No. 4 become binding, and are not all parties estopped from attacking the validity of said election, and would not an injunction properly lie to restrain parties from selling intoxicating liquors in said commissioner's precinct No. 4, or for permitting same to be stored upon premises for said purpose, no contest having been filed as required by the above named act of the Legislature?"

In my opinion, the question propounded by you must be answered in the negative. Chapter 8, Section 2, of the Acts of the Thirtieth Legislature, referred to by you, is as follows:

"Section 2. Any qualified voter of any county, justice precinct or subdivision of any county, or any town or city within this State which has heretofore voted on local option may contest said election under the provisions of this act, and if no contest is filed within sixty days from the taking effect of this act, it shall be conclusively presumed that said election as held was valid in all things and binding upon all courts."

The question is, does the act above quoted have the effect to render valid and binding the election held in said commissioner's precinct No. 4 on June 9, 1906, no contest having been filed within sixty days from the taking effect of the act, as provided in said act? In my opinion it does not.

Article 3393 of our Revised Statutes reads as follows:

"No election under the preceding articles shall be held within the same prescribed limits in less than two years after an election under this title has been held therein; but at the expiration of that time the commissioners court of each county in the State, whenever they decree it expedient, may order another election to be held by the qualified voters of said county, or of any justice precinct, or such subdivision of a county as may be designated by the commissioners court, of such county, for the same purpose; \* \* \* and the order granting such other elections, as well as that declaring the result, shall, if prohibition be carried, have the same force and effect and the same conclusiveness as are given to them in the case of a first election by the provisions of this title."

By Article 3395 of said Revised Statutes it is provided:

"The failure to carry prohibition in a county shall not prevent an election from being immediately thereafter held in a justice's precinct or subdivision of such county as designated by the commissioners court, or of any town or city in such county; nor shall the failure to carry prohibition in a town or city prevent an election from being immediately thereafter held for the entire justice's precinct or county in which said town or city is situated; nor shall the holding of an election in a justice's precinct in any way prevent the holding of an election immediately thereafter for the entire county in which the justice's precinct is situated; but when prohibition has been carried at an election ordered for the entire county, no election on the question of prohibition shall be thereafter ordered in any justice's precinct, town or city of said county until after prohibition has been defeated at a subsequent election for the same purpose, ordered and held for the entire county, in accordance with the provisions of this title; nor in any case where prohibition has carried in any justice's precinct shall an election on the question of prohibition be ordered thereafter in any town or city of such precinct until after prohibition has been defeated at a subsequent election ordered and held for such entire precinct."

An examination of these statutes discloses the fact that the said election of June 9, 1906, was wholly unauthorized and void, as declared by the Court of Criminal Appeals in *Ex Parte Randall*, supra. One of the justice's precincts (No. 7) was under local option, and the only way, under Article 3393, to avoid the election in that precinct was by an election held within its boundaries. Those who were opposed to local option could, if they desired, have an election held in that precinct after the expiration of two years, and set aside the law, but this was never done. Under the statute no election could be held in that precinct within two years from the time local option was put into operation within the territory.

Under Article 3395 no election could be held in precinct No. 5 for that precinct within two years of the election which resulted against local option on the 10th of March, 1906, and in *Ex Parte Randall*, 98 S. W. Rep., 871, the court say:

"By the provisions of the general law, which requires that, after an election has been held within the given territory, that territory shall remain undisturbed by local option elections, except where the territory is smaller than the county, unless in case a county

election is ordered, or where a smaller portion of the justice's precinct, city, town or subdivision may choose to ask for an election for prohibition."

It will thus be seen that there could be no election held for the entire commissioners precinct, either under article 3395, or under the general law fixing the limitation at two years. Again, it will be observed that Article 3395 does not authorize an election, when local option has failed in the county, except for a justice's precinct, city or town. It does not authorize an election for a subdivision, except when the county election results against local option. The election held on March 10, 1906, was not a county election, but a precinct election. The Court of Criminal Appeals in the Randall case held that the statute did not authorize, and the commissioners court had no power to order, the election of June 9, 1906, for commissioner's precinct No. 4. Under this case said election was not merely irregular, but absolutely void and should be held for naught. See also *Ex Parte Heyman*, 78 S. W. Rep., 349; *Ex Parte Mills*, 79 S. W. Rep., 567.

The act of the Legislature above quoted which provides for the contest of local option elections, applies to elections held under authority of law in which there may have been defects and irregularities, but it does not apply to elections that were wholly unauthorized. Besides, as said by the Supreme Court in the case of *Milam County vs. Bateman*, "The legislative action can not be made to retroact upon past controversies, and to reverse decisions which the courts in the exercise of their undoubted authority made; for this would not only be the exercise of judicial power, but it would be its exercise in the most objectionable and offensive form, since the Legislature would, in effect, sit as a court of review, to which parties might appeal when dissatisfied with the rulings of the courts." See 54 Texas, 167. To the same effect see *Denny vs. Mattoon*, 2 Allen, 361; *Mayes vs. Dentler*, 75 Amer. Dec., 616. It has also been held that illegal elections can not be cured by subsequent legislative confirmation. *Wade on Retroactive Laws*, 263, and authorities cited.

The consequence of recognizing this power as belonging to the Legislature would be to open the widest possible door for disregard of constitutional restraints. If the Legislature might legalize a proceeding in the form of an election, it might, in the exercise of the same power, validate any such proceeding, however inadequate as a fair expression of the popular will it might be. *Wade on Retroactive Laws*, Section 268. But, as above stated, I do not think that said Section 2 of Chapter 8 of the Acts of the Legislature was intended to be applied to an election of the character of the one under consideration. An universal principle applied in considering constitutional questions is, that an act will be so construed, if possible, as to avoid conflict with the Constitution, although such construction may not be the most obvious or natural one. *Bates vs. Bratton*, 96 Texas, 279; *State vs. Smith*, 52 N. W. Rep., 700; *State vs. Atl. City*, 28 Atl. Rep., 427.

Yours truly,



## MEDICAL LAW—PATENT MEDICINES—LICENSED DRUGGIST—PHYSICIANS—ACT CONSTRUED.

AUSTIN, TEXAS, October 8, 1907.

*Hon. Thomas J. Newton, County Attorney, San Antonio, Texas.*

Dear Sir: We are in receipt of yours of the 7th instant, in which you state:

“Under Section 10 of the one-board medical act, it is made unlawful for persons other than licensed druggists or physicians in this State to offer for sale upon the streets or other public places remedies which they recommend for the cure of disease.

“I beg to advise that there are a great number of patent medicine concerns in the State who are exhibiting their wares for sale upon the public streets in our cities, and who carry with them a man who recommends the medicines which they offer for sale, but who does not offer for sale, nor sell, any of the medicines so carried.

“I also desire to state that these medicine companies carry with them regularly licensed physicians who have complied in every particular with the laws of our State covering the qualifications of the regularly practicing physician.

“The question has presented itself to me as to whether or not it is unlawful for these men who recommend this medicine, to do so, they not being either licensed druggists or physicians qualified to practice medicine under the provisions of the act referred to, even though they do not sell, or offer for sale, such medicines.”

In reply thereto, beg to advise that each case, of course, depends upon its own particular facts. The provision of the act to which you refer makes it unlawful for persons, other than licensed druggists or physicians, to offer for sale upon the streets or other public places remedies which they recommend for the cure of disease.

An offer for sale can be made without any actual manual handling of the medicine and the receipt of the money therefor, and the recommendation of the medicine made by the person to whom you refer can go far enough to be an offer for sale, although he does not, in fact, pass the medicine to the purchaser nor receive the money therefor, or offer to do so. The mere fact that the unlicensed man only does the talking and recommending, and the medicine is actually handled by the licensed physician carried along for that purpose, would not relieve said unlicensed person from a violation of the law.

Thus you see that it will depend upon the acts of the party in each particular instance as to whether or not there is an offer for sale by the person who is not authorized under the law to offer same for sale.

Your question seems to be predicated upon the fact that one man does the recommending, who is not authorized under the law to sell the medicine, and another man acts as a dummy, so to speak, in handling the medicine, delivering it to the purchaser and receiving the money therefor. In such case, even if it can not be said that the man doing the recommending makes the sale, still he is actively engaged in offering the medicine for sale.

It does not take an actual manual handling of the article in order

for there to be an offer for sale, and under the statement submitted by you it would be well known before the matter reaches the registered physician that the medicine is offered for sale, the physician's part in the transaction being the actual handling of the medicine.

We think the scheme is clearly an attempt to evade the provisions of the law.

Yours truly,

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CITY RECORDER—NOT A CONSTITUTIONAL OFFICER.

Office of city recorder, not being a constitutional office, but one authorized by the Legislature, may be abolished by act of city council. Officer being elected for two years is wholly immaterial.

AUSTIN, TEXAS, October 26, 1907.

*Hon. D. E. Patterson, Mayor, Belton, Texas.*

Dear Sir: In your letter of the 22nd inst., you make the following inquiry:

"I write to ask if in your opinion, under Article 405, a city or town incorporated under the General Laws of the State could by act of its council abolish the office of city recorder after a regular election of the person to fill said office for the term of two years."

To which I wish to reply:

That it is well settled in the United States that an office is not the property of an office holder, but is a public trust or agency; that it is not held by contract or grant; that the officer has no vested right therein; and that, subject to constitutional restrictions, the office may be vacated or abolished, the duties thereof changed, and the term and compensation increased or diminished. 23 Amer. & Eng. Enc. of Law, 328, Subdivision IV; and authorities there cited.

A constitutional office can not be abolished by the Legislature, but can only be abolished by constitutional amendment. Any legislative office or office created by act of the Legislature, which is not a constitutional office, can be abolished by an act of the Legislature.

When the Legislature confers upon a municipality the power to create an office in the absence of legislative restraint such municipality may abolish such office.

*Augusta vs. Sweeney, 44 Ga., 463.*

*Frankford vs. Brawner, 100 Ky., 166.*

*Chandler vs. Lawrence, 120 Mass., 213.*

*Cambridge vs. Fiefield, 126 Mass., 428.*

*Donaghy vs. Macy, 167 Mass., 178.*

*State vs. Jennings, 57 Ohio, 415.*

*Palestine vs. West (Texas Civ. App.), 37 S. W. Rep., 783.*

*Jones vs. Shaw and Swisher, 15 Texas, 577.*

The office of city recorder is not a constitutional office and it is not a legislative office, the Legislature simply having authorized the city councils of the municipalities of the State to create such office when they might see proper.

I know of no statute preventing a city council from discontinuing or abolishing the office of city recorder after such city recorder

has been elected or appointed to the position, and in the absence of such legislative restraint, in my opinion, the city council clearly has the power to discontinue or abolish such office, and I think this would be true without the expressions contained in the provision of Article 405, which clearly indicates that it was the legislative intention to expressly empower the city council to discontinue or abolish such office. A part of that Article reads as follows:

"The city council may, at any time after the acceptance of the provisions of this Title, by ordinance establish the office of recorder of the city, and appoint a suitable person to fill the same, and when so appointed he shall be the chief judicial magistrate of the city, and shall hold his office until the installment of a new city council, unless the council shall sooner *discontinue* the office by ordinance."

The latter part of the same article of the statute reads as follows:

"And provided further that until the said office of recorder is established and a recorder is elected by the city council, or when the same is *discontinued*, or a vacancy occurs therein, the mayor of the city shall possess and execute all the powers and duties of recorder."

It therefore occurs to me to be very plain that it was the intention of the Legislature to authorize the city council of any city in the State to create the office of city recorder at the will of such council and *discontinue* same when they saw proper to do so.

I think the fact that a city recorder has been elected for two years is wholly immaterial. The city council has the power and the legal right to repeal the ordinance creating the office at any time they may see proper, regardless of the fact that the recorder has been elected for two years.

With best wishes, I am,

Yours truly,

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#### SALOONS—LICENSE.

Can not operate two saloons in the same building under one license.

AUSTIN, TEXAS, October 28, 1907.

*Captain W. J. McDonald, State Revenue Agent, Capitol Building.*

Dear Sir: Answering the inquiry submitted by you as to whether or not Mr. James Lawler may lawfully maintain and conduct two separate bars or saloons in the Rice Hotel in the City of Houston, Harris County, Texas, located as shown on the plat of the ground floor of said hotel submitted to us, under one license, we beg to advise that in our opinion he can not. The facts are as follows:

Mr. James Lawler is the proprietor and manager of the Rice Hotel, situated in the city of Houston, Harris County, Texas. Said hotel occupies the northwest corner of Main street and Texas Avenue in said city; and is kept by Mr. Lawler for the accommodation of the public as a hotel. In said hotel the proprietor maintains two separate and distinct bars or saloons, at each of which spirituous liquors are sold at retail for money. One of said bars is situated on Main street, three doors north of the east entrance to the hotel,

and the other on Texas Avenue, near the rear of said hotel building and on the south side of same. Each of said saloons may be entered by the public from the street. They have no direct and immediate communication with the office rotunda or corridor. Both of said bars are accessible to the guests without going out of said hotel and are each patronized by guests and others. Each bar is complete in itself in equipment and in service, and a separate account is kept of the liquors going into and sold at each bar.

Section 7 of the act, commonly known as the Baskin-McGregor liquor bill, provides that "no retail liquor dealer, nor retail malt dealer, shall carry on said business at more than one place under one license."

The facts stated clearly show that the proprietor of said Rice Hotel is carrying on the business of a retail liquor dealer at more than one place and he should be required to take out a license for each of said saloons. Our attention has been called to the case of *St. Louis vs. Geradi*, 90 Mo., 640, 3 S. W. Rep., 608, in which under one license the managers of the Planters Hotel were held authorized to run three complete saloons, each of which opened upon a different street, but in that case they were connected with each other by doorways opening into the main office of the hotel. As shown by the facts stated, there is no such direct connection or communication between the two saloons in the Rice Hotel. However, in the decision of the question presented to us we must be guided by our own statute. The exact question presented has not been passed upon by our own courts, but the decisions of the courts of a number of other States construing statutory provisions almost identical with ours support the conclusion we have reached. In the case of *Chicago vs. Walker*, decided by the Supreme Court of Illinois, one Malkan had taken out a license to keep a saloon at No. 118 Quincy street in the city of Chicago. He installed a saloon in the basement and another on the first floor, connecting them by an inside stairway. There was also a separate outside stairway leading down to the basement saloon from the street. In this case the contention of the city was that Malkan had no right to run two saloons under one license. That of Malkan was that he had the right under one license to operate as many bars (saloons) as he pleased in the premises known as No. 178 Quincy street. The Illinois statute upon the subject was as follows:

"Nor shall the person licensed keep a dramshop at more than one place at the same time."

Upon the above facts the court in rendering its opinion, said:

"The license issued to appellee was to keep a saloon at 178 Quincy street in the city of Chicago. We find nothing in the statute \* \* \* which permits, directly or by implication, the seller of liquors to run more than one saloon under a single license. Appellee was engaged in a business regulated by statute—a business he could not legally carry on except under and by virtue of a license. In running these saloons he was exercising a privilege and not a right. Such privilege will be strictly construed. *Ritchie vs. Zaleski*, 98 Iowa, 592. It is not the law of this State that under one license the licensee can run as many saloons as he has room in his building, provided such rooms connect with each other by doors, openings or stairways."

City of Chicago vs. Malkan, 119 Ill. App., 542; Malkan vs. City of Chicago, 217 Ill., 471.

In Volume 17, American & English Encyclopedia of Law, page 237, it is said: "One license will not authorize the person or persons licensed to conduct the business in more than one place. A license is necessary for each place in which the business is conducted."

In Thomas vs. Arie, 122 Iowa, 138, the Supreme Court of that State said:

"The only question presented for our determination is whether a person having paid but one tax and having but one license, may keep for sale and sell intoxicating liquors in two different and wholly separate rooms in the same building. We are clearly of the opinion that such question must be answered in the negative. To hold otherwise would certainly violate not only the spirit of the law, but, we think, the letter of the law. Section 2432 of the code provides that 'every person, \* \* \* maintaining a place where intoxicating liquors are sold or kept with intent to sell, shall pay an annual tax,' etc. It must be manifest from our statement of the facts, that the defendant is maintaining two places, each independent of the other in every material sense necessary to be considered. The mere fact, that by his license he is authorized to carry on business in the building mentioned can not be construed to confer the right on defendant to cut such building up into separate rooms, the number to be limited only by the capacity of the building, or the extent of the premises, and in each maintain an independent place for the sale of liquors."

The Illinois and Iowa cases above mentioned are in point on the question presented to us and they commend themselves to our approval. See also Sanders vs. Elberton, 50 Ga., 178.

For the reasons stated, we are of the opinion that Mr. Lawler must take out another license or close one of his saloons.

Yours truly,

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CUSTOMS COLLECTOR—DEPOSIT OF U. S. FUNDS—WEST  
TEXAS BANK & TRUST CO.

Agent in charge has no authority to pay out any funds of said bank, and  
Commissioner of Banking without authority to comply with such  
demand.

AUSTIN, TEXAS, November 8, 1907.

*Colonel A. P. Wooldridge, Special Agent in Charge of West Texas  
Bank and Trust Co., San Antonio, Texas.*

Dear Sir: We have given careful consideration to your letter of the 6th instant, requesting us to advise you as to your duties in connection with a demand made by the United States Treasury Department through its agent, Mr. J. W. Wheatley, for payment out of the funds of said bank of the sum of \$2883.74, same being a portion of a deposit of \$2911.89 in said bank to the personal credit of E. G. Rountree, who is a United States deputy collector of customs,

said claim for payment being based upon the contention that the said sum of \$2883.74 in fact belongs to the United States Government.

In reply to your inquiry, I beg to say that we are of the opinion that you are without authority of law to comply with said demand. We believe that there is no law which authorizes the Superintendent of Banking, a State bank examiner engaged in the examination of the affairs of a State bank, or a special agent temporarily in charge of the affairs of such bank, under direction of the Superintendent of Banking, to make any payment or disbursement whatever of any of the funds of such bank.

If it be conceded that the money claimed by the United States Government belongs to it, and that the Government is entitled to priority in payment thereof, such facts constitute no valid reason for an exception to the rule above announced.

I have advised Mr. Wheatley in person of the conclusion which we have reached, as hereinabove stated.

Yours truly,

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#### ANTI-PASS LAW—TELEPHONE COMPANIES.

Not intention of law to prevent discrimination between localities, but between persons in the same locality—Baird, Clyde and Cross Plains.

AUSTIN, TEXAS, November 8, 1907.

*Hon. Allison Mayfield, Chairman Railroad Commission, Capitol.*

Dear Sir: We are in receipt of yours enclosing letter from the Home Telephone & Electric Company, of Baird, Texas, presenting an inquiry under the anti-pass law. The statement submitted by the telephone company is as follows:

“In Baird we charge \$2.50 for business telephones and \$1 for a residence telephone. In Clyde and Cross Plains we charge \$1.50 and \$1.

“At Baird we have about 400 telephones, and at Clyde and Cross Plains about 80 each. The population of Baird is about 2500, Clyde about 700 and Cross Plains, 500.

“We charge \$1 for residence phones at all places for they have the same privileges, while the business phones in Baird have the additional number of phones to solicit from.”

The question submitted is, whether or not it is a violation of the anti-pass law for a telephone company to charge a different price for telephone service in one town from that which it charges in another town if the service in the two towns is not different and is rendered under circumstances and conditions which are substantially similar. This involves the question as to whether or not the anti-pass law is intended to regulate the rates and charges of telephone companies as to localities, although said localities may be similarly situated and the service rendered therein may be under substantially pass law is intended to regulate the rates and charges of telephone companies required to charge the same rate in all towns where the

service is of a like kind and given under substantially similar circumstances and conditions? If the act is thus construed, it would be an anti-discrimination act as to localities, and, in effect, a rate-making bill as to localities; for instance, if a telephone company is operating in one town of 2000 inhabitants, with 500 phones, the rate fixed in this town would have to be applied in all towns of similar size having similar service rendered under substantially similar circumstances and conditions. If a rate is put in between two towns the same rate would have to be applied between all towns where the service is under substantially similar circumstances and conditions. This would result in the rate being fixed according to the circumstances and conditions surrounding each particular place or each particular mile of service. A rate being fixed for any particular locality, or between any two localities, the act itself would fix the rate as to other localities where the service is of like kind, under substantially similar circumstances and conditions. The rate would be fixed for the locality and for localities similarly situated regardless of the controlling feature of the bill to prevent discrimination amongst persons.

Again, if a rate is fixed for a locality, based upon competition in that particular locality, the telephone company would be required to maintain the same rate in other localities where they have like service under substantially similar circumstances and conditions, although in doing so it might not be able to meet the competition in the other town, or, should it be able to meet such competition, it might, as to that particular town, be compelled to operate at a loss.

It should not be overlooked that the Twenty-ninth Legislature passed an act authorizing the city council of any city or town, in conjunction with the district court of the district in which the town is situated, to fix the rates to be charged by telephone companies. (See Chapter 145, Acts of the Twenty-ninth Legislature, page 348, Section 7.) This act has not been repealed, nor does the anti-pass law purport to amend or affect same; neither is there anything in the anti-pass law indicating that the Legislature intended to modify in any degree the provisions of the Act of the Twenty-ninth Legislature.

It is interesting to note too, that to the bill introduced for the purpose of carrying out the provisions of the Democratic platform as to requiring connections between telephone companies, there was attempted to be added a schedule of rates for long distance telephones and for local service of telephones, and to classify cities and towns where telephone service was in operation, into four classes and to fix the rates for each class. (See House Journal, May 6, 1907, pages 227, 228, Section 10.) This attempt was defeated. (House Journal, May 7, 1907, p. 245.)

The Act of 1905 being effective, and the anti-pass law being construed as regulating the matter of rates as to localities, this condition is not only a possible condition but a probable condition, viz., a city or town in the State would fix the rate for telephone service under the Act of 1905. The telephone company would be required to maintain the same rate in all other towns of similar size where a like service is given under substantially similar circumstances and

conditions, and it would be no defense to any indictment that the rate was fixed by the city council in one town and not fixed by the city council in the other town. The rate in the town where the city council had not acted might be so low as to require the business to be operated at a loss or it might be so high as not to enable the telephone company to meet any competition which it might encounter in said town. So, it appears to us that a construction of the act, applying it to localities as such, would result in interminable confusion. It has not been the policy of the State to regulate the rates for telephone service and there was no discussion as to the regulation of such rates before the people by any candidate for Governor, neither was there any platform demand that such rates be regulated, neither is there any indication in the message of the retiring Governor, or of the present Governor, that there was a public demand or desire that the Legislature regulate the rates to be charged by telephone companies by the enactment of the anti-pass law or any other law other than those already upon the statute books.

It is a well settled principle of construction that the Legislature intends in its enactments to accord with the principles of public policy and does not intend to enact laws that will bring about absurd consequences, and an act should not be so construed unless it is very clear from its provisions that such was its intent. It must be presumed that there was no intention to affect any other statute in force further than the plain terms of the act require, and a statute ought to receive such a construction as that the existing rights of the public and of individuals and the public policy of the State, expressed in its prior enactments, should not be infringed. It must always be assumed that the Legislature aims to enact only what is reasonable and just, and any suggested construction which necessarily involves a flagrant departure from this aim should not be adopted if any other is possible by which absurd or pernicious consequences can be avoided. A construction which must occasion great public or private mischief must never be preferred to a construction which will occasion neither, and where even the literal enforcement of a statute would result in a great inconvenience and absurd consequence and cause injustice which the Legislature could never have contemplated, the courts are bound to presume that such consequences were not intended and adopt a construction which will promote the ends of justice and avoid the absurdity. The courts uniformly hesitate to place such a construction upon the terms of an act as will lead to manifestly absurd consequences and impute to the Legislature total ignorance of the subject with which it undertook to deal. (Black on Construction of Statutes, paragraphs 48-50; Sutherland on Statutory Construction, Vol. 2, paragraphs 487-490.)

There is another serious difficulty to such a construction of the act as would make it a rate-fixing act as to localities, and that is, that there is no guide given as to what constitutes substantially similar circumstances and conditions. It is highly penal in its nature, providing not only for a fine against the corporation but for the imprisonment of the officials responsible for its acts. This last named penalty is imposed when any person shall be convicted of "unlawful



discrimination in rates or charges for the transportation of passengers or property and the transmission of messages." This suggests that the Legislature had in mind that there might be discrimination which would be lawful and one which was made unlawful. From the provisions of the act, if applied to rate-making as to localities, the determination of what is an unlawful discrimination would be impossible, because the officers of the telephone company would not know what the law is until a jury has passed upon whether or not the service was under substantially similar circumstances and conditions and there is no guide given in the act for the information of the court in instructing the jury as to what this term means. The jury in one case might find that the service between two points and the service between two other points were like services rendered under substantially similar circumstances and conditions and the telephone company might take this verdict of the jury as a basis for future action as to the establishment of a rate between two other places and still be mulched in fines and have its officers imprisoned if another jury should find that the service last established was not a like service under substantially similar circumstances and conditions as found by the jury in the first case.

A penal law is intended to regulate the conduct of people of all grades of intelligence within the scope of responsibility. It is therefore essential to its justice and humanity that it be expressed in language which they can easily comprehend, and that it be held obligatory only in the sense in which all can and will understand it. This construction presses with increasing weight according to the severity of the penalty. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the Legislature, not in the judicial department. The Legislature and not the court should define a crime and ordain its punishment. (Sutherland on Statutory Construction, paragraph 520.)

Under the circumstances cited above the crime would not be defined until the jury has passed upon the facts and the officers and agents of the telephone company would be at a loss to know where they had committed a felony although their actions might have been in the utmost good faith and devoid of any intent to violate the law.

The Legislature of 1905 passed an act requiring railroad companies to maintain suitable closets at a reasonable and convenient distance from the depot and keep same reasonably clean and in a sanitary condition. There was no guide given in the act as to what a suitable closet or as to what was reasonably clean or as to what was a reasonable and convenient distance from the depot, and the Court of Civil Appeals held that failure to designate with sufficient certainty what was required and therefore a failure to apprise the railway in advance as to what they must do in order to conform to the act, made the penal portion thereof invalid for uncertainty. (See *State vs. T. & N. O. Ry. Co.*, 19 Texas Ct. Rep., 550.)

In Section 4 of the act we find this language applying to telephone companies: "No company \* \* \* shall charge \* \* \* any person \* \* \* a greater or less or different compensation for any service rendered or to be rendered in the transmission of

\* \* \* messages than it charges \* \* \* any other person \* \* \* for doing for him \* \* \* a like service if the \* \* \* transmission is a like kind of traffic or service under substantially similar circumstances and conditions."

The words "substantially similar circumstances and conditions," if the act is construed as being an anti-discrimination act as to localities, render the operation and effect of the law so doubtful as to leave it without that certainty which is requisite to the validity, and necessary to the administration of any penal or criminal law of this State.

It is therefore clear to us that the act should not be construed as being an anti-discrimination act as to localities.

The caption of the act, in so far as it relates to telephone companies, is as follows:

"An Act to prohibit \* \* \* telephone companies \* \* \* from \* \* \* transmitting messages free of charge or giving to or for any person authority to have \* \* \* messages transported free over any line or lines owned, operated or controlled by any such company in this State \* \* \*; and also prohibiting any of said companies \* \* \* from discriminating among *persons* in rates and services."

The body of the act is responsive to the caption and refers to and relates only to discrimination among *persons* in rates and service. This being a highly penal statute, a construction can not be given to the act that, inasmuch as the entire service to be rendered by a telephone company is with reference to "persons," a "locality" would be included within the term. The broad phraseology of every portion of the act indicates that the Legislature did not intend to leave to construction that which could be expressed in clear language, and in the accomplishment of this purpose a great many words have been used that were not absolutely necessary; for instance, in the clauses under consideration it is probable that the word "person" would have been held to have included "firms, associations of persons and corporations." Throughout the entire act there is a manifest purpose to use language which would undoubtedly cover everything intended to be said by the Legislature. It would have been perfectly easy to have inserted the words "places" or "localities," or "cities, towns and villages," and if there had been any intention to make the law comprehensive enough to prevent discrimination as to places, these words would have been used. At several points in the act there was an opportunity for the insertion of the word "locality" or "place" if the Legislature had intended any legislation regulating such discrimination, as in Sections 2, 3, 4 and 11; but in each of these sections the word "persons" alone is used.

Summarizing, note:

1. The caption of the act prohibits corporations, etc., from discriminating among "persons" in rates and service.
2. Section 1 of the act prohibits the charging of a greater or less fare or rate to one "person" than is charged other "persons."
3. Section 4 of the act prohibits the giving of rebates, etc., or the using of any other device so as to enable the corporation to charge or collect or receive from any "person" a greater or less or dif-

ferent compensation, etc., than it charges or receives from any other "person," etc.

4. Section 7 provides that the offense prohibited is *unlawful* discrimination in rates, thus indicating that all discrimination was not unlawful under the act, but that the penalties to be assessed for conviction for such discrimination as is by the act made unlawful, to-wit, the discrimination amongst "persons." Nothing is intimated as to discrimination amongst "localities."

The Legislature evidently intended to prevent discrimination as to specific services as applied to "persons;" for instance, the transportation of a person on a railroad, the transportation of a particular species of property on a railroad, the transmission of telegrams and telephone messages, by providing that for these services there should be no discrimination amongst *persons*.

The purpose of the act is to enforce equality between persons, and it forbids any special rate, rebate, draw-back or other device by which two persons, over the same line of railroad or the same telephone line, the same distance, under the same circumstances or carriage, are compelled to pay a different price for the service. It can not be believed that the Legislature intended to regulate the relation between the telephone companies and the public other than to prevent the giving of special privileges to particular individuals. The people had in mind in the demands for the passage of anti-pass and anti-privilege laws one thing especially, viz., the prevention of the possibility of influencing public officers by these special privileges; and, secondarily, the treatment of all persons alike by corporations serving the public. The act undertook to accomplish this, and did not undertake to state what these charges should be, but left the railroads and all other corporations included therein in the same position in which they had been before as to the amount of the charge for the services rendered.

Construing the act as being intended to prevent discrimination between "persons" as is clearly expressed in the caption and in the body, there is no difficulty as to its enforcement and no confusion arising as to what the officers of the telephone company must know in order to comply with its provisions. Under this construction we have for the telephone companies the same rule as applies to railroad companies as to what are "substantially similar circumstances and conditions" as to services rendered, based upon the particular service to the particular individual, and the act is relieved of the confusion unavoidably incident to an attempt to apply the term "substantially similar circumstances and conditions" to localities.

Therefore, we are constrained to hold that the act does not intend to prevent discrimination as to localities, in so far as telephone companies are concerned, but is aimed only at the prevention of discrimination amongst persons, and so long as all persons are charged the same for similar service there is no violation of the law: that is, telephone companies can not charge a higher rate for service for one man in a town than it charges any other man in a town for the same service; it can not charge one man a higher or different rate for long distance service between two towns than it charges any other man; but the act does not prevent a telephone

company from maintaining one rate for local service in one town or between two localities, and another rate in another town or between two localities, although the towns and localities may be similar in size and the service may be under substantially similar circumstances and conditions.

Yours truly,

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COUNTY DEPOSITORY — COUNTY COMMISSIONERS — DISQUALIFICATION OF IN DESIGNATION OF DEPOSITORY — BIDS FOR MAY BE FILED ON FIRST DAY OF COURT — TAX COLLECTOR — BOND OF LIABILITY OF SURETIES.

AUSTIN, TEXAS, November 15, 1907.

*Hon. W. Van Sickle, Alpine, Texas.*

Dear Sir: In your letter of the 11th inst., you make the following statement and inquiry:

"First. The commissioners court of Brewster County, in regular session, November 11, 1907, accepted the bid of the First National Bank of Alpine as county depository. The record shows there were present in said court A. M. Turney, county judge, a stockholder in said bank; J. D. Jackson, commissioner of Precinct No. 2, a stockholder in said bank; M. A. Ernst and D. C. Bourland, two other commissioners.

"Under the law, is not such a contract void because a majority of the court not interested in said bank did not and could not select such depository, there being only three county commissioners present, one of them, together with the county judge, being disqualified to sit in court when such bid was acted upon.

"Such county judge, A. M. Turney, and county commissioner, J. D. Jackson, participating in the said selection of the county depository, are they not subject to suspension from office, and also subjected themselves to a criminal prosecution for a violation of law and their oaths of office?

"Second. Revised Statutes, Article 5157, prescribing the qualifications of sureties of the State Tax Collector's bond, and providing such sureties shall attach to such bond a schedule, under oath, all real property, describing the same in detail, and further declaring that when such bond is filed that a lien is thereby created on such real estate, does not the filing of such bond encumber such real estate described in such schedule accompanying such bond?

"Third. Session Laws, 1905, page 387, provides that when the county judge shall have advertised for bids for the county funds, that such bids must be filed on or before the first day of the term of the court at which such bids are to be considered. Is a bid filed under Section 21 of such acts at 12:25 a. m. on the first day of the term of the court in time, even though such court convened at 10 o'clock a. m. on that day, and at that particular minute there was only one bid on file which was opened immediately and the award made, and at the time above stated there was no other bid on file

with the clerk of the commissioners court which would have been considered by the court, and the contract awarded to the bank in which the judge of the court and one commissioner were stockholders."

This is, therefore, to advise you:

First. That if, as you state in your letter, the county judge and three commissioners only were present on the first day of the term at which the county depository was selected and that the county judge was and is a stockholder in said bank and one of the commissioners present was and is also a stockholder in said bank and that there were also only two other commissioners present who were not interested in said bank, then, in my judgment, all the proceedings of the commissioners court in selecting the bank in which these officers were interested as county depository were null and void. The county judge, being interested in the bank, was clearly disqualified to preside over the deliberations of the commissioners court, and neither the county judge nor the interested commissioner could legally participate in any of the proceedings of the court while the bid of such bank was before the court for consideration. There were, therefore, only two members of the court present who were qualified to act for the county in the selection of such depository and those two members were without authority to select a county depository.

A contract entered into between the county, through its county commissioners court, and a bank, by which such bank was to become the county depository of the county, when a majority or even an equal number of the members of the commissioners court present were interested as stockholders in such bank, is clearly against public policy and void.

Robinson vs. Patterson, 71 Mich., 149.

Brown vs. Bank, 137 Ind., 655.

Meguire vs. Corwine, 101 U. S., 108.

Rigby vs. State, 27 Texas App., 55.

Knippa vs. Stewart Iron Works, 66 S. W. Rep., 322.

Texas Anchor Fence Co. vs. City of San Antonio, 71 S. W. Rep., 301.

Not only is such a contract against public policy and void, but some places such members of the commissioners court, including the county judge, who were interested as stockholders in such bank, in the position of violating their oath of office.

Revised Statutes, Article 1535, reads in part as follows:

"Before entering upon the duties of his office, the county judge and each commissioner shall take the oath of office prescribed by the Constitution, and shall also take an oath that he will not be directly or indirectly interested in any contract with or claim against the county in which he resides, except such warrants as may issue to him as fees of office."

You will, therefore, readily see that no member of the commissioners court, including the county judge, can remain a member of such court and retain his interest in such bank after the bank has become the county depository without doing so in direct violation of his oath of office.

I wish also to call your attention to Article 264 of the Criminal Code, which reads as follows:

“Any officer of any county in this State, or of any city or town therein, who shall contract, directly or indirectly, or become in any way interested in such contract, for the purchase of any draft or order on the treasury of such county, city or town, or for any jury certificate or other debt, claim or demand for which said county, city or town may or can in any event be made liable, shall be punished by a fine of not less than ten nor more than twenty times the amount of the order, draft, jury certificate, debt, claim or liability so purchased or contracted for.”

This provision of the Criminal Code, you will observe, would render such county commissioner amenable to the criminal laws if the bank in which he is interested should purchase any of the claims described in this article of the Code against the county, which would render it practically impossible for such commissioner or county judge to retain his official position if the bank should at any time see proper, with or without notice to such commissioner, to purchase any claim against the county.

I also desire to call your attention to Article 266, Penal Code, which reads as follows:

“If any officer of any county in this State, or of any city or town therein, shall become in any manner peculiarly interested in any contract made by such county, city or town, through its agents or otherwise, for the construction or repair of any bridge, road, street, alley or house, or any other work undertaken by such county, city or town, or shall become interested in any bid or proposal for such work, or in the purchase or sale of anything made for or on account of such county, city or town, or who shall contract for or receive any money or property, or the representative of either, or any emolument or advantage whatsoever, in consideration of such bid, proposal, contract, purchase or sale, he shall be fined in a sum not less than fifty nor more than five hundred dollars.”

This provision of the Criminal Code might appear to exclude the members of the commissioners court who might be interested as stockholders in a county depository selected by the county but for the construction given it by the Court of Criminal Appeals in the case of *Rigby vs. State*, 27 Texas App., page 55, wherein the court uses the following language:

“But, when viewed in connection with the context, and with reference to the purpose which the Legislature intended to effect by the enactment of the statute, such an interpretation would, in our judgment, be too restrictive if not strained and unreasonable. Manifestly the Legislature, in enacting the statute, intended thereby to protect counties, cities and towns from official speculation. Such speculation was the evil sought to be suppressed, and the statute strikes at the very root of the evil by making it an offense for any officer of the county, city or town to become interested pecuniarily in matters wherein such corporations are pecuniarily interested. The purpose of the statute is to prevent official “rings” from being formed and operated to prey upon the treasuries of the counties, cities and towns; to prevent the officers of such corporations from

using their official knowledge and influence to their individual pecuniary advantage in the financial transactions of such corporation.”

It is, therefore, as above stated, my opinion that the orders of the commissioners court and the contract with the bank as a county depository, is wholly void for the reasons herein stated ;and it is further my opinion that if the other member of the commissioners court had been present, and not interested in the bank selected, and those three commissioners who were not so interested had selected such bank, then the county judge and the interested commissioner would still, for the reasons herein indicated, be disqualified to retain their official positions unless they severed their connection with the bank selected.

Second. For answer to this inquiry I am herewith enclosing you a copy of an opinion rendered by this department to Hon. W. J. Arrington, county judge of Stonewall County, December 6, 1906.

Third. Section 21, Chapter 164, Acts of the Twenty-ninth Legislature, reads, in part, as follows:

“Sec. 21. Any banking corporation, association or individual banker in such county desiring to bid, shall deliver to the county judge, on or before the first day of the term of the commissioners court at which the selection of a depository is to be made a sealed proposal, stating the rate of interest that said banking corporation, association or individual banker offers to pay on the funds of the county for the term between the date of such bid and the next regular term for the selection of the depository.”

This provision of the depository law authorizes the filing of such bid on or before the first day of the term of the commissioners court, and you are therefore advised that if a bid was filed any time during the first day of the term it was filed in time, as it is clearly implied by the provisions of the act that all of the first day of the term should be given bidders to file their bids. In other words, it would be improper for the commissioners court to act on a bid the first day of the term as that particular day is given bidders within which to file their bids.

Yours truly,

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SCHOOL TEACHERS—CERTIFICATES OF—TEACHERS’ IN-  
STITUTES—ATTENDANCE UPON.

AUSTIN, TEXAS, November 20, 1907.

*To the State Board of Education:*

I have duly considered the question submitted to me on yesterday by yourselves, namely: The construction of a proviso in Section 125 of the Laws of 1905, providing for a complete system of public free schools in Texas, and known as Chapter 124.

This proviso is as follows:

“Provided, that teachers whose certificates are to be extended and held valid under the provisions of this act shall in no case have their certificates extended and continued valid, unless said

teachers shall have faithfully attended the county teachers' institute for four days each year."

The question for determination is, whether or not this proviso has reference to both institutes, three institutes of six days—of two days each—during the year, and an institute of five consecutive days during said year.

The proviso, as you will observe, is broad in its terms, and might be construed to apply to both; yet, in my opinion, it is not clear that it does, and I think the better reason is that the proviso only applies to the one institute which is spoken of in the section where the proviso is found and immediately above the proviso.

The rule of law of construction of provisions of this character and as we find this proviso in this section is:

"The natural and appropriate office of a proviso to a statute or to a section thereof is to restrain or qualify the provisions immediately preceding it. Hence, it is a rule of construction that it will be confined to that which directly precedes it, or to the section to which it is appended, unless it clearly appears that the Legislature intended it to have a wider scope." (Black on Interpretation of Laws, Section 110, p. 273.)

Following this rule, I am of opinion, as above stated, that it does not clearly appear that the proviso has reference to any institute except the one mentioned in the section to which the proviso is appended and of which it is a part.

My conclusion is that a four-day attendance authorizing the extension of a certificate only applies to the three institutes of two days each.

For an institute that is held for five consecutive days, I find no law whatever for the extension of certificates.

Yours truly,

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COMMISSIONERS COURT—COUNTY COMMISSIONER—SUPERVISOR OF ROADS AND BRIDGES—COMPENSATION OF—NEPOTISM.

Commissioners court may employ father of one of commissioners to oversee bridge work, provided son, who is commissioner, does not participate in the proceedings of said court.

AUSTIN, TEXAS, November 20, 1907.

*Hon. George H. McLaren, County Judge, Graham, Texas.*

Dear Sir: In your letter of the 13th inst. you ask the following questions:

"1. Can the commissioners court by proper order entered pay one of the members, say, \$2 per day, or any reasonable amount, to inspect certain roads or oversee the work on bridges, etc.

"2. Can they (the commissioners), receive pay for the time they are out going and coming and the time spent inspecting the bridges and which was done without delay? Would it not be lawful for the county to pay their actual expenses, railroad fare and hotel bills, etc., while visiting these bridges?



"3. Can the commissioners court employ the father of one of the commissioners to oversee work on bridge,—would this be a violation of the law? Can one in the employment of the county employ his son to assist him in certain work for the county and said son being one of the members of the commissioners court?"

To which I reply as follows:

1. The commissioners court is not authorized to employ its members to perform any service for the county, except his official duties prescribed by law, and these duties he is to perform, not by virtue of any contract with the commissioners court, but by virtue of his oath of office.

2. Revised Statutes, Article 4712, reads, in part, as follows:

"The county commissioners of the several counties are hereby constituted supervisors of public roads in their respective counties, and each commissioner shall supervise the public roads within his commissioner's precinct once a year, and shall receive as compensation therefor \$3 per day for the time actually employed in the discharge of his duties, to be paid out of the road and bridge fund of the county; provided, that no commissioner shall receive pay for more than ten days in each year."

You are, therefore, advised that the commissioners can perform the duties specified in this provision of the statute at a per diem of \$3 each, which is clearly intended by the provisions of the law that the inspection of such roads and bridges shall be confined to the commissioners precinct of each commissioner, and you are further advised that there are no expenses provided for by law to be paid by the county, other than the per diem referred to in this act.

3. The commissioners court may employ the father of one member of the commissioners court to oversee bridge work, provided that such related commissioner does not in any way participate in the proceedings of the court making such contract, but you are further advised that when such employment has been so engaged by the county commissioners court, that such employee can not then employ his son, who is a member of the commissioners court, to assist in such work. Such commissioner accepting such employment would violate the plain provisions of his oath of office.

Yours truly,

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CITY RECORDER'S COURT—MAYOR'S COURT SUPERSEDED—CRIMINAL.

Offenses may be prosecuted in corporation court under Penal Code of State.  
Fines collected for benefit of city, etc.

AUSTIN, TEXAS, November 25, 1907.

*Hon. J. R. Brown, City Attorney, Marble Falls, Texas.*

Dear Sir: In reply to your letter of the 21st inst. I wish to advise:

1. That Section 17, Chapter 33 of the Acts of the Twenty-sixth Legislature reads as follows:

“That until the due and legal organization of the said court in any city, town or village, as herein provided for, the municipal court of said city, town or village, as now established, shall continue to exercise its power and jurisdiction; that after the due and legal organization of the said corporation court, the said municipal court and the office of the judge, recorder and clerk thereof shall be and the same is hereby abolished, and the said municipal court in each city, town or village shall be superseded by the corporation court and such officers herein created and established, as the same shall be and become duly and legally organized.”

You are, therefore, advised that if your city council has ever established a corporation court under this provision of the law, that the mayor's court is entirely superseded by the corporation court.

2. Section 8 of that act reads, in part, as follows:

“That under all prosecutions in said court, whether under an ordinance or under the provisions of the penal code, shall be commenced in the name of the State of Texas, and shall conclude against the ‘peace and dignity of the State.’”

You are, therefore, advised that by express provisions of this section offenses may be prosecuted in the recorder's court under the Criminal Code of the State, and it is therefore not necessary that the city council re-enact the provisions of the Criminal Code, which it may desire to prosecute under.

3. Section 10 of the act reads as follows:

“That all costs and fines imposed by the said court in any city, town or village in any prosecution therein, shall be paid into the city treasury of said city, town or village for the use and benefit of the city, town or village.”

Section 15 reads in part as follows:

“That unless provided by special charter, the council or board of aldermen of each city, town or village shall by ordinance prescribe the compensation and fees which shall be paid to the recorder, city attorney, city secretary and other officers of said court, which compensation and fees shall be paid out of the treasury of the said city, town or village. In all of such cases the fines imposed on appeal, together with the costs imposed in the corporation court, and the court to which the appeal is taken, shall be collected of the defendant and his bondsman, and such fine and the costs of the corporation court shall, when collected, be paid into the treasury of the city, town or village.”

You are, therefore, advised that all fines collected on appeal from the recorder's court and all costs incurred in the recorder's court which may be collected on such appeal, must be paid into the treasury of the city, town or village from which such appeal is taken.

4. Section 8 of the act reads in part as follows:

“All prosecutions in such court shall be conducted by the city attorney of such city, town or village, or by his deputies; but the county attorney of the county in which said city, town or village is situated may, if he so desires, also represent the State of Texas in such prosecutions, but in all such cases the said county attorney shall not be entitled to receive any fees or other compensation

whatever for said services, and in no case shall the said county attorney have power to dismiss such prosecution pending in said court, unless for reasons filed and approved by the recorder of said court."

You are, therefore, advised that if the county attorney sees proper he has the power under this section of the act to appear and prosecute cases under the State law filed in the recorder's court but he is not entitled to any compensation therefor, and whatever fees may be charged against the defendant on conviction for the prosecution of a case legally goes to the city attorney.

Yours truly,

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JUSTICE OF PEACE—CITY MARSHAL—PEACE OFFICER—  
COUNTY CLERK.

Examining trials not authorized in misdemeanor cases.

City marshal can not execute process in justice court and receive compensation therefor, unless process directed to him.

Peace officer not entitled to compensation for unnecessarily detaining defendant before or after issuance of warrant for his arrest.

In all cases transferred to the county court, by appeal or otherwise, the court should disregard bill of cost unless itemized—county clerk not guilty of extortion if excess costs were collected for another officer.

AUSTIN, TEXAS, November 26, 1907.

*Hon. Thos. A. Caufield, County Clerk, Waco, Texas.*

Dear Sir: Your letter of the 25th inst. was received by me today, and your letter of the 18th inst., directed to this department has today been transferred to me for reply.

In your letter of the 18th inst. you ask the following questions:

"1. Can a justice of the peace in a misdemeanor case on his own motion, and without any application, formal or otherwise, on the part of the defendant, proceed to hold an examining trial and collect fees therefor?

"2. Can a city marshal, as in this case, execute the process of the justice court and compel the collection of his fees by the county clerk?

"3. Can a peace officer detain a defendant, either before or after the issuance of a warrant for his arrest, unnecessarily and charge a fee for his care while in restraint?

"4. Under the law of this State, particularly Chapter 94 of the Thirtieth Legislature, are a justice of the peace, a constable or sheriff entitled to fees in an examining trial in all misdemeanor cases, whether such trial is had or not, when such case is returnable to the county court, complaint having been filed in the justice court?

"5. Should the county clerk in all cases demand an itemized bill of costs? Can he tax costs unless they are itemized by the officer claiming them?

"6. Is the rendition by an officer of the amount of his costs binding on the clerk, or is it the duty of the clerk to scrutinize

all returns of justices of the peace, as well as peace officers and censor such returns as show obvious error?

“7. If the county clerk, or his deputy, tax and collect costs which he knows to be excessive, such costs being those of the justice of the peace or a peace officer, would such clerk or deputy be guilty of extortion under Articles 256, 257 of the Penal Code?”

To which I wish to reply as follows:

1. A justice of the peace is not authorized by law to hold an examining trial on a misdemeanor charge made before him, unless demand is made by defendant that such trial be had. If the defendant does not make such demand, then the law does not authorize such examining trial, and if one should be held, except on demand of the defendant, the officers so holding such trial would not be entitled to any fees therefor.

2. A city marshal executing the process of a justice of the peace in this character of case would not be any more entitled to his costs than a justice of the peace, as he is charged by law with notice of the illegal action of the justice of the peace in holding such trial.

I also call your attention to the further fact that process from a justice court is almost invariably directed to the sheriff or any constable of the county, but is usually served by the constable. Such process the city marshal would not be authorized to serve. The city marshal can serve process issued by the justice if such process is directed to the marshal. (C. C. P., 940, Subdiv. 2.)

3. A peace officer detaining a defendant unnecessarily before or after the issuance of the warrant for his arrest is not entitled to compensation for his care during such unnecessary restraint.

4. Under the law, it is not necessary to hold an examining trial in a misdemeanor case unless demand is made by the defendant that such trial be had. Chapter 94, Acts of the Thirtieth Legislature, does not change the rule heretofore existing. Prior to said act there was no statute authorizing fees in examining trials in misdemeanor cases held by justices of the peace, but that statute was expressly enacted to give justices of the peace the right to charge fees in holding examining trials, but there is no provision of that act requiring that examining trials be held, or making examining trials in misdemeanor cases more necessary than before the enactment of such law, and before the enactment of such law the Court of Criminal Appeals held that examining trials were not legally necessary. (Ex Parte Way, 89 S. W. Rep., 1075.)

5. In my opinion the county clerk in all cases transferred to him, either by appeal or otherwise, should wholly disregard a bill of costs made in the court from which the transfer of the case was made, unless such bill of costs was itemized. In my opinion, the law does not authorize the collection of any bill of costs except where the same is itemized. (C. C. P., Art. 1074.)

6. In my opinion, the rendition by an officer of the amount of his costs is not binding on the clerk of the court to which the case may be transferred, except possibly so far as the facts with reference to the performance of the service for which the cost is claimed

is wholly unknown to the clerk. Of course, where it is purely a question of fact, the certificate of the officer certifying to such bill of costs, if the same is itemized, should be recorded by the county clerk, and unless the same is called in question by motion from the defendant, and such motion acted on by the court, the clerk should allow the cost as certified to. Where any controversy should arise between the clerk and the officers claiming the costs, same should be submitted to the court, and an order entered containing the decision of the court upon the question.

7. I do not think that the county clerk could be charged with extortion if he, or his deputy, should collect costs of other officers which the county clerk or his deputy know to be unauthorized by law; provided, such cost was not for such clerk as, in my opinion, Penal Code, Article 256, applies to costs which an officer collects for himself and not to costs which one officer may collect on the certificate of some other officer and for such other officer.

Yours truly,

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FORT WORTH COUNTRY CLUB—BASKIN-McGREGOR  
LIQUOR LAW.

Dispensing of liquors to members of club held not to violate said law,  
and club not subject to tax as retail liquor dealer.

AUSTIN, TEXAS, November 29, 1907.

*Hon. R. E. L. Roy, County Attorney, Fort Worth, Texas.*

Dear Sir: We are in receipt of your letter of the 12th inst., in which you say:

“The Ft. Worth Country Club is incorporated under the laws of Texas and organized for social purposes and innocent sports and recreation, and none but its members and guests invited by them under certain restrictions and limitations are permitted to enjoy its privileges. It is supported by payment of dues by its members and is not a money-making institution, but, on the contrary, has found it difficult to meet its current expenses with its revenues. It has a golf course and polo field, keeping a kitchen for the furnishing of food to its members and guests, and is patronized and kept up by business men of the city of Fort Worth and Arlington Heights, who, with their wives and female relatives, make it a resort for recreation and social functions. The club has an apartment which may be properly termed a grille-room or buffet, where a servant of the club employed by the manager thereof, who is himself under the control and employment of the directors of the club, serves to members of the club spirituous and malt liquors in quantities less than a gallon, for which liquor so served tickets or slips are signed by the members receiving the same and delivered to the servant, who is and has been since the organization of the club a negro boy, and these slips or tickets are by him turned in to the manager and the amount of indebtedness which each represents is charged against the house account of the member sign-

ing the ticket and is collected from him thereafter by the manager. Occasionally cash is paid to the servant. The amounts charged for drinks vary with the character and quality of the liquor used and the funds derived from this source go into the general funds of the club and the liquors are purchased from the general funds of the club and all the revenues from every source are used for the general support and maintenance of the club. The club is not engaged in the business of selling liquors, nor is selling liquors its occupation, nor has it any business or occupation in a legal sense, and the amount of liquor sold and the amount of money derived from this source represents only a small portion of the revenues of the club."

You desire to know whether under the above facts the Ft. Worth Country Club is subject to the license tax imposed by the Baskin-McGregor act. In our opinion, it is not, provided, of course, it is a *bona fide* club, organized and maintained for the purposes named in its charter and not as a mere device resorted to as a means of evading the law, which is not a question of law, but of fact.

Section 1 of the act under consideration provides that there shall be collected from every person, firm, corporation or association of persons selling spirituous, vinous or malt liquors \* \* \* in this State \* \* \* an annual occupation tax of three hundred and seventy-five dollars on each separate establishment.

Section 4 provides that no person shall directly or indirectly sell spirituous or vinous liquors capable of producing intoxication in quantities of one gallon or less without taking out a license as a retail liquor dealer.

Section 7 provides that no retail liquor dealer shall carry on said business at more than one place at the same time under the same license.

Section 8 makes it unlawful for any person having a license as a retail liquor dealer to permit a minor to enter and remain in his place of business.

Section 9 provides that any person desiring a license as a retail liquor dealer shall make an application to the Comptroller of Public Accounts for a permit to apply for a license to engage in such business.

Section 15 provides that any person or firm selling spirituous, vinous or malt liquors to be drunk on the premises shall keep an open, quiet and orderly house or place for the sale of such liquors.

Section 23 provides that no license shall be granted any person as a retail liquor dealer who shall have carried on any such business after the expiration of his license previously issued.

It is evident from the provisions of the statute above quoted that it was the intention of the Legislature to impose the occupation tax provided for by the act upon the selling of liquors as a *business*. There is no doubt but that the distribution of liquors by the Ft. Worth Country Club to its members is selling in the ordinary sense of the term. (*Kravek vs. State*, 41 S. W. Rep., 612.) But the decisions of the courts of this State and also of many other States are to the effect that for the purposes of a statute requiring the payment of a tax for the business or occupation of selling liquors the term "*selling*," as used in such laws, must be construed to mean *selling*

as a business or occupation. (See *Koenig vs. State*, 33 Texas Crim. App., 375; *State vs. Austin Club*, 89 Texas, 20.)

The case of *Koenig vs. State*, supra, contains an exhaustive review of the authorities, and as we think said case is very much in point here, we quote it at length from the opinion of Judge Hurt in that case:

“A serious and much-vexed question arises on the facts and the charge of the court in this case. The facts are undisputed. Appellant played a game of cards in the club room of a building known as ‘Turner Hall,’ situated in Cuero, on the date named in the indictment. The building is occupied and controlled by the Cuero German Turnverein, a private corporation chartered under the general laws of the State: By the terms of its charter, the purposes of the association are expressed to be: ‘Mental, moral, and physical improvement of the stockholders, their families and others; to promote generally the diffusion of the knowledge of literature, the arts and sciences, and to encourage social and friendly intercourse.’ Under the by-laws members are elected by ballot. Members have a right, with their families, to visit the hall, take part in all festivities of the association, and introduce strangers as guests. The name and residence of a guest must be entered on the guest book, with the name of the member introducing him, who will be held responsible for his good conduct. A person who has sojourned in Cuero thirty days can not be introduced as a guest unless he has made application for membership. The fee for membership is \$10. In addition, an assessment of 50 cents per month from each member is levied to meet the expenses of the association and provide for the comfort and pleasure of the members. The employees in charge of the bar, or the messenger of the same, are positively forbidden to receive any money from others than members. The management of the hall, bar and grounds is under the director elected for that purpose. The capital stock of the association is fixed at \$4000, divided into \$10 shares. Such are the purposes and management of the association, as exhibited by its charter and by-laws. The building we have mentioned consists of a large hall, a stage and a club room in the basement. The hall is used for theatricals, private parties, dancing, conventions and lectures. The best people of the community go there to listen and attend public and private dances and ice cream festivals. Hall rent is charged to professional troupes, and nominal rent to private parties. The theatricals and conventions and the hall rent are the chief income of the association. The club room contains all the fixtures and appliances of a first-class broom—counterfi glasses, ice-chest, billiard table, etc. A supply of spirituous, vinous and malt liquors for the exclusive use of the members is kept, and sold only to members by the drink, by the steward, at 5 and 10 cents per drink, which is either paid in money or charged to the member and collected at the end of the month. The money thus paid by members is paid by the steward into the general fund of the association, but is chiefly used in replenishing the stock of liquors. The bar is run at a loss, it not being the intention to run the bar for profit or to conduct the same as a business or calling, but simply for the convenience of members. The steward has strict instructions from the directors not to

sell liquors to any strangers for any consideration. Such instructions are rigidly observed, but some times members buy liquors at the bar and take it away on a waiter, and the steward does not know what becomes of the liquor; and it may thus happen that at times strangers get liquors, but they do not buy or purchase them. The liquors are principally sold to members on Sunday, and at night on week days. More is sold on Sunday than on any other day. The billiard table is used only by members, and no fees are charged, and no betting thereon. Other tables are in the club room, and are used by members only for playing social games of cards, and no table fees are charged. The club room is also supplied with the papers, periodicals and magazines of the day, and some members resort there to read and converse only. The room is orderly and quiet, and is visited by members, who are the leading and best people of Cuero. The windows of the building are stained, and no one on the outside can see what is going on inside. The doors to the club are generally closed during the performances or public meetings, and it is a private place, inasmuch as no stranger is admitted unless he lives outside the city and is introduced as a guest of a member, and then such stranger can not buy any liquor at the bar of the club. To the east of the building is a lawn, on which the association has a gymnasium. The lawn is often used for church fairs and festivals. During these festivals the doors of the club room are kept closed, and no one except a member has access to it. But the members do not stop playing cards in the club room while the festivals are going on. There are 75 or 100 members. The association pays no occupation tax or liquor tax, either to the State, county or city, but does pay the United States revenue tax as liquor dealers. The liquors and bar fixtures are all the property of the association. The association has been conducted as above since 1879.

“This is the uncontradicted testimony of the steward. The secretary of the association corroborated in every respect the testimony of the steward, and further testified, that the association was not organized to evade the license laws of the State. It is a social club, whose members may indulge in a social glass without resort to bar-rooms. The liquors are not kept for the purpose of obtaining revenue, and the payments made by members are put into the general fund. The so-called ‘bar’ is run at an absolute loss, the loss for the past year being about \$500. The members carry out, in letter and spirit, the object of the corporation as stated in the charter.

“These being the facts, the court charges the jury, that it ‘makes no difference, under the law, whether the liquors were retailed in a private club room, in an open saloon, or in a private residence, and regardless of the persons to whom or how the spirituous liquors were sold—whether to members only, or to the public generally.’ And again, ‘if you believe that the Cuero German Turnverein is an incorporated institution under the laws of this State, and in that case, if so, it becomes an artificial person, and can own and hold, buy and sell, property as individuals; and if you further believe \* \* \* that such Turnverein kept and dispensed spirituous liquors, through an agent, janitor, or a steward, to individual persons, and that said liquors were paid for in money or charged to the in-



dividuals, then the acts of the body corporate, through its agent, janitor, or steward, and the individual, in dispensing and obtaining the liquors, constitute a sale and purchase under our law, regardless of whether the individual is a member of the incorporated body or not.' The charge was excepted to, on the ground that it was erroneous in defining a house for retailing spirituous liquors. The effect of the court's charge was to tell the jury to convict appellant on the facts in evidence, and the question for us to determine is, do the acts show a violation of the statute? The playing at a game of cards being an admitted fact, the question is narrowed to this: Was the club room in question a house for retailing spirituous liquors within the meaning of Article 355, Penal Code? That article reads: 'If any person shall play at any game with cards at any house for retailing spirituous liquors, storehouse, tavern, inn, or any other public house, or in any street, highway, or other public place, \* \* \* he shall be fined.' \* \* \* The next succeeding article is explanatory, and reads: 'All houses commonly known as public, and all gaming houses, are included within the meaning of the preceding article. Any room attached to such public house and commonly used for gaming is also included, whether the same be kept closed or open. A private room of an inn or tavern is not within the meaning of public places, unless such room is commonly used for gaming; nor is a private business office or a private residence to be construed as within the meaning of the public house or place; provided, said private residence shall not be a house for retailing spirituous liquors.'

"We have no decision in Texas upon the question, nor do we find any decisions of other States directly in point. There is a line of decisions, however, which serves to illustrate and throw light upon the subject. In Maryland the statute (Laws 1866, Chapter 66) provides, that 'No person in this State shall sell, dispose of \* \* \* any spirituous liquors \* \* \* or beer \* \* \* on the Sabbath day' \* \* \* and a penalty was fixed. The officers of a corporation known as the Concordia were indicted for selling beer on Sunday. The purpose and management of the Concordia were in all respects the same as that of the Turnverein in this case. It was admitted that one Springer, a member, at the time and place alleged, called for a glass of beer in the usual way, was served by the steward, drank it then and there, and paid 5 cents therefor, that being the price fixed by the corporation. The Supreme Court of that State say: 'We are all of the opinion that transaction was not a sale of beer to Springer within the intent and meaning of the statute. \* \* \* The act has no application to a case like the present.' 'The license laws which forbid the sale or barter of spirituous or fermented liquors without a license have never been construed as applicable to a social club. \* \* \* We think it clear that no license is required, for the reason that such a transaction is not a sale within the meaning of the license laws. Such a transaction is not a barter or sale in the way of trade.' *Seim vs. The State*, 55 Md. 566.

"In Massachusetts the defendant was charged with keeping and maintaining a common nuisance, to-wit: 'a tenement used for the

illegal keeping and illegal sale of intoxicating liquors.' The Supreme Court said: 'If the liquors really belonged to the members of the club, and had been previously purchased by them or on their account of some person other than the defendant, and if he merely kept the liquors for them, and to be divided among them according to a previously arranged system, these facts would not justify the jury in finding that he kept and maintained a nuisance within the meaning of the statute under which he is indicted. There would be neither selling nor keeping for sale.' 'If the whole arrangement was a mere evasion, and the substance of the transaction was a lending of money to the defendant, that he might buy intoxicating liquors to be afterwards sold and charged to the associates, or if he was authorized to sell, or did sell, or keep any of the liquors, with the intent to sell to any persons not members of the club, he might well be convicted. This, however, would be a question not of law, but of fact.' *The Commonwealth vs. Smith*, 102 Mass., 147.

'In the case of *The Commonwealth vs. Pomphret*, the complaint was for keeping liquors with intent unlawfully to sell the same. The trial judge charged as follows: 'If the association of persons, of whom defendant was one, owned a quantity of liquors, which they kept under an arrangement to furnish them in such quantities as might be required, to be drunk on the premises, to such members of the association as should call for them, in return for checks which represented certain values, and which were obtained from the defendant, as a steward of the association, and were paid for, when obtained, at the price they purported to represent, and defendant was one of the persons keeping these liquors for said purpose, and was personally in charge of them, furnishing them in return for said checks, the jury may find that said liquors were kept by him for unlawful sale.' The Supreme Court said: 'One inquiry always is, whether the organization is bona fide a club with limited membership, into which admission can not be obtained by any person at his pleasure, and in which the property is actually owned in common. \* \* \* *Graff vs. Evans*, 8 Q. B., Div. 373, was decided on the ground that there was no transfer of a special interest, as all members of a club were owners in common, and that as the club was a bona fide club, the furnishing of liquors to a member was not a sale within the meaning of the English licensing act. \* \* \* The ruling and instruction in this case seemed to us to assume that this was a bona fide club, that the liquors were owned in common by the members, that they were furnished only to members, and that they were kept by the defendant as one of the members and as steward of the association. It does not appear in the exceptions in what manner new members were admitted, except that they paid an admission fee of \$1, but we can not assume that any person could join the association at his pleasure; and the ruling and the instructions are not put upon the ground that there was evidence that this was an association open to anybody at a price. On the assumptions upon which we understand the instructions to proceed, we think that, under the decision in *The Commonwealth vs. Smith*, it was not competent for the jury to find the defendant guilty. 137 Mass., 564.

“In a later case in the same State, the instruction of the trial judge was to the effect that if the club was a bona fide club, and the liquors owned in common by the members, and the members, on receiving liquors, gave money in return, it would not be a sale within the meaning of the statute; but if this is a mere device to cheat the government out of its license fees, and prevent the due execution of the law, it is not a protection, and the defendant does not act with impunity. The Supreme Court held that the charge correctly presented the law. *The Commonwealth vs. Equig*, 145 Mass., 119.

“In a case before the Supreme Court of New York, the principles enunciated in the foregoing cases were approved, and the cases, with many others to the same effect, were cited. However, in the case before the court, the fact did not bring it within the rule. The ball given by the club was not confined to the members, in as much as the tickets were sold to any one who would buy, and the liquors were indiscriminately sold to persons admitted and desiring them. ‘The Academy of Music,’ said the court, ‘ceased to be a private club house for the period during which the ball continued. The entrance to which, and privileges therein, were not confined to its members and their guests in the proper and legal sense of that term. *Circle Francais de L’Harmonie vs. French*, 44 Hun., 123.

“In Virginia a statute (Acts 1889-90, p. 242, et seq.), provided ‘no person, corporation, company, firm, partnership, or association, shall, within the limits of this State, engage in the business, sell, or offer to sell, ardent spirits,’ without first having obtained a license. It was further provided, that ‘any person, club, or corporation desiring to carry on the business of a retail liquor merchant and also that of a bar room, shall obtain a separate license for each.’ The Piedmont Club was indicted for selling liquor without license. It was conceded that it was a bona fide club, organized for the purposes named in its charter, and not as a mere device resorted to as a means of evading the law. None but members or invited guests are entitled to the privileges of the club, and no person not a member is permitted to pay for either food or drink. The money received for the liquors goes into the general fund, which is again used to replenish the stock. No profit is made on the liquor. The Supreme Court said: ‘What is complained of as an unlawful selling is nothing more than an equitable mode by which the cost of the liquor used by members is divided among them in proportion to the quantity that each one uses. \* \* \* If there can be said to have been, in the strictest or most technical sense, a sale at all, it was not such a sale as the statute contemplates. The defendant club, in dispensing liquors to or at the expense of its members, was not engaged in carrying on the business of selling liquors.’ *Piedmont Club vs. The Commonwealth*, 12 So. E. Rep., 963. In a recent case the Supreme Court of South Carolina reviewed the above cases, and approved them. *The State vs. McMaster*, 14 So. E. Rep., 290.

“To the same effect are the cases of *Tennessee Club vs. Dwyer*, 11 Lea, 452; *Barden vs. Montana Club*, 25 Pacific Reporter, 1042. From these cases the principle is deducible that the distribution of

liquors by a bona fide club among its members is not a sale, within the inhibition of a liquor law, even though the person receiving the liquor give money in return for it. It is otherwise, however, where such club is simply a device resorted to as a means of evading the statute. See *McMaster's case*, supra; Amer. & Eng. Ency. of Law, title, 'Intoxicating Liquor.'

"We are of the opinion that, upon authority and reason, it must be held, under the facts of the present case, the transaction was not a sale of the liquor in the way of trade, and that neither the association, its members, nor its steward were engaged in the occupation of selling liquors. If this be true, was the club room a place for retailing liquors? 'To retail,' in this connection must mean 'to sell in small quantities.' 'A house for retailing' must mean 'a house where the liquors are sold in small quantities in the way of trade.' Again, our statutes regulating the sale of spirituous liquors recognizes the distinction between selling liquors at retail and otherwise as an occupation. It is very clear, both from the decisions we have cited and our statutes, that the club, its members, or steward, are not engaged in the occupation of selling liquors in quantities less than one quart. In the case made by the facts, it is equally clear that no question of evasion of the laws, or of a device to conceal the real objects, purposes and acts of the association arises in this case. The dispensing of liquors to the members is but incidental, and for the purpose of adding to the pleasure and comfort of the members."

The above case was followed and approved in the case of *State vs. Austin Club*, in which it was held that the license tax imposed upon persons engaged or engaging in the business of selling spirituous liquors does not apply to a club organized under the general incorporation laws for the encouragement of social intercourse among its members, although spirituous liquors were bought and dispensed without profit to its members and that the State could not recover a liquor license against such club.

In *State vs. St. Louis Club*, 26 L. R. A., 573, it was held that the distribution of wines or other liquors among the members of a social club, which is a bona fide organization with limited membership, admission to which is only on a vote of the governing board and with common ownership of property, is not a sale of liquor within the meaning of the Missouri Dram Shop Act. This is a recent case and the opinion contained is a review of all other decisions upon the subject.

In the case of *People vs. Adelphi Club*, 149 N. Y., page 5, it was held that the distribution of intoxicating liquors to members of a social club upon the written order of a member at a price fixed by the officers of the club designed to cover purchase price and disbursements in serving where the club was incorporated for a legitimate purpose, to which the furnishing of liquors to its members is merely incidental, does not constitute a sale within the meaning of the statute prohibiting sales of such liquors without a license.

In the case of *Klein vs. Livingston Club*, 34 L. R. A., 94, it was held that the distribution of intoxicating liquors by an incorporated

club to its members without any profit to the club, but on payment by each member for what he receives in the same way as he pays for any food or drink obtained there, does not constitute a sale within the meaning of the Pennsylvania Liquor License Act.

The Supreme Court of Montana holds that a social club is not subject to a license tax on "all persons who deal in a sale, or dispose of" intoxicating liquors, by reason of keeping a bar and furnishing such liquors to its members, where they are not sold at a profit and the club is not a device for evading the laws as to the sale of intoxicating liquors. (See *Burden vs. Montana Club*, 11 L. R. A., 593.)

Upon the whole we think the intent must govern. On the one hand, if the object of the organization is merely to provide the members with a convenient method of obtaining a drink whenever they desire it, or if the form of membership is no more than a pretense, so that any person, without discrimination, can procure liquor by signing his name in a book or buying a ticket or a slip, thus enabling the proprietor to conduct an illicit traffic, then it falls within the terms of the law. But on the other hand, if the club is organized and *conducted in good faith*, with a limited and selected membership, really owning its property in common, and formed for the enjoyment of golf or other innocent sports, or for social, literary, artistic or other purposes, to which the furnishing of liquor to its members would be merely incidental, in the same way and to the same extent that the supplying of dinners and daily papers might be, then it can not be considered as within the purpose or letter of the law.

This rule is developed with much clearness and force in an opinion by the Supreme Court of Massachusetts, as follows:

"It is well known that clubs exist which limit the number of the members and select them with great care, which own considerable property in common, and in which the furnishing of food and drink to the members for money is but one of the many conveniences which the members enjoy. If a club were really formed solely or mainly for the purpose of furnishing intoxicating liquors to its members, and any person could become a member by purchasing tickets, which would entitle the holder to receive such intoxicating liquors as he called for, upon a valuation determined by the club, the organization itself might show that it was the intention to sell intoxicating liquors to any person who offered to buy, and the sale of what might be called a temporary membership in the club, with a sale of the liquors, would not substantially change the character of the transaction. One inquiry always is, whether the organization is bona fide a club with limited membership, into which admission can not be obtained by any person at his pleasure, and in which the property is actually owned in common, with the mutual rights and obligations which belong to such common ownership, under the constitution and rules of the club, or whether, either the form of a club has been adopted for other purposes, with the intention and understanding that the mutual rights and obligations of the members shall not be such as the organization purports to create,

or a mere name has been assumed without any real organization behind it." (Commonwealth vs. Pomphret, 137 Mass., 564; 50 Amer. Rep., 340.)

Truly yours,

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COMMISSIONERS COURT—COUNTY FUNDS—TRANSFER  
FROM ONE FUND TO ANOTHER—WHETHER SAME  
CONSTITUTES A LOAN.

AUSTIN, TEXAS, November 30, 1907.

*Judge Hiram F. Lively, County Judge of Dallas County, Dallas,  
Texas.*

Dear Sir: We have your letter of the 27th inst., in which you say:

"Some time ago the commissioners court of this county passed an order transferring or borrowing money from the jury fund and placing same in the general fund and further transferring from the general fund to the district road and bridge fund of the county proportionately except as to District No. 2, which had already received \$1000 more from the general fund than the other districts, a copy of which order is herewith enclosed for your inspection.

"There is about \$46,000 now in the jury fund; allowing a liberal estimate for the expense of the jury under the new law, our judgment is that our juries will not cost us in excess of \$36,000, and beyond question we have an excess in the jury fund now over and above what will be necessary to pay jurors for the coming year.

"Section 18 of the Dallas County road law provides that the commissioners court shall not draw in excess of 25 per cent of the uncollected revenues for road and bridge purposes for any fiscal year or create debts against any road and bridge funds in excess of any such amount.

"After the court had passed the order transferring the funds as a loan to the general fund and then transferring to the district road and bridge funds the auditor declined to make such transfer on the ground that it was creating a debt against such road and bridge fund in excess of the 25 per cent; he claiming that transfer by borrow from the jury fund to the general fund and then transferring to the road and bridge fund was merely a loan and a borrow from the jury fund to the district road and bridge fund and for that reason he declined to make the transfer, as ordered in the copy of the order herewith sent you.

"The contention of the court in this connection was that under the law the court had the authority, there being an excess in the jury fund over and above what is now necessary to pay the juries for the coming year, to transfer such fund to any other fund that the court saw fit. We made the borrow from the jury fund to the general fund so that in the event of a possible deficiency in the jury fund, which we not think could arise, that we would trans-

fer from the general fund back to the jury fund, and could avoid any possible deficiency in such fund; there being a great necessity for funds in the district road and bridge fund.

"We made the transfer from the general fund in such order direct to the district road and bridge fund, believing that under the general law we had authority to do so.

"The transfer to the road and bridge fund is not and was not contemplated to be a loan to such fund, but an absolute transfer. We were under the opinion and are now of the same opinion, that under the law we had the right.

"We also send you a copy of the communication of the auditor to the court in reference to the matter.

"As a difference has arisen between the auditor and the court, we have each decided to submit the matter to you for your ruling in the matter, and will greatly appreciate an early reply."

The attached copy of the order of the commissioners court is as follows:

"It is ordered by the court that there be transferred from the jury fund to the general fund a loan from the said jury fund the sum of \$11,000, there being a large surplus in said jury fund, and the auditor and country treasurer are directed to make such transfer.

"It is further ordered that there be transferred from the general fund to the district road and bridge funds Nos. 1, 2, 3 and 4, in the following sums: To district and bridge fund No. 1, 3 and 4, \$3000 each, and to district road and bridge fund No. 2, \$2000, and the auditor and county treasurer are directed to make such transfers."

From the attached copy of the communication from the county auditor to the commissioners court I quote the following:

"The clerk of the court has just handed me your order directing the treasurer and auditor to transfer from the jury fund to the general fund, as a loan, eleven thousand dollars, and from the general fund to district road and bridge funds Nos. 1, 3 and 4, three thousand dollars each, and two thousand dollars to district road and bridge fund No. 2, aggregating eleven thousand dollars. As there has been transferred from the general fund to the several road and bridge funds, during the past year, something like \$45,000, and there is still a little more than \$12,000 remaining, after paying all expenses up to the present time, including about \$13,000 for a new tile flooring, it is quite evident that the general fund does not need this loan, but is only used as a medium of transfer, the real borrowers being the district road and bridge funds which are in this way creating a debt largely in excess of the provisions of Section 18 of the Dallas County road law, which is as follows: 'Except as provided in this act it shall be unlawful for said commissioners court to issue warrants of the county or to otherwise create debts against the county, in connection with its roads and bridges, in excess of 25 per cent of the uncollected road and bridge taxes of the county for any fiscal year'. The uncollected taxes for the fiscal year 1906 amount approximately to \$25,000, of which 15 cents on the \$100 is for road and bridge purposes, and amounts

to \$3750, therefore, under the above provisions, the several districts are permitted to go into debt, in the aggregate, for a sum not exceeding this amount. Taking into consideration the expenditures in this month, the fund is now in debt further than is permitted under the above provisions, and to further create a debt of \$11,000 by borrowing from the jury fund, especially in view of the fact that the general fund is now due the jury fund about \$15,000 borrowed some two years ago, would, in my opinion, be altogether inconsistent with the law."

In considering this matter I have been impressed with the idea that the differences of opinion which exist between the commissioners court, including yourself, upon the one hand, and the county auditor upon the other hand, results from a disagreement upon a question of fact, viz., whether or not the proposed transfer of \$11,000 to the several road and bridge funds constitutes a mere loss to those funds, the county auditor taking the affirmative of that proposition, and the commissioners court, including yourself, the negative.

Of course, this department can not undertake to pass upon questions of fact, and you do not expect or desire us to do so.

We note that while the order of the commissioners court transferring money from the jury fund to the general fund expressly declares that the transfer is made as a loan from the jury fund to the general fund, there is no similar provision in the order transferring the money from the general fund to the road and bridge funds, and this of itself indicates upon the face of the order that it was the purpose of the commissioners court to treat the two transfers differently making the transfer from the jury fund to the general fund a loan, but making the transfer from the general fund to the road and bridge funds absolute.

In support of the presumption that such was the purpose of the commissioners court, is your positive statement that "the transfer to the road and bridge fund is not and was not contemplated to be a loan to such fund, but an absolute transfer."

Upon the whole, I must presume that the transfer to the road and bridge funds was intended by the commissioners court to be, and is in law, an absolute transfer and not a loan, and we think that the county auditor should so consider and treat the order of transfer.

Now, as I understand the county auditor's objection to the proposed order of transfer, it is that, by reason of what he has been considering and treating as a loan to it, the road and bridge fund of the county will become indebted in an amount "in excess of 25 per cent of the uncollected road and bridge taxes of the county" for the current fiscal year, in violation of the provisions of Section 18 of the Dallas County road law of 1905; but this apprehension seems groundless in view of the conclusion which we have already reached to the effect that the proposed transfer to the road and bridge fund is not a loan and does not create any indebtedness whatever against that fund. Inasmuch as the proposed transfer to the road and bridge fund creates against that fund, or against the county, no indebtedness whatever, such transfer is not in vio-



lation of the above-mentioned statutory provisions which make it unlawful for the commissioners court to issue warrants of the county or to otherwise create debts against the county in connection with its road and bridges in excess of 25 per cent of the uncollected road and bridge taxes of the county for any fiscal year.

It seems to me, therefore, that the real question involved in this controversy is not as to a proper construction of the above-quoted Section 18 of the Dallas County road law, but whether under general law the commissioners court has the authority to transfer money from one fund to another in manner and form as shown in its above quoted order of transfer. That question must be answered in the light of the following statutes:

Revised Statutes, Article 852. "Claims against a county shall be registered in three classes, as follows:

- "1. All jury scrip and scrip issued for feeding jurors.
- "2. All scrip issued under the provisions of the road law or for work done on roads and bridges.
- "3. All the general indebtedness of the county, including feeding and guarding prisoners, and paupers' claims.

"Art. 853. Each claim shall be entered in the register, stating the class to which it belongs, the name of the payee, the amount, the date of the claim, the date of registration, the number of such claim, by what authority issued, and for what service the same was issued.

"Art. 857. The funds received by the county treasurer shall be classed as follows:

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

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

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

"Art. 859. The commissioners court shall have power by an order to that effect to transfer the money in hand from one fund to another, as in its judgment is deemed necessary and proper, except that the funds which belong to class first shall never be diverted from the payment of the claims to which the same are appropriated by Article 857, unless there is an excess of such funds."

From the last quoted article you will note that as a condition precedent to the legal transfer of money from the jury fund to the general fund there must be in fact an excess of money in the jury fund, and in making this proposed transfer the commissioners court takes the risk of having judgments rendered against the county to the extent of the money so transferred from the jury fund and in favor of the holders of claims against the jury fund

if it shall be found that the amount left in that fund is insufficient. (Clarke & Courts vs. San Jacinto County, 45 S. W. Rep., 315.)

I must assume that you are correct in stating that "beyond question we have an excess in the jury fund now over and above what will be necessary to pay jurors for the coming year," and upon that assumption I conclude that the commissioners court had authority to order said transfer from the jury fund to the general fund.

I am further of the opinion that Article 859, above quoted, authorizes the proposed transfer as an absolute transfer from the general fund to the road and bridge funds.

My conclusion, therefore, is that both of the above quoted orders of the commissioners court are within the discretion and authority of that court, and are in all respects legal and valid, and should accordingly be observed and obeyed.

Since your first letter on this subject reached me, I have been compelled to make several trips out of the city, and while here have been very busy with court work, hence the delay in reply.

Yours truly,

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CITY CORPORATION COURT—CITY RECORDER.

Council has authority to abolish office of city recorder.

AUSTIN, TEXAS, December 5, 1907.

*Hon. W. K. Sanders, City Recorder, Belton, Texas.*

Dear Sir: In your letter of the 30th ult. you make the following request:

"In this connection I would be glad to have your opinion as to the power of the city council of a town or city incorporated under the general laws to abolish the office of recorder of a corporation court, which court was created by an act of the Legislature of 1899, and which act is known as the 'Corporation Court Act'."

To which inquiry I wish to reply as an additional opinion to that rendered to Mayor D. E. Patterson and as supplementary thereto, and call your attention to Section 3 of the Corporation Court Act of 1899, which reads as follows:

"Such court shall be presided over by a judge to be known as the recorder of such court in such city, town or village, who, in cities, towns or villages incorporated under special charter or charters, shall be elected or appointed in the manner and under the respective provisions of the charter now in force concerning the election or appointment of the magistrate to preside over the municipal court in such city, town or village, and all such provisions are hereby made applicable to the recorder herein provided for, and in cities, towns and villages not incorporated under special charter, such recorder shall be elected by the qualified voters of such city, town or village in the same manner as the mayor of such city, town or village, and whose term of office shall be the same

as such mayor; provided that in such cities, towns and villages, not incorporated and acting under special charter the mayor of such city, town or village shall be ex-officio recorder of such court, and shall act as such unless the city council or board of aldermen of such city, town or village shall by ordinance authorize the election of a recorder."

I want to call you attention to the latter part of Section 4 of the act, which reads as follows:

"Provided further, that the board of aldermen may provide by ordinance for the mayor to act as ex-officio recorder in all cities and towns not operating under special charter."

You will observe from the proviso to Section 3 of the act the mayor of a city or town incorporated under the general laws of the State is ex-officio recorder of the city court of such city or town, unless the board of aldermen or city council see proper by ordinance to provide for the election of a city recorder. If such provisions is not made by the city council, then the mayor of the city would be ex-officio recorder of such city or town, but if the office of city recorder is provided for by the city council by ordinance the city council would have a right to repeal that ordinance at any time they might see proper under the authorities quoted in the opinion to Mr. Patterson.

The proviso to Section 4 of the act expressly authorizes the city council or board of aldermen of cities and towns incorporated under the general laws to provide by ordinance that the mayor shall act as ex-officio city recorder.

You are, therefore, advised that the opinion rendered Mayor Patterson is a proper opinion in the construction of the corporation court act herein under consideration, and the city council of any city or town in the State, incorporated under the general laws, has the right and the legal power to abolish the office of city recorder at any time they may see proper.

Yours truly,

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#### SHERIFF AND TAX COLLECTOR—SURETIES OF—BOND OF.

Commissioners court can not create two offices where law only provides for one, and where sureties ask for relief from his bond as tax collector, he can not serve in the capacity of sheriff only; nor in the capacity of sheriff and tax collector until he files new bond as sheriff and tax collector.

AUSTIN, TEXAS, December 7, 1907.

*Hon. W. J. Arrington, County Judge, Appermont, Texas.*

"Dear Sir: In your letter of the 27th ult. you state the following:

"The sheriff of this county by virtue of his office also becomes the collector of the State and county taxes. His bondsmen on the collector's bond has seen fit to file with the commissioners court their application asking to be relieved from further liability on his bond as collector. The question that I want to know is this:

Should he fail to make another and satisfactory bond and file same with the commissioners court, as required by law, will such failure operate or bar him from still performing the duties of the sheriff's office and authorize the commissioners court to appoint some one to collect the taxes."

As I understand your letter, your county is a county with less than 10,000 population and that your sheriff under the Constitution and laws of the State is ex-officio tax collector of the county, and you desire to know if his bondsmen on his tax collector's bond should be relieved from their obligation and he should fail to make another bond, could he still retain the office of sheriff and allow your commissioners court to appoint some other person tax collector of the county. In other words, whether your commissioners court can make two offices where the Constitution and laws of the State provided for only one.

Article 8, Section 16 of the Constitution reads as follows:

"The sheriff of each county, in addition to his other duties, shall be the collector of taxes therefor, but in counties having 10,000 inhabitants, to be determined by the last preceding census of the United States, a collector of taxes shall be elected to hold office for two years and until his successor shall be elected and qualified."

Revised Statutes, Article 5156, reads as follows:

"In each county having less than 10,000 inhabitants the sheriff of such county shall be the collector of taxes, and shall have and exercise all the rights, powers and privileges, be subject to all the requirements and restrictions, and perform all the duties imposed by law upon collectors; and he shall also give the same bond required of the collector of taxes."

You will, therefore, observe from the constitutional provisions and article of the statute above quoted, that in counties of less than 10,000 population you can not create in the manner proposed or otherwise the office of tax collector independent of the office of sheriff. The office of sheriff and the office of tax collector are one and the same office in that class of counties. The sheriff is simply ex-officio tax collector of the county. If your commissioners court should select a tax collector for the county because the sheriff failed to give the tax collector's bond and the sheriff should continue to discharge the duties and hold the office of sheriff, you would have two offices created out of one. Your sheriff would be occupying one office and the person selected to collect the taxes would be occupying the other office. This is forbidden by the evident meaning of the Constitution and the statute herein referred to.

You are, therefore, advised that if the sheriff's bondsmen on his tax collector's bond are relieved from their obligation and the sheriff fails or refuses to execute a new bond satisfactory to the commissioners court, that he can not then discharge the duties of either sheriff or tax collector until such bond has been filed and approved.

Yours truly,

## ANTI-PASS LAW—CITY CHARTER—STREET RAILWAY COMPANIES—HALF-FARE TICKETS TO STUDENTS, ETC.

AUSTIN, TEXAS, December 11, 1907.

*Hon. James J. Collins, City Attorney, Dallas, Texas.*

Dear Sir: We have received and carefully considered your letter of the 4th instant, in which you say:

"For my official guidance as city attorney, I desire your construction and opinion as to the matter of street railways issuing and furnishing half-fare tickets to students in attendance upon schools. Questions have arisen in our city with regard to this matter which involves the consideration and construction of paragraph 8. Section 8, franchises, of Article 2 of the charter of the city of Dallas, page 20, the same being a special act passed by the Thirtieth Legislature; the provisions of an Act of the Twenty-eighth Legislature regulating fares of street railways in cities of forty thousand or more, acts of the Legislature of 1903, page 182, supplement to Sayles' Texas Civil Statutes of 1897 to 1904, pages 504, 505, also the Act of the Thirtieth Legislature prohibiting the issuance of free passes, etc., pages 93-98. In giving your opinion, I ask your consideration and attention to said provision of the city charter of the city of Dallas, and to said acts of the Legislature.

"The facts upon which the question arises are these: There are in our city several schools bearing the title of colleges, having curriculums or courses of study higher than the public high schools of this State, said curriculums or courses of study in said schools also embracing grades of study and instruction *not higher* than those of the *public high schools* of the State, and some even lower. In other words, these institutions have courses of instruction ranging from grades taught in common and high schools of the State to grades higher than those taught in the public high schools of this state, including in their range studies and grades of a modern university. Students not more than seventeen years of age in attendance upon such colleges and pursuing studies *not higher* than those of the public high schools of the State have applied to the street railway companies of this city for half-fare tickets under the Act of 1903, hereinbefore referred to. You will understand, the students are in attendance upon schools having and teaching higher grades than those of the public high schools of this State and also having grades of *lower studies*, but the students themselves so applying for such transportation are not pursuing studies in grades *higher* than those of the public high schools of the State.

"Questions:

"1. Are the street railway companies of this city required under the Act of 1903 to issue half-fare tickets to such students under the facts stated?

"2. Under the provisions of the city charter of the city of Dallas; to which you have been referred. and under the anti-free pass act of the Thirtieth Legislature, may such street railway companies lawfully issue such half-fare transportation to such students?

"I beg to request that you will give this matter your earliest practical consideration and attention."

Under the above facts, we think that both questions submitted by you should be answered in the affirmative.

Chapter CXVI, Acts of 1903, applies to all cities in this State having a population of forty thousand or over, and, therefore, includes the city of Dallas.

Section 2 of said act provides that:

"All such persons or corporations owning or operating street railways shall sell or provide for the sale of tickets in lots of twenty each, good for one trip over the line or lines owned or operated by such person or corporation, at and for one-half the regular fare or charge collected for the transportation of adult persons, to students not more than seventeen years of age in actual attendance upon any academic, public or private school of grades not higher than the grades of the public high schools of this State, situated within or adjacent to the town or city in which such street railway is located. Such tickets are required to be sold only upon the presentation by the student desiring to purchase the same of the written certificate of the principal of the school upon which he is in attendance, showing that he is not more than seventeen years of age, is in regular attendance upon such school, and is within the grades hereinbefore provided. Such tickets are not required to be sold to such students, and shall not be used except during the months of the year when such schools are in actual session, and such students shall be transported at half fare only upon the presentation of such tickets."

It is clear that under the provisions of the statute above quoted, street railway companies operating in the city of Dallas are required to issue half-fare tickets as provided therein, to students pursuing studies in grades not higher than the public high schools of this State, notwithstanding the schools upon which they are in attendance may have grades higher and lower than those of said public schools, provided said act has not been repealed. It is admitted that it has not been expressly repealed, but the question is, has it been repealed by implication, either by Section 8 of Article 2 of the charter of the city of Dallas, page 20, the same being a special act passed by the Thirtieth Legislature; or by the provisions of the anti-pass law?

Said Subdivision 8 of Section 8 of the Dallas city charter provides that "every public service corporation shall furnish and provide equal and uniform service alike to all citizens of Dallas, and it shall be unlawful and a sufficient ground for the forfeiture of any franchise for any such corporation to grant free service or to furnish service at a lower price or rate, quantity considered, to any person or persons, or otherwise discriminate in the matter of rates or service between citizens of Dallas." Said subdivision further provides, however, that the board of commissioners may authorize any street railway company to grant free transportation "when the same shall not be in conflict with the general laws of the State, which shall control and govern this subdivision." It is clear, we think, that the act above quoted does not repeal the Act of 1903, for it is expressly declared to be subject thereto. So we have the single question: Does the anti-pass law repeal

the said Act of 1903, in so far as to prohibit the issuance of half-fare rate tickets to students as therein provided? As before stated, the said anti-pass law of 1907 does not, in terms, repeal the said Act of 1903, and we do not think the Legislature intended that it should have that effect. The provision of the said Act of 1907 bearing upon this subject is as follows: "That if any steam or electric railway company, street railway company, etc., \* \* \* shall knowingly haul or carry any person or property free of charge, or give or grant to any person \* \* \* any authority, or permit whatsoever to travel or to pass or convey or transport any person or property free, or shall sell any transportation for anything except money or for any greater or less rate than is charged to all persons under the *same conditions*, over any railway or transportation line or part of line in this State; \* \* \* except such persons as are hereinafter exempted under the provisions of this act, shall be guilty of a misdemeanor." This act merely makes it unlawful for any of the transportation companies named therein to sell any transportation to any person for any greater or less rate than is charged to all persons *under the same conditions*, or in the same situation for a like traffic.

In order to constitute an unlawful discrimination under the provisions of the anti-pass law, the street railway companies must charge or receive directly from one person a greater or less compensation than from another, or must accomplish the same thing indirectly by means of a special rate, but in either case it must be for a like service in the transportation of a *like kind of traffic*, under substantially the same circumstances and conditions. Consequently to bring the present case within the statute we must assume that to carry out the provisions of the said Act of 1903 would have this effect, which we do not think is true. If we are correct in this, then the two statutes in question are not repugnant to each other and both may stand.

In the case of *United States vs. Chicago & N. W. Ry. Co.*, 82 C. C. A., 465, 127 Fed., 785, the Chicago & Northwestern Railway had in effect a party rate applicable to theatrical and amusement companies. The United States government claimed the benefit of this rate. It transported over the line of the railway company certain parties of troops, more than ten in number, that being the minimum number to which the party rate applied, and insisted that in making settlement for the transportation of these troops it should be allowed the same rate per mile fixed by the party rate schedule governing theatrical and amusement companies, but the court held otherwise. It held that the circumstances and conditions under which the troops were transported for the government were not the same as those under which the theatrical and other amusement companies were moved by the railway companies, noting the following differences:

1. Musical companies and similar organizations could not travel if obliged to pay the regular rate of fare. The giving of these reduced rates stimulates this kind of business and adds to the revenues of the railways without any corresponding increase in the cost of operation; and,

2. While these tickets are only sold from point to point on the line of a particular railway, it is reasonably certain that the company will buy more than one ticket in going from place to place. Do not the reasons given above apply with equal or greater force to the granting of special rates to students going to and returning from school, when said students, in order to get the advantage of reduced rates, are required to purchase tickets in blocks of twenty at a time?

The court in the above case further says:

“Again, the testimony establishes that party rate tickets secure patronage that yields large revenues to the respondent (railway company) and that the withdrawal of those tickets would almost entirely destroy that patronage, for it appears that the rate is as high as can be made without putting it beyond the reach of those who are the main purchasers. Are all these considerations to be left out of the account in determining whether there has been ‘like and contemporaneous service,’ ‘under substantially similar circumstances and conditions?’ Does it depend solely upon whether party rate passengers and those holding single tickets occupy the same cars, have the same accommodations, and are traveling from the same point to the same destination? Is that the full meaning of ‘similar circumstances and conditions?’ The answer, which the question itself seems to suggest, is that the phrase has a much larger and more comprehensive meaning, else Congress could not consistently have recognized mileage or excursion or commutation tickets for all these trespass upon the narrow ground on which the contrary view rests. To give the act its proper interpretation, the phrase must be held to include circumstances and conditions affecting the business of the carrier and of its patrons, or, in other words, circumstances and conditions of a commercial character.”

Under a statute similar to the one we are considering here, the Interstate Commerce Commission has frequently upheld the action of railroad companies in issuing round-trip tickets at reduced rates limited to government employees in returning home to vote at public elections.

The reasons for the enactment of statutes to prevent unjust discrimination and undue preferences by railway companies and other public service corporations are based upon public policy. They are questions of public morality, and we do not think it was the intention of the Legislature in enacting the anti-pass law to interfere with or affect any rates that were already regulated by a statute of this State, which is presumed to reflect its public policy. There could be no public principle or question of public policy involved in such a course. Besides, the rule is well settled that repeals by implication are not favored, and that if two statutes can be read together without contradiction, or repugnancy, or absurdity, or unreasonableness, they should be read together, so that both will have effect. *Smith vs. Speed*, 50 Ala., 276; *Enloe vs. Ricke*, 56 Ala., 50; *Regina vs. Muse*, L. R. 8 App Cas., 339. If, by fair and reasonable interpretation, acts which are seemingly incompatible or contradictory may be enforced and made to operate in harmony and without absurdity, both will be upheld, and



the later one will not be regarded as repealing the others by construction or intendment. *Railway Co. vs. Elizabethtown Ry. Co.*, 12 Bush, 233; *Higgins vs. State*, 64 Md., 419; *Conley vs. Commonwealth*, 32 S. W. Rep. (Ky.), 285; *George vs. Lillard*, 106 Ky., 820, 51 S. W. Rep., 793. As laws are presumed to be passed with deliberation and with a full knowledge of all existing ones on the same subject, it is but reasonable to conclude that the Legislature in passing a statute did not intend to interfere with or abrogate any former law relating to the same matter, unless the repugnancy between the two is irreconcilable. *Jobb vs. Meagher County*, 51 Pac., 1034; *Ridgeway vs. Gallatin County*, 181 Ill., 521.

In the case of *People vs. Bortleson*, 47 Pac., 87, it is held that two statutes are not repugnant to each other unless they relate to the same subject and are passed for the same purpose. "It is not enough," says the Supreme Court of Pennsylvania, "that there is a discrepancy between different parts of a system of legislation on the same general subjects; there must be a conflict between different acts on the same specific subject. *Comm. vs. DeCamp*, 177 Pa. St., 112, 35 Atl., 601. "It is a reasonable presumption," says the Supreme Court of Oregon, "that all laws are passed with a knowledge of those already existing, and that the Legislature does not intend to repeal a statute without so declaring." *Boothe's Will*, 40 Ore., 154, 61 Pac., 1135, 66 Pac., 710.

For the reasons stated we think the Act of 1903 requiring street railway companies to sell half-rate tickets to students under certain named conditions is still in full force and effect.

Yours truly,

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#### INSURANCE COMPANIES—TEXAS SECURITIES—RESERVE.

AUSTIN, TEXAS, December 12, 1907.

*Hon. A. S. Thweatt, Acting Commissioner of Insurance, Capitol.*

Sir: Answering your request of this date for our opinion upon two questions submitted by you, calling for a construction of Chapter 170 of the General Laws of the Thirtieth Legislature, commonly known as the "Robertson Insurance Act," which questions are based upon inquiries made of you by Mr. J. R. Clark, president of the Union Central Life Insurance Company, under date of December 4, 1907, I beg to say:

1. Section 1 of said statute requires the insurance companies to which is refers to make certain investments in *Texas Securities* and in Texas real estate."

In Section 2 the phrase "Texas securities" as used in Section 1 is defined as including loans made to policyholders against the reserve value of their policies."

Section 3 of said statute is as follows:

"That all bonds, stocks, mortgages and securities (except policies upon which loans may be made) in which the 75 per cent of the insurance reserve belonging or apportioned to policies upon the lives of citizens of Texas shall be invested as above pro-

vided, shall be by the company so investing deposited in the vaults of the Treasury of the State of Texas, or with any national bank in this State designated and appointed by the Comptroller of the Currency as a depository for moneys and funds belonging to the United States, or with any State bank or trust company or national bank in this State authorized and appointed by law as a depository for State moneys and funds, and the president of any depository in which any such securities are deposited shall forward to the State Treasurer of this State quarterly, or whenever demanded by him, a statement of the character and amount of securities so deposited, and such securities shall at all times be subject to the payment of any money that may become due on any of such policies of insurance; provided, that no securities when deposited under the provisions of this act shall be withdrawn without authority in writing from the State Treasurer."

The term "securities" in its broadest sense embraces bonds, certificates of stock, and other evidences of debt or of property, including promissory notes.

Thayer vs. Wathen, 17 Texas Civ. App., 382, 44 S. W. Rep., 906.

Jennings vs. Davis, 31 Conn., 134.

Duncan vs. Maryland Sav. Inst. (Md.), 10 Gil. & J., 299.

Bank of Commerce vs. Hart, 37 Neb., 197, 40 Amer. St. Rep., 479.

I am, therefore, of the opinion that this statute requires that promissory notes taken by such insurance companies for loans made upon policies upon the lives of citizens of Texas shall be by such companies deposited in the vaults of the Treasury of the State of Texas, or with some one of the other depositories designated in the above quoted Section 3.

2. Section 4 of said statute is as follows:

"That insurance companies which have loaned, or which may hereafter loan to Texas policyholders on the sole security of their policies more than 25 per cent of the entire reserve, shall only be required to invest in Texas securities the remainder of the said 75 per cent of the reserve.

I am of the opinion that this section of the statute contemplates that the insurance companies referred to therein, that is to say, insurance companies which have loaned or which may hereafter loan to Texas policyholders on the sole security of their policies more than 25 per cent of the entire reserve set apart and apportioned to policies of life insurance written by such companies on the lives of citizens of the State of Texas, shall be required to invest in Texas securities only the remainder or residue of 75 per cent of such reserve after deducting from said 75 per cent of such reserve the full amount of all such loans.

I do not think that it was the purpose of this statute to give to such companies credit upon the required investment of 75 per cent of the reserve for only the excess over 25 per cent of the entire reserve so loaned to Texas policyholders on the sole security of their policies.

For illustration, take a company whose entire legal reserve set apart and apportioned to policies of life insurance written on the lives of citizens of this State amounts to \$100,000, and whose loans

to Texas policyholders on the sole security of their policies amounts to \$45,000. Seventy-five per cent of such reserve amounts to \$75,000.

Now, under my view of this statute, the amount of the deposit required of this company will be found by deducting said \$45,000 from said \$75,000, which leaves \$30,000 as the amount of the required deposit.

Under the other view, which I think is incorrect, the amount of the required reserve would be found by taking the difference between \$25,000 (which is 25 per cent of the reserve) and \$45,000, the amount of such loans, which gives \$20,000, and deducting from that amount from said \$75,000, which would give \$55,000 as the amount of the required deposit of such company.

It will be noted that on this latter theory the amount of the required deposit is found by deducting from the required 75 per cent reserve the excess of such loans over 25 per cent of such reserve.

While the above Section 4 of said Statute is somewhat ambiguous, I construe the statute as a whole as showing the general legislative intent and purpose to be to require all insurance companies mentioned in said act to invest and keep invested in Texas securities and in Texas real estate as provided in said statute a sum of money equal to at least 75 per cent of the aggregate amount of the legal reserve set apart and apportioned to policies of life insurance written on the lives of citizens of Texas, but that it was the purpose of the Legislature, as expressed in said Section 4 to discriminate in favor of insurance companies which have loaned or which may hereafter loan to Texas policy holders on the sole security of their policies more than 25 per cent of the entire reserve aforesaid, the discrimination consisting in crediting upon the required 75 per cent of such reserve the full aggregate of such loans.

In other words, all insurance companies within the purview of this statute must invest in Texas securities other than such loans to policyholders or in such other Texas securities and such loans to policyholders the required 75 per cent of such reserve.

In calculating the required 75 per cent reserve the insurance company gets credit thereon to the extent of its outstanding loans to Texas policyholders made on the sole security of their policies, if it has any such loans, and if it has no such loans, the entire required 75 per cent reserve must be invested in such other securities as are designated in Section 2 of said statute.

The construction which I have placed upon this statute not only harmonizes the various sections thereof which bear upon the question involved, but is rendered actually necessary by the provisions in Section 2 of the statute that the phrase "Texas securities" as used in Section 1 of this act "shall be held to include \* \* \* loans made to the policyholders against the reserve value of their policies."

Yours truly,

COUNTY DEPOSITORY—NO LIEN UPON PROPERTY OF  
SURETY ON BOND OF, BY REASON OF HE OR SHE  
BEING SUCH SURETY—SHALL BE FIVE  
SURETIES ON SAID BOND.

AUSTIN, TEXAS, December 12, 1907.

*Hon. W. R. Butler, County Judge of Bell County, Belton, Texas.*

Dear Sir: I have your favor of the 12th, wherein you advise me that the Temple State Bank was, at the time required by law during this year, selected as county depository for Bell County; that said bank filed its bond, which was duly approved, in the sum of \$250,000; that on November 29, 1907, one of the sureties on the bond as the owner of \$100,000 worth of unencumbered real estate, conveyed her entire landed estate, consisting of about 26,000 acres, to her four children, in consideration of her love and affection, and a yearly rental of about 50 cents per acre, and that her heirs had full knowledge of the parent's suretyship on said bond at the time of the conveyance to them; that, irrespective of the legal effect of such transfer, the commissioners court is of the opinion that the remaining sureties on said bond are wholly solvent, and that the county is amply protected against any loss through such county depository, and that the remaining sureties on the bond have unencumbered real estate to the value of \$150,000.

Upon the above facts you propound the following questions:

"1. Does the conveyance of said surety of her real estate to her children release the land conveyed from her obligation on the bond?"

"2. The commissioners court, being of the opinion that the bond is ample without said surety, is it mandatory upon the court under the depository law, especially Section 31, Title 34a of said law, to require a new bond, or is the matter within their discretion?"

"3. If you rule that the court must require a new bond, then can they accept an additional bond to the one already given, in such an amount as will make up the deficiency, leaving the old bond as it now is?"

"4. Is it the duty of the court to see that, at all times, the sureties on the bond have unencumbered real estate equal to the amount of the bond, or have they any discretion in the matter of demanding a new bond?"

To the first question, I answer that the conveyance of said surety passed to her vendees the title to the land conveyed, free from any claim of the County of Bell which might hereafter accrue to it by reason of the vendor being a surety upon the bond to secure the county in the matter of the county depository. There is no law of this State which creates a lien on the property of any surety, or which prevents a surety from conveying the property during the term of the suretyship.

To the second question, I answer that Section 23 of the act of the Legislature relating to county depositories, approved May 1, 1905, provides:

"Within five days after the selection of such depository, it shall be the duty of the banking corporation \* \* \* so selected to execute a bond, payable to the county judge and his successors in office,

to be approved by the commissioners court of said county \* \* \* with not less than five solvent sureties who shall own unencumbered real estate in this State not exempt from execution under the laws of this State of as great value as the amount of said bond."

Section 21 of said act provides:

"If the commissioners court shall, at any time, deem it necessary for the protection of the county, it may require any depository to execute a new bond."

In all matters pertaining to the giving of the original bond or the giving of a new bond the law invests the commissioners court with absolute discretion, except in one particular, viz.: that said sureties shall be in number not less than five. Their solvency, that they own unencumbered real estate and the value thereof, are to be determined by the said commissioners court. As provided in said Section 31, if the said commissioners court deem the said original bond not sufficient, it may in its discretion require a new bond. All the above matters, as I have stated, are simply within the discretion of the commissioners court to act according to their best judgment. In other words, the commissioners court has the right to consider the question of the present depository bond, and to determine whether or not it is still a sufficient bond, notwithstanding the conveyance made by one of the sureties; and if, after such consideration, it should determine that the bond is still sufficient, the court would be acting within its power and discretion.

Your third question is answered by the answer given to the second; but if the commissioners court, in its discretion, should require a new bond, then such bond should be given in place of the old bond, as the law, in my opinion, calls for a new bond and not a supplemental or additional bond.

To your fourth question, I answer that, as the law requires that the sureties shall own unencumbered real estate in this State not exempt from execution under the laws of this State, of as great value as the amount of the said bond, it follows as a matter of course that it is the duty of the commissioners court to see that this law is complied with; but, as I have said before, it is within the discretion of the commissioners court to determine whether or not the statute has been complied with.

Yours truly,

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TAX ASSESSOR—COMMISSIONERS COURT—DUTY OF COMMISSIONERS COURT TO PROVIDE OFFICE FOR TAX ASSESSOR.

AUSTIN, TEXAS, December 13, 1907.

*Hon. S. H. Gilleland, Tax Assessor, Coleman, Texas.*

Dear Sir: In reply to your letter of the 10th inst., with reference to the county furnishing you an office for the transaction of your official business, I wish to call your attention to Revised Statutes, Article 819, which reads as follows:

"It shall be the duty of the county commissioners court of each

county, as soon as practicable after the establishment of the county seat, or after its removal from one place to another, to provide a court house and jail for the county and offices for county officers at such county seat, and keep the same in good repair."

I also wish to call your attention to Revised Statutes, Article 2475, which reads, in part, as follows:

"There shall be allowed to county judges, clerks of the district and county courts, sheriffs and county treasurers, such books, stationery, including blank bail bonds and blank complaints, and office furniture as may be necessary for their offices, to be paid for, on the order of the commissioners court, out of the county treasury; and suitable offices shall also be provided by the commissioners court for said officers at the expense of the county."

You will bear in mind that Article 819 appears to have been passed in 1879, and Article 2475 was passed in 1885, and it might appear that because Article 2475 authorizes an office to be furnished by the county to county judges, clerks of the county and district courts, and sheriffs and county treasurers, that all other officers were excluded and the county was not authorized to furnish such other officers an office, and that this Article 2475 having been passed in 1885 and Article 819 being passed in 1879, that Article 2475 would repeal Article 819 so far as the same appeared to be in conflict with Article 2475; but you will bear in mind that both of said articles were brought forward in the Revised Statutes of 1895, and were each re-enacted in the adoption of that statute, and will, therefore, have to be construed together.

It is, therefore, my opinion that it is the duty of the county to furnish you an office for the transaction of your official business as provided in Article 819.

Truly yours,

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#### MEDICAL LAW—ONE BOARD BILL.

Provisions of Act of 1901 and of Thirtieth Legislature, 1907, construed.

AUSTIN, TEXAS, December 13, 1907.

*Dr. G. B. Foscoe, Secretary of the Medical Board, Waco, Texas.*

Dear Sir: As I understand the questions submitted by you they are as follows:

"First. If an applicant holds a certificate granted by one of the State Boards under the Act of 1901, upon an examination, and failed to record same prior to the 13th day of last July, is he entitled to a certificate from this board when his right to obtain said license is based solely upon this certificate.

"Second. If the holder of a State board certificate who obtained the same by verification or reciprocity and failed to record it, can we legally grant him verification?

"Third. I desire same information as to your opinion upon district board certificates and diplomas that were not recorded prior to July 9, 1901.

"Fourth. I desire further your opinion upon cases where applicant shows that he obtained a certificate from one of the former boards, either State board or district board, but never resided in this State, but had his certificate recorded in some county in Texas and now desires verification from this board, though he never has been a resident of this State.

"Fifth. Can the new board go behind the action of any of the old boards in granting licenses to ascertain whether or not fraud has been practiced?

"Sixth. We desire to know whether the present board, has the right to charge an examiner's fee of \$5, as provided by Section 3 of Subdivision 5 of the Rules and Regulations of the Board of Medical Examiners."

Answering the questions submitted by you, I beg to advise:

1. That upon a careful examination of the Act of the Thirtieth Legislature, commonly known as the one board medical act, I think it was the intention of the Legislature to require every person desiring to practice medicine in this State to secure from the Board of Medical Examiners provided for by that act either a verification license or a license upon examination. I also think it is clear that only those persons who were legal practitioners under the Act of 1901 are entitled to verification licenses from the present board. By legal practitioners under the Act of 1901 is meant those who had complied with all the requirements of that law, one of which was, that before a person to whom a certificate was granted was entitled to practice by virtue thereof, such certificate must have been recorded. (See Article 3787 of the Act of 1901, Article 440 of the Penal Code and the case of Wicks-Nease vs. Watts, 70 S. W. Rep., 1002.) By not complying with this law not only was a practitioner unable to enforce the collection of his pay for professional services, but he was liable to prosecution under Article 440 of the Penal Code.

I advise, therefore, that if an applicant holds a license granted by one of the State Boards under the Act of 1901, upon examination, and failed to record same prior to the repeal of said act, he is not entitled to a certificate from the present board by virtue of said license. The right to record a license granted by one of the State boards under the Act of 1901 passed with the repeal of said act. The Act of 1907 only authorizes the recording of licenses granted by the present board. (See Sections 4 and 5 of said Act.)

It is true that Section 15 of the Act of 1907 provides that all persons who were practicing medicine under the provisions of the Act of 1901 shall have one year in which to obtain a license from the present board, but this has reference to those holding certificates that were valid under said act, and certificates that were not recorded prior to the repeal of the said Act of 1901 were not valid under said act.

2. The same rule applies to those holding State board certificates obtained by verification or reciprocity under the Act of 1901 and what I have said in answer to your first question applies equally to this.

3. In my opinion this class are not entitled to certificates from

the present board nor to practice within this State without examination, except those who were practicing medicine in Texas prior to January 1, 1885. Legal practitioners of medicine in this State, within the meaning of Section 6 of the new medical act, are those who qualified to practice under the Act of 1901 and under the provisions of said act those holding certificates from the district boards upon examination or diploma were required to record same prior to July 9, 1901, as provided by Articles 3784 to 3787 of the Revised Statutes. In other words, those holding district board certificates were required to record same prior to July 9, 1901, in order to be entitled to practice, under said act. (See Sayles' Supplement to the Revised Civil Statutes, Article 3783.)

4. I think it is immaterial whether those persons who obtained certificates from one of the former boards and had said certificates recorded in some county in Texas ever resided in Texas or not.

5. I think it is clear under Section 11 of the one board medical act that when a certificate granted by one of the old boards is presented to the present board for the purpose of obtaining verification license, the present board clearly has the right and authority to inquire into the action of the old board in granting the license in order to ascertain whether or not fraud or deception was practiced in passing examinations and securing licenses from any of the old boards.

6. I do not think the medical act authorizes the examinations provided for by said Section 3 of Subdivision 5 of the Rules and Regulations of the Board of Medical Examiners. Therefore you would not be authorized to assess the examiner's fee of \$5, as provided therein.

Trusting that the above may sufficiently answer the questions submitted by you, I beg to remain.

Yours truly,

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TEXT BOOK BOARD—AS TO DISQUALIFICATION OF  
MEMBER THEREOF.

AUSTIN, TEXAS, January 14, 1908.

*Hon. T. M. Campbell, Governor, and Chairman State Text-Book Board, Capitol.*

Dear Sir: I have your favor of this date, wherein you desire that I should advise you as to whether Captain E. F. Comegys is disqualified to act as a member of the State Text-book Board. The facts touching the disqualification, if any, of Captain E. F. Comegys are substantially as follows:

Some seventeen years ago he took employment with the publishing house of Ginn & Company during his vacation as their agent or representative in presenting their books to the teachers of Texas. He is not now and never has been, directly or indirectly, interested in or related to any publishing house, person, firm or corporation (including the said Ginn & Company), that proposes to submit to the present board any books for adoption, and is not, directly or indirectly, interested in any book that will be offered for adoption.



As I understand, the sole question as to his eligibility is by reason of the fact that Captain Comegys was about seventeen years ago the agent or representative of the said Ginn & Company and served them as such agent during one of his vacations.

The qualifications of the members of the State Text-book Board are defined by Section 1 of the Act of May 14, 1907, and known as Chapter 9 of the General Laws of the State of Texas. There is no question made, as I understand, as to Captain Comegys being qualified to act as a member of the State Text-book Board, as provided by this section. The only question is as to whether or not being a member of the board he is disqualified from acting by reason of the fact that he was agent or representative of a corporation.

Section 3 of the said act in substance provides:

"That each member of the board shall make out and file with the Secretary of State an affidavit that he is not and has not been, directly or indirectly, interested in or related to any publishing house, person, firm or corporation submitting any books for adoption or in any books offered for adoption, nor is he related to any person or agent representing such house, person, firm or corporation, and that he will not become so interested."

tion that proposes submitting a bid to the present board for adop-

The further provisions of the statute as to the affidavit are not material and are not quoted.

The only possible question that could be raised as to the disqualification of Captain Comegys, under this affidavit is:

1. Whether or not, under the facts, he has been, directly or indirectly, interested in the publishing house of Ginn & Company so as to disqualify him being a member of the board.

2. Whether or not, under the above facts, Captain Comegys is related by affinity or consanguinity to Ginn & Company.

As to the first, my opinion is, that the fact that he served them as an employee or agent he did not thereby become interested in this corporation within the terms or spirit or meaning of the statute.

As to the second, no question can arise as it is a corporation which is under consideration.

I, therefore, beg leave to advise you that in my opinion Captain Comegys is not disqualified from acting as a member of the State Text-book Board.

Yours truly,

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#### STREET RAILWAYS—OCCUPATION TAX.

Section 10, Act of May 16, 1907, does not relieve companies from occupation tax provided for in Section 54 of Article 5049, R. S. Section 54, Article 5049, not limited to street railway companies in cities of 10,000 or more.

AUSTIN, TEXAS, January 18, 1908.

*Messrs. Baker, Botts, Parker & Garwood, Houston, Texas.*

Gentlemen: We have given very careful consideration to the question submitted by you in your letter of the 19th instant, and in

our opinion the conclusion is irresistible that the occupation tax upon street railways provided for in Section 10 of the Act of May 16, 1907, does not relieve the companies subject thereto from the obligation of paying the occupation tax provided for in Section 54 of Article 5049, Revised Statutes. Section 22 of the said Act of 1907 expressly provides that all taxes levied by that act shall be in addition to all other taxes previously levied by law. If this section means anything at all, it means that the tax provided for by Section 10 is in addition to the tax provided for in Article 5049 of the Revised Statutes.

We do not think that said Section 54 of Article 5049 is limited to street railway companies in cities of less than 10,000 inhabitants, by reason of the fact that the Act of 1907 applies only to such railway companies in cities of more than 10,000 inhabitants; that is, we do not think that this fact indicates that it was the intention of the Legislature in enacting the Act of 1907 to repeal Section 54 of Article 5049, of the Revised Statutes, nor to limit the said Article 5049, to street railway companies in cities of less than 10,000 inhabitants.

We also think the fact that the caption of the Act of 1907 only provides "for the levy and collection of an occupation tax" does not prevent the tax levied by the act from being an additional occupation tax. It is not necessary, in our opinion, for the caption to expressly provide for "an additional occupation tax."

Yours truly,

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OCCUPATION TAXES—INDICTMENTS FOR NON-PAYMENT OF.

Act of the Thirtieth Legislature repeals Article 112 of Penal Code.

AUSTIN, TEXAS, January 21, 1908.

*Hon. John W. Brady, County Attorney, Austin, Texas.*

Dear Sir: We have received and carefully considered your letter of the 14th instant, in which you say:

"I desire to submit to you for my official guidance, the following state of facts and law question arising thereunder, viz.:

"A number of indictments were returned by the grand jury of Travis County in October, 1907, against persons who were charged therein with having pursued occupations taxed by law without having first obtained a license therefor. The cases have not yet been tried, but are pending in the county court. The said occupations were all such as are embraced in Chapter 35, Acts of 1907, page 57, which act repeals the tax on certain occupations, from and after January 1, 1908. The question I wish to ask is this, to-wit: Does the passage of the latter act have the effect of abating prosecutions aforesaid, or of repealing Article 112 of the Penal Code, as to such occupations?"

In our opinion the question submitted by you must be answered in the affirmative.

Article 112 of the Penal Code is as follows:

"Any person who shall pursue or follow any occupation, calling or profession, or do any act taxed by law, without first obtaining a license therefor, shall be fined in any sum not less than the amount of the taxes due, and not more than double that sum."

Article 114 provides that any person prosecuted under Article 112 of the Penal Code shall have the right at any time before conviction to have such prosecution dismissed upon payment of the taxes and all cost of said prosecution and procuring the license to pursue or follow the occupation for the pursuing of which without license the prosecution was instituted.

Article 116 of the Penal Code provides that "the repeal of a law, where the repealing statute substitutes no other penalty, will exempt from punishment all persons who may have offended against the provisions of such repealed law, unless it be otherwise declared in the repealing statute."

As we understand it, the act for which the persons mentioned by you are indicted is not now an offense under the law, and the question is, should prosecution under said indictments be dismissed, said act being unlawful at the time the indictments were returned. It is well settled in this State that where the Legislature has repealed a specific offense without any provisionary clause as to offenses committed, **indictments for such offenses brought before repeal must be dismissed.** (Thomas vs. State, 3 Texas Appeals, 113.) Upon repeal of the law which has created an offense no further proceedings can be had thereunder to enforce the punishment after the repealed law takes effect. (Wall vs. State, 18 Texas, 196.)

In the case of Greer vs. State, 22 Texas, 588, our Supreme Court says: "The general principle is admitted, that, if the law which created the offense is repealed, after the repealing law takes effect no further proceeding can be taken under the repealed law to enforce punishment."

In the case of Yeaton vs. United States, 5 Cranch, 281, the Supreme Court of the United States speaking through Chief Justice Marshal, uses the following language: "It has been long settled, on general principles, that after the expiration or repeal of a law no penalty can be enforced nor punishment inflicted for violations of the law committed while it was in force unless some special provisions be made for that purpose by statute."

The general rule expressed above that upon the repeal of a criminal statute without a saving clause all proceedings being prosecuted under it fall, apply to any stage of the case. Thus if the law in force at the time the crime is committed is repealed after indictment and before trial, no conviction can be had. (Thomas vs. State, 3 Texas Appeals, 112; Montgomery vs. State, 2 Texas Appeals, 618; Broughton vs. Bank, 17 Alabama, 828; Taylor vs. State, 7 Blackf., 93; People vs. Tisdale, 57 California, 104; see also valuable note in 94 Amer. Dec., 217.)

In the case of State vs. Robinson, 19 Texas, 479, the question decided by the court was very similar to the one under consideration here. By an act of 1845 it was provided that "any person who shall violate any law or laws requiring the payment of license taxes shall

be deemed guilty of misdemeanor." The act levying the tax was repealed by a later statute enacted in 1850. In the above case the court said: "The repeal of the law requiring the payment of taxes must necessarily operate a repeal of the penalty for their violation, though it were not expressly included in the repealed statute. There can be no penalty or criminality in violating a repealed statute. It seems perfectly clear that the repeal of the former law on the subject effected a complete abrogation of all their provisions; not only those enjoining the duty of the citizen, but those annexing a penalty to its violation."

For the reasons stated, we think that said prosecutions should be dismissed.

Truly yours,

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PENSIONS—RESERVES OR HOME GUARDS—NOT  
ENTITLED TO PENSIONS.

AUSTIN, TEXAS, January 22, 1908.

*Hon. J. W. Stephens, Comptroller, Capitol Building .*

Dear Sir: Answering the question submitted by you as to whether or not, under the act approved May 12, 1899, "Reserves" organized under an Act of Congress of the Confederate States and published by general order No. 26 of the Adjutant and Inspector General's Office, are entitled to pensions under the said Act of May 12, 1899.

We beg to advise that in our opinion they are not. The act makes no provision for the grant of pensions to those who constituted reserves for State defense, and detail duty only. These reserve corps were composed of persons between the ages of seventeen and eighteen and forty-five and fifty years, were not required to perform service out of the State, and were not entitled to any pay except when in actual service. Said reserves were what were known as "Home Guards," and it does not appear that they were ever called into active service. We do not think these reserves were Confederate Soldiers within the meaning of the said Act of 1899. Section 2 of that act provides that the application for a pension shall state the name, age and residence of the applicant and "the company and regiment in which he enlisted in the Confederate Army, or where he served in the Confederate Navy and *time of service* in each."

Yours truly,

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LEGISLATURE—RAILROADS.

Southern Kansas Ry. Co. authorized to remove track from Panhandle to Washburn and lay tracks from Panhandle to Amarillo.

AUSTIN, TEXAS, January 23, 1908.

*Hon. T. M. Campbell, Governor of the State of Texas, Capitol.*

Dear Sir: I have duly considered the petition of a number of citizens of Washburn, Texas, and the letter of Mr. Stephen Bishop,

of Washburn, Texas, of date December 26, 1907, and December 29, 1907, respectively, and beg leave to reply:

The last Legislature, as you know, authorized the Southern Kansas Railway Company to take up and abandon that part of its track and roadbed extending from Washburn to Panhandle, and, in lieu thereof, locate and operate its road on a line extending from Panhandle to Amarillo.

This act was, in my opinion, a constitutional exercise of the Legislative power. The effect thereof, whether it was wise or proper, or whether it would result in the loss to property of any individual or a number of individuals, was a proper matter for consideration by the Legislature and such matters were considered by the Legislature, where you will find in Section 3a of the act the following:

“The enactment of this law shall not preclude any person who may have a legal cause of action against said Southern Kansas Railway Company for damages, if any, occasioned by reason of taking up and destruction of said track, from prosecuting said cause of action in the proper courts having jurisdiction thereof.”

The Legislature having granted to the railroad company authority to remove its roadbed and track, it can do so, but if any damages are sustained by any person by reason of such removal, then Section 3a of the act authorizes a suit against the railroad company by any person or persons so damaged.

I have no authority, under the law, to prevent the railroad company from exercising its rights conferred by this act of the Legislature. The Legislature had the right to pass the act and all the rights and equities of the citizens of Washburn were matters which should have been considered by the Legislature before the act was passed, and I suppose they were considered, as the said Section 3a, above quoted, gives a right of action for damages sustained by any citizen against the railroad company.

I return you the petition and the letter of the citizens and property owners of Washburn.

Yours truly,

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COMMISSIONERS COURT—STATIONERY—CONTRACT FOR.

Section 1, Chapter 136, Act of Thirtieth Legislature, mandatory on commissioners court.

Members of Commissioners court, under law, can not be interested in contract with county.

AUSTIN, TEXAS, February 4, 1908.

*Hon. Jesse D. Kugle, County Attorney, Cleburne, Texas.*

Dear Sir: In your letter of the 29th ult., you make the following inquiry:

“Kindly refer to House Bill No. 126, Acts of the Thirtieth Legislature, page 252, authorizing the commissioners court to purchase stationery, and advise me as follows:

“1. Is this act mandatory, or is it discretionary with the commissioners court as to whether they will contract by the competitive system provided by this statute? Can the court by declining to

make the order provided for in the first section, purchase these supplies from such persons and at such prices as they may deem proper without submitting the same for bids?

"2. Is it a violation of this act for the commissioners court to contract for the supplies named in this act with a corporation organized under the laws of this State, a director of which is a county officer of the county purchasing the supplies."

In reply thereto, I wish to advise that said act reads as follows:

"Section 1. That the commissioners court of each and every county may by an order entered of record be authorized and empowered to contract, as hereafter prescribed with some suitable person or persons to supply the county with all blank books, all legal blanks and all stationery of every kind and description, as may be required by law to be furnished the county officials.

"Section 2. It shall be the duty of the commissioners court to advertise at least once in every two years for sealed proposals to furnish said blank books, legal blanks, all stationery and such other printing as may be required for the county for the term of such contract. Said advertisement shall be made by the county clerk, who shall notify, by registered letter, each newspaper published and each job printing house in the county and at least three stationery and printing houses in the State, of the time said contract is to be awarded, and of the probable amount of supplies needed. Should said supplies, when furnished by the successful bidder under this act, not be of the quality designated in the contract and bond hereafter provided for, then and in any such event the commissioners court may declare such contract null and void, and at the next regular or call session of said court again advertise for sealed proposals as in the first instance; and the commissioners court shall have the right to again advertise for proposals as often and whenever from any cause supplies are not received under the previous contract."

After making other provisions relative to the manner of making such contracts for the supplies mentioned, Section 5 of the act provides as follows:

"Section 5. No member of the commissioners court or any county officer shall be either directly or indirectly, interested in any such contract, and all contracts shall be made in open court, with the lowest bidder and all bids shall be spread in full on the minutes of the court."

You are, therefore, advised:

1. That it is my opinion that Section 1 of the act is mandatory upon the commissioners court and they are in duty bound to pass the order required in that section of the act, notwithstanding the same provides that the commissioners "may" enter an order to such effect.

It is a well settled rule of law that "where with reference to conditions expressed or implied, or independent of any special circumstances, it is manifestly intended that the power should be exercised for the promotion of justice or the public good, such permissive words are imperative. Permissive words in respect to courts or officers are imperative in those cases in which the public or individuals have the right that the power so conferred be exercised.

Such words when used in the statute will be construed as mandatory for the purpose of sustaining and enforcing rights, but not for the purpose of creating the right or determining its character; they are peremptory when used to clothe a public officer with power to do an act which ought to be done for the sake of justice, or which concerns the public interest or the rights of third parties. (Sutherland on Statutory Construction, Section 462.)

The word "may" in the statute will be construed to mean "shall" whenever the rights of the public or third persons depend on the exercise of the power or the performance of the duty to which it refers and such is its meaning in all cases where the public interest and rights are concerned, or a duty is imposed on public officers and the public or third persons have a claim de jure that the power shall be exercised.

People vs. Commissioners of Highways, 130 Ill., 482.

Kane vs. Footh, 70 Ill., 587.

Fowler vs. Pirkins, 77 Ill., 271.

State vs. Laughlin, 73 Mo., 443.

Columbus & C. R. Co. vs. Mowatt, 35 Ohio, 284.

Haynes vs. Los Angeles County, 99 Cal., 74.

Havemeyer vs. Superior Court of City and County of San Francisco, 84 Cal., 327.

Provisional Municipality of Pensacola vs. Lehman, 57 Fed. Rep., 324.

Market National Bank of New York vs. Hogan, 21 Wis., 317.

Blair vs. Murphree, 81 Ala., 454.

Section 1 of the act referred to seems to come clearly within the authorities herein cited, and is, therefore, in my opinion, mandatory upon the commissioners court and they should comply with the provisions thereof.

2. It would appear from the provisions of Section 5 of the Act of the Thirtieth Legislature referred to in your letter, that it would only be a violation of the provisions of that act for any member of the commissioners court, or any county officer to be directly or indirectly interested in any of the contracts specified by said act if the commissioners court had complied with the provisions of Section 1, and in the event that they did not comply with the provisions of Section 1, then it seems that Section 5 would not apply and they would not be violating the provisions of Section 5, unless they had complied with the provisions of Section 1.

In my construction of the act, as above stated, it is mandatory upon the commissioners court to comply with section 1, and after having complied with Section 1 and the other provisions of the act having been complied with, it would be a violation of Section 5 for any officer mentioned therein to be interested directly or indirectly in such contract. However, independently of whether or not Section 1 of the act has been complied with and whether or not the officers mentioned violate the act, if any were interested directly or indirectly in such contracts, I will state that in my opinion whether the commissioners court do or do not comply with the provisions of Section 1, that no county officer, including the county commissioners, can be legally interested, directly or indirectly, in any of the

contracts mentioned when made with the county. First, because such officer would be violating the provisions of Articles 264 and 266 of the Penal Code. Second, because no county commissioner could be interested, directly or indirectly, in such contracts by reason of the provisions of Article 1535, prescribing the official oath for county commissioners.

Penal Code, Article 264 reads as follows:

“Any officer of any county in this State or of any city or town therein, who shall contract directly or indirectly, or become in any way interested in any contract for the purchase of any draft or order on the treasurer of such county, city or town, or for any jury certificate, or any other debt, claim or demand, for which said county, city or town may or can in any event be made liable, shall be punished by fine of not less than ten nor more than twenty times the amount of the order, draft, jury certificate, debt, claim or liability so purchased or contracted for.”

Penal Code, Article 266 reads as follows:

“If any officer of any county in this State, or of any city or town therein shall become in any manner pecuniarily interested in any contract made by such county, city or town through its agents or otherwise for the construction or repair of any bridge, road, street, alley or house, or any other work undertaken by such county, city or town, or shall become interested in any bid or proposal for such work, or in the purchase or sale of anything made for or on account of such county, city or town, or who shall contract for or receive any money or property, or the representative of either, or any emolument, or whatsoever in consideration of such bid, proposal, contract, purchase or sale, he shall be fined in a sum not less than fifty, nor more than five hundred dollars.”

In my opinion, these two provisions of the Penal Code apply to all county officers, including the members of the commissioners court, and a county officer who is interested as a stockholder or otherwise in a corporation, organized under the general laws of the State, would be by virtue of his interest in such corporation interested in contracts made by such corporation with the county for the furnishing of the supplies mentioned in your letter, and such officer so interested in said corporation would be violating the criminal code above quoted.

In addition to the liability of all county officers, including the commissioners court, a commissioner interested in a corporation, if such corporation should be a successful bidder for the furnishing of the supplies to such county, would violate the provisions of his official oath and could not in my judgment retain his office as county commissioner and at the same time retain his interest in such corporation, if the corporation should be the successful bidder for the furnishing of such supplies.

Revised Statutes, Article 1535 reads as follows:

“Before entering upon the duties of his office, the county judge and each commissioner shall take the oath of office prescribed by the Constitution and shall also take an oath that he shall not be directly or indirectly interested in any contract with or claim against



the county in which he resides, except such warrants as may issue to him as fees of office."

This provision of the law has been repeatedly held by our higher courts to render invalid any contract made by any member of the commissioners court with his county. (*Knippa vs. Stewart Iron Works*, 66 S. W. Rep., 324.)

Yours truly,

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TAXES—PENALTIES—GROSS RECEIPTS.

Corporations, co-partnerships, individuals, etc., liable for penalty if tax not paid by February 1st, etc.

AUSTIN, TEXAS, February 5, 1908.

*Hon. John T. Smith, Acting Comptroller of Public Accounts, Capitol.*

Sir: We have your letter of yesterday, which is as follows:

"I would thank you for an opinion upon the collection of penalties under Sections 18 and 19, Chapter 18, Acts Special Session Thirtieth Legislature. A number of reports have been received in this office on and after February 1st bearing different dates ranging from January 29th to February 3, 1908. Should penalties be collected from those whose reports do not reach this office by February 1st regardless of date of report? The reports in question show gross receipts of the quarter preceding January 1, 1908, and the payment of the tax is for quarter ending March 31, 1908. As I understand the law, Section 18 provides that if a report is not filed within 30 days after January 1, 1908 (in the present case), a penalty of not more than \$1000 accrues in addition to a 10 per cent penalty provided for in Section 19.

"Please advise if Article 2824, Revised Statutes 1895, which provides in part that the Comptroller shall direct and superintend the collection of all monies due the State will govern in the collection of such penalties as may be due or will Section 20 of said Chapter 18, Acts Special Session Thirtieth Legislature, which provides that penalties shall be recovered by the Attorney General govern?"

In reply, I beg to say: I assume that the reports which have been received in your office on and after February 1st, bearing different dates ranging from January 29, 1908, to February 3, 1908, are quarterly reports which said statute required to be filed on or before the first day of January, 1908.

The sections of said statute providing penalties for failure to comply with its requirements as to filing of reports and paying taxes, as follows, namely:

"Section 18. Any person, company, corporation or association, or any receiver or receivers, failing to make report for thirty days from the date when said report is required by this act to be made, shall forfeit and pay to the State of Texas a penalty of not exceeding one thousand dollars.

"Section 19. Any person, company, corporation or association or any receiver or receivers failing to pay any tax for thirty days, from the date when said tax is required by this act to be paid, shall for-

feit and pay to the State of Texas a penalty of ten per cent upon the amount of such tax."

I am of the opinion that failure upon the part of any such person, company, corporation or association, receiver or receivers to file in your office within thirty days after January 1, 1908, or, in other words, on or before January 31, 1908, has already made such person, company, corporation or association, receiver or receivers liable to the State of Texas for a penalty of not exceeding one thousand dollars; and if the tax which was due on January 1, 1908, was not, in fact, actually paid over to the State Treasurer on or before January 31, 1908, such taxpayer is, by reason of such failure to make such payment, also liable to the State of Texas for an additional penalty of ten per cent upon the amount of such tax.

In other words, while the law specifies that such report shall be made on January 1, 1908, and that the tax shall be paid at the same time, it allows thirty days thereafter in which such report may be actually filed and such tax actually paid, but prescribes penalties for failure to do either within such thirty days, the penalties for not filing the report not later than the expiration of the thirty days being an amount not exceeding one thousand dollars, and the penalty for not paying the tax not later than the expiration of the thirty days being ten per cent upon the amount of said tax. The law contemplates and requires that such reports shall be duly filed and that such payments of taxes shall be actually made within the above-mentioned time limits, and merely dating or even dating and mailing such reports and remittances of such taxes within such time limits can not be properly held to be or considered a substantial compliance with the letter or with the spirit of the statute.

Revised Statutes, Article 2824, in prescribing the duties of the Comptroller of Public Accounts, provides that, "He shall examine and settle the accounts of all persons indebted to the State, and certify the amount or balance to the Treasurer, and direct and superintend the collection of moneys due the State."

Section 23 of the above-mentioned tax statute, provides:

"If for any reason the Comptroller of Public Accounts is not satisfied with any report from any such person, company, corporation, co-partnership or association, he may require additional or supplemental reports containing information and data upon such matters as he may need or deem necessary to ascertain the true and correct amount of all taxes due by any such person, firm, or corporation."

It also makes the following provisions concerning the collection of the above-mentioned penalties:

"Section 20. The penalties provided for by this act shall be recovered by the Attorney General in a suit brought by him in the name of the State of Texas, and venue and jurisdiction of such suit is hereby conferred upon the courts of Travis County, Texas."

Considering this tax statute as a whole, in connection with the above quoted Article 2824, I am of the opinion that the proper procedure is for the Comptroller to certify to the State Treasurer the proper amount of taxes based upon the original report, or upon such original report and such additional and supplemental reports, if any, and for the taxpayer to thereupon pay over to the State Treasurer

the proper amount of taxes; and that in the event of his failure to do so, the Comptroller should certify such failure and the proper amount of the taxes, together with copies of such original and additional and supplemental reports, if any, and for the Attorney General to thereupon institute in behalf of the State, a suit against such taxpayer for the aforesaid amount or amounts of such penalty or penalties.

Yours truly,

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INDEPENDENT SCHOOL DISTRICTS—ISSUANCE OF BONDS  
TAXATION FOR INTEREST AND SINKING FUND.

May reduce tax rate as value of property in district increases as to make original rate excessive.

AUSTIN, TEXAS, February 7, 1908.

*Mr. M. A. Reese, Lott, Texas.*

Dear Sir: In reply to your letter of the 4th inst., I wish to advise that when an independent school district issues a series of bonds the law requires that they make a tax levy each year sufficient in amount to provide funds to pay the interest and provide the necessary sinking fund. They are not required by law to levy any greater rate than is absolutely necessary to raise such funds.

Section 161, Chapter CXXIV, Acts of the Twenty-ninth Legislature, reads as follows:

"The trustees elected in accordance with the preceding section shall be vested with the full management and control of the free schools of such incorporated town or village and shall in general be vested with all the powers, rights and duties in regard to the establishment and maintaining of free schools, including the powers and manner of taxation for free school purposes that are now conferred by the laws of this State upon the council or board of aldermen of incorporated cities and towns."

Revised Statutes, Article 912, reads in part as follows:

"Whenever any bonds shall be issued, the county commissioners court or council of such city or town shall levy upon the last assessment of the property for such city or town, as the case may be, a tax sufficient to pay the interest and sinking fund of not less than 2 per cent upon such bonds. The tax so levied shall remain as the levy for that purpose until the new levy be made for that purpose; provided that such commissioners court or council may from time to time increase or diminish such tax so as to adjust the same to the taxable values of the property of the county or city or town and the amount to be collected; provided further that the amount shall not at any time be reduced so that it will not raise an amount sufficient to pay the annual interest and sinking fund on all the bonds sold or exchanged under the provisions hereof."

It, therefore, appears clear that under the act of the Twenty-ninth Legislature, above referred to, the trustees of an independent school district have the same power to regulate the tax rate that city councils of cities and towns have to regulate city taxes, and according to the provisions of Article 912, above referred to, the city council of

cities and towns have the right to increase or diminish the tax rate at any time the necessities for such increase or diminish arise.

In other words, the issuance of bonds by an independent school district, or by counties, cities and towns, simply becomes a contract between the county, city, town or district and the purchaser of such bonds, and in the issuance of every series of bonds the law requires that a tax levy be provided for, sufficient to pay the interest and provide a sinking fund sufficient to redeem the bonds at maturity, and the law provides that this levy shall be made every year. The law does not require that a greater tax rate be levied for any one year than is necessary to raise the necessary funds, and a bond holder has no right to complain if the tax rate is sufficient to pay interest and provide a sinking fund for the bonds. If the bond holder has no right to complain, certainly no one else has. Any county, city, or town, independent or common school district, may reduce or have its tax rate reduced at any time when the taxable values increase so as to make the original tax rate excessive.

Yours truly,

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CORPORATIONS—CAPITAL STOCK—INCREASE OF CAPITAL STOCK—METHOD OF.

AUSTIN, TEXAS, February 6, 1908.

*Capt. W. R. Davie, Secretary of State, Austin, Texas.*

DEAR SIR: Responding to your request contained in your favor of this date, I beg leave to advise you that any corporation desiring to increase its capital stock can do so in accordance with Section 3 of the Acts of 1907, page 310 of the General Laws, and such amendment must be executed by at least a majority of the board of directors and acknowledged by each of them before any officer duly authorized to take acknowledgments of written instruments for record in this State.

I am also of the opinion that accompanying the said amendment there should be a copy of the resolution adopted by the stockholders authorizing the increase of capital stock, and also a copy of the resolution of the board of directors ordering the increase of such capital stock, and that the president and secretary of said board of directors, under its corporate seal, should certify: First, that the above resolutions are true and correct copies of the originals; and, second, that the persons signing the amendment are directors, and are, at least, a majority of the board of directors.

Yours truly,

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PAWN BROKER—GROSS RECEIPTS TAX—NOT LIABLE FOR —WHEN.

AUSTIN, TEXAS, February 8, 1908.

*Hon. John W. Stephens, Comptroller of Public Accounts, Capitol.*

Sir: You have submitted to this department a question which is as follows:

"Will you please advise if a pawnbroker is liable for 50 per cent tax on sale of pistols under Section 12, Chapter 18, Special Session, Thirtieth Legislature, gross receipts bill, when such sales are made in compliance with and under Articles 3641, 3642, 3643 and 3644 of the Revised Statutes of Texas.

"In other words, when a pawnbroker receives a pistol as a pledge and the time expires within which such pledge was agreed upon to be redeemed and the pawnbroker proceeds to sell said pledge under the above articles is he liable for said 50 per cent tax under such sale?"

In reply, I beg to say that merely making sales pursuant to the provisions of Articles 3641, 3642, 3643 and 3644 of pistols which have been pawned with him in regular course of business does not subject a pawnbroker to the tax prescribed by Section 12 of Chapter 18 of the General Laws of the Thirtieth Legislature (1907), page 485, such sales being made for the purpose of enforcing a lien upon property.

But I am of the opinion that if after such sale at public auction for the enforcement of such lien such pawnbroker shall in regular course of business sell, or offer for sale, pistols which shall have been bought in by him at such auction sale, or other pistols, then such pawnbroker will thereby become subject to said tax, being a "wholesale or retail dealer of pistols" within the meaning of said Section 12.

Yours truly,

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#### ELECTION LAW.

County executive committee may prescribe as a qualification for voting in primary that the voter shall be "white." Word "white" must not be printed upon ballot.

AUSTIN, TEXAS, February 8, 1908.

*Hon. Andrew J. Briton, County Attorney, Quitman, Texas.*

Dear Sir: We are in receipt of your letter of the 5th inst., in which you submit the following inquiries:

"1. Does Section 114a of Chapter CLXXVII, Acts of the Thirtieth Legislature, page 329, repeal or in any way conflict with Section 103 of Chapter 11, Acts Twenty-ninth Legislature, page 543?"

"2. Under Section 114a may the county executive committee of the Democratic party add the word "white" to the primary ballot so that none but white Democrats shall participate in the general Democratic primary?"

"3. If it is construed to be unlawful to print the word "white" on the ballot of the Democratic primary, then may not the county executive committee, under Section 103, Acts of the Twenty-ninth Legislature, above referred to, prescribe in addition, the additional qualification that the voter must be a white man?"

We answer the first two questions both in the negative and the third in the affirmative.

Said Section 103 provides that:

"No one shall vote in any primary election unless he has paid his

poll tax or obtained his certificate of exemption from its payment in cases where such certificate is required before the 1st of February next preceding, which fact must be ascertained by the officers conducting the primary election by an inspection of certified lists of qualified voters of the precinct and of the poll tax receipts or certificates of exemption; nor shall he vote in any primary election, except in the voting precinct of his residence \* \* \* provided that the executive committee of any party for any county may prescribe additional qualifications for voters in such primaries not inconsistent with this Act."

Said Section 114-a, Acts of the Thirtieth Legislature, is as follows:

"Section 114-a. No official ballot for primary election shall have on it any symbol or device or any printed matter, except a primary test, to be uniform throughout the State, which shall read as follows: 'I am a ..... (inserting name of political party or organization of which the voter is a member) and pledge myself to support the nominees of this primary,' and any ballot which shall not contain such test printed above the names of the candidates thereon shall be void and shall not be counted. Such ballot shall also contain the names and residences of the candidates."

We do not think that there is any conflict between the two statutes above quoted, and in the absence of such conflict, the latter does not repeal the former.

The Act of the Thirtieth Legislature, in which Section 114-a above quoted is found, does not purport to amend or repeal said Section 103 of the Acts of the Twenty-ninth Legislature.

It will be further observed that said Section 114a does not attempt to prescribe the qualifications of voters, but simply to provide what the ballot shall contain. Under the amendment to the election law, it would be unlawful for the primary ballot to have on it any symbol or device or printed matter, except the primary test provided for by said Section 114-a. If said ballot contain any other test in addition to that prescribed, it would also be unlawful, but we see no reason why the executive committee, under the authority conferred by said Section 103, would not have the right to prescribe that none but white democrats should participate in the democratic primary. The word "white," however, must not be printed upon the ballot.

Yours truly,

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#### TELEGRAPHERS' EIGHT-HOUR LAW.

Construction that law is valid, and mandatory upon railroad company. Operators can not, under law, be forced to work over eight hours.

AUSTIN, TEXAS, February 12, 1908.

*Hon. Sam C. Lowrey, County Attorney, Fayette County, LaGrange, Texas.*

Dear Sir: We are in receipt of your letter relative to the eight-hour telegraphers' act passed by the Thirtieth Legislature, in which you submit the statement of facts in a suit which you have pending and upon which you desire an opinion of this department.

The fact is brought to our attention that the railroads are requiring telegraph operators to labor eight hours per day at that occupation and at the expiration of that time shift the operator to other work, such as heavy clerical work, or to loading baggage, freight, checking cotton and performing such duties as require heavy manual labor from four to six hours after they have labored eight hours discharging the important duties of handling trains wherein the safety of hundreds of human lives and property of immense value are dependent upon their care, skill and attentiveness to duty.

The contention that this act is unconstitutional on the grounds that it invades the liberty of contract, is in my opinion untenable.

It is a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that its use may be so regulated as not to be injurious to the rights of others, or to the rights of the community, and is subject to such reasonable restraints and regulations established by law as the Legislature in the exercise of the police power of the State for the protection of the lives, property and safety of the public may think necessary and expedient. *Commonwealth vs. Alger*, 7 Cush., 53.

This power, legitimately exercised, can neither be limited by contract or bartered away by legislation. *Holden vs. Hardy*, 169 U. S., 393.

"The possession and enjoyment of *all rights* are subject to such reasonable conditions as may be deemed by the governing authority of the county essential to the safety, health, peace, good order and morals of the community." *Crowley vs. Christensen*, 137 U. S., 86.

And the liberty of contract, like other constitutional rights, is subject to such reasonable restraints as are deemed necessary for the safety and welfare of not only the public, but of the health and happiness of the individuals who may be parties to the contract. The State still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual's health, safety and welfare are sacrificed or neglected the State must suffer. *Holden vs. Harry*, supra.

Therefore, there can be no doubt of the power of the Legislature to enact laws regulating the hours of labor in such a hazardous occupation as that of telegraph operator in whose hands are confided the lives and property of the public.

The only question that can arise is whether the Legislature has enacted a law that limits the hours of employment to eight hours per day.

In Section 1 of the act is found the following language:

"That it shall be unlawful for any person, corporation or association operating a railroad within this State to permit any telegraph or telephone operator who spaces trains by the use of telegraph or telephone \* \* \* to be on duty for more than eight hours in any twenty-four consecutive hours, provided that the provisions of this act shall not apply to railroads, telegraph or telephone operators at stations where the services of only one operator is needed."

This language is clear as to the duty of the railroad company, but in Section 3 of the act the following language is employed:

"It shall be unlawful for any railroad, telegraph or telephone operator to work more than eight hours in twenty-four consecutive hours at such occupation \* \* \*."

It might be urged that by the use of the phrase "*as such occupation*," the Legislature did not intend to prevent the employment of the operator at other labor after he had worked eight hours telegraphing.

Where there is an apparent conflict in the provisions of an act the court will look to all sections of the act and even to the journals of the Legislature to ascertain the intention of the Legislature, and when the purpose underlying the enactment is ascertained the courts will give it effect.

In construing statutes courts will undertake to ascertain the intention of the Legislature and will look beyond the mere letter of the law in such cases. *Yick Wo vs. Hopkins*, 118 U. S., 356.

Looking to the terms of the entire act, we note that the caption reads as follows: "An Act to provide for an eight-hour day for railroad, telegraph or telephone operators, \* \* \*."

The emergency clause contains the following language:

"Owing to the crowded condition of the calendar, the near approach of the end of the session and the necessity for a law providing for an eight-hour day for railroad telegraphers, creates an emergency, etc."

The Committee on Labor of the House, in reporting the bill favorably, among other things, said in their report:

"The fact that operators are often worked long hours, thus rendering them unfit for good and efficient service, either to themselves or to the public, and under such conditions there is no wonder at the fearful accidents that are almost daily happening all over the country, 75 per cent of which is the result of overworked telegraphers. Not even an iron constitution could stand the strain, and to consider the fact that thousands of human lives traveling over the lines of railroads entrusted to the care and keeping of these worn-out and semi-conscious men can in anywise be safe, being forced at present to work day after day, long hours, the tension never being relaxed, no rest, the grist of the mill goes on and the grist is the very life, the happiness and the hearts of men, women and children. The dispatchers who issue the orders never work but eight hours out of twenty-four, but what can the dispatcher do if the operator is overworked and in a semi-conscious condition is unable to give him a proper report as to the location of a train he wished to give the order. These conditions confront the people today and we believe the sooner these conditions are removed the sooner accidents to the traveling public will cease

(Signed)

"STEPHENSON,  
"MOORE."

Taking into consideration the foregoing, together with the mandatory provision in Section 1 of the act, that the railroad company shall not permit the operator to be on duty more than eight hours,



it is obvious that the Legislature intended that the hours of labor for a person employed as a telegrapher should be eight hours and no more.

The Legislature has a right to, and doubtless did, take cognizance of the difficult and responsible duties devolving upon such employees, duties which require special training and a high order of skill and alertness to properly discharge.

That persons so engaged labor under a constant mental and nervous strain very trying on the strength and endurance of the operator requiring precision and promptness in displaying the proper signals governing the movement of trains and accuracy in receiving and transmitting orders from the dispatcher; that the nature of his duties confine him during the hours of his employment close to his instruments.

In order to properly discharge such duties he should be sober, alert and attentive at all times; that failure to deliver an order or neglect in displaying signals would send a train speeding on its way, carrying human souls and property to death and destruction, beyond the power of the operator to recall or the dispatcher to obviate.

It would be convicting the Legislature of rank folly and idiotic inconsistency to hold that after a man had exhausted himself mentally by a long vigil at the key they intended that the company could put him to labor handling baggage, loading freight, making way-bills and performing other heavy clerical duties for six hours longer in order to complete his physical exhaustion before he could enjoy surcease from his labors for the day.

The very purpose of the enactment refutes the suggestion, when it is considered that many of these operators work wholly at night under circumstances that double the strain, having to contend with the forces of nature demanding sleep while laboring in the discharge of such responsible duties, the Legislature had the right, and, in my judgment, have said that eight hours should be the extent of time he could be employed out of twenty-four, except in case of emergency.

At any rate, if by any construction the act permits him to engage in other duties beyond the hours named, it is at least clear that such duties can not be performed for the railroad company as the provision as to the railroad company is mandatory and they are prohibited from permitting the operator to remain on duty after the eight hours have expired.

Upon the principles above stated, we think the act in question will be sustained as a valid exercise of the police powers of the State.

Yours truly,

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#### ANTI-NEPOTISM LAW.

What constitutes relationship within the third degree by affinity or consanguinity.

AUSTIN, TEXAS, February 13, 1908.

*Mr. James M. Edwards, President School Board, Tyler, Texas.*

Dear Sir: In your letter of the 9th inst., you ask the following question:

“What constitutes relationship within the third degree by consanguinity or affinity?”

In reply thereto, I wish to advise that relationship by consanguinity is the relation existing among all the different persons descended from the same stock, or common ancestor, as distinguished from affinity, which is a relationship established by marriage.

Relationship by consanguinity is either lineal or collateral. Lineal consanguinity is that which subsists between persons of whom one is descended in a direct line from the other, as between a man and his son, grandson and great grandson, and so on down in a direct descending line; or between a man and his father, grandfather, and great grandfather, and so on upward in an ascending line.

It is a very easy matter to determine the degrees of relationship by lineal consanguinity, as there is one degree represented by every generation. A man is related within the first degree to his father, second degree to his grandfather and third degree to his great grandfather, and so on in an ascending line. He is also related within the first degree to his son, second degree to his grandson and third degree to his great grandson, and so on in a descending line.

If you determine the degree of relationship by consanguinity, there is no difficulty arriving at the relationship by affinity, as a man's wife would be related within the same degree by affinity that the man is related to his relatives by consanguinity.

It is more difficult to determine the degree of relationship of collateral kinsmen, or relatives related by what is known as collateral consanguinity or affinity. Collateral consanguinity is the relation subsisting among persons who descend from the same common ancestor, but not from each other. It is essential, to constitute this relation, that they spring from the same common stock, but different branches.

The mode of computing degrees of collateral consanguinity at the common law and by the canon law, is to trace the parties to a common ancestor and then begin with such common ancestor and reckon downwards until the degree of the two persons whose relationship is sought to be established, or the more remote of them, is distant or degrees from such common ancestor and this will determine the degree of relationship between the parties. For instance, two brothers are related to each other in the first degree because they are each within one degree of the father. An uncle and nephew are related to each other in the second degree because the nephew is two degrees distant from the common ancestor; and the rule of computation is extended to the remotest degree of collateral relationship. You will bear in mind that this manner of computation is really an unreasonable one, for the simple reason that in an analysis of the relationship you will discover that second cousins, according to this manner of computation, are related to each other within the third degree because they are each removed from the common ancestor three degrees, or they have each the same great grandfather and one of such parties would also be related within the third degree and

within the same degree to his great uncle, his great uncle's son and his great grandfather that he is related to his second cousin because in computing by this method you determine the degree of relationship of the person most remotely removed from the common ancestor, which would make such person related within the same degree to all of his collateral kinsmen down to the one equally distant from such common ancestor, including the common ancestor. However, unreasonable this method of computation appears, it is the one which has been adopted by all the higher courts of our State having passed upon the point.

Dougllass vs. Overton, 1 W. & W., Secs. 533-536.

Baker vs. McRimmon, 48 S. W. Rep., 742.

Page vs. State, 22 App., 551.

Reed vs. State, 11 App., 585.

The most reasonable way, it occurs to me, of computing the degree of relationship between parties would be to take for instance a member of your board of trustees who is related to one of the teachers and trace them to the common ancestor and then count the number of degrees from such trustee to the common ancestor and then down from the common ancestor to such related teacher and the number of degrees they would be removed from each other through the common ancestor would be the number of degrees they are related to each other. This is the method adopted by what is known as the civil law and it appears to have been the method usually adopted by the American courts and by the statutes of the American States, so far as they are statutory enactment upon the subject. (Vol. 27, Amer. & Eng. Ency. of Law, 2nd Ed., 310, 311.)

It has been held that in the absence of the statute the civil law rule for computation of degrees prevails.

Hillhouse vs. Chester, 3 Conn., 166.

Hays vs. Thompson, 1 Ill., 180.

Clark vs. Sprague, 5 Ind., 412.

Cloud vs. Bruce, 61 Ind., 171.

Schenck vs. Vail, 24 N. J. Eq., 538.

Taylor vs. Bray, 31 N. J. L., 182.

Smith vs. Gaines, 36 N. J. Eq., 297.

Clayton vs. Drake, 17 Ohio State, 368.

McDowell vs. Adams, 45 Pa. St., 430.

As stated above, this appears to be the most reasonable rule and the one adopted by the American courts in the absence of an express statutory provision to the contrary. But however reasonable this rule may appear, our courts have adopted the contrary rule and it is adhered to by the ruling of this department.

Yours truly,

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PUBLIC LANDS—GRANT OF, TO RAILROAD COMPANY—  
(G., H. & S. A.):

Period of time within which alienation by the railroad company is required to be made, must begin with the date of the issuance of patents; patents may now be issued to said lands.

AUSTIN, TEXAS, February 14, 1908.

*Hon. John J. Terrell, Commissioner of the General Land Office,  
Austin, Texas.*

Sir: We have your letter which is as follows:

“Following the suggestion of the Supreme Court, in the case of the State vs. G., H. & S. A. Ry. Co., 81 Texas, 572, the defendant company selected for itself 483 sections of the 619 sections involved and judgment was then given in favor of the State for 136 sections, in the district court of Val Verde County, April 6, 1892, in the consolidated causes Nos. 84 and 110 of the State vs. said railway company. A certified copy of this judgment designating particularly the sections awarded the State is on file in this office. Applications for patent have been made for sundry sections of those which the State failed to recover. Is there now any legal obstacle to issuance of patent? A full statement of the facts is given in the case cited.”

In the case of the State of Texas vs. The Galveston, Harrisburg & San Antonio Railway Company, 81 Texas, 572, our Supreme Court held that although the certificates in question purport upon their face to have been issued by virtue of the Act of January 30, 1854, and Acts amendatory thereof, the real authority for this grant of land to said railway company is to be found in the Act of August 16, 1876, Laws of 1876, page 153; 8 Gammel, 989, bottom.

Section 3 of that Act was as follows:

“All lands acquired by railroad companies under this act shall be alienated by said companies, one-half in six years and one-half in twelve years from the issuance of patents to the same, and all lands so acquired by railroad companies, and not alienated as herein required, shall be forfeited to the State and become a part of the public domain, liable to location and survey as other unappropriated lands; provided further, that the State shall retain the right to regulate the rates of freight and passengers' fare by general law on all roads accepting a grant of land under this act.”

The Constitution of 1876 became effective on April 18, 1876, and was, therefore, in force when the above quoted statute of 1876 took effect.

Section 3 of Article 4, of that Constitution is as follows:

“The Legislature shall have no power to grant any of the lands of this State to any railway company except upon the following restrictions and conditions:

“First—That there shall never be granted to any such corporation more than sixteen sections to the mile, and no reservation of any part of the public domain for the purpose of satisfying such grant shall ever be made.

“Second—That no land certificate shall be issued to such company until they have equipped, constructed and in running order at least ten miles of road, and on the failure of such company to comply with the terms of its charter, or to alienate its land at a period to be fixed by law, in no event to exceed twelve years from the issuance of the patent, all said land shall be forfeited to the State and become a portion of the public domain, and liable to location and survey. The Legislature shall pass general laws only, to give effect to the provisions of this section.”

So much of Section 5 of Article 14 as seems applicable to the question here under consideration, is as follows:

“All lands heretofore or hereafter granted to railway companies, where the charter or law of the State required or shall hereafter require their alienation within a certain period, on pain of forfeiture, or is silent on the subject of forfeiture, and which lands have not been or shall not hereafter be alienated, in conformity with the terms of their charters and the laws under which the grants were made, are hereby declared forfeited to the State, and subject to pre-emption, location and survey, as other vacant lands.”

Thus, by the terms of the Constitution of 1876 and the aforesaid Act of August 16, 1876, the calculation of the period of time within which alienation by the railway company of these lands is required to be made, must begin with the date of the issuance of the patents to such lands, respectively.

Your letter shows that in these instances patents have not issued; hence, such period of time for alienation has not begun to run, and, so far as the question of alienation of such lands is concerned, there seems to be no valid reason why such patents should not now be issued.

Your letter does not indicate that there was any irregularity in the issuance or location of any of the certificates which are involved in your inquiry, and I must presume that there was no such irregularity. However, in that connection, I beg to refer you to my letter to you of date February 11, 1908, concerning issuance of patents to lands located under certified copies of certificates issued to the International & Great Northern Railroad Company, which letter sets out at length my views concerning such irregularities, if any.

Assuming that the certificates here inquired about by you were regularly issued and located, I beg to report that I do not know of and have been unable to discover any reason for not issuing patents to the lands which are embraced in your inquiry.

The great pressure of work in this office has prevented earlier reply.

Yours truly,

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ELECTION LAW—STATE EXECUTIVE COMMITTEE—A. & M. COLLEGE—DIRECTOR OF.

One can not legally hold position of director of A. & M. College and be a member of State Executive Committee at the same time.

AUSTIN, TEXAS, February 14, 1908.

*Senator W. P. Sebastian, Austin, Texas.*

Dear Sir: You submit to us the following inquiry:

“I am one of the directors of A. & M. College, and I desire to know whether or not, by reason thereof, I am disqualified to act as a member of the State Executive Committee.”

Answering the above inquiry, you are respectfully advised that you are an officer of the State, and therefore disqualified under the pro-

visions of Section 60 of the Terrell Election Law to act as a member of an executive committee, either for the State, district or county. Said Section 60 provides that no one who holds an office of profit or trust under this State or in any city or town in this State, shall act as chairman or as a member of an executive committee. We think it is clear that the directors of the A. & M. College are officers within the meaning of the provisions of the Terrell Election Law above referred to.

In the case of *Hendricks vs. The State*, 20 Texas Civil Appeals, 179, the courts say:

"Among the criterions given for determining whether an employment is a public office or not are the delegation of a portion of the sovereign functions of the government; the requirement of an official oath; that the powers are created and conferred by law and not by contract; and the fixing of the duration or term of office. Mech., Section 2, et seq. All of these distinguishing features are found in the trusteeship of the school districts of this State. The schools are public schools, and are administered as a part of the State government. A part of the sovereign functions of the State are intrusted to the discharge of the trustees by the law providing for the maintenance of the schools, who are required to be elected for a fixed term to serve until their successors have been elected or appointed and have qualified, which is done by taking an oath of office. It is not necessary that a salary or fees should be annexed to the office to determine the nature of the position. They are mere incidents, and form no part of the office. Mech., Section 7."

Trusting that the above sufficiently answers your inquiry, we beg to remain,

Yours truly,

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INSURANCE COMMISSIONER—LIFE INSURANCE COMPANY  
—DUTIES REQUIRED OF, BEFORE ACCEPTANCE  
OF POWER OF ATTORNEY, ETC.

AUSTIN, TEXAS, February 17, 1908.

*Hon. Thos. B. Love, Commissioner of Insurance, Capitol.*

Sir: You have referred to this department a letter addressed to you on February 6, 1908, by Messrs. Locke & Locke, of Dallas, Texas, attorneys for the Metropolitan Life Insurance Company, transmitting the application of said company for license to do business in the State of Texas during the year ending December 31, 1908, and accompanying papers and documents.

You ask to be advised by this department upon three points, namely:

First. Whether or not you should file said application, documents and papers.

I am of the opinion that all of them should be now filed by you with the exception of the power of attorney, our objections thereto being as follows, namely:

(a) Revised Statutes, Article 3064, provides that the requisite power of attorney "shall be embodied in a resolution duly adopted

by such company." In my opinion the power of attorney tendered to you does not comply with this statutory provision. It is true that it begins with the words "Be it resolved by the Metropolitan Life Insurance Company of New York" and that it is signed by the president and secretary of the company, and bears the impress of the company's seal. The certificate of acknowledgment also recites that the resolution was "duly passed for the purposes and considerations therein mentioned," but does not state by whom such resolution was passed. Upon its face the power of attorney does not recite or indicate that such resolution was adopted by the board of directors, and does not purport to be a copy of any resolution, but indicates that the resolution was adopted by the president and secretary only. The recital that said resolution was "duly passed" is not found in the body of the power of attorney but appears in the certificate of acknowledgment only, and at best it states a mere conclusion of the officers making the acknowledgment and does not state facts from which you, as Commissioner of Insurance, can determine whether or not the resolution was "duly adopted by such company."

In my opinion the power of attorney should be in the form of a certificate signed by the president and secretary of the company in their official capacities and attested by the seal of the corporation, setting out at length the statutory resolution and reciting the same was duly adopted by the board of directors of said company at a certain meeting, designating the time of such meeting.

(b) The resolution itself is defective in form, in that it is not in the language of the statute and does not even in substance follow the phraseology or comply with the requirements of the statute.

Revised Statutes, Article 3064, requires that such power of attorney shall be for all the "agents, officers or representatives" of the company in this State, "authorizing such agents, officers and representatives, and each of them, to accept service," etc.; but the power of attorney tendered you makes no mention of or reference to any "officers" or "representatives" of the company. It will also be noted that the statute requires that such agents, officers and representatives, and each of them, shall be by said power of attorney authorized to accept service while the power of attorney tendered you uses the word "acknowledge" instead of "accept."

The other irregularities in the form of the resolution are of perhaps less importance and need not be mentioned here, inasmuch as that instrument should be re-drafted and re-executed, and in re-drafting same it will be easy to follow the language of the statute.

Said statute also requires that "all of the persons named in said power of attorney shall be residents of this State, and the full name and residence of each shall be stated." I am of the opinion, therefore, that the full name and residence of each and every *agent, officer and representative* of the company should be set out in full in the body of the resolution, and that upon the appointment or designation by such company of any new or additional agent or officer or representative in the State of Texas, a similar power of attorney should be likewise executed and filed in your office.

The note which is appended to said power of attorney and which states that "additional names of agents will be inserted from time to

time in the resolution so on file, by the Commissioner, whenever he shall be duly authorized so to do by letter signed by the president and secretary of the company," is no part of the power of attorney here under consideration, and even if it were, such suggested attempt to confer by that means authority upon agents of the company to accept service of legal process from and in behalf of said company would be ineffective and not in compliance with the requirements of said Revised Statutes, Article 3064.

Second. What form of certificate should be given by you to the company as to the filing of its report and the amount of its tax, based upon said report, under Chapter 18, Section 8, of the General Laws of the First Called Session of the Thirtieth Legislature?

In reply to this inquiry I suggest that you incorporate in the form of such certificate, usually given by you, the following language, namely:

"This certificate confers upon said company no right or permit to do business in the State of Texas during the year 1908 or any portion thereof, and is not intended and is not to be understood or construed as a recognition by me of any such right or as entitling said company to such permit.

"The question whether or not said company shall or shall not be granted such permit is to be hereafter determined under the laws of said State."

Third: What answer should you give to the attorneys for said company, as to the issuance by you of a permit to do business in Texas for the year December 31, 1908?

The above mentioned letter from said attorneys to you contains the following paragraph:

"However, these papers show that Metropolitan Life Insurance Company has not complied with the requirements of Chapter CLXX of the General Laws of 1907, commonly known as the Robertson Act. The company is advised that said chapter, because of its repugnancy to several provisions of the Constitution of Texas and the Constitution of the United States, is not a law, but is wholly void."

Said company has also given notice to the public through the press and otherwise that it does not intend to comply with the provisions of said Robertson Act, but, on the contrary proposes to test its constitutionality.

Revised Statutes, Article 3048, is as follows, namely:

"When application is made to the Commissioner by any company desiring to pursue the business of insurance, or a certificate of authority, he shall, before granting such certificate, *be satisfied that such company has fully and in good faith complied with all the requirements of the law* and is possessed of the amount of capital stock required by law, and such commissioner may make or cause to be made such examination and investigation into the affairs of such company as he may deem prudent."

You inform us that inasmuch as the above mentioned papers and said letter accompanying said application for said permit upon their face show that said company has wholly and intentionally failed to comply with the requirements of said Robertson Act, you have made no further examination into the affairs and standing of said company and



that you are consequently not now "satisfied that such company has fully and in good faith complied with all the requirements" of other statutes now in force in this State, which are applicable to said insurance company, and that it is not your desire or intention to proceed with the further investigation of the affairs and status of said company, pending its refusal to comply fully with the provisions of said Robertson Act, and that before becoming satisfied that they have done so, it may become necessary for you to exercise your statutory right and authority to make a thorough investigation of its affairs in the home office of said company in New York City.

These being the facts, it only remains for you to decline to issue such permit to said company at this time, basing your declination upon the fact that you are not satisfied that such company has fully and in good faith complied with all the requirements of the law applicable to said company.

The above mentioned letter, documents and papers are herewith returned to you.

Yours truly,

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#### TOWN OR VILLAGE—ISSUANCE OF BONDS.

Town or village incorporated under R. S., Title 18, Chapter 11, has no authority to issue bonds.

AUSTIN, TEXAS, February 22, 1908:

*Mr. J. D. Powell, Sheriff and Tax Collector, Archer City, Texas.*

Dear Sir: In your letter of the 19th inst., you make the following inquiry:

"We have over 500 inhabitants and the question with us is, have the people a right, after incorporating, to issue bonds for the purpose of putting in water works?"

You do not state in your letter, but I assume from your statement that having a population of over five hundred you desire to incorporate as a town or village under Revised Statutes, Title 18, Chapter XI, and that your town has never heretofore been incorporated for any purpose.

Assuming that I am right in this statement, your attention is respectfully called to Revised Statutes, Article 587, which reads as follows:

"When the entry mentioned in the preceding article has been made, the town shall be invested with all the rights incident to such corporation under this chapter, and shall have power to sue and be sued, plead and be impleaded and to hold and to dispose of real and personal property: provided such real property is situated within the limits of the corporation."

You will observe that the powers and duties of such corporations are confined to the provisions of this title and chapter. The provisions of that title and chapter granting a taxing power to such corporation is found in Article 595, which reads as follows:

"The board of aldermen shall have power to levy and collect an

occupation tax of not more than one-half the amount levied by the State, also to levy taxes on the persons and property, real and personal, within the corporation subject to taxation by the laws of the State; but the tax on persons and property shall not in any one year exceed the rate of one-fourth of 1 per cent on the \$100 valuation."

This is all the taxing power granted in this chapter to towns and villages incorporated under this title and chapter.

It has been held by the Supreme Court that towns and villages so incorporated are not authorized by this article to levy and collect a poll tax. (Morris vs. Cummings, 91 Texas, 618.)

The court saying in that opinion that "the inference is therefore strong that if it had been intended to authorize the towns in this State, organized under the general law, to levy a poll tax, the Legislature would have made use of that well defined term."

In other words, the Legislature in enacting this chapter failed to authorize such corporations to levy and collect a poll tax. There being a failure on the part of the Legislature to so authorize such taxing, the court has decided that they have no such authority. For the same reason it would occur that they have not any authority to issue bonds. There is no provision in this chapter authorizing the issuance of bonds and no provision in this chapter for the levying and collecting of a tax to pay interest and provide a sinking fund for any bond issues, and for the same reason that the court has held that such corporations are not authorized to levy a poll tax, they are not authorized to issue bonds and levy an interest and sinking fund tax.

You will observe, therefore, that before a town or village so incorporated can issue bonds, they must become incorporated as a city or town under Title 18, Chapter 1, Article 381 or Article 365.

Under Article 381 a town or village having incorporated under Chapter XI of this title and having 1000 population, or over, may accept the provisions of Title 18 with all the powers conferred upon cities and towns under that title and thereby become authorized to issue all municipal bonds mentioned in Article 486.

It is also true that towns and villages, if they contain a population of 1000, or over, may incorporate as a city or town under the provisions of Chapter XI of this title and also under Article 385. They may incorporate under Article 385 without having previously incorporated under Chapter XI; provided such town or village contains a population of 1000 or over.

After such city or town has incorporated under Chapter 1, Title 18, as provided in Article 381 or 385, they are then authorized to issue municipal bonds for all the purposes mentioned in 486, but until they have been so incorporated, they are not authorized to issue any kind of municipal bonds.

Yours truly,

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TEXT-BOOKS—TEXT-BOOK BOARD.

Public schools must use books adopted by State Text Book Board.

AUSTIN, TEXAS, March 14, 1908.

*Hon. R. B. Cousins, State Superintendent, Capitol.*

Dear Sir: I am in receipt of your letter of the 10th instant, enclosing a letter from Mr. F. W. Chatfield of Dallas, of the 9th instant. You desire an opinion from this department in answer to the questions propounded to you by Mr. Chatfield.

The questions in his letter read as follows:

"1. Can the school board of any of the public schools of Texas select such supplementary reading as they deem proper and best for use in their respective schools?"

"2. Suppose a book should be adopted by the Text-Book Board that could not be used intelligently by pupils below certain grades, may a more elementary book on the same subject, adapted to the advancement of the pupil be used to supplement this lack, in bringing the pupil to a proper preparation for the use of the adopted book? To illustrate: Suppose a book on physics should be adopted of such an advanced character that it could not be used by pupils below the tenth or eleventh grades; could a more elementary book, adapted to pupils in the lower grades be used as a supplementary text to prepare pupils for the more advanced text?"

In reply thereto, I call your attention to the provisions of Chapter IX, Acts First Called Session of the Thirtieth Legislature. This act creates the State Text-Book Board and prescribes its duties. A part of Section 1 of the act reads as follows:

"Said Board is hereby authorized and required to select and adopt a uniform system of text-books to be used in the public free schools of Texas, and the series so selected shall include and be limited to text-books on the following subjects."

This provision is followed by a list of subjects upon which the Text-Book Board is authorized to prescribe and adopt a series of text-books for the public free schools of the State. At the close of the sentence prescribing the subjects upon which text-books are to be adopted by the Text-book Board, this provision is found:

"Provided, however, that nothing herein shall be construed to prevent the use of supplementary books."

This provision, then, is followed by the further provision which reads as follows:

"The Text-Book Board shall adopt a series of supplementary reading books for the first, second and third grades, and each bidder presenting books for adoption shall state at what price the readers are offered as basic readers and as supplementary readers. Such supplementary books shall not be used unless approved by the trustees of such school as to price, binding, printing and general arrangement, and they shall not then be used to the exclusion of the books prescribed under the provisions of this act. But full use must be made, in good faith, of the books adopted under this act, provided, that when supplementary books are used, they shall be furnished at the price to be fixed by the trustees of the schools in which they are used."

It appears from the reading of this section of the act that the power of the Text-Book Board to prescribe supplementary books

is limited to supplementary reading books for the first, second and third grades.

It is my opinion that the Legislature intended to establish a uniform series of text-books in the above schools throughout the State and to leave no discretion with the board of trustees as to the use of the books adopted by the Text-Book Board. I think it clearly within the power of the board of trustees of the respective schools of the State to adopt such supplementary readers as they may see proper to adopt in their schools, supplementing those prescribed by the Text-book Board, but not in lieu thereof. I do not think it within the power of the board of trustees of any public school in the State to reject the basic or supplementary texts described by the Text-Book Board and adopt in lieu thereof books of their own selection, but that they must, in good faith, use the books adopted under the text-book act, including supplementary readers prescribed by law.

It is, therefore, my opinion that Mr. Chatfield's first question should be answered in the affirmative, except as to the supplementary readers authorized to be adopted and prescribed by the Text-Book Board.

Second. Chapter CLXIX, Acts Regular Session of the Thirtieth Legislature, reads in part as follows:

"All public schools in the State shall be required to have taught in them orthography, reading in English, penmanship, arithmetic, English grammar, modern geography, composition, physiology and hygiene, including the effect of alcoholic stimulants and narcotics on the human system, mental arithmetic, Texas history, United States history, civil government, elementary agriculture and other branches as may be agreed upon by the trustees or directed by the State Superintendent of Public Instruction."

I am of the opinion that Chapter IX of the Acts of the First Called Session of the Thirtieth Legislature is not in conflict with the act above quoted, and that in construing the two acts together effect can be given to both. I am of the opinion that the board of trustees of the respective schools of the State have the right to prescribe the course of study for their schools with such additional studies as may be directed by the State Superintendent of Public Instruction, except so far as this power of adopting text-books has been by the text-book act taken away from the trustees and placed in the hands of the Text-Book Board. The trustees of the schools of the State have a right to adopt any text-book they may see proper to adopt as a supplementary book, supplementing those prescribed by the Text-Book Board.

You are, therefore, advised that as to Mr. Chatfield's second question that, in my opinion, if the State Text-Book Board should adopt a text-book which could not be intelligently used by pupils below a certain grade, that the trustees of such school could adopt as a supplementary text a more elementary work upon the same subject, and that in doing so they would not violate the provisions of the text-book act. It would not be adopting a book of their own selection to the exclusion of those adopted by the Text-Book Board, but would be adopting a supplementary work to be used

by pupils until they were sufficiently advanced to intelligently use the ones adopted by the Text-Book Board.

The act provides, as hereinbefore stated, that full use must be made, in good faith, of the text-books adopted under this act. This, of course, requires that in the adoption of any supplementary work that the trustees are not expected to and are not authorized to adopt a book of their own selection in total disregard of those adopted by the Text-Book Board, but that they must, in good faith, use the books adopted by the Text-Book Board. After they have done this, they are authorized to use any other books as supplementary books, as may, in their judgment, be necessary in their schools.

Yours truly,

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GROSS RECEIPTS TAX ACT—WHOLESALE DRUGGIST.

Wholesale druggists dealing in naphtha, benzine, and other mineral oils required to pay gross receipts tax.

AUSTIN, TEXAS, March 14, 1908.

*Hon. J. W. Stephens, Comptroller of Public Accounts, Capitol.*

Dear Sir: Answering the inquiry submitted by the San Antonio Drug Company of San Antonio, Texas, as to whether wholesale druggists dealing in naphtha, benzine and other mineral oils refined from petroleum, and also spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication at wholesale, are required to pay a gross receipts tax under Chapter XVIII, Acts First Called Session of the Thirtieth Legislature, we beg to advise that, in our opinion, such druggists are. Section 9 of said act provides that "Each and every individual company, corporation or association created by the laws of this State or any other State or nation, which shall engage \* \* \* in this State in the business of wholesale dealers in coal oil, naphtha, benzine and other mineral oils refined from petroleum are required to pay an occupation tax equal to 2 per cent of the gross receipts and the amount uncollected from such sales."

Section 11 of said act provides that "Each and every individual, company, corporation or association \* \* \* who shall engage in this State in the business of a wholesale dealer or a wholesale distributor of spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication, shall \* \* \* pay an occupation tax equal to one-half of one per cent of said gross receipts from said sale."

Said Section 11 further provides that a wholesale dealer or distributor within the meaning of the statute is any individual, company, corporation, etc., selling any of the articles mentioned therein to retail dealers.

It is not questioned that wholesale liquor dealers and wholesale dealers in naphtha, benzine, etc., are within the provisions of the law and are required to pay taxes, but the question is whether

the San Antonio Drug Company and other like corporations, being known as wholesale druggists and not as wholesale liquor dealers or wholesale oil dealers, are subject to the tax; but, as above stated, our opinion is that wholesale druggists dealing at wholesale in the commodities embraced within the provisions of the gross receipts tax act must pay a tax on the gross receipts from sales of such commodities.

In the case of *Kelley vs. Dwyer*, 75 Tenn., 180, 187, it is held that a general grocery merchant who carries spirituous liquors as a part of his stock, which he sells at wholesale, is a "wholesale liquor dealer."

The above case is directly in point upon the question under consideration here and supports the conclusion which we have expressed above.

Yours truly,

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TERMINAL RAILWAY COMPANIES—GROSS RECEIPTS  
TAX—INTANGIBLE ASSETS TAX.

Terminal railway companies subject to payment of gross receipts tax, but not the intangible assets tax.

AUSTIN, TEXAS, March 20, 1908.

*Hon. L. T. Dashiell, Tax Commissioner, Capitol.*

Sir: You have requested of this department an opinion as to whether the corporations which are hereinafter named are subject to the gross receipts occupation tax statute which was passed by the Thirtieth Legislature (Chapter 18), or to the intangible tax statute which was passed by the Twenty-ninth Legislature (Chapter 146), said corporations being as follows, viz.:

Houston Belt & Terminal Railway Company.

Galveston Terminal Railway Company.

Fort Worth & Denver Terminal Company.

Galveston East End Pier, Wharf, Dock, Shipping and Terminal Company.

An examination of the articles of incorporation of these corporations, respectively, indicates that each is a terminal railway company. I presume they are conducting the business for which they were incorporated, and I understand from you that, so far as your information extends, each of said companies is in fact a terminal railway company operating a terminal railway as its sole or principal business.

Assuming that to be true, I beg to answer your inquiry as follows:

Said gross receipts occupation tax statute of 1907 levies, in Section 16, an occupation tax measured by gross receipts upon "each and every individual, company, corporation or association, whether incorporated under the laws of this or any other State or Territory, or of the United States, or any foreign country, which owns, controls, manages or leases any terminal companies, or any railroad doing a terminal business within this State."

This classification seems to embrace each of the corporations above named.

Section 25 of said statute of 1907 contains the following provisions:

"All persons, associations of persons, firms and corporations upon whose business an occupation tax is imposed under this act, shall, upon the taking effect hereof, be exempted and relieved from the operation of the Act of the Twenty-ninth Legislature approved April 17, 1905, being Chapter 146 thereof, providing for the taxation of the intangible assets of certain corporations, associations and individuals, and all sections of the Act of the Twenty-ninth, being Chapter 148 thereof, approved April 17, 1905, imposing an occupation tax upon the occupations herein taxed are hereby repealed."

In my opinion the above quoted provisions of said Section 25 exempt and relieve each of the above-named corporations from the operation of said intangible tax statute of 1905.

In other words, each of said corporations is subject to an occupation tax under said gross receipts tax statute of 1907, but is not subject to said intangible tax statute of 1905.

Yours truly,

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QUARANTINE—CONTAGIOUS AND INFECTIOUS DISEASES  
COMMISSIONERS COURT—CITY AUTHORITIES.

Duty of, to establish and maintain quarantine; and if court fails to take such action, duty may be enforced by mandamus.

Duty of city authorities to act on failure of commissioners court to establish and maintain quarantine.

AUSTIN, TEXAS, March 23, 1908.

*Dr. W. M. Brumby, State Health Officer, Capitol.*

Dear Sir: The department is in receipt of your letter of the 3rd instant, submitting certain inquiries upon the subject of quarantine. The legal questions involved seem to be upon whom is the legal duty cast, county or city authorities, to establish and maintain quarantine, when same should be established, and whether or not the duty may be enforced by mandamus or otherwise.

Article 4340 of the Revised Statutes provides that "Whenever the commissioners court has reason to believe that they are threatened at any point or place within or without the county limits, with the introduction or dissemination of a dangerous, contagious or infectious disease that can and shall be guarded against quarantine, they *may* direct their county physician to declare and maintain said quarantine against any and all such dangerous diseases."

Under the above statute we think it is within the discretion of the commissioners court to determine whether or not the county is threatened at any point or place with the introduction or dissemination of contagious diseases, etc. While the said commissioners court is invested with the discretion of determining whether the county is threatened with the introduction of said diseases, yet when they believe such to be the case, notwithstanding the use of

the word "may" in the statute, it is their imperative duty, enjoined upon them by law to cause their county physician to establish and maintain the necessary quarantine.

Endlich, in his work on the interpretation of statutes, in Section 312, speaking of the word "may" in a statute says, "The result seems to be that when a public benefit is conferred in enabling terms, a duty is impliedly imposed to exercise it whenever the occasion arises."

We advise, therefore, that whenever the commissioners' court of any county believes that the county is threatened with the introduction or dissemination of dangerous contagious and infectious diseases, it is the imperative duty of said court to direct the county physician to establish and maintain a quarantine, and if the court fails to take any action in such cases, the duty may be enforced by writ of mandamus or mandatory injunction at the suit of any interested person resident in the county.

We advise also that the city authorities are given only a permissive right to maintain quarantine in the city limits. In the event of the failure or refusal of the commissioners court to discharge its duty as to quarantine, then it becomes the duty of the city authorities to establish and maintain the necessary quarantine within the city limits. It is, however, made the plain duty of the commissioners court of the county to declare, take charge of, control and maintain such quarantine throughout the county, including incorporated cities and towns therein, and to bear the expense of same.

Yours truly,

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CITY ALDERMAN—CITY FIREMAN.

City fireman who is paid by city council can not, at the time he is drawing pay from city as fireman, hold office of alderman of said city.

AUSTIN, TEXAS, April 1, 1908.

*Mr. J. S. Weaver, Dublin, Texas.*

Dear Sir: I am in receipt of your letter of the 16th ult., and on account of pressing business in the department have been unable to reply thereto before now.

You make the following inquiry:

"For the past several years many of our firemen have been members of the city council. We have three companies of fire boys, about forty in all, which are paid by the city. Now, firemen being aldermen, vote for allowances for their pay and all appropriations. Consequently, instead of the city governing, the firemen control to a great extent. Is a fireman in a paid company eligible for election as city alderman?"

Ordinarily, the opinions of this department are restricted to official inquiries and on account of this not being official, we would not answer the same but for the fact of its public interest to the people of your city.

In reply to your inquiry, I wish to call your attention to Revised Statutes, Article 566, which reads as follows:



"No member of the city council shall hold any other employment or office under the city government while he is a member of said council, unless herein otherwise provided, and no member of the city council or any officer of the corporation shall be directly or indirectly interested in any work, business or contract, the expense, price or consideration of which is paid from the city treasury, or by an assessment levied by an ordinance or resolution of the city council; nor be the surety of any person having a contract, work or business with said city for the performance of which security may be required, nor be the surety on the official bond of any officer of the city."

Answering your question directly, it is my opinion that a member of the fire department of your city is eligible to the office of alderman of your city for the same reason that a member of the city council or any officer of the city would be eligible for election to any other city office. When any officer or any employee of the city is elected a member of the city council, he thereby, when he qualifies as such alderman, vacates any other office or position of employment which he may have theretofore held. While a fireman of your city is eligible to the office of alderman, when he qualifies as such alderman he must and does thereby legally terminate his employment with the city as a member of its paid fire company.

It therefore results that members of the city council are not eligible to employment by the city as members of its fire department under the provision of the statute herein quoted. It further results that the payment by the city through the city council of the salaries of the aldermen as firemen is an illegal and improper disbursement of the city's funds and a misappropriation thereof.

Yours truly,

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TAX—SCHOOL TAX—DIMINISHING OF—SCHOOL BOARD—  
SCHOOL BOOKS.

School board may handle same.

When statute prescribes form in which question of reduction of school tax shall be submitted to voters, the statute should be strictly complied with.

AUSTIN, TEXAS, April 9, 1908.

*Hon. John L. Terrell, County Judge, Fort Worth, Texas.*

Dear Sir: In your letter of the 5th instant you make the following inquiry:

"1. In one election the ballots were 'For 5 cent tax' and 'Against 5 cent tax,' when the question submitted to the voters was 'For diminishing the tax for 20 cents on the \$100 valuation to 5 cents on the valuation.' Does the carrying of the proposition upon the form of ballot invalidate the election, the majority being one vote 'For 5 cent tax'?"

"2. In the election held to diminish tax from 20 cents to 10 cents on \$100 valuation, does it require two-thirds vote to diminish tax, or a mere majority?"

"3. In a school trustee election here one of the trustees elected is owner of a drug store which carries school books. There is another store of the same kind in town which also sells school books. The proprietor recently elected trustee has no exclusive agency. In Acts of the Twenty-ninth Legislature, Chapter 124, Section 175, he would seem disqualified from holding office, as he is interested in the sale of books, but under General Laws, Acts of the Thirtieth Legislature, Chapter 9, Section 8, it would appear otherwise."

You desire the opinion of this department upon the above inquiries. In reply thereto, I wish to advise:

1. Acts of the Twenty-ninth Legislature, Chapter 124, Section 64, reads as follows:

"If the election be to abrogate or diminish the school tax, each voter favoring the abrogation or diminution shall have written or printed upon his ticket 'For abrogating school tax' or 'for diminishing school tax to — cents,' as the case may be; and each voter opposing the abrogation or diminution shall have written or printed on his ballot 'Against abrogating school tax' or 'Against diminishing school tax to — cents,' as the case may be, and a majority vote shall be necessary to abrogate or diminish the school tax."

You will observe from the provisions of this section of this act that the Legislature has expressly provided the form of ballot to be used in abrogating or diminishing the tax in a common school district, and a compliance with the provisions of the law would have required your ballots to read:

"For diminishing school tax to 5 cents."

"Against diminishing school tax to 5 cents."

You will observe, therefore, that the law has not been followed in this particular in the election referred to in your letter.

The Supreme Court of this State has held that when a statute which authorizes a special election for the imposition of a tax prescribes the form in which the question shall be submitted to the popular vote, that the statute should be strictly complied with. (Reynolds Land & Cattle Co. vs. McCabe, 72 Texas, 57.)

It is therefore my opinion that the election referred to is entirely invalid.

2. A majority vote of the qualified voters in a common school district is all that is required to diminish or abrogate a tax of such district. (Acts Twenty-ninth Legislature, Chapter 124, Section 64.)

3. I am of the opinion that Section 8, Chapter 9, of the General Laws of the First Called Session of the Thirtieth Legislature repeals in part Section 175, Chapter 124, Acts Twenty-ninth Legislature, in so far as that act refers to the members of the board of trustees of a common school district. A part of the act of the Thirtieth Legislature referred to reads as follows:

"Any person, dealer or school board in any county in the State may order from the central agency and the books so ordered shall be furnished at the same rates and discount as are granted to agents at the county seat, provided the price of books so ordered be paid in advance."

This provision seems to expressly authorize the handling of school

books by the board of trustees, and, of course, thereby authorizes the handling of the same by any member of such board. The provision referred to expressly conflicts so far as the board of trustees or any member thereof are concerned, with Section 175, Chapter 124, Acts of the Twenty-ninth Legislature. The same being in conflict, the last legislative expression controls.

Yours truly,

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STATE HEALTH OFFICER—BOARDS OF HEALTH OF INCORPORATED TOWNS AND VILLAGES—POWERS AND DUTIES OF.

AUSTIN, TEXAS, April 17, 1908.

*Dr. W. M. Brumby, State Health Officer, Capitol.*

Dear Sir: This department is in receipt of your inquiry concerning the powers and duties of boards of health for unincorporated towns and villages in this State. We think such boards have power to make regulations and orders of general application which shall be published and obeyed as laws; also to make special orders, to meet emergencies not provided for by regulations or general obligation, to be enforced for the suppression of nuisance and of sources of contagious diseases and other great dangers to life and health.

The duties which commonly devolve upon such boards may be enumerated as follows:

1. To discover and remove preventable causes of disease, and to this end to maintain an efficient system of sanitary inspection and reports.
2. To appoint agents and inspectors to carry into effect the sanitary rules and regulations.
3. To cause every case of infectious or contagious disease to be reported immediately to the board.
4. To keep the State Health Officer informed concerning dangerous diseases in its jurisdiction.
5. To receive and examine into the nature of complaints concerning nuisances and causes of danger and injury to the public health and to cause such nuisances and all other things dangerous to the public health to be removed, suppressed and abated.
6. To protect the community and every family against infectious and epidemic diseases, and to prevent the spread of contagion by providing for the regular isolation of domestic quarantine of every case of contagious disease which occurs in the community.

The powers are conferred and the duties enjoined upon the board to secure the preservation and promotion of the public health by the enforcement of all necessary and proper sanitary regulations and the suppression, amendment or removal of all conditions detrimental to the lives and health of the people. And in view of the importance of the interest confided to the care of such health boards, the laws conferring these powers receive a liberal construction in aid to the beneficial purposes for their enactment.

In the case of Gregory vs. New York, 40 New York, 275, the court say:

"The importance of sustaining local boards of health in all lawful measures tending to secure or promote the public health should make the courts cautious in declaring any curtailment of their authority, except upon clear grounds."

Yours truly,

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### PHARMACY LAW—BOARDS OF PHARMACEUTICAL EXAMINERS.

All persons registered as Pharmacists prior to taking effect of Act of 1907, upon payment of \$1, are entitled to registration under present law without examination.

Must obtain license from present board. Board should return old certificates filed as proof of proper registration.

AUSTIN, TEXAS, April 18, 1908.

*Mr. R. H. Walker, Secretary Board of Pharmacy, Gonzales, Texas.*

Dear Sir: Replying to the several questions propounded by you in your letter of the 16th inst., beg to advise:

First. That all persons who were registered by district boards as pharmaceutical examiners in accordance with the provisions of the law in force prior to the adoption of the Pharmacy Act of 1907, upon the payment of one dollar, are entitled to a certificate of registration as licensed pharmacists from the State Board of Pharmacy without examination, which certificate will entitle such person to practice as pharmacist for a period of two years from its date, but not longer. Every such pharmacist, however, will be entitled to a renewal certificate if application therefor is made to the Board within thirty days next preceding the expiration of his or her license, accompanied by a fee of one dollar.

You are also advised that all persons who were engaged in the practice of pharmacy in this State at the time said Act of 1907 took effect must obtain a license from the present board before being entitled to continue such practice. The Act of 1907 governing the practice of pharmacy is a complete act in itself and repealed all former laws on the subject and all licenses issued under those laws were revoked. That the Legislature had power to do this can not seriously be questioned. The Legislature has the undoubted power to regulate the practice of pharmacy and to require all persons to obtain a license from a duly constituted board before engaging therein. Such licenses contain none of the elements of a contract; they confer no vested right or interest that can not be impaired by subsequent legislation but are at all times revokable at the pleasure of the Legislature.

See Pomeroy's Constitutional Law, Sections 554-560; and authorities there cited.

Second. By Section 2 of the new pharmacy act it is provided that: "Proprietors and employees of such proprietors who are actively engaged in the preparation of physicians' prescriptions and compounding and vending of medicines in towns of less than one thou-

sand inhabitants in the State of Texas, and also proprietors and employees of such proprietors who shall become so engaged in such towns during the next five years after the passage of this act, shall be exempt from examination, provided he or she will register as required in this act, and upon paying the State Board of Pharmacy one dollar, shall receive a certificate of registration which shall entitle such person to practice pharmacy in towns of one thousand inhabitants or under."

We think that persons coming within the provisions of the section above quoted and complying with all of its requirements have done all that the statute requires of them and have nothing further to do with the board of pharmacy. They are not required to obtain renewal certificates nor pass examination at any time.

Third. We think that certificates of all persons, issued upon examination by the pharmacy board, should be dated as of the date of the meeting at which they pass the examination and that all other certificates should be dated as of the date issued.

Fourth. The pharmacy act does not require that licenses issued thereunder should be recorded in the county in which the licentiates reside. It does, however, require that the license shall be conspicuously exposed in the pharmacy or drug store or place of business of which the person to whom is issued is owner or manager, or in which he is employed.

Fifth. If any person shall continue in the practice of pharmacy without obtaining a license from the present board as required by the pharmacy act, he is guilty of a misdemeanor and on conviction thereof may be fined in any sum not less than ten nor more than one hundred dollars as provided by Section 14 of the act.

In our opinion the Board of Pharmacy would not be justified in refusing to return to the owners all district board certificates which have been filed with the board as proof of proper registration under the old law.

We return you herewith the enclosures sent us.

Yours truly,

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CHAIRMAN CONGRESSIONAL DISTRICT—DISTRICT  
COMMITTEE.

Chairman of congressional district must be a county chairman.  
District committee must be composed of chairmen of all counties in district.

AUSTIN, TEXAS, April 21, 1908.

*Hon. Cecil A. Lyon, Sherman, Texas.*

Dear Sir: We are in receipt of yours of the 16th inst., in which you desire to know whether or not it is necessary for the chairman of each congressional district to be a county chairman in the district.

In our opinion your question should be answered in the affirmative. Section 121 of the Terrell Election Law reads as follows:

"On primary election day, when candidates for State, district, county and precinct offices are nominated the voters of each organized

political party shall vote for a chairman of the county executive committee and the result shall be reported to the county clerk, and the county chairman thus elected shall at once enter upon the discharge of the duties of such position; the said county chairman shall be ex-officio a member of the executive committee of all districts of which his county is a part, and the district committee thus formed shall elect its own chairman; and all chairmen and members of the different executive committees in existence when this law becomes effective shall remain in office until their successors are elected, as provided herein."

It will be seen from the above section that the district committee must be composed of the county chairmen of all the counties in the district, and that the committee thus formed shall elect its own chairman. The above section of the election law was not amended or changed in any way by the Thirtieth Legislature.

By Section 114 of the Terrell Election Law it is also provided that:

"Before such convention assembles (district convention) the executive committee of such district shall meet and elect one of its number chairman of such committee."

This section was amended by the Acts of 1907, but the provision above quoted was left unchanged. See Acts of 1907, page 328.

Yours truly,

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#### LOTTERY—RAFFLE.

Lottery prohibited; raffle authorized by statute, provided article raffled does not exceed in value \$500.

AUSTIN, TEXAS, April 24, 1908.

*Hon. T. J. Harris, District Attorney, Palestine, Texas.*

Dear Sir: We are in receipt of your of the 3rd instant, in which you say:

"I enclose you a card and several tickets that are being used by a number of merchants of this city for the purpose of disposing of merchandise. \* \* \* From the cards you will understand the scheme. Numbers are sold as enclosed in envelopes from one cent up, each player drawing the envelope out of the pack, not knowing the number enclosed until the envelope has been opened and paying for the number as drawn. When all of the numbers have been sold the sealed number on the card is opened and the corresponding number wins. This scheme is used by some parties to dispose of certain articles of merchandise named and by others for suits of clothes. The winner selects his suit from a sample book and the suit is then made up. When the drawing takes place the suit is not in existence.

"1. Does this card scheme constitute a lottery?

"2. Where goods are raffled, regardless of how the winner is determined, where the chances run from one cent up, enclosed in envelopes, does this scheme constitute a lottery within itself be-

cause every participant is not equal with every other in the proportion of his risk and prospect of gain?

“3. Where persons exhibiting these card games with numbers and have no display and ready for business, in their places of business, are they not guilty of running a gaming house under the articles of the Thirtieth Legislature and subject to prosecution for a felony?”

“4. Is it not a violation of the law to raffle a suit of clothes before it is made or selected?”

We do not think that the scheme described by you constitutes a lottery within the meaning of the statute of this State defining and prohibiting lotteries. Article 373 of the Penal Code is as follows:

“If any person shall establish a lottery or dispose of any estate, real or personal, by lottery, he shall be fined not less than \$100 nor more than \$1000.”

In the case of *Randle vs. State*, 41 Texas Reports, 292, it is stated that every scheme for the distribution of prizes by chance is a lottery. Mr. Webster in his dictionary defines a lottery as follows:

“A lottery is a distribution of prizes by lot or chance.”

If these authorities are followed in defining the offense under our statute the facts shown in your statement would prove the distribution of merchandise by chance or lot; but the difficulty arises because our statutes authorize the raffling of personal property (which is nothing but the distribution of same by lot or chance) where the value of such property is under \$500.

If we turn to the books outside of our own statutes and reports defining a lottery, it would be difficult, if not impossible, to determine that a raffle is not a lottery. Our authorities upon the subject have endeavored to distinguish between a lottery, which is inhibited by statute, and a raffle, which is authorized by statute.

Article 375 of the Penal Code reads as follows:

“If any person shall establish a raffle for the distribution by raffle of any estate, real or personal, exceeding \$500 in value, he shall be fined not less than \$100 nor more than \$1000.”

It will thus be seen that under the above article of the code, raffling is not inhibited unless the article raffled exceeds in value the sum of \$500. A raffle is defined to be a game of perfect chance in which every participant is equal with every other in proportion to his risk and prospect of gain. The price is a given fund or that which is purchased by a given fund. Each is an equal actor in developing the chances in proportion to his risk. The successful party takes the whole prize and all the rest lose. The element of one against many, the keeper against the betters, is not found in it. It has no keeper, dealer or exhibitor. (See *Stearnes vs. State*, 21 Texas, 692; *Long vs. State*, 2 S. W. Rep., 541; *Presdegast vs. State*, 57 S. W. Rep., 850, and *Risien vs. State*, 71 S. W. Rep., 974.)

If there is any difference between the definition of a raffle above given and the statement of facts presented by you, it is that all do not contribute equally in the purchase money of the prize, the chances running from one cent up; but we do not think that this

makes any difference. In the case of *Risien vs. State*, supra, it was held that where the owner of a horse and buggy of less than \$500 valuation sold the entire number of 200 tickets, numbered from 1 to 200, consecutively, for so many cents each as the number borne thereby indicated, and the purchasers determined by lot or chance which one of them was to take the whole property. The preceding constituted a raffle and was not the establishing of a lottery to dispose of a horse and buggy for which the owner could be indicted. As to whether the scheme described by you constitutes a violation of the statute defining and prohibiting gaming is not free from difficulty, but we are inclined to think that it does. While a raffle in itself is not unlawful, still if it is established and conducted, for gaming purposes, it is unlawful. This is a question of fact about which we can not advise. For a full discussion of this subject, see the case of *Dalton vs. State*, 74 S. W. Rep., 25, and the authorities there cited, especially the case of *Blades vs. State*, 66 S. W. Rep., 555.

We do not think it would be a violation of the law to raffle a suit of clothes before it is made or selected. If it is a bona fide raffle, such as is permitted by the statute, we do not think the fact that the suit of clothes is not selected or made is material.

Yours truly,

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STATE MEDICAL BOARD—VERIFICATION LICENSE—CERTIFICATES—CONSTRUCTION OF MEDICAL LAW OF 1907.

AUSTIN, TEXAS, May 16, 1908.

*Dr. G. B. Foscue, Secretary State Medical Board, Waco, Texas.*

Dear Sir: In your letter of the 9th inst., you make the following inquiries:

“1. Is the holder of a certificate issued by one of the State Boards of Medical Examiners under the law of 1901 entitled to verification license upon same when same was obtained by an examination and bears the signature of only six members of said Board?

“2. Is a certificate valid when granted by one of the State Boards under the law of 1901, issued at a meeting of said Board, in which there were at no time more than five members of said Board present?

“3. Would the secretary or any other member of one of these Boards have the right to sign the name of an absent member, and if so, would these certificates so signed entitle holder to verification if this name was signed by one holding a power of attorney?

“4. Would you consider the certificates valid granted upon reciprocity or approved credentials from some other State which were signed at a meeting in which there were only five members actually present and the sixth name was affixed thereto by the secretary of the board who claims that he holds the absent member's power of attorney to do so?”

In reply thereto, you are advised as follows:

1. I am of the opinion that a certificate bearing the signatures



of only six members of the Medical Board under the law of 1901 is an invalid certificate. It is true that First Sayles' Supplement, Art. 3779, provides that six members of the Medical Board under the law of 1901 shall constitute a quorum to transact business, but Article 3780 requires that the certificates issued by the Board shall contain the signatures of all members. It is, therefore, very clear that if the Legislature had intended that the six members should transact all business including the issuance of certificates, that it would certainly have omitted the requirements in Article 3780 which requires the signatures of the entire Board. Where the law requires all members of a board of officers to act, the action of a part of such board is insufficient.

People vs. Coghill, 47 Cal., 361.

Powell vs. Tuttle, 3 N. Y., 396.

2. I am of the opinion that five members of the Medical Board could not transact any business of any kind or character under the law of 1901, except to adjourn, and a certificate granted and issued by the Board at a meeting with less than a quorum is an individual certificate.

3. I am of the opinion that under the Act of 1901 a member present having authority to sign the name of an absent member, if there is no other question involved, would have the right to sign the name of such absent member to a certificate authorized by the Board. It would be wholly immaterial in my opinion whether the member present acting in that respect for an absent member had a power of attorney or not. If he had the authority to sign the name of an absent member to the certificate when the certificate was properly and legally authorized I think it would be sufficient if the name of the absent member was signed in this way.

In other words, it is my opinion that a member of a board of State officers, such as a medical board, could authorize another member to perform for him any ministerial duty and the signing of his name to a certificate properly authorized to be issued would simply be a ministerial duty. An absent member, however, could not authorize a member present to act for him in the passing upon the question of granting the certificate, as that would be a question involving the judgment and discretion of the members present and neither of them could act in that particular for an absent member.

Powell vs. Tuttle, 3 N. Y., 396.

Cowen vs. Murch, 97 Tenn., 590.

4. I am of the opinion, as above stated, that no business of any kind or character was authorized to be transacted by the Medical Board under the law of 1901 at a meeting with less than six members present, except to adjourn such meeting. The fact that one of the five present held a proxy or power of attorney, or any other authority from an absent member would not be sufficient to complete a quorum and only a quorum could transact the business of the Board, and unless a quorum was present and authorized the certificate it would not be valid, though signed by all the members of the Board.

Yours truly,

## TAXATION.

School property not used exclusively for school purposes not exempt from taxation.

AUSTIN, TEXAS, May 23, 1908.

*Hon. T. J. Newton, County Attorney, San Antonio, Texas.*

Dear Sir: We are in receipt of your inquiry of the 16th instant, in which you submit the question as to whether or not certain property owned by Prof. Wesley Peacock and used by him for school purposes is exempt from taxation.

As we understand it, this property is in three separate parcels, but each situated adjacent to each other. On one lot there is a cottage occupied only by school boys and regular boarders, bringing in no rent or remuneration. On another lot there is a cottage which was occupied only by cadets and regular boarders until February 6, 1908, since which time it has been occupied by a regular United States army officer detailed to the Peacock School by the War Department. Professor Peacock providing this officer with free use of the property. The other lot, as we understand it, is used exclusively as a parade ground.

It is our opinion that the property above described is not subject to taxation. By section 2 of Article 8 of the Constitution it is provided that "the Legislature may, by general laws, exempt from taxation all buildings used exclusively and owned by persons or associations of persons for school purposes, (and the necessary furniture of all such schools)."

Acting under this constitutional grant of authority, the Legislature has exempted all public colleges, public academies, all buildings connected with the same, and all lands immediately connected with public institutions of learning and all buildings used exclusively and owned by persons or association of persons for school purposes. (See Revised Statutes, Article 5065, Acts 1905, page 314.)

In the case of *Cassianno vs. Ursuline Academy*, 64 Texas. 673, our Supreme Court held that the word "building" must be construed to embrace the land used in connection with it. In that case the court further say:

"It has been the policy of the State to encourage educational enterprises by exempting them from the burdens of government, and there is nothing to warrant the inference that the framers of the Constitution in the use of the word 'building' intended to discriminate against private schools."

It was also held in this case that the ground used for the recreation of students and to supply the school table with vegetables which was necessary for the proper and economical conduct of the school, is exempt. See also *Red vs. Morris*, 72 Texas, 554; *Edmunds vs. City of San Antonio*, 36 S. W. Rep., 495.

The question as to whether or not buildings and the land on which they are located which are used exclusively for school purposes is exempt from taxation is not in controversy. Such property is exempt by the plain provisions of the Constitution and statutes; but the question arises as to whether a separate building

situated on the same or adjacent property to that upon which the main school buildings stand and owned by the school and occupied by those who are connected with the school, is exempt from taxation, some of the buildings owned by Professor Peacock described above being occupied by teachers in his school. As above stated, we do not think the fact that some of this property is so occupied takes it out of the exemption and subjects it to taxation.

This, however, is to be taken with this qualification, that if the property in question which is said to be owned by Professor Peacock and occupied by those only who are connected with his school, is leased or rented by him to the persons occupying it, the owner thus deriving revenue from it, it would not be exempt from taxation. To make our meaning clear, if persons own a school building used exclusively by them for school purposes and not simply leased to others to be used for such purposes, and if such persons also own other buildings on the same lot or parcels of ground as the school building or ground adjacent thereto, which other buildings are occupied only by persons connected with the school, still if the owners of the school and other buildings rent or lease the other buildings to the persons so occupying them, deriving revenue of any kind therefrom, such other buildings would not be exempt from taxation.

For instance, if such other buildings were rented by the owners of the school building to the teachers or other employees connected with the school, they would not be exempt, on the same principle that if the school building was rented by the owner to other persons to be used by such persons exclusively for school purposes, it would not be exempt. See *Red vs. Morris*, supra. In the case of *Griswold College vs. State*, 46 Iowa, 275; 26 American Reports, 138, it was held under Section 797 of the Code of Iowa exempting from taxation the property of certain literary, benevolent and religious institutions, etc., that the residences of professors on the grounds of literary institutions used exclusively for such dwellings without income to the owners, were exempt from taxation. See also *Cook vs. Hutchings*, 46 Iowa, 706. In the case of *State vs. Ross*, 24 N. J. Law, 497, it was held that the exemption in the tax act "of all colleges, academics and seminaries of learning" extended to the houses and lots provided by the college for the residences of president, professors and steward as parts of their compensation.

We call your attention to a well-settled rule of law which is that statutes exempting property from the burdens of taxation are to be strictly construed and under the constitutional provision above quoted school property is not exempt from taxation unless used exclusively for school purposes.

In the case of *Edmunds vs. City of San Antonio* it was held that the house owned by a practicing attorney in which he lived with his wife, she conducting therein a day and boarding school, was not exempt under authority of the Constitution, Article 8, Section 2.

Yours truly,

## GROSS RECEIPTS TAX—FRANCHISE TAX.

Street railway companies subject to occupation tax under Section 10, Chapter 18, of General Laws of First Special Session Thirtieth Legislature, but not to franchise tax prescribed by Chapter 23 of First Special Session of said Thirtieth Legislature.

AUSTIN, TEXAS, June 9, 1908.

*Hon. W. R. Davie, Secretary of State, Capitol.*

Sir: In reply to your question as to whether or not the Rapid Transit Railway Company, the Metropolitan Street Railway Company and the Dallas Consolidated Electric Street Railway Company, all of Dallas, are liable for the franchise tax prescribed by Chapter 23 of the General Laws of the First Special Session of the Thirtieth Legislature of Texas (1907), I beg to say:

The aforesaid Chapter 23 which prescribes franchise taxes to be paid by corporations provides in Section 13 thereof that "the franchise tax imposed by this act shall not apply to any \* \* \* transportation company, or any sleeping, palace car and dining car company which is now required to pay an annual tax measured by their gross receipts," etc.

Section 10 of Chapter 18 of the General Laws of said Special Session, requires "each and every individual, company, corporation or association owning, operating or controlling any interurban, trolley, traction or electric street railway in this State and charging for transportation on said railway" to pay *quarterly*, an occupation tax measured by its gross receipts for the next preceding quarter derived from such transportation.

I understand that each of the corporations above named falls within this classification and is, therefore, required to pay such occupation tax.

It will be noted that the exemption clause found in Section 13 of said Chapter 23 treats in the same way insurance companies; surety companies, guaranty or fidelity companies, transportation companies, sleeping car companies, palace car companies and dining car companies, although of all such corporations insurance companies alone are required by said Chapter 18 to pay such occupation tax annually, all the other classes of corporations above enumerated by said chapter being required by said Chapter 18 to pay such occupation tax *quarterly*.

But, unquestionably, the above-named corporations about which you inquire are transportation companies within the meaning of said Section 13, and their occupation taxes prescribed by said Chapter 18 are measured by their gross receipts, and I am of the opinion that although such occupation tax is payable quarterly, it should be construed and held to be an annual tax within the meaning and effect of said Section 13, and that, in as much as the above-named Dallas corporations are subject to and have paid such occupation tax, they are not subject to the franchise tax prescribed by said Chapter 23.

I do not think it was the purpose of the Legislature to require any of the classes of corporations enumerated in Section 13 of said Chapter 23 to pay both a franchise tax under the provisions

of said Chapter 23 and an occupation tax measured by gross receipts under the provisions of said Chapter 18.

Yours truly,

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GROSS RECEIPTS TAX—INTANGIBLE ASSETS TAX—  
TENDER.

Terminal railway company subject to gross receipts occupation tax.  
Terminal railway company doing both terminal business and general railroad business not subject to gross receipts tax, but is subject to payment of intangible assets tax.

AUSTIN, TEXAS, June 9, 1908.

*Hon. J. W. Stephens, Comptroller of Public Accounts, Capitol.*

Sir: We have your letter transmitting a letter addressed to you by Judge E. B. Perkins, as attorney for the Dallas Terminal Railway and Union Depot Company, of Dallas, raising certain questions as to the effect upon that corporation of two statutes which were enacted by the First Called Session of the Thirtieth Legislature, 1907, one being Chapter 17, known as the "Intangible Tax Statute," and the other being Chapter 18, which levies certain occupation taxes measured by the gross receipts of the subjects of the tax.

In reply to the inquiries thus propounded, I beg to say:

From the statement of facts submitted to us it appears that said corporation was incorporated as a railroad company under the provisions of Revised Statutes, Title 94, but that it is doing a terminal business only, and does not originate or receive traffic on its own account, and that said corporation paid an intangible assets tax for the year 1907 before the same became delinquent.

You ask whether or not said corporation is liable for taxes for 1908 upon its intangible assets and property under said Chapter 17 and also whether said corporation is liable for an occupation tax for the quarter beginning October 1, 1907, under Section 16 of said Chapter 18.

Section 8 of said Chapter 17 requires payment of an ad valorem tax upon the intangible assets and property of "each and every incorporated railroad company, ferry company, bridge company, turnpike or toll company, doing business or in part within the State of Texas.

I am of the opinion that in the case here under consideration the words "each and every incorporated railroad company doing business wholly or in part within the State of Texas" should be construed and held to mean every *incorporated railroad company* \* \* \* *doing business, generally, as a railroad company*, in contradistinction to *doing business as a terminal railway company*.

Said Section 16 prescribes an occupation tax to be paid by "each and every individual, company, corporation or association, whether incorporated under the laws of this or any other State or territory, or of the United States, or any foreign country, which owns,

controls, manages or leases any terminal companies, or any railroad doing a terminal business within this State, such tax to be measured by the gross receipts of the taxpayer from all sources whatever within this State during the next preceding quarter of the year. This department holds that these provisions of said Section 16 are applicable to terminal railways engaged exclusively in terminal business and that this is true of terminal railways owned, controlled, managed, leased or operated by any corporation, whether same was incorporated under the general railroad statute (R. S., Title 94), or whether it was incorporated under the terminal railway incorporation statute (R. S., Art. 642, Subdivision 53).

In other words, our view of the matter is that in the enactment of these two statutes, which were approved by the Governor on the same day, it was the purpose of the Legislature to make said intangible assets statute applicable to railroad companies which were incorporated under the general railroad statute (R. S., Title 94), and which are engaged in what is known and recognized as a general railroad business, and to make said occupation tax statute applicable to terminal railway companies doing only a strictly terminal business and not engaged in such general railroad business, the question whether or not a particular railroad is to be classed as terminal railroad being determined by the character of business done by it rather than by the particular statute under which it was incorporated.

Our conclusion is that the Dallas Terminal Railway and Union Depot Company should for the purposes of these two statutes be treated and considered and held to be a terminal railway company and that it is, therefore, subject to the occupation tax prescribed by said Chapter 18 and that it is not subject to the intangible assets tax prescribed by said Chapter 17.

And for the same reasons that it is not subject to taxes for 1908 under said Chapter 17 it was not subject to taxes for 1907 under said Chapter 17.

Inasmuch as said corporation was not legally liable for intangible assets taxes for the year 1907 payment by it of such taxes for that year does not exempt it from liability for an occupation tax for the last quarter of that year under Section 16 of said Chapter 18.

I note from the enclosed letter that the tender on behalf of the above-mentioned corporation of the amount of its aforesaid occupation tax under said Chapter 18 for the first quarter of the year 1908 is made upon the express condition that acceptance thereof by you shall operate as a release by you and by the authorities of the State of Texas of all liability by said corporation for any intangible assets tax. In this connection I beg to suggest that no taxpayer has the right to annex any condition whatever to the payment of taxes due the State, and that you should decline to accept the amount of such tax unless same be tendered and paid unconditionally. Section 19 of said Chapter 18 fixes a penalty for failure to pay such occupation tax within the time designated by that statute.

You further ask us to advise you whether or not a railroad

company which does both a railroad and a terminal business will be liable to an occupation tax under said Chapter 18.

Upon this feature this department holds that in as much as Section 16 of said Chapter 18 was intended to apply solely to railroads which are engaged exclusively in doing a strictly terminal business, in contradistinction to a general railroad business, any railroad company which does both a general railroad business and a terminal business is not liable for such occupation tax under said Chapter 18, but is liable for such ad valorem tax upon its intangible assets and property under said Chapter 17.

Yours truly,

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STREET RAILWAY COMPANY—OCCUPATION—GROSS RECEIPTS—CITY OR TOWN OF 10,000 INHABITANTS.

Street railway company which operates its lines both within and without city limits of city of less than 10,000 inhabitants is subject to gross receipts occupation tax.

AUSTIN, TEXAS, June 11, 1908.

*Hon. J. W. Stephens, Comptroller of Public Accounts, Capitol.*

Sir: You have requested of this department an opinion as to whether or not the Beaumont Traction Company, of Beaumont, is subject to the tax prescribed by Section 10, of Chapter 18, of the General Laws of the First Special Session of the Thirtieth Legislature.

From the statement of facts submitted to us it appears that said traction company operates an electric street railway in the town of Beaumont and also a line from inside the corporate limits of said town to what is known as the Driving Park, which lies outside of said corporate limits, where a race track is maintained and where citizens congregate from time to time to witness ball games, fairs, etc., and also operates another line running from inside the corporate limits to the suburbs several blocks beyond said corporate limits, and that, according to the last United States census, Beaumont had less than 10,000 inhabitants.

Section 10 of said statute is as follows:

“Each and every individual, company, corporation or association owning, operating or controlling any interurban, trolley, traction or electric street railway in this State and charging for transportation on said railway shall, on or before the first day of July, 1907, and quarterly thereafter make a report to the Comptroller of Public Accounts, under oath of the individual or of the president, treasurer or superintendent of such company, corporation or association, showing the amount of gross receipts from said charges for transportation on said railway paid to or uncollected by said individuals, company, corporation or association for the quarter next preceding. Said individual, company, corporation or association, at the time of making said report, if in or if connecting any town or city of less than twenty thousand inhabitants, shall pay to the Treasurer of the State

as an occupation tax for the quarter beginning on said date equal to one-half of one per cent of said gross receipts as shown by said report; if in a city of more than twenty thousand inhabitants, said individual company or corporation or association, at the time of making said report, shall pay to the Treasurer of the State of Texas an occupation tax for the quarter beginning on said date equal to three-fourths of one per cent of said gross receipts as shown by said report. Provided that in ascertaining the population of any city or town, the same shall be ascertained by the last United States census, and provided further that where any interurban railroad shall connect any town having a population of more than 20,000 with another of a less population, that it shall be liable for the tax measured by the population of the largest town. Provided, further, that the provisions of this act shall not apply to any street railway or traction company wholly within any town of less than ten thousand inhabitants."

I am of the opinion that, inasmuch as operated lines of the Beaumont Traction Company do not lie wholly within the town of Beaumont, said traction company does not come within the terms of the last proviso contained in said Section 10, and is, therefore, subject to the occupation tax prescribed by said Section 10.

Yours truly,

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#### ESCHEATED ESTATES—COUNTY ATTORNEY.

State not authorized to pay county attorney fee for representing State in suit for recovery of escheat money from State Treasurer. Such service is incident to duties of his office and without special compensation.

AUSTIN, TEXAS, June 25, 1908.

*Mr. J. C. Scott, County Attorney Nueces County, Corpus Christi, Texas.*

Dear Sir: We have your letter of the 23rd instant, reporting that Mrs. Johanna Schmock has filed suit in the district court of Nueces County against the State of Texas to recover from the State Treasury proceeds of sale of lot 2, in block 9, in the beach part of Corpus Christi, alleging that she is the only heir of Christopher Werner, deceased, in whose name the property stood when same was escheated to the State in cause No. 4159 in the district court of Nueces County.

You ask how much of that money the State still has; also whether you are entitled to a fee from the State for defending this suit of Mrs. Schmock for the recovery of said money, and if so, what will be the amount of your fee and how same is to be paid.

In reply, I beg to say:

I enclose herewith memorandum of this date signed by Sam Carter, chief bookkeeper in the office of the State Treasury, which shows the amount of this deposit in the State Treasury to be \$2161.68.

Out of the remittance sent to this department as proceeds of sale of the property, we sent to the county attorney of Nueces County his statutory fee for representing the State in the escheat proceedings



and the residue was deposited in the State Treasury in two items, the sum of \$275 being withheld from deposit in order to give to Mr. A. W. Denmark an opportunity to try out his rights in an application to the Supreme Court for a writ of mandamus to compel the Attorney General to pay over to him, out of said proceeds, the sum of \$275 which had been allowed him by the court for representing the unknown heirs of the decedent in the escheat proceedings under appointment by the court, inasmuch as I, as acting Attorney General at the time, had advised him that, in my opinion, he was not entitled, under the statute, to any fee whatever in the premises.

In the case of the State, ex rel., A. W. Denmark vs. R. V. Davidson, Attorney General, the Supreme Court held that Mr. Denmark was not entitled to the fee and the \$275 was accordingly deposited by the Attorney General in the State Treasury.

I regret to have to say that I am unable to find in the statutes any provision authorizing the payment by the State of a fee to the county attorney for representing the State in the suit which you say is now pending in your county for the recovery of this escheat money from the State Treasury. Article 5, Section 21, of the Constitution of Texas, provides that "the county attorney shall receive as compensation only such fees, commissions and perquisites as may be prescribed by law." Revised Statutes, Article 297, prescribes a fee for the district or county attorney to be paid out of amounts collected by him or out of money realized for the State under the escheat law; but nowhere do we find a fee prescribed for the county attorney for representing the State in a suit to recover escheated money on deposit in the State Treasury, although Revised Statutes, Article 1834, expressly provides that in such suits a copy of the petition shall be served on the district or county attorney and that he shall put in an answer to the same.

I am of the opinion that such services must be rendered as one of the duties incident to the office and without special compensation.

Hallman vs. Campbell, 57 Texas, 54.

State of Texas vs. Moore, 57 Texas, 307.

Howth vs. Greer, 14 Texas Ct. Rep., 64.

Yours truly,

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ELECTION LAW — COUNTY EXECUTIVE COMMITTEE —  
ELECTION OFFICERS, MANNER OF THEIR  
APPOINTMENT, ETC.

AUSTIN, TEXAS, June 25, 1908.

*Mr. H. B. Sallaway, Member of Bexar County Democratic Executive Committee, San Antonio, Texas.*

Dear Sir: We are in receipt of yours of the 25th inst., in which you say:

"The chairman of the Bexar County Democratic Executive Committee holds the following written recommendations addressed to him from certain of the seventy-one committeemen of the Bexar County Executive, as follows:

“ “ .....1908.

“ ‘To C. L. Bass, Chairman Democratic Executive Committee, Bexar County, Texas.

“ ‘I recommend .....  
for appointment as presiding judge of the Democratic primary election to be held in this precinct No. ...., on the 25th day of July, 1908. I hereby approve of the appointments that you make of presiding judges in the following places of the Democratic primary election to be held on the 25th day of July, 1908, in Bexar County, Texas.

“ ‘Yours very truly,

“ “

“ ‘Member of Democratic Executive Committee, Precinct No....., Bexar County, Texas.’

“ ‘Quaere No. 1. Can the chairman, before the appointment of a presiding judge which he may *thereafter* make, secure the written approval of certain committeemen to such appointment under Section 123 of the election law? The minutes of the executive committee showing that the committee stands called to meet Saturday, June 17, 1908, for sole purpose of selecting presiding judges of election.

“ ‘Quaere No. 2. Under your opinion to C. L. Bass of July 16, 1906, and adhered to by you June 20, 1908, is it not necessary for the chairman to secure from a majority of the committee their approval of *each* appointment of presiding judge?

“ ‘Quaere No. 3. Does not Section 123 contemplate that a list of *all* appointments of presiding officers by the chairman shall be submitted to a majority of the committee for their approval?

“ ‘Quaere No. 4. Can a committeeman, after having given the above recommendation hereinabove set out, revoke and repudiate same verbally at meeting June 25, 1908, and can same be revoked and repudiated in writing addressed to chairman?

“ ‘Quaere No. 5. In case of a vacancy in the committee can a majority of the executive committee under Section 106 delegate to the chairman the power to select and appoint committeeman to fill said vacancy?

“ ‘Quaere No. 6. Under your ruling that a majority of the whole committee is necessary to confirm nominations of presiding judges do you mean a majority of the committee as actually composed or do you mean a majority of the entire committee authorized by law, to illustrate, suppose a county has seventy-one precincts and consequently is entitled to seventy-one committeemen, but as a matter of fact there are several vacancies, will it take a majority of the seventy-one or a majority of the committee as actually constituted?

“ ‘Quaere No. 7. Suppose that a majority of the committee refuses to confirm any appointments of presiding judges made by the chairman then how and by whom are the presiding judges to be appointed or selected?

“ ‘Quaere No. 8. Can the chairman, with the approval of the committee, appoint more judges for polling places than is provided by law?’

Answering the questions propounded by you in the order in which they are submitted, you are respectfully advised:

1. That the election law contemplates that the presiding judges of the precincts in primary elections shall be appointed by the chairman of the county executive committee, and that each appointment when made shall be approved by a majority of the members of the county executive committee. We think it would be in violation of Section 123 of the Terrell election law for the members of an executive committee to delegate to the chairman the right and authority to select the presiding officers or to approve the appointments of the chairman before they are actually made. The members of the executive committee may recommend to the chairman certain persons for appointment, or the chairman may make the appointments without such recommendation, but in all cases the names of those persons appointed by the executive committee for approval. The language of that portion of the statute under consideration is as follows:

“All the precinct primary elections of a party shall be conducted by the presiding judge, to be appointed by a chairman of the county executive committee of the party, with the assistance and approval of at least a majority of the members of the county executive committee.”

In the very nature of things, it would be impossible for the members of the executive committee to approve appointments before they are made. It is the intention of the law that the county chairman shall have the assistance of the members of the committee in the selection of presiding officers and that the appointments made by the chairman shall be approved by at least a majority of the members of the executive committee.

2. As above stated, it is necessary for the chairman of the county executive committee to secure from a majority of the committee their approval of each appointment of presiding judge.

3. Your third question is covered in our answer to your first question.

4. It is our opinion that the members of the executive committee would clearly have the right at any time to revoke any recommendation made to the county chairman of person to be appointed presiding officers, provided such persons have not already been appointed by the chairman and approved by a majority of the members of the committee, in the manner provided by statute.

5. Section 106 of the Terrell election law, as amended by the act of the Thirtieth Legislature, provides that in case of a vacancy occurring in the office of chairman, county or precinct, or any member of such committee, such vacancy shall be filled by a majority of the county executive committee. Under this section we think it would not be legal for a majority of the county executive committee to delegate to the county chairman the power to select and appoint committee to fill a vacancy.

6. Under that provision of Section 123, of the Terrell election law, requiring the approval of at least a majority of the members of the county executive committee, we think it is meant a majority of the committee as actually constituted. It does not mean a majority of the entire committee authorized by law. If a county has seventy-one precincts and is consequently entitled to seventy-one committeemen, but as a matter of fact there are several vacancies, a majority of

the members of the committee, as actually constituted, may approve the appointments made by the county chairman.

7. If a majority of the executive committee fail and refuse to approve an appointment made by the chairman, then the chairman should appoint some other person, and so on until some person is appointed whom the committee will approve. If the committee refuses to approve of the appointment of any and all persons named by the chairman and it is impossible to select any presiding judge for a precinct in the manner provided for by law, then I think the analogy found in Section 83 of the Terrell election law, governing general elections, would govern; that is, the voters present may appoint their own presiding officer and also the necessary assistant judges of election.

8. We do not think that the county chairman with the approval of the committee can appoint a greater number of judges for polling places than is provided for by law. The election law does not provide for the appointment of more than two judges for primary elections and we know of no provision of the law whereby more than two judges can be appointed. (See Section 123 of the Terrell Election Law.)

Yours truly,

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COMMISSIONER OF INSURANCE AND BANKING—STATE  
BANKING LAW—DEPOSITS, LOANS, ETC.

AUSTIN, TEXAS, June 26, 1908.

*Hon. Thomas B. Love, Commissioner of Insurance and Banking,  
Capitol.*

Sir: Press of urgent work in the courts has prevented earlier reply to your letter of the 13th instant, in which you say:

“Section 7 of the Texas State banking law as amended by the Thirtieth Legislature requires that every banking corporation shall at all times have an amount of cash on hand and cash due from other banks, equal to at least 25 per cent of the aggregate of its demand deposits, 10 per cent of which is to be actual cash in the bank.

“The Temple State Bank at Temple, Texas, is a State depository and as such has a considerable amount of State funds on hand under the provisions of the State depository law. I desire your opinion as to whether or not this State deposit is to be considered a demand deposit and if to be included with their demand deposits in reckoning the amount of the cash reserve required to be maintained by that bank under the law as above referred to.

“Section 53 of the State banking law provides that no bank shall loan its money to any individual, corporation or company, directly or indirectly or permit any individual, corporation or company to become at any time indebted or liable to it in a sum exceeding 25 per cent of its capital stock actually paid in or permit a line of loans or credits to any greater amount to any individual or corporation,

permanent surplus being reckoned as a part of the capital. Said section also provides that 'the discount of bills of exchange drawn in good faith against actual existing values' shall not be considered as money borrowed within the meaning of this section. The Temple State bank has a capital stock of \$50,000 which, in a letter just received, dated June 12, 1908, makes the following statement:

" 'As to the indebtedness of Geo. W. Cole, Jr., we beg to advise that this indebtedness was originally in the form of notes aggregating \$16,000, secured by collateral representing values of at least \$35,000. This loan was made in this form under an interpretation of Section 53, Subdivision 1, of the banking law.

" 'Upon the occasion of the examination of our bank by Mr. Hays in November of last year, he stated that said loan was in violation of the banking law because the paper was in the form of a note and not a bill of exchange as mentioned in said Subdivision 1 of Section 53.

" 'While in our opinion this was a technical objection, yet we informed Mr. Cole of the examiner's ruling.

" 'We then took from Mr. Cole in satisfaction of the notes held by us the following instrument:

" ' "Temple, Texas, March 25, 1908.

" ' "\$15,500.00

" ' "One year after date, pay to the order of Hugh Cole, fifteen thousand five hundred dollars, with interest at the rate of eight per cent per annum from date and ten per cent per annum after maturity and defaulting interest to draw ten per cent per annum until paid, and if said indebtedness is not paid at maturity and is placed in the hands of an attorney for collection, I agree to pay 10 per cent additional as attorneys fees on the amount then due.

" ' "Geo. W. Cole, Jr.

" ' "To Temple State Bank.

" ' "Temple, Texas.

" ' "Endorsed by Hugh Cole."

And we attached to this bill of exchange the original collateral which was in the form of vendor's lien notes on real estate, and a deed of trust on other real estate, all representing existing values to the amount of \$35,000.

" 'Now, in our opinion, concurred in by three able lawyers, this action on our part is clearly authorized by Section 53, Subdivision 1, of the banking law. Said subdivision does not attempt to define what class or kind of values that must exist before the excessive loan is authorized, but only states that the bill of exchange must be drawn against existing values.

" 'It seems clear to us that black land values should be the most acceptable of all values, at least there are no better values in Texas.'

" 'I desire your opinion as to whether or not the paper referred to and quoted in this letter from the Temple State Bank may be discounted by the bank without violating the provisions of said Section 53 of the State banking law; and in this connection I would be glad to have the opinion of your department as to the meaning of the sentence in said section 'the discount of bills of exchange drawn in good faith against actual existing values.'"

Answering your inquiries in their order, I beg to say:

1. No useful purpose would be subserved by a technical discussion here of what constitutes deposits, or *demand deposits*.

In plain words, a demand deposit within the meaning of the banking laws of the State of Texas is a deposit in bank payable on demand.

Section 18 of Chapter 164 of the General Laws of the Twenty-ninth Legislature (1905) providing a system of State depositories expressly provides that "on demand of the State Treasurer any State depository shall issue to him or his order, free of charge, a draft or exchange on any bank in this State, designated by the United States authorities as a 'Reserve Bank,' which draft may be in any sum stated by the State Treasurer not exceeding the amount of the State deposit in said depository."

I am, therefore, of the opinion that your first question should be answered affirmatively and that all deposits of State funds in such depositories within the State of Texas should be held to be demand deposits and should be included with its demand deposits in reckoning the amount of cash reserve required to be maintained by such bank under the provisions of the statute to which you refer.

2. Section 53 of Chapter 10 of the General Laws of the First Called Session of the Twenty-ninth Legislature (1905), page 509, provides that as a general rule "no incorporated bank, nor trust company in this State organized under this act shall loan its money to any individual, corporation or company, directly or indirectly, or permit any individual, corporation or company to become, at any time, indebted or liable to it in the sum exceeding twenty-five per cent of its capital stock actually paid in, or permit a line of loans or credits to any greater amount to any individual or corporation; a permanent surplus, the setting apart of which shall have been certified to the Secretary of State, and which can not be diverted without due notice to said officer, may be taken and considered as a part of the capital stock for the purpose of this section."

The same section contains several provisions, in the nature of exceptions to such general rule, among such proviso being one which declares that "the discount of the following classes of paper shall not be considered as money borrowed within the meaning of this section, viz.:

"(1) The discount of bills of exchange, drawn in good faith, against actually existing values."

The evident purpose of the Legislature in declaring this exception to the general rule prescribed in Section 53 as a limitation or restriction upon the right of the bank or trust company to lend its money was *to facilitate the transfer of funds*. Surely the Legislature never contemplated that this permissive right, so accorded to the bank or trust company in the above quoted language of said proviso, should be made the basis or pretext for an abrogation or evasion of the very substance of the general rule of limitation so prescribed in said Section 53. Note that the language of the statute is "bills of exchange, drawn in good faith, against existing values." Three essential ingredients or elements are thus defined by statute and all must co-exist in any transaction in order to bring such transaction within the meaning and operation of this proviso, and each such element must be considered and is to be determined and ascertained in con-

nection with both of the other two elements mentioned by the statute.

This proviso requires that the instrument discounted must be a bill of exchange in contra-distinction to a promissory note and that it shall be *drawn against*, rather than *secured by* actually existing values, and that it shall be drawn in good faith as a real rather than as a simulated or pretended bill of exchange. I think that the Legislature meant to require that the bill of exchange should be drawn in good faith against actually existing values for the principal and immediate purpose of transferring current funds, that being the ordinary function, in commercial practice, of bills of exchange.

I think that this proviso contemplates only such drafts as are drawn against money on deposit or commodities presently or readily convertible into money by cashing bills of lading attached to such drafts or other values of like nature and character, not including general securities, even though backed up by real estate values.

Upon these considerations I am of the opinion that the instrument to which you refer, of date March 25, 1908, and set out in your letter, is not within the scope, effect or meaning of the above quoted proviso, and can not fairly be held to be a bill of exchange drawn in good faith against actually existing values, even though it be secured by a valid vendor's lien and a deed of trust upon real estate furnishing abundant security.

It follows, logically, that the loan in question is, in my opinion, in excess of what is permitted by law to the extent to which it exceeds twenty-five per cent of the capital stock of the Temple State Bank.

Yours truly,

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#### NEUTRALITY LAWS—MEXICAN REVOLUTIONISTS— EXTRADITION.

The Federal government having exclusive jurisdiction, sheriff of frontier county could not, properly, take official action.

AUSTIN, TEXAS, June 26, 1908.

Gov. T. M. Campbell, Capitol.

Sir: You have referred to this department a telegram which is as follows:

“Del Rio, Texas, June 26, 1908.

“Gov. T. M. Campbell, Austin, Texas.

“Los Vacas, Mexico, opposite to Del Rio was attacked by Mexican revolutionists this morning at daybreak; indications are that revolutionary forces were repulsed. Unable to communicate with defenders of town. Revolutionists sure to take refuge Texas side. Must we apprehend all who cross Rio Grande violation neutrality law. Please advise us by wire in the premises.

“JOHN F. ROBINSON, Sheriff.

“LUDE DOWE, Dep'ty Collector Customs.”

And have asked our views as to the law applicable in such cases.

In reply, I beg to say:

In cases of foreign extradition the rule seems to be that the accused may be arrested, without a requisition from the foreign government, upon a warrant issued by a United States Commissioner on

complaint of a consul of said government, for offenses embraced by the treaty between the two governments.

Benson vs. McMahan, 127 U. S., 457.

In re Luis Ateiza, 136 U. S., 330.

In re Herres, 33 Fed. Rep., 165.

In re Adutt, 55 Fed. Rep., 376.

In re Mineau, 45 Fed. Rep., 188.

In certain frontier States there has grown up a practice under which the governors of such States have surrendered up fugitives from justice to the foreign government from which such fugitive fled. But Article IX of the treaty between the United States of America and Mexico provides that after a fugitive has been examined by the extradition magistrate, the records of the proceedings shall be forwarded "to the proper executive authority of the United States of America," who shall deliver up the fugitive according to the forms of law.

It seems that this precise point has not been determined by the courts; but I am of the opinion that the Federal authorities have exclusive jurisdiction in such matters and that it would not be proper for the sheriff of Val Verde County to take any official action in the premises.

Conditions may arise under which it will become proper for the sheriff to co-operate with the Federal authorities, but, in my opinion, such conditions are not disclosed by said telegram.

Yours truly,

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DEPOSITORY OF COUNTY—COUNTY JUDGE—OATH OF  
OFFICE—COMMISSIONERS COURT—CONTRACT  
WITH COUNTY.

Member of commissioners court, including county judge, can not be interested in contract awarded by said court.

AUSTIN, TEXAS, July 1, 1908.

*Hon. W. B. Silliman, El Dorado, Texas.*

Dear Sir: In your letter of the 22nd ult., you make the following statement and inquiry:

"Our county judge is cashier of the El Dorado State Bank and this bank is the depository of the county funds.

"Can the same man consistently be the cashier of the bank; that is county depository, and at the same time serve the county as county judge?"

In reply thereto, I wish to advise that, in the absence of any statute or decision upon the question in this State, it is against public policy for public officials to be pecuniarily interested in contracts made between corporations, or individuals, and the county or city whose officials they are; and in this instance your county judge being the cashier of the El Dorado State Bank disqualifies him to participate in the proceedings of the commissioners court while the bid of this bank is under consideration by the court; and while the other mem-



bers of the commissioners court, if they were in nowise interested in said bank, might alone transact the business of the court in accepting the bid of this bank for the county deposits, it would, in my opinion, render the county judge disqualified to retain his position as cashier of the bank and retain his position as county judge.

I note your statement that the county judge does not own any stock in the bank. He being cashier of the bank is, nevertheless, an officer of that bank, and, being an officer of the bank, he, of course, is interested indirectly in the bank depository contract with the county. This, it seems to me, violates his official oath as county judge.

Revised Statutes, Article 1535, reads, in part, as follows:

“Before entering upon the duties of his office, the county judge and each commissioner shall take the oath of office prescribed by the Constitution, and shall also take an oath that he will not be directly or indirectly interested in any contract with or claim against the county in which he resides, except such warrants as may issue to him as fees of office.”

You will, therefore, readily see that no member of the commissioners court, including the county judge, can remain a member of such court and retain his interest in such bank after the bank has become the county depository without doing so in direct violation of his official oath.

There is another phase of this question that I wish to call your attention to. Penal Code, Article 264, reads as follows:

“Any officer of the county in this State or of any city or town therein who shall contract directly or indirectly or become in any way interested in such contract for the purchase of any draft or order on the treasury of such county, city or town, or for any jury certificate or other debt, claim or demand for which said county, city or town may or can in any event be made liable, shall be punished by a fine of not less than ten nor more than twenty times the amount of the order, draft, jury certificate, debt, claim or liability so purchased or contracted for.”

In addition to the county judge violating his official oath in retaining his position as cashier of the bank while the bank retains its depository contract with the county, the county judge of the county, it occurs to me, violates the spirit if not the letter of the provisions of the Criminal Code, above referred to.

Penal Code, Article 266, reads as follows:

“If any officer of any county in this State or of any city or town therein shall become in any manner pecuniarily interested in any contract made by such county, city or town, through its agents or otherwise, for the construction or repair of any bridge, road, street, alley or house, or any other work undertaken by such county, city or town, or shall become interested in any bid or proposal for such work or in the purchase or sale of anything made for or on account of such county, city or town, or who shall contract for or receive any money or property, or the representative of either, or any emolument or advantage whatsoever in consideration of such bid, proposal, contract, purchase or sale, he shall be fined in any sum not less than fifty nor more than five hundred dollars.”

The Court of Criminal Appeals of the State of Texas, in the case

of *Rigby vs. State*, 27 Texas App., page 55, in construing the Criminal Code herein referred to, makes the following statement:

“Manifestly, the Legislature in enacting the statute intended thereby to protect the counties, cities and towns from official speculation. Such speculation was the evil sought to be suppressed, and the statute strikes at the very root of the evil by making it an offense for any officer of the county, city or town to become interested pecuniarily in matters wherein such corporations are pecuniarily interested.

“The purpose of the statute is to prevent official ‘rings’ from being operated to prey upon the treasuries of the counties, cities and towns; to prevent the officers of such corporations from using their official knowledge and influence to their individual pecuniary advantage in the official transactions of such corporation.”

There are many other decisions of the higher courts of this State and of other States which condemn the execution of such contracts and declares them null and void.

*Robinson vs. Patterson*, 71 Mich., 149.

*Brown vs. Bank*, 137 Ind., 655.

*Meguire vs. Corwine*, 101 U. S., 108.

*Knippa vs. Stewart Iron Works*, 66 S. W. Rep., 322.

*Texas Anchor Fence Co. vs. City of San Antonio*, 71 S. W. Rep., 301.

Under Revised Statutes, Article 566, the statutory rule is laid down for the guidance of city officers to the same effect, which prevents any member of the city council, or any other city officer, from being interested in any contracts with the city while they remain such city officers.

Yours truly,

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LIFE INSURANCE COMPANIES—HEALTH, ACCIDENT, FIRE,  
MARINE AND INLAND INSURANCE—DOMESTIC AND  
FOREIGN—TWO CORPORATIONS OF SAME NAME.

AUSTIN, TEXAS, July 2, 1908.

*Mr. W. B. Gano, Dallas, Texas.*

Dear Sir: In reply to your letter of the 27th ult. I wrote you saying that this department can not approve any articles of incorporation of the Trinity Life and Annuity Insurance Company until there shall have been submitted to us a certificate of the Secretary of State showing that the old Trinity Life and Annuity Association has been dissolved according to law, in as much as the two names are, in our opinion, so similar as to be likely to mislead the public. Further replying to your said letter, I beg to say:

I note that you say that the new company proposes to incorporate under Chapter 4 of Title 58 of the Revised Statutes, beginning with Article 3096a and ending with Article 3096y.

This statute (Acts 1895, page 97), provides for the incorporation, government and control of home companies, that term being therein defined to mean life or accident, or life and accident insurance companies, incorporated and formed in the State of Texas. You

will note that Chapter 4 says nothing whatever about health companies.

I am of the opinion that said Chapter 4 does not apply to any company doing or proposing to do a health insurance business, and that no company which does such business, whether by itself or in connection with any life or accident or life and accident insurance business can be incorporated thereunder.

I am further of the opinion that if any health insurance company can be incorporated in this State it must be done under the general provisions of the insurance law as set out in Revised Statutes, Chapter 1, Title 58, which seems to be broad enough to embrace health insurance companies. But the very fact that said later Act of 1895 (Chapter 4, Title 58), expressly and fully deals with home companies, as above defined, evidences a manifest intention upon the part of the Legislature to take such home companies out of the operation of the general statute found in said Chapter 1, at least to the extent covered by said Chapter 4, and to place them in a class to themselves, subject to the operation of special rules and regulations particularly applicable thereto, all as set forth in said Chapter 4.

Consequently, this department will not approve any articles of incorporation of any company which proposes to do a life, accident and health insurance business.

If you think this conclusion is erroneous and that our construction of the law is too strict, the matter can easily be tested in the courts, whereas, if we were to adopt your view of the matter and approve the proposed articles of incorporation of the Trinity Life and Annuity Insurance Company it would not be so easy to test the matter and I do not at the moment see how it could be tested at all unless we should bring suit to cancel the charter upon the theory that it ought never to have been approved by this department.

I think you will agree with me that it is better to test the question in advance of the approval and filing of the proposed articles of incorporation.

In this connection I beg to call your attention to the following facts:

(1) The laws of Texas, so far as I can find, do not *in express terms*, authorize the incorporation of a health insurance company.

(2) The following statutes now in force relate to or embrace health insurance companies:

(a) Revised Statutes, Article 3050, Subdivision 24.

This statute makes it the duty of the Commissioner of Insurance "to see that no company is permitted to insure lives or *health* in this State whose charter authorizes it to do a fire, marine or inland business, and that no company authorized to do a life or *health* insurance business be permitted to take fire, marine or inland risks." This provision seems to apply alike to domestic and to foreign corporations.

(b) Revised Statutes, Article 3062.

This article provides that "any life or *health* insurance company desiring to transact the business of insurance in this State shall

furnish said Commissioner with a written or printed statement," etc.

Subdivision 4 concerning assets makes certain specific requirements "if the said company be one organized under the laws of this State."

This article, with the exception noted, seems to apply alike to both domestic and foreign corporations.

(c) Revised Statutes, Article 3063.

This article seems to apply alike to both domestic and foreign corporations.

(d) Revised Statutes, Article 3065.

This article, which refers to the amount of capital actually invested and specifies in what classes of securities same shall be invested, is *by its terms* made applicable to any life or *health* insurance company incorporated "in this State or any other State."

(e) Revised Statutes, Article 3067.

This article, concerning deposits with the State Treasury, is by its terms applicable to only foreign corporations.

(f) Revised Statutes, Article 3073.

This article is as follows:

"It shall be unlawful for any life or health insurance company to take any kind of risks or issue any policies of insurance except those of life or *health*, nor shall the business of life or *health* insurance in this State be in anywise conducted or transacted by any company which, in this or any other State or county, is engaged or concerned in the business of marine, fire, inland or other insurance."

(3) Section 1, Chapter 143, of the General Laws of the Twenty-eighth Legislature (Section 150 of Ins. Dig. of 1907), requiring that all insurance business must be transacted through regularly commissioned and licensed agents, is by its terms made applicable to various classes of insurance companies "legally authorized to do business in this State," including *health* companies.

There are now other statutes in force in this State requiring insurance companies, including *health* insurance companies, to pay franchise taxes, occupation taxes measured by their gross receipts, etc., to which more particular reference need not be made here.

(g) Act of May 2, 1874, page 197; H. Gam., page 129, bottom.

Section 1 of this statute shows that it applied to all *health* insurance companies doing business in this State, whether incorporated in this State or out of it.

This act seems to form the basis for several of the articles of the Revised Statutes hereinabove referred to.

The laws to which I have hereinabove referred appear to be the only laws applicable to *health* insurance companies which have ever been in force in Texas.

So far as I have been able to find, without having absolutely exhausted the search, all of the laws now in force in this State applicable to *health* insurance companies are with a single exception applicable alike to both domestic and foreign companies, the exception being that found in Subdivision 24 of Revised Statutes, Article 3050, set forth in subdivision (a) above.

I am of the opinion that it would be contrary to the whole policy of our laws as reflected in the insurance legislation of this State and as interpreted and declared from time immemorial by the Insurance Department, the Attorney General's Department and the courts of this State, to permit the incorporation of a single company for the combined purpose of carrying on life, accident and health insurance business.

In view of our conclusion as to name and purposes of the proposed corporation I deem it hardly necessary to take up at this time the details of the proposed charter which have been discussed in our correspondence. We will take pleasure in giving them prompt and final consideration whenever they shall be reached, in order.

I am writing directly to you, in reply to your letter, with a view of simplifying and expediting matters, waiving the formality of requiring the correspondence to pass through the hands of the Commissioner of Insurance; but I am sending him a carbon copy hereof.

Yours truly,

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CORPORATIONS, FOREIGN—ARTICLES OF INCORPORATION—AMENDMENT TO.

Secretary of State authorized to collect fee for filing amendment to original articles of a foreign corporation which now has permit to do business in this State.

AUSTIN, TEXAS, July 7, 1908.

*Hon. W. R. Davie, Secretary of State, Capitol.*

Sir: I have your letter of this date, in which you say:

"Please advise this department on the following question:

"Is this department authorized under the Statute to collect a fee for filing an amendment to the original articles of a foreign corporation that now has a permit to do business in this State?"

"It is the uniform policy of this department, and has been for years past, to collect a fee under the same rules as that collected when filing an amendment for a domestic corporation."

I beg to answer your inquiry as follows:

Chapter 22 of the General Laws of the First Called Session of the Thirtieth Legislature, amending Revised Statutes, Article 2439, prescribes fees to be charged by the Secretary of State for the use of the State.

In the first instance it fixes fees to be charged "for each and every charter, amendment or supplement thereto" of various classes of corporations, specifying such classes, the amount of the fee varying with such respective classes, and then makes a general provision fixing the fee to be charged for each and every charter, amendment or supplement thereto of a private corporation created for any other purpose, intended for mutual profit or benefit."

Further on, in the same article, is the following provision:

"Every foreign corporation obtaining permit to do business in this State shall pay fees as follows:

"Fifty dollars for the first ten thousand dollars of its authorized

capital stock, and ten dollars for each additional ten thousand dollars, or fractional part thereof."

The answer to your question depends upon the proper construction of this quoted provision concerning foreign corporations.

If it is to be construed as a separate and independent provision, without reference to the preceding portions of Revised Statutes, Article 2439, as so amended, then, inasmuch as the language above quoted does not specifically and expressly mention amendments of charters of such foreign corporation, it would seem that your question should be answered in the negative. Under that view the statute should be construed as though it reads thus:

*Each foreign corporation which shall obtain a permit to do business in this State shall pay to the Secretary of State therefor fees as follows:*

*Fifty dollars for the first ten thousand dollars of its authorized capital stock and ten dollars for each additional ten thousand dollars, or fractional part thereof."*

This view of the matter assumes that the Legislature either expressly or inadvertently failed to authorize you to charge a foreign corporation for filing amendment of its charter, although making provision for you to charge a domestic corporation for filing an amendment to its charter.

But under another view of this statute the words "obtaining permit to do business in this State" found in the above quotation from Revised Statutes, Article 2439, as so amended, may be treated as merely descriptive, and as used for the purpose of classification only, and not as declaring the service or item for which the prescribed fee is to be paid by the foreign corporation; and under that view this statute may reasonably be construed to mean that each foreign corporation which shall desire a permit to do business in this State shall be required to pay certain prescribed fees for the same service or items which are specifically mentioned in the preceding and first hereinabove mentioned provisions of said Article 2439, as so amended, such service or items being the filing of any charter or amendment or supplement thereto.

In support of the second view of the matter here suggested it may be urged that it relieves the Legislature of a design to discriminate against domestic corporations and in favor of foreign corporations, in so far as the service or items to be charged for by the Secretary of State are concerned.

I note that you say that it has been the uniform policy of the Department of State for years past to apply to foreign corporations the same rule which has been applied by it, under the statute, to domestic corporations, and to charge both foreign and domestic corporations for filing amendments to their charters. Our courts have held that in the absence of a clear and convincing showing that such a construction is erroneous the courts will not change a rule of construction which has been adopted by another department of the State government. And this is the general rule.

*Tolleson vs. Rogan, Commissioner, 7 Texas Court Rep., 128.*

*Chambers vs. Fisk, 22 Texas, 504.*

*Ex Parte Rodriguez, 39 Texas, 768.*

Edwards vs. James, 7 Texas, 382.  
 Cowan vs. Hardeman, 26 Texas, 221.  
 G., H. & S. A. Ry. vs. State, 81 Texas, 602.  
 Baldwin vs. State, 21 Texas App., 594.  
 Kimbrough vs. Barnett, 93 Texas, 312.  
 State vs. Moore, 57 Texas, 307.  
 State vs. Garhardt, 145 Ind., 439 (44 N. E. Rep., 469).  
 Carson vs. Smith, 5 Minn., 78 (77 Am. Dec., 539).  
 Moers vs. City of Reading, 21 Pa. St., 188.

I am not prepared to say that in so holding your department has not correctly construed the law.

I am inclined to believe that the courts will construe this Act of 1907 as authorizing you to charge a foreign corporation for filing an amendment to its charter at any time, the same as for filing its charter upon making application to you for permit to do business in this State. At any rate, I respectfully advise you to do so unless and until the courts shall hold otherwise.

If you err against the interests of a foreign corporation, it has its remedy; but if you err against the interests of the State, the State is practically without remedy.

Yours truly,

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ANTI-PASS LAW—CONFEDERATE INMATE—INDIGENT  
 POOR.

Railway company may grant free trip passes to the indigent poor when application therefor is made by any religious or charitable organization.

Same: Inmate of Confederate Home, when, etc.

AUSTIN, TEXAS, July 15, 1908.

*Hon. L. J. Storey, Railroad Commission, Capitol.*

Dear Sir: I am in receipt of your favor of the 14th instant, enclosing communication addressed to you by A. H. Dashiell, assistant general attorney of the Texas Midland Railway Company, and requesting me to give you an opinion upon the question therein submitted. The question is as follows:

"I enclose you herewith a request from Mr. I. N. George, an inmate of the Confederate Home at Austin, requesting transportation over the line of the Texas Midland Railway. I am uncertain whether under the provisions of the anti-pass law I can grant his request. \* \* \* The company desires to give him the transportation if it can."

You are respectfully advised that said railway company may grant a trip pass to the said I. M. George upon the application of the Superintendent of the Confederate Home without in any way violating the provisions of the anti-pass law.

By Section 2 of the act above referred to it is provided that any railway company may grant free "trip passes to the indigent poor when application therefor is made by any religious or *charitable* organization."

Our statutes governing admission to the Confederate Home, among other things, provides that "all applications for admission

to said Home must show on the oath of the applicant that he is disabled and indigent. \* \* \*” (See R. S., Art. 174.)

I am also of the opinion that the anti-pass law does not prohibit railroad companies from making special or reduced rates to inmates of the Confederate Home, provided authority therefor is first obtained from the Railroad Commission.” (See Section 2 of the act referred to.)

You are also advised that the Act of Congress of August 29, 1906, entitled “An Act to regulate commerce,” does not prohibit railroad companies from issuing free transportation to inmates of the Confederate Home of this State good for an interstate journey. Said act contains the following provision:

“No common carrier subject to the provisions of this act shall after January 1, 1907, directly or indirectly, issue or give an interstate free tickets, free pass or free transportation for passengers, except to \* \* \* inmates of the National or State homes for disabled and volunteer soldiers and of soldiers’ and sailors’ homes, including those about to enter and those returning after discharged.”

It will thus be seen that the Act of Congress referred to expressly exempts from its operation inmates of soldiers’ homes.

Yours truly,

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CITY TREASURER—SCHOOL FUNDS OF CITY—INDEPENDENT SCHOOL DISTRICTS.

In cities which have assumed control of their schools city treasurer should handle funds, in such case the election of treasurer of school board not being authorized. Board of independent school district may elect treasurer, provided said district is not merely a city assuming control of its schools.

AUSTIN, TEXAS, July 31, 1908.

*Hon. R. B. Cousins, State Superintendent of Public Instruction, Capitol.*

Dear Sir: Your letter of the 16th instant contains the following statement and inquiry:

“I understand that Section 34 of Chapter 164, Acts of the Twenty-ninth Legislature, as amended by Chapter 61 of the Acts of the Thirtieth Legislature, makes it necessary that the school funds of a city which has, under the general law, assumed control of the public free schools within its limits, be placed in the city depository. Section 37 of the law above mentioned contains this language: ‘No money belonging to the city shall be paid out of the city depository except upon the checks of the city treasurer.’ Query: Should the school board of such city elect a treasurer of the school funds as provided in Section 165 of Chapter 124, Acts of the Twenty-ninth Legislature, or does this law make the city treasurer ex-officio treasurer of the school fund.”

Your inquiry involves the construction of Section 165, Chapter 124, Acts of the Twenty-ninth Legislature. I am of the opinion that the office of treasurer referred to in that section of the law requiring the



creation of such office, would refer to independent school districts and not to cities and towns which have assumed control of their public free schools. Cities and towns assuming control of their public free schools have a city treasurer under the law and it certainly was not the intention of the Legislature to require such cities and towns to elect two treasurers instead of one—one for the school fund and one for the other funds of the city. Under every construction of the law, it occurs to me the school fund of such cities and towns is a city fund and the city having a treasurer and providing how the city's funds may be paid out by the treasurer is sufficient to determine how the school funds may be paid out by such city treasurer. I am not sure that the expression that the city treasurer would be ex-officio treasurer of the school fund is correct because a city treasurer is city treasurer for all the funds of the city and the school fund being a part of the city funds, he is simply city treasurer and that includes the custody and disbursement of the school funds as well as all other funds.

In other words, in cities and towns assuming control of their schools and having their city treasurer, the board of trustees, in my opinion, have no authority to elect a treasurer of such board, he having no duties to perform and there being a city treasurer already elected under the law; but in independent school districts created as such there should be a treasurer elected whose duty it is to handle and disburse the school funds of the district, and when I speak of independent districts in this particular, I do not have reference to cities and towns becoming independent school districts by assuming control of their schools.

Yours truly,

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COMMISSIONER OF THE GENERAL LAND OFFICE—SUB-  
MERGED LANDS IN SHALLOW WATERS OF SAN  
JACINTO BAY—LEGISLATURE.

Commissioner, in absence of special legislation, should decline to sell such lands.

AUSTIN, TEXAS, August 6, 1908.

*Hon. John J. Terrell, Commissioner of the General Land Office, Austin, Texas.*

Sir: We have received and carefully considered your recent inquiry as to your rights, powers and duties with regard to sale of submerged lands under the shallow waters of San Jacinto Bay in Harris County, and elsewhere.

The question arises upon applications to purchase such lands filed under Revised Statutes, Title 71, the contention of the applicants being that said lands are oil and gas bearing lands and therefore subject to sale by you under the statutes providing for the sale of mineral lands.

The question thus presented is one of considerable importance, as it involves your right to sell all submerged lands under the shallow waters of all lakes and bays within this State and along the gulf coast.

It will be remembered that by an act entitled "An Act to define the boundaries of the Republic of Texas," and approved December 19, 1836 (1 Gam., 1193, bot.), the first Congress of Texas declared "that from and after the passage of this act, the civil and political jurisdiction of this Republic be, and is hereby declared to extend to the following boundaries, to-wit: beginning at the mouth of the Sabine river, and running west along the Gulf of Mexico three leagues from land, to the mouth of the Rio Grande," etc.

And after annexation the Legislature of Texas re-affirmed its "exclusive right to the jurisdiction over the soil included in the limits of the late Republic of Texas," excepting such as may be vested in the United States, by the Constitution of the United States, and by the joint resolution of annexation. (Hart. Dig. Arts. 1631 and 1634.)

It will also be remembered that by the terms of the act of February 23, 1900, defining the permanent school fund of the State of Texas, partitioning the public land between said fund and the State and adjusting the account between said fund and the State and setting apart and appropriating to said school fund in part payment of said account the residue of the public domain of the State to which said fund was entitled under Section 2, Article 7 of the Constitution of 1876, it was expressly declared that "this act shall not have the effect to transfer to the school fund any of the lakes, bays and islands on the Gulf of Mexico within tide water limits, whether surveyed or unsurveyed."

I think it is clear that under the usage of nations and the rules of the common law and the above mentioned legislative enactments all such submerged lands, whether in lakes or bays or along the gulf coast, were claimed by and reserved to and are now owned and held by the State of Texas subject to such disposition as may now or as may hereafter be authorized and directed by the Constitution and laws of the State of Texas, subject, of course, to the exercise by the United States Government of the constitutional powers relative to navigation and commerce.

But do the laws of this State now in force, and especially those found in Revised Statutes, Title 71, and amendments thereof, upon the subjects of mines and mining, authorize you to sell such submerged lands or any part thereof?

I think not.

I think a careful reading of our statutes relating to the sale of public lands, especially including those found in Revised Statutes, Title 71, will impress any reasonable mind with the idea that they were not intended by the Legislature to be applicable to such submerged lands, even though it should be conceded that the phraseology employed therein is sufficiently broad and comprehensive when read and construed literally to embrace such submerged lands.

Our Supreme Court has held in effect that the laws of this State providing for the sale of public lands should be construed in the light of the surroundings and history of the times in which they were enacted and with due regard to all other legislation concerning the public domain, all with a view of giving effect to the legislative purpose, rather than to adhere rigidly to the particular phraseology employed in a given statute.

And in the case of *Roberts vs. Terrell, Commissioner*, that court recently held that Mustang Island was not within the operation and scope of the general statutes providing for sale of public lands, and that, consequently, an attempted location upon that island of certificate which had been granted by the Legislature to William A. A. (Big Foot) Wallace was invalid.

See, also, *State vs. Delesdenior*, 7 Texas, 76; *Franklin vs. Tierman*, 56 Texas, 624.

The uniform practice of the Legislature in dealing with the islands along the gulf coast has been to do so by specific legislation.

The first Congress of the Republic granted by act of December 9, 1836, to Michael B. Menard and his associates a league and labor of land lying and situate on and including the east end of Galveston island. (1 Gam., 1131, bot.)

By act approved June 12, 1837, the Congress made special provision for the disposition by the Secretary of the Treasury by sale at public auction of the Island of Galveston, except the league and labor sold to M. B. Menard and associates, and all other islands within the Republic, in lots of not less than ten nor more than forty acres. (1 Gam., 1127, bot.)

The Thirtieth Legislature, in Chapter 122 of the General Laws of 1907, page 320, made special provision for the sale of lands constituting portions of the public domain and situated upon Mustang Island, the plan of sale being widely different in many respects from that prescribed by the general statute authorizing sale of public lands.

Other instances might be given, but these will suffice to show that it is the general policy of the Legislature to specially treat the disposition of lands on islands along the coast. I am firmly convinced that the Legislature would have likewise made special provision for the sale of submerged lands in lakes and bays and along the gulf coast had it intended that any of such lands should be sold or otherwise disposed of by the Commissioner of the General Land Office.

Indeed, such special provisions have been made for disposition of such lands, under certain conditions, to channel and dock corporations, and to deep water corporations. (Revised Statutes, Title 21, Chapters 14 and 15.)

I am strongly persuaded that in a matter so fraught with public interest as is the disposition of such submerged lands in lakes and bays and along the gulf coast, the Legislature would have unquestionably maintained its settled policy of enacting laws specifically dealing with that subject matter, had it intended to place such submerged lands on the market for sale.

I am of the opinion that in the absence of such legislation you should decline to sell such lands, leaving it for the Legislature to deal with the subject by appropriate legislation.

Another view of the matter which strengthens my conclusion is that it has always been the settled policy of our State government to hold the lakes and bays and the shallow waters along the gulf coast, in trust, as it were, for the public, rather than to permit them to be appropriated to private ownership.

Indeed, that has been the policy of practically all civilized governments, from time immemorial. (*City of Galveston vs. Menard*, 23 Texas, 349.)

As was well said by Judge Roberts in *City of Galveston vs. Menard*, 23 Texas, 395-6:

"By the civil law, the shores of the sea, of bays, and navigable streams generally, as well as the tide-waters, were jealously guarded from private appropriation, and reserved for common use. As early as 1837, Congress in establishing a general land office, for the distribution and disposition of lands, enacted "that all streams, of the average width of thirty feet, shall be considered navigable streams," and "shall not be crossed by lines of a survey. (Hart. Dig., Art. 1878.) The same act made provision for diminishing the front line of tracts, surveyed on navigable streams, indicating an anticipated advantage in the use of such streams for navigation." (Article 1858.)

It may be added that both of these statutes, in substantially the same form, are in force to day.

It is obvious that if you recognize the right of applicants to purchase such submerged lands under existing laws, and award such lands to such applicants, the erection of derricks and other structures thereon may seriously and permanently obstruct navigation and may materially impair or interfere with the rights of owners of lands heretofore sold by the State fronting on such lakes, bays and gulf.

In the able brief submitted by Judge Lock McDaniel in behalf of the applicants, two patents are mentioned as furnishing precedents for you to award submerged lands under the above mentioned applications. The first of these patents, No. 487, Volume 36, dated January 7, 1887, and signed by Governor John Ireland, was for a lot of land measuring 300 by 1100 feet "in Galveston County on the eastern end of Galveston Island."

The second of these patents, No. 633, Volume 32, dated December 6, 1888, was signed by Governor O. M. Roberts and was for "a certain circular tract of submarine land, having a radius of 372 feet, in Galveston County."

Each of these patents shows upon its face that it was issued in accordance with the provisions of Section 34 of Article 16 of the Constitution of Texas and Article 331 of Revised Statutes, the numbers of the section and article of the Constitution being transposed, however, in said Patent No. 487.

In other words, these two tracts of land were patented to the United States Government for military purposes under constitutional and statutory provisions authorizing a sale of the public lands to the United States for that purpose.

It will be noted that said patent No. 633 was signed by the great jurist who wrote the exhaustive and learned opinion of the court in *City of Galveston vs. Menard*, *supra*.

Whether the grants of lands evidenced by these two patents were authority by then existing laws or not, it will be noted that the purposes and effect of said grants were very different from what would be the probable and necessary purpose and effect of sales by you of such submerged lands to individuals. I do not consider the cases cited as precedents in the case here under consideration, nor

do I think that even though they were strictly in point, such precedents should control your action in the premises.

Upon the whole, I am of the opinion that fair construction of existing laws and public policy alike require that you shall decline to sell any such submerged lands until there shall have been further legislation specifically authorizing you to do so, or until the Supreme Court of this State shall have held that it is your duty to do so under existing laws.

Yours truly,

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COUNTY ATTORNEY—COMMISSIONERS COURT—PRIMARY  
ELECTION—PRINTING NAME ON OFFICIAL BALLOT  
—WRITING NAME ON OFFICIAL BALLOT.

Commissioners court not authorized to employ and pay county attorney a salary out of public funds.

No candidate can have name printed on official ballot unless he makes application to the county chairman within time prescribed by law and pays proportionate part of expense of holding election. Voters not prohibited from writing name of such person on official ballot.

AUSTIN, TEXAS, August 7, 1908.

*Mr. T. M. Jones, Gail, Texas.*

Dear Sir: Replying to the interrogatories propounded by you in your favor of the 1st inst., we beg to advise:

1. The commissioners court of a county have no authority to employ the county attorney and pay him a salary out of the public funds of the county. The statute provides for the election of county attorneys and fixes their compensation, and we do not think it would be legal for the commissioners court to pay him out of the public funds any additional compensation. (*Grooms vs. Atascosa County*, 32 S. W. Rep., 188.) This is not authorized by statute and it is well settled that the commissioners court have no authority, except such as the statutes conferred upon them.

2. No candidate for nomination to any office can have his name printed upon the official ballot in the primary election, unless he makes application to the county chairman within the time prescribed by law and pays his proportionate part of the expenses of holding the election. This, however, does not prevent voters participating in the election from voting for such person by writing his name upon the ballot and if he receives a majority of the votes in this way he is entitled to the nomination.

Yours truly,

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MEDICAL LAW—PROVISIONS CONSTRUED.

AUSTIN, TEXAS, August 12, 1908.

*Dr. M. E. Daniel, Secretary State Medical Board, Honey Grove, Texas.*

Dear Sir: In your letter of the 22nd ult. you ask the following questions:

"1. Will it be legal to record a verification license now, or at any future time, while the present medical practice act is in force, that was issued but not recorded prior to July 12, 1908?

"2. Will it be legal for the Board now, or in the future while the present act is in force, to issue verification license to those who were entitled to it, but failed to apply for same prior to July 12, 1908?

"3. In verifying osteopathic physicians as is provided for under the present law, and who were exempt under the Act of 1901, Section 13, last paragraph, should this Board have verified the said osteopaths to practice all the branches of medicine, or limit their verification to the practice of osteopathy?

"4. In verifying midwifery, as is provided for under the present law, who were exempt under the Revised Statutes, 1879 (the old district board law, Art. 3637, Subdiv. 3), should the board limit their verification to the practice of midwifery or verify them to practice all the branches of medicine?"

"5. When the Board is mandamusd or seeks to revoke a license are the district and county attorneys expected to fight these cases free of expense to the Board, or will the latter, of necessity, have to employ counsel at its own expense? In instances where the Board loses a case, does the State lose the cost or does the Board collectively and individually become responsible therefor?"

In reply thereto, I wish to advise as follows:

1. Verification licenses procured from the board within twelve months after the present medical act went into effect may be recorded at any time, though the holder thereof would not be authorized to practice medicine after July 12, 1908, without having such verification license first recorded.

2. I am of opinion that the present Medical Board is without authority to issue verification licenses to practitioners who failed to apply therefor before July 12, 1908. If that provision of the law does not mean what it says and the Legislature did not intend to limit their right to procure such verification license to a period of twelve months after the law went into effect, the Legislature certainly would have omitted that provision.

3. In verifying osteopathic physicians for the practice of medicine under the present act, it occurs to me that the present Medical Board under the present act should have issued to them license to practice medicine in all its branches.

4. The present Medical Board in issuing verification licenses to those practicing midwifery or obstetrics, who were not authorized to issue license to practice all the branches of medicine to those who had under previous laws a license to practice midwifery or obstetrics.

5. When an application for mandamus is made to the district courts of the State against the present Medical Board, it would appear by the provisions of the Code of Criminal Procedure, Arts. 32 and 39, that county and district attorneys could represent the Board in any litigation involving the validity of the law or the discharge of the official duties of the members of such Board;

but there is no law within my knowledge compelling such officers to so represent the Board.

This department has decided to furnish a representative to the Medical Board in all cases involving the construction and the validity of that medical act.

I am of the opinion that in litigation involving the construction, the enforcement or the validity of this medical act, in cases where the Board loses in such litigation, that the expenses of such litigation would have to be borne by the Board, provided the Board had funds in its hands belonging to the Board officially, sufficient to satisfy such cost. Unless the Board had such funds or should thereafter collect funds sufficient to satisfy such costs, it occurs to me that there would be no way of satisfying the cost accruing from such litigation. The members of the Medical Board would be acting in their official capacity and they would be sued as officials and not as individuals, and no judgment could be properly rendered against them individually so as to subject their individual property to the payment of any costs of litigation, or any judgment that might be procured against such board. But, of course, as state above, all funds coming into their hands as official funds authorized by law to be used by the Board in paying expenses of the Board could properly and legally be appropriated to the payment of such costs.

Yours truly,

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PUBLIC SCHOOL LAND—PURCHASER.

Application and obligation, together, constitute bid of applicant.

AUSTIN, TEXAS, August 15, 1908.

*Hon. John J. Terrell, Commissioner of the General Land Office,  
Austin, Texas.*

Sir: I have given careful consideration to your letter of 12th instant, in which you say:

“On June 15th, 1908, A. J. Seargent filed his application in this office to purchase section No. 20, block 87, Public School, in El Paso County, copy of said application being attached to this letter and marked “Exhibit A.” On June 16, 1908, Harrold D. Beal filed his application in this office to purchase said section 20, block 87, Public School, in which application he offered the sum of \$1.50 per acre for said land, and his application and obligation appear to be regular in every particular. This section came on the market June 15, 1908, was appraised at \$1.25 per acre, and shows to contain 640 acres. You will note that in the body of the application made by Mr. A. J. Seargent that he offers \$2.01 per acre for the land, while the obligation for the deferred payment is for \$1,244.24, or \$1.99 31-78 per acre, and this department would like to be advised at your earliest convenience as to whether or not this application should be accepted and the land awarded to Mr. Seargent, or whether his application should be rejected and the application of Mr. Beal accepted.

“In this connection Section 3 of the Act of April 15, 1905, reads in part as follows: ‘Any person desiring to purchase any of the surveyed land mentioned in this act shall make a separate application in writing for each tract applied for and be addressed to the Commissioner of the General Land Office. It shall sufficiently designate the tract sought to be purchased, and give the price offered therefor which shall not be less than the appraised value fixed by the Commissioner. \* \* \* Also every application shall be accompanied by the obligation of the applicant in a sum equal to the amount of the deferred payment offered for the land.’”

I note that the obligation of Mr. A. J. Seargent is for ten dollars less than the aggregate price mentioned in his application to purchase and that the application and also the obligation of Harrold D. Beal are in all respects in compliance with statutory requirements. The law makes it the duty of the Commissioner of the General Land Office, in making sales under competitive bids, “to award the land to the one offering the highest price therefor.” (Chap. 103, General Laws, 1905, Section 4.)

However, this statutory provision should be read and construed in connection with the above quoted provisions of Section 3 of said statute which expressly require that the application shall state the price offered for the land, and that the application shall be accompanied by the obligation of the applicant *in a sum equal to the amount of the deferred payment offered for the land.*

I am of the opinion that the application and obligation together constitute the bid of the applicant for the land, and that if the obligation be for an amount less than the deferred payments for balance of purchase money, according to the purchase price offered in the application, the bid is not a legal bid and should be rejected by you; and that in such instances you should award the land precisely as though such ineffective application and obligation had not been filed.

Mound Oil Co. vs. Terrell, 99 Texas, 629.

Gracey vs. Hendrix, 93 Texas, 30.

Spence, Administrator vs. Mitchell, 96 Texas, 43.

It follows that in the case stated by you the land in controversy should, in my opinion, be awarded by you to Harrold D. Beal.

Yours truly,

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#### GROSS RECEIPTS TAX—CLEBURNE ELECTRIC & GAS CO.

Tax prescribed by Chapter 18, General Laws, First Called Session of Thirtieth Legislature, does not repeal former statute prescribing occupation tax.

AUSTIN, TEXAS, August 20, 1908.

Hon. J. W. Stephens, Comptroller of Public Accounts, Capitol.

Dear Sir: We have your letter of this date transmitting letters from M. B. Templeton, Esq., General Counsel of the Cleburne & Electric Gas Co., and one from Mr. Claude White, tax collector of Johnson County, raising the question whether or not payment by said



corporation of the occupation tax prescribed by Section 3 of Chapter 18 of the General Laws of the First Called Session of the Thirtieth Legislature (1907), page 480, will relieve that corporation from liability from the occupation tax prescribed by former statutes.

I am of the opinion that this question should be answered negatively, and that said corporation is clearly subject to payment of both such occupation taxes.

Section 22 of said Chapter 18 is as follows:

"Except as herein stated, all taxes levied by this act shall be in addition to all other taxes now levied by law, provided that nothing herein shall be construed as authorizing any county or city to levy an occupation tax on the occupations and business taxed by this act."

I can not concur with counsel for the Cleburne Electric and Gas Co. in his conclusion that "all other taxes now levied by law" means merely that the occupation taxes prescribed by said Chapter 18 shall be in addition to ad valorem taxes and intangible taxes to which any of the companies embraced by said chapter 18 are liable under other statutes.

It is true that, as contended by counsel, the construction which I place upon said Chapter 18 leaves certain corporations subject to double occupation taxes; but that is a matter which is wholly within legislative discretion and is not a matter about which any other department has any concern or over which any State or county officer can exercise any control whatever.

The Constitution of Texas contains no restriction upon the power of the Legislature to impose double occupation taxes.

The provision in Section 1 of Article 8 of the Constitution of Texas that "taxation shall be equal and uniform" applies only to a direct tax on property and not to an occupation tax, and does not limit the power of the Legislature as to the subjects of taxation, being intended only to prevent the arbitrary taxation of property according to kind or quality, without regard to value.

Phoenix Carpet Co. vs. State (Ala.), 22 So. Rep., 627.

Beebe vs. Wells (Kans.), 15 Pac. Rep., 565.

City of Newton vs. Atchison (Kans.), 1 Pac. Rep., 288.

The only restrictive provision concerning occupation taxes to be found in the Constitution of Texas is in Section 2 of Article 8, which declares that "all occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax."

Taylor vs. Boyd, 63 Texas, 541.

Higgins vs. Bordages, 88 Texas, 461.

Texas Banking Co. vs. State, 42 Texas, 636.

Blessing vs. Galveston, 42 Texas, 641.

Fahey vs. State, 27 Texas App., 146.

The Legislature has wide discretion in making classifications for purposes of levying occupation taxes.

Armour Packing Co. vs. Lacy, 200 U. S., 226.

Metropolitan Street Ry. vs. New York, 199 U. S., 1.

Savannah, etc., Ry. Co. vs. Savannah, 198 U. S., 397.

Connally vs. Union Sewer Pipe Co., 184 U. S., 540.

Cargill vs. Minnesota, 180 U. S., 452.

Kidd vs. Alabama, 188 U. S., 730.

Cable vs. U. S. Life Ins. Co., 191 U. S., 307.

Fidelity Mutual Life Ins. Co. v. Mettler, 185 U. S., 225.

In *Armour Packing Co. vs. Lacym*, supra, the Supreme Court of the United States quotes approvingly from its opinion in *Osborne vs. Florida*, 164 U. S., 650, as follows:

“As we have frequently held, the State has the right to classify occupations and to impose different taxes upon different occupations. Such has been constantly the practice of Congress under the internal revenue laws. *Cook vs. Marshall County*, 196 U. S., 261-275. What the necessity is for such tax, and upon what occupations it shall be imposed, as well as the amount of the imposition, are exclusively within the control of the State Legislature.”

In discussing the Fourteenth Amendment to the Constitution, the Supreme Court of the United States said:

“It is enough that there is no discrimination in favor of one as against another of the same class, and the method for the assessment and collection of the tax is not inconsistent with natural justice.”

*Michigan Central R. R. Co. vs. Powers*, 201 U. S., 293.

*Bells Gap R. R. Co. vs. Pennsylvania*, 134 U. S., 232.

Of said Chapter 18 it may fairly be said that it “does not discriminate against some and favor others, but, though limited in its application, does within the sphere of its operation affect alike all persons similarly situated.” And this is also true of said Chapter 18 and of the former statute prescribing occupation taxes, even when construed together.

*Merchants' Life Assn. vs. Yoakum*, 98 Fed. Rep., 271.

*Barbier vs. Connally*, 113 U. S., 27.

*Cooley on Taxation*, 3rd Ed., page 72, et seq.

*Amer. & Eng. Enc. of Law*, Vol. 21, p. 800, and case cited in Note 3.

In view of the foregoing I can not agree with Mr. Templeton's conclusion that “the position can hardly be maintained in our courts that some corporations are liable for two occupation taxes and some not.” I consider it unquestionably true that the *Cleburne Electric and Gas Co.* is clearly liable under the law for both occupation taxes.

Inasmuch as similar questions are constantly arising with regard to other classes of taxpayers, I will add that what I have said above applies as well to any and all taxpayers mentioned by said Chapter 18 of the General Laws of 1907, First Called Session, which were subject to an occupation tax when this statute took effect.

Yours truly,

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#### TELEPHONE COMPANIES.

Telephone companies may lawfully operate their lines along the public highways of the county without securing right of way or franchise.

AUSTIN, TEXAS, August 26, 1908.

*Judge C. R. Buchanan, Snyder, Texas.*

Dear Sir: Replying to yours of the 24th, you are advised that telephone companies can lawfully operate their lines along the public highways of the county without securing right of way or franchise.

See Arts. 698, 699, Sayles' Civil Statutes.

G., C. & S. F. Ry. Co. vs. S. W. Tel. & Tel. Co., 45 S. W. Rep., 151.

G., C. & S. F. Ry. Co. vs. S. W. Tel. & Tel. Co., 61 S. W. Rep., 407.

Railroad Co. vs. S. W. Tel. & Tel. Co., 55 S. W. Rep., 117.

Yours truly,

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PURE FOOD ACT—SEIZURE OF ADULTERATED PRODUCTS  
—DISTRICT AND COUNTY ATTORNEY.

Commissioner, his deputy, or person appointed by him, should take sample only, and if found adulterated or misbranded, complaint should be made before justice of the peace.

District or county attorney shall render Commissioner legal assistance when called upon.

AUSTIN, TEXAS, August 31, 1908.

*Dr. J. S. Abbott, Pure Food and Dairy Commissioner, Denton, Texas.*

Dear Sir: Yours of the 21st instant, concerning the seizure of adulterated food products, received. The statute provides that the Pure Food and Dairy Commissioner or any person appointed by him for that purpose is authorized at all times to seize and take possession of any and all kinds of food products, drinks, and dairy products, etc., kept for sale contrary to the provisions of the pure food act. The law also provides that the person so making such seizure shall take from such goods as seized a sample for the purpose of analysis and shall cause the remainder thereof to be boxed and sealed and shall leave the same in possession of the person from whom they were seized. It is further provided that if upon such analysis it shall appear that the said food products or dairy products are adulterated, substitutes or imitations, within the meaning of the act that the Commissioner or his deputy or any person by him duly authorized may make complaint before any justice of the peace having jurisdiction where such goods were seized. It then provides for a trial of the issues involved before a justice of the peace and if it is found that the goods are being sold in violation of the provisions of the act, said goods shall be forfeited to the State. There is no question in my mind as to the validity of the provisions of the act referred to, except possibly those provisions with reference to the seizure of the goods without warrant. The Constitution provides that the people shall be secure in their persons, houses, papers, and possessions from all unreasonable seizure and search and that no warrant to search any place or seize any person or thing shall issue without describing them as near as may be nor without probable cause supported by oath or affirmation. See Section 9 of Article 1 of the Constitution.

In view of this constitutional provision, I do not think that you

should attempt to have food products seized, but should take a sample only and if it is found upon analysis of the sample that the goods are adulterated and misbranded, you should make complaint thereof to a justice of the peace, as provided by Section 59 of the Pure Food Law, and allow the goods to remain in the possession of the owner to await the final disposition of the trial of the case. I desire to call your attention to the fact that the pure food statute makes it the duty of the district and county attorneys to, when called upon, by the Commissioner or by any other person by him authorized, render any legal assistance in his power in person, under the provisions of the Act. (See concluding paragraph of Section 59, of the act referred to.)

Yours truly,

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ANTI-NEPOTISM LAW—FEE BILL—SHERIFF.

Neither sheriff nor any other officer exempt from provisions of anti-nepotism law, whether affected by fee bill or not.

AUSTIN, TEXAS, September 1, 1908.

*Hon. George W. Tilley, Sheriff, Waco, Texas.*

Dear Sir: I am in receipt of your letter of the 29th ult., and in reply thereto I wish to advise that in my opinion it is wholly immaterial whether the sheriff comes under the fee bill or not, as to the application of the anti-nepotism law.

Section 1 of the anti-nepotism law reads as follows:

"Hereafter it shall be unlawful for any executive, legislative, ministerial or judicial officer of this State to appoint or vote for the appointment of any person related to him by affinity or consanguinity within the third degree to any clerkship, office, position, employment or duty in any department of the State, district, *county*, city or municipal government of which such executive, legislative, ministerial or judicial officer is a member, when the salary, wages, pay or compensation of such appointee is to be paid for out of public funds or fees of officers."

Section 2 of the act makes it unlawful for an officer to draw a warrant for the payment of the salary of such officer.

Section 3 of the act provides the penalty for the violation of the same. Section 4 of the act reads as follows:

"Under the designation executive, legislative, ministerial or judicial officer as mentioned herein, are included the Governor, Lieutenant-Governor, Speaker of the House of Representatives, Railroad Commissioner, all the heads of the departments of the State government, judges of the courts of this State, mayors, recorders and aldermen of all incorporated cities and towns, public school trustees, officers and boards of managers of the State University, and its several branches, State Normals, the penitentiaries and eleemosynary institutions, members of the commissioners court and all other officials of the State, district, *county*, cities or other municipal subdivisions of the State."

So it seems clear that sheriffs are not exempt from the provisions of the anti-nepotism law and neither is any other officer exempted from the provisions of the anti-nepotism law, whether he is affected by the fee bill or not.

With kindest regards, I am,

Yours truly,

