SCHEDULE XVIII.

OFFICIAL OPINIONS.

(The opinions in this volume have been passed upon and approved by the Department in executive session.—B. F. Looney, Attorney General.)

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OPINIONS CONSTRUING ANTI-NEPOTISM LAW.

ANTI-NEPOTISM—OFFICERS.

1. Uncle and niece are related within the second degree. Degrees of affinity are computed in same way as those of consanguinity.
2. First cousins are related within second degree.

May 1, 1915.

Hon. Tom Whipple, County Attorney, Waxahachie, Texas.

DEAR SIR: In your communication of the 30th ultimo, you submit the following:

"The tax assessor of Ellis county, Texas, has propounded to me the following question:
"Mr. Bruce Tanner has made application for a position with Lem Wray, tax assessor of Ellis county, Texas. Tanner's father is the brother of Lem Wray's wife's mother. Is this relation within the third degree as mentioned in the statutes?"

Replying, I beg to say:

The father of Tanner is Wray's wife's uncle, and is consequently Wray's uncle by marriage, and Tanner is Wray's first cousin by marriage.

An uncle and niece are related to each other in the second degree because the niece is two degrees distant from the common ancestor. The degrees of affinity are computed in the same way as those of consanguinity. I Bouv. 160.

Article 381, Penal Code, 1911, prohibits the appointment by any officer of a person related to him within the third degree by consanguinity or within the second degree by affinity. Tanner being a first cousin to Wray's wife, he is related to Wray within the second degree by affinity, and the law would prohibit his appointment to a clerkship by Wray.

Yours truly,

B. F. LOONEY,
Attorney General.

ANTI-NEPOTISM LAW.

The common law rule of computing degrees of relationship being in force in this State: first cousins are related in the second degree, and therefore it would be a violation of the anti-nepotism law for the Board of Live-stock Sanitary Commissioners to employ a first cousin to the wife of a member of such Board, as the relationship would be in the second degree by affinity.

Penal Code, Articles 381-386.

January 9, 1915.

Hon. J. H. Avery, Amarillo, Texas.

DEAR SIR: At the request of Hon. J. F. Cunningham, of Abilene, Texas, we are addressing you this opinion.

At your request, Mr. Cunningham addressed a communication to us, desiring to know whether in the opinion of this Department it would be a violation of the anti-nepotism statute for the Live-stock Sanitary Commissioners to appoint as the Chief Inspector of such Commission a gentleman who is the first cousin to the wife of one of the Commissioners.

Answering the question, we beg to say that, in the opinion of this Department, such action on the part of the Commissioners would be a violation of the Penal Code relating to nepotism.

Article 381 of such Code is as follows:

"Subject to the exceptions set forth in Article 384, it shall hereafter be unlawful for any officer of this State, or for any officer of any district, county, city, precinct, school district or other municipal subdivision of this State, or for any officer or member of any State, distict, county, city, school district or other municipal board, or judge of any court, created by or under authority of any general or special law of this State, to appoint, or to vote for, or to confirm the appointment to any office, position, clerkship, employment or duty, of any person related within the second degree by affinity or within the third degree by consanguinity to the person so appointing or so voting, or to any other member of any such board or court of which such person so appointing or voting may be a member, when the salary, fees, wages, pay or compensation of such appointee is to be paid for, directly or indirectly, out of or from public funds or fees of office of any kind or character whatever."

The party the incoming Commissioners will probably wish to appoint, being a first cousin to the wife of one of the Commissioners, is related to that Commissioner by affinity in the second degree.

The method of computing degrees of relationship in this State is as under the common law; that is, in computing the degrees of collateral relationship the rule is to begin with the common ancestor and count downward to the party in question most remote, which would establish the degree of relationship between the two parties. In the instant case, beginning with the grandfather of the applicant for this position and coming downward, the father, or mother, as the case might be, of the applicant would be one and then the applicant would be two. The wife of the Commissioner, being the first cousin of the applicant, would be also two degrees removed from the common ancestor, and therefore the relationship existing between

the wife of the Commissioner and the applicant would be the second degree.

Tyler Tap R. R. Co. vs. Overton, W. & W., Secs. 534-6.
Baker vs. McRimmon, 48 S. W., 742.
G. C. & S. F. Ry. Co. vs. Looney, 95 S. W., 691.

The case of Ry. Co. vs. Overton, being so particularly in point, we quote from that case as follows:

"535. *The mode of computing the degrees of consanguinity.*—In computing the degree of lineal consanguinity existing between two persons, every generation in the direct course of relationship between the two parties makes a degree, and the rule is the same by the civil and common law. The mode of computing degrees of collateral consanguinity at the common and by the canon law is to discover the common ancestor, to begin with him to reckon downwards, and the degree the two persons, or the more remote of them, is distant from the ancestor, is the degree of kindred subsisting between them. For instance, two brothers are related to each other in the first degree, because from the father each one of them is one degree. 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 uncle is extended to the remotest degree of collateral relationship.

"The method of computing by the civil law is to begin at either of the persons in question and count up to the common ancestor and then downwards to the other person, calling a degree for each person both ascending and descending, and the degree they stand from each other is the degree in which they stand related. Thus, from a son to his father is one degree, to the grandfather two degrees, and then to the uncle three degrees, which points out the relationship. If we adopt the common law method, the Hon. G. W. Smith and James P. Douglass are first cousins, and related by affinity in the second degree.

"536. *Common law as a rule of decision.*—The common law of England, so far as it is not inconsistent with the constitution and laws of Texas, shall, together with such acts, be the rules of decision in this State. (Pas. Dig., Art. 978.) The common law method of computing degrees of consanguinity is the correct one, and therefore the Hon. George W. Smith was disqualified to sit in the case."

We think confusion arising in matters of this character is from the fact that under the civil law the rules of computation in degrees of collateral relationship is different from that under the common law, the civil law rule being to begin with one of the parties in question and to count *upward* to the common ancestor, each generation being one degree, and then down the collateral line to the other party in question, which, in the case of first cousin, would establish the degree of relationship to be that of the fourth degree; that is to say, from one of the parties to his parent to be one degree, to his grand-parent two degrees, then going down the collateral line to the parent of the other party three degrees, and then to the other party in question four degrees. But the common law rule of decision being in force in this State, and under the decisions above cited, we must adhere to those decisions until the common law rule is abrogated.

Yours very truly,

C.W.TAYLOR,
Assistant Attorney General.

ANTI-NEPOTISM—OFFICERS—CORPORATIONS—RECEIVER.

A receiver of an insolvent corporation appointed by the district court is not an officer within the meaning of the nepotism statute, and he may employ members of his family related to him within the degrees mentioned in the nepotism statute to assist him in his duties as such receiver, and such employment would not be a violation of the nepotism act.
Articles 381 and 382, P. C. Article 2128, R. S. 1911.

July 15, 1915.

Hon. Webster Jarvis, County Attorney, Tyler, Texas.

DEAR SIR: The Attorney General has your letter of July 14th, in which you submit the following statement of facts for an opinion from this Department.

"The court has appointed 'A' as receiver of an insolvent corporation; 'A' has employed his son-in-law and other members of his family to assist him in his duties as such receiver. Is this a violation of the Nepotism Act?"

Replying thereto we beg to say that while a receiver for an insolvent corporation appointed under Article 2128, R. S., 1911, is an officer of the court, yet he is not such an officer as is contemplated by Article 381 of the Penal Code known as the anti-nepotism statute. Nepotism as defined by this article, is the appointment or voting to confirm the appointment to any office, position, clerkship employment or duty of a person related within the inhibited degrees to the persons so appointing or voting when at the time of such appointment or voting for confirmation such party is an officer of the State or of any district, county, city, precinct, school district or other municipal subdivision of the State or is a member or officer of any district, county, city, school district or other municipal board or judge of any court, and when the salary, fee, wages, pay or compensation of the appointee is to be paid directly or indirectly out of public funds or fees of office. This is the general definition of nepotism. Article 381, Penal Code.

Article 382 enumerates certain officers included, but expressly provides that the enumeration therein contained is not intended to exclude from the operation of the law persons included within its general provision as set out in Article 381. The enumeration contained in Article 382 certainly does not contain any language to be held to include a receiver of a corporation appointed by the district court, nor could such receiver be held to be an officer of the State or district, county, city, precinct, school district or municipal subdivision of the State in the sense contemplated by Article 381.

The compensation of a receiver is fixed by the District Judge to be paid out of the assets of the insolvent corporation and consequently does not come from public funds, and in our opinion is not such fees of office as is contemplated by Article 381. As we view it the expression "fees of office" used in Article 381 relates to those fees to which certain officers are entitled by reason of statutes expressly authorizing the collection of such fees and could not be construed to mean such compensation as the district judge in his discretion might

see fit to allow to a receiver of an insolvent corporation to be paid out of the assets of that concern.

We therefore advise you that in the opinion of this Department the anti-nepotism statute does not apply to a receiver of an insolvent corporation and that in the discharge of his duties if he should employ certain members of his family related to him within the degrees mentioned in the anti-nepotism statute to assist him in his duties it would not be a violation of the nepotism act.

Very truly yours,

C. W. TAYLOR,
Assistant Attorney General.

OPINIONS RELATING TO ANTI-TRUST LAW.

ANTI-TRUST LAWS—LABOR UNIONS.

1. The Act of 1899, known as the Labor Organization Statute, authorizes the organization of labor unions for the purpose of protecting laborers in their personal work and service, but no right or privilege is granted therein that is prohibited or denied by the Anti-Trust Code.
2. The clause of the statute denouncing combinations for the purpose of restricting the free pursuit of a business authorized or permitted by law construed and the authorities bearing thereon reviewed.
3. Certain working rules of the Plasterers' Union held not in violation of Anti-Trust Code.

September 27, 1916.

Mr. Olle J. Lorehn, President Texas State Association of Architects, Union National Bank Bldg., Houston, Texas.

DEAR SIR: Since you and your committee were in our office for the purpose of requesting a re-consideration by this Department of the questions theretofore submitted by you, involving the right of the Plasterers Union of Houston to observe certain Working Rules promulgated by the Operative Plasterers International Association, we have given the question further consideration with the result that we are more firmly convinced of the correctness of our opinion heretofore given you, to the effect that the members of said Plasterers Union of Houston are not violating the Anti-Trust Statutes of this State in the observance of the working rules complained of. In order to make our position clear, we will here set out in full the working rules to which you make objection and will give the reasons upon which we base our conclusions. Said working rules are as follows:

"Section 1. All patent mortar shall be prepared according to the instructions furnished by the Patent Mortar Company. All patent mortar shall be put on in two coats. That no contracting plasterer shall contract for or let by contract any separate part of cement work or plastering, ornamental or otherwise.

"Section 2. All work must be rodded; all angles, including ceilings, must be straight and regular; all ceilings to be well keyed and to receive not less than one-half inch of mortar. All metal lath shall be given three coats of any kind of plastering material, scratch, brown and finish. All brick walls two coats. All hard or white finish shall be troweled three times."

All members of the Plasterers Union are pledged to the observance of the above rules, and the question is raised as to whether or not such agreements fall within the inhibitions of the Texas Anti-Trust Statutes. It will be observed that the purpose of the above rules is to require a certain number of coats of plaster to be placed on certain kinds of work and we assume that the workmen, members of the union, would decline to work on any building if the owner or

contractor refused to permit the work to be done in accordance with said rules.

In 1899 the Legislature enacted a statute to protect working men in the right of organization, which statute reads as follows:

"Section 1. That from and after the passage of this act it shall be lawful for any and all persons engaged in any kind of work or labor, manual or mental, or both, to associate themselves together and form trades unions and other organizations for the purpose of protecting themselves in their personal work, personal labor and personal service in their respective pursuits and employments.

"Section 2. And it shall not be held unlawful for member or members of such trades unions or other organizations or associations, or any other person, to induce or attempt to induce by peaceable and lawful means any person to accept any particular employment or quit or relinquish any particular employment in which such person may then be engaged or to enter any pursuit or refuse to enter any pursuit or quit or relinquish any pursuit in which such person may then be engaged; provided that such member or members shall not have the right to invade or trespass upon the premises of another without the consent of the owner thereof.

"Section 3. But the foregoing sections shall not be held to apply to any combination or combinations, association or associations of capital or capital and persons, natural or artificial, formed for the purpose of limiting the production or consumption of laborers' products or for any other purpose in restraint of trade; provided that nothing herein contained shall be held to interfere with the terms and conditions of private contract with regard to time of service or other stipulations between employers and employes; provided further, that nothing herein contained shall be construed to repeal, affect, or diminish the force and effect of any statute now existing on the subject of trust conspiracies against trade, pools and monopolies."

While the above quoted statute grants the right to any number of persons to form trades unions and other organizations for the purpose of protecting themselves in their personal work, personal labor and personal service, yet such organization cannot do lawfully any of the things denounced by our Anti-Trust Code, because of the provisions of Section 3 of the above quoted act and for the further reason that construing both acts together, as of course they should be, it is clearly obvious that the Legislature did not intend to exempt labor organizations from the operation of the Anti-Trust Statutes. If the Legislature had undertaken to do this, its efforts would have been futile, for such an exemption would have rendered the Anti-Trust Code unconstitutional and void.

Connally vs. Union Sewer Pipe Co., 184 U. S., 540.

No right is conferred by the labor organization statute that is denied by the anti-trust statute. No privilege is granted by the former that is prohibited by the latter. In fact, the only right conferred by the 1899 act is the right to organize labor organizations for certain named purposes. Such combinations or organization of persons cannot lawfully do any of the things inhibited by the Anti-Trust Code. Therefore, we must determine whether or not the provisions of the Anti-Trust Code are violated by the agreements above set out. Our Anti-Trust Code is divided into three divisions and defines three separate offenses, viz.: Trusts, monopoly and conspiracy against trade. The offense defined as a monopoly deals exclusively with corporations

and therefore that part of the statute can have no application to the question under discussion. The statute defining a conspiracy against trade simply declares it an offense for two or more persons, firms, corporations or associations of persons who are engaged in *buying* or *selling* any *article* of *merchandise,* produce or commodity to enter into an agreement or understanding to refuse to buy from or sell to any other person, firm, corporation or association of persons any articles of merchandise, produce or commodity, or for two or more persons, firms, corporations or association of persons to agree to boycott or threaten to refuse to buy from or sell to any person, firm, corporation or association of persons for buying from or selling to any other person, firm, corporation or association of persons. As labor is not an article of merchandise, nor produce, nor a commodity, it is manifest that the conspiracy statute likewise has no application to the question in hand. If therefore said agreements are to be condemned as violations of our Anti-Trust Code, they must fall within the prohibitions of the statute defining trusts, which reads 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, or to create or carry out restrictions in the free pursuit of any business authorized or permitted by the laws of this State.

2. To fix, maintain, increase or reduce the price of merchandise, produce, or commodities, or the cost of insurance, or of the preparation of any product for market or transportation.

3. To prevent or lessen competition in the manufacture, making, transpartation, sale or purchase of merchandise, produce or commodities, or the business of insurance, or 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 price of any article or commodity of merchandise, produce or commerce, or the cost of transportation, or insurance, or 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 sell, dispose of, transport or to prepare for market or transportation any article or commodity, or to make any contract of insurance at a price below a common standard or figure, or by which they shall agree in any manner to keep the price of such article or commodity or charge for transportation or insurance, or 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 price of any commodity or article or the cost of transportation or insurance or 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 sale or transportation of any such article or commodity or business of transportation or insurance or 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 sale or purchase of any article or commodity or charge for transportation or insurance or charge for the preparation of any product for market or transportation whereby its price or such charge might be in any manner affected.

6. To regulate, fix or limit the output of any article or commodity which may be manufactured, mined, produced or sold, or the amount of insurance which may be undertaken, or the amount of work that may be done in the preparation of any product for market or transportation.
7. To abstain from engaging in or continuing business or from the purchase or sale of merchandise, produce or commodities partially or entirely within the State of Texas, or any portion thereof."

It will doubtless be readily conceded that no portion of the above quoted statute can have any application to the questions under consideration, unless it be subdivision 1 thereof. Our inquiry is therefore limited to determining whether or not said agreements create or tend to create or carry out restrictions in trade or commerce or aids to commerce, or whether or not they create or carry out restrictions in the free pursuit of any business authorized or permitted by the laws of this State.

The term "trade," as used in the above quoted statute, means the buying and selling of commodities. In the case of Queen Insurance Company vs. State, 34 S. W., 397, our Supreme Court defines said term as used in our Anti-Trust Code as follows:

"It embraces the buying and selling of any article of commerce, the barter of such articles and their transportation by common carriers."

The term "commerce" means the exchange or buying and selling of commodities, especially the exchange of merchandise on a large scale between different places or communities; extended trade or traffic.

In the Queen Insurance Company case, supra, our Supreme Court defined the term "commodity," as used in our anti-trust statute, as follows:

"The word is ordinarily used in the commercial sense of any movable or tangible thing, that is ordinarily produced or used as the subject of barter or sale, and we think that this was the meaning intended to be given to it by the Legislature in the statute in question."

Hence, it is obvious that the agreements of the Plasterers Union not to work on any building unless a certain number of coats of plaster be used, can not be construed to be any restriction in trade or commerce nor can they be held to affect in any manner an aid to commerce.

We will next consider whether the agreements are prohibited by the clause of the statute above quoted, which denounces a combination for the purpose of restricting the free pursuit of a business authorized or permitted by the laws of this State. The term "business" is defined to be "that which employs the time, attention and labor of men for the purpose of livelihood or profit, but it is not necessary that it should be the sole occupation or employment. It embraces everything about which a person can be employed."

Bouvier's Law Dictionary, vol. 1, p. 406.
Flint vs. Tracy Co., 220 U. S., 107.
Lemons vs. State, 50 Ala., 130.
People vs. Commissioners of Taxes of City of N. Y., 23 N. Y., 244.

If the agreements in question restrict the free pursuit of any business that is authorized or permitted by the laws of this State, they would fall under the condemnation of this clause of the statute. But do they produce or effect such a restriction? In order to determine this, we must first understand the character of restriction the statute denounces. This clause of the statute has been construed by our courts in a number of cases, some of the most important ones being:

State vs. M. K. & T. Ry. Co. of Texas, 91 S. W., 214.
Fort Worth & Denver City Ry. Co. vs. State, 87 S. W., 336.
Lewis et al. vs. Weatherford M. W. & N. W. Ry. Co., 81 S. W., 111.
Redland Fruit Co. vs. Sargent, 113 S. W., 330.

In the case of the State vs. M., K. & T. Ry. Co. of Texas our Supreme Court held that an agreement between a railway company and an express company, whereby the latter was given exclusive privileges and the former bound itself not to contract with others, to do an express business on its road, was violative of that provision of the Anti-Trust Code prohibiting a combination for the purpose of creating and carrying out restrictions in the free pursuit of a business authorized or permitted by the laws of this State. In this case it was held by the court that in order to determine whether or not this clause of the statute is violated in any given case, it is necessary to inquire into the effect intended by the parties to the combination upon the business of parties other than those embraced in the combination. It was furthermore held that the restriction must be in the pursuit of a business the law authorizes or permits. The statute of our State authorizes express companies to pursue their businesses on all railroads controlled by State legislation with "equal and reasonable facilities and accommodations and upon equal and reasonable rates." The lawful scope of the express business is thus defined by statute, and because the contract involved in the above named case limited, narrowed and restricted the scope of said business, it was held illegal under the Anti-Trust Code. The two main points decided by the court in said case, which are of assistance to us in the correct solution of the questions here involved, are the following:

1. To come within the purview of the statute, the restriction must be upon the business of persons other than those embraced in the combination or agreement; and,
2. The business restricted must be one authorized by law.

In the case of Fort Worth & Denver City Ry. Co. vs. the State a contract between the railway company and the Pullman Company, whereby the latter company was given the exclusive right for a period of fifteen years to furnish sleeping cars to the railway company, was assailed as being in violation of our anti-trust statute. Our Supreme Court held the contract legal and in a very elaborate and able opinion construed the clause of the statute now under discussion. We quote the following relevant excerpt from said opinion:

"Did the contract create or carry out restrictions in the free pursuit of a business authorized or permitted by the laws of this State? The Anti-

Trust Act does not create a new business for any person, nor does it give a new right in the property of others, but the object of the law was to prevent interference with business authorized and carried on in accordance with the laws of the State. It is therefore pertinent to inquire what business interest was in any way affected by this contract? The two companies unquestionably had the right to contract that the one should furnish the sleeping cars and maintain them, thereby furnishing accommodations to the passengers of the other, and to collect fares therefor. So far the contract is in conformity to law. This action rests alone upon the alleged illegality of the provision of the contract which grants to the Pullman Company the exclusive right to furnish sleeping cars for use on all lines of road owned or controlled by the Fort Worth & Denver City Railway Company and all roads which it might thereafter acquire or operate. * * * Did the railroad company have the lawful right to make a contract with the Pullman Company whereby it excluded all other companies for fifteen years from furnishing to the railway company cars for use on all of its lines? That question suggests this: Did all sleeping car companies have a right to demand of the railroad company to haul their coaches on its road? If yea, the contract restricted the free pursuit of a lawful business, and constitutes a trust under the act of 1903; otherwise the law has not been violated by the agreement. * * * This contract in no way interfered with the right of any other sleeping car company, if any existed, to build or furnish its cars to other railroads. Neither the Pullman nor any other corporation or person had a right to have sleeping cars attached to the passenger trains of the Fort Worth & Denver City Railway Company. Therefore to exclude them did not restrict 'the free pursuit of any business authorized or permitted by law,' because such business was not authorized to be pursued on a railroad without the consent of the owner; and since no such business right existed, it could not be restricted. Lewis vs. Ry. Co., 81 S. W., 111; Kates vs. Atlanta Baggage and Cab Co., 107 Ga., 636; Express Cases, 117 U. S., 26; Chicago, St. Louis & N. O. Ry. Co. vs. Pullman So. Car Co., 139 U. S., 79; Fluker vs. Ga. Ry. & B. Co., 81 Ga., 461; Barney vs. O. B. & H. Steamboat Co., 67 N. Y., 301."

Lewis vs. Railway Company, above cited, was decided by the Court of Civil Appeals at Fort Worth, an application for writ of error being refused by the Supreme Court. The contract between the railway company and a liveryman, whereby the liveryman was given the exclusive privilege to go upon the trains of the railway company and solicit baggage constituted the basis of the suit. Lewis, a competitor of the liveryman, insisted that he had a right to solicit baggage upon the railway company's trains and persisted in doing so until he was stopped by an injunction obtained by the railway company. At the trial of the case it was contended that the contract between the railway company and the liveryman was a restriction upon a business authorized and permitted by the laws of the State. The court, however, held that said contract did not constitute a restriction upon a business authorized or permitted by law, because, notwithstanding the fact that other persons had the right to engage in the business of soliciting and hauling baggage, yet no one was given any right by law to solicit baggage on the railroad company's trains; that such a right had to be obtained by contract, and therefore no business authorized by law was restricted.

Redland Fruit Co. vs. Sargent, cited above, was decided by the Court of Civil Appeals of Texarkana. The contract out of which the litigation grew gave to Sargent the exclusive right to sell merchandise on the premises of the Redland Fruit Company for a period

of five years and the company further agreed to give Sargent the business of its plantation during said time. Sargent brought suit for damages against the company alleging a breach of the contract. The company, among other defenses, contended that the contract was void because in violation of the anti-trust statutes. In disposing of this question the court said:

"The question then is: Do the terms of the contract sued on violate the anti-trust statutes? The provisions of the contract pointed out as being obnoxious to that statute are those by which Sargent is given exclusive right to sell goods on the appellant's premises and by which appellant bound itself to endeavor to induce its employes to trade with Sargent. * * * An undertaking on the part of the appellant to endeavor to induce its employes to trade with the appellee could not be regarded as in violation of law, and the vice, if any, in the contract must be that portion which gives to the appellee the exclusive right to sell goods on the appellant's premises. If this is in violation of the anti-trust statute then the assignment should be sustained; otherwise it should be overruled. We do not think it was the purpose of the statute to prevent the making of exclusive contracts of every kind. Such an inhibition would be productive of a greater evil than that which the law attempts to remedy. The business competition which cannot be restricted is that which under the laws of the State a person is permitted or authorized to engage in. The privilege of selling goods upon the premises of another is not derived from the laws of the State, but by the consent of the owner. * * * Were any restrictions created or carried out in the contract under consideration against the free pursuit of any business which the law gave others the right to engage in? Did others have the right under the law to demand of the appellant that they be permitted to sell goods upon its premises? The right to sell upon the premises of another is not given by law, but by consent of the owner. The latter has the right to say who shall or who shall not use his premises for any such purpose."

We have reviewed at length the decisions of the courts in the above cited cases for the purpose of showing that the uniform construction given to the clause of the statute in question is, that the restriction must be in the pursuit of a business the law gives to others than the parties to the combination or agreement the right to engage in.

Applying these principles to the agreements under consideration, we can reach but one conclusion and that is, they restrict no other person in the pursuit of a business the law gives him a right to engage in. Whose business is restricted by the agreement of the plasterers not to work on a building unless a certain number of coats of plaster is placed thereon? Is it the architect's? If the architect's specifications call for two coats of plaster and the members of the Plasterers Union refuse to contract to do the work on the building because three coats are not specified, the business of the architect is probably restricted because he is deprived of the right to exercise his own judgment with reference to the matter. This would certainly be true if no other persons than the members of the Plasterers Union could be secured to do the work. But granting that the agreements of the plasterers place restrictions on the business of the architect, the next question that arises is, does the law confer upon the architect the right independent of contract to draw the plans and make the specifications of the building for the owner? It can not be denied that the architect has the right to engage in his business or profes-

sion, but it must be conceded that the law does not give him the right irrespective of a contract to draw plans and make specifications for persons contemplating the erection of buildings. If the law does not confer such a right, then the restriction, if any, is not in the pursuit of a business authorized or permitted by the law and therefore does not come within the purview of the statute.

What is true of the architect is likewise true of the contractor. The right to contract to build houses for others is not given by law, but by the consent of the owner.

Do the agreements affect the owner's business? The owner has the right under the law to build on his own premises, but is he engaged in the pursuit of a business within the meaning of those terms, as used in the statute, when he employs others to build a house for him? We think this would depend largely upon the facts, for example: If a person were engaged in some other line of business and should have a residence built by contract, we do not think the building of the residence in such manner would be the pursuit of a business by him, but if he engaged in the business for a livelihood or profit of building houses for sale or rent, we think he would properly be considered in the pursuit of a business.

But assuming that the architect, contractor and the owner are each and all engaged in businesses authorized by law, do the agreements in any way restrict them in the free pursuit of same? If it is a restriction upon the business of the architect, contractor or owner, for the members of the Plasterers Union to agree that they will not work on any building unless a certain number of coats of plaster be put thereon, then it would be a restriction for them to agree to work only eight hours per day, or to charge a certain fixed compensation for their services or to quit or relinquish any work in which they might be engaged. It was clearly not the intention of the Legislature to denounce such combination or agreements. On the contrary, by legislative enactment laborers are authorized to associate themselves together for the purpose of protecting themselves in their personal work, labor and service and in the accomplishment of this purpose they are authorized to refuse to enter or to pursue any pursuit and they are likewise authorized to fix by contract the time and conditions of service. The 1899 act was a statute at the time of the passage of the 1903 Anti-Trust Code and no reference to the former act having been made in the latter, and no conflicts existing between said acts, it is reasonable to conclude that the Legislature did not intend to abridge or modify the rights conferred by the 1899 Act in the passage of the Anti-Trust Code.

There is no law that will compel a freeman to work for another, nor is there any law to compel any person to give work to others. This is a question of contract between employer and employe. If the laborer declines the proffered employment unless certain stipulations be complied with, he is clearly within his legal rights. If the employer does not desire to meet the requirements of the laborer, he has the lawful right to refuse to enter into the contract demanded. In our opinion, the members of the Plasterers Union do not violate the law when they agree among themselves not to work for any man

who does not put a certain number of coats of plaster on his building. Such an agreement is not a restriction upon the right of the owner, the contractor or the architect to pursue a business authorized or permitted by the law. If the owner, or the contractor, does not desire the number of coats of plaster required by the members of the Plasterers Union as a condition precedent to accepting employment, he can refuse to employ the members of the union and can look elsewhere for men to do his work. The agreements place him under no restrictions because he is free to make or refuse to make the contract, and there is nothing in the agreements to prohibit him from employing others to do the work for him.

That part of the agreement contained in Section 1 to the effect "that no contracting plasterer shall contract for or let by contract any separate part of cement work, or plastering, ornamental or otherwise" does not fall within the prohibitions of the statute, because it does not restrict any person in the pursuit of a business authorized or permitted by law, as the right to engage in the business of contracting for or letting by contract cement work or plastering with or for others is not given by law, but by the consent of the parties involved.

After having given these questions careful consideration, we have reached the conclusions above stated and advise you that in our opinion the agreements of the Plasterers Union above set out and discussed are not prohibited by any of the provisions of the Anti-Trust Code of this State.

Yours very truly,
C. A. SWEETON,
Assistant Attorney General.

ANTI-TRUST ACT CONSTRUED.

1. At common law a contract between a purchaser and seller whereby the seller agrees to abstain from engaging in or continuing business if unlimited both as to time and place, or as to place only, is void, but if the restraint is limited as to place though not as to time, or if limited both as to time and place, the validity of the contract depends upon the reasonableness of the restriction.
2. The anti-trust act of 1903 does not affect a contract or agreement wherein a single person or a single firm purchases the business and good will thereof of another and as a part of the consideration therefor the seller obligates himself not to resume business at a specified place for a limited period of time.
3. If two or more persons, firms or corporations for any or all of the purposes defined by the statute combine their capital, skill or acts in the purchase of the business and good will thereof of another, and as a part of the consideration therefor the seller obligates himself to abstain from engaging in or continuing business at a specified place for any period of time, such an agreement contravenes the provisions of the anti-trust act.

April 13, 1915.

Mr. James A. Sparks, Memphis, Texas.

DEAR SIR: Under date of April 9th, in a letter addressed to this

Department you state that a short time since you sold your restaurant business in the town of Memphis and soon thereafter engaged in the confectionary and ice cream business in that town; that the parties to whom you sold desire you to sign a written agreement to abstain from again engaging in the restaurant business in the town of Memphis for a period of five years, and you request this Department to advise you whether or not such an agreement would be illegal.

From the facts stated by you we cannot advise you definitely with reference to this matter for it does not appear from your letter whether one or more persons, firms or corporations purchased your business, nor does it appear that as a part of the consideration of the purchase you agreed to abstain from engaging or continuing in the restaurant business in Memphis for a period of five years. We can, however, give you a few principles or rules of law which you can apply to the facts of your case and determine whether or not the contract or agreement you were requested to sign, is legal.

I.

Under the common law a contract between a purchaser and seller whereby the seller agrees to abstain from engaging or continuing in business if unlimited both as to the time and place or as to place only, is void, but if the restraint is limited as to place though not as to time, or if limited both as to time and place, the validity of the contract depends upon the reasonableness of the restriction.

Comer vs. Burton-Lingo Co., 58 S. W., 969.

If, therefore, you agreed at the time you sold your restaurant business as a part of the consideration of said transaction to abstain from resuming said business in Memphis for a period of five years, such a contract in our opinion would not be illegal at common law, and the only question to be determined is whether such a contract is prohibited by the terms of our anti-trust statute.

II.

It was held by our courts in a number of cases that the anti-trust acts in force in this State prior to the passage of the 1909 acts did not apply to the sale of a business and good will thereof where a part of the consideration was an obligation on the part of the seller not to resume business for a limited time at a specified place where the purchaser was a single person or firm.

Gates vs. Hooper, 39 S. W., 1079.
Erwin vs. Hayden, 43 S. W., 611.
Comer vs. Burton-Lingo Co., 58 S. W., 969.
Wolff vs. Herschfield, 57 S. W., 572.

Under the anti-trust acts of 1889, 1895, and 1899 in order to constitute a trust, a combination of two or more persons, firms or corporations or either two or more of them, was essential, and because

the necessary element of combination did not exist in a transaction wherein a single person or a single firm purchased the business and good will of another, the seller agreeing to abstain from engaging or continuing in business at said point for a limited period of time, the courts uniformly held that such agreements did not contravene the provisions of the anti-trust acts above named. In 1903, however, the Legislature enacted our present Anti-Trust Code. In the 1903 act the following definition of a "trust" is incorporated which the prior acts did not contain, to-wit:

> "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 * * * to abstain from engaging in or continuing business or from the purchase or sale of merchandise, produce or commodities partially or entirely within the State of Texas, or any portion thereof."

In construing this provision of the 1903 act with reference to contracts or agreements similar to the one now under consideration, our courts have held that said provision is not contravened by an agreement on the part of a seller to a single individual or single firm as purchaser not to resume business in any particular locality for a limited period of time. The reason for this holding on the part of the courts is that by the terms of the 1903 act a combination is essential in order to create a trust. There is no difference in the 1903 act and the former acts defining trusts with respect to this particular matter; that is to say, a combination of two or more persons, firms or corporations is and has been under all of the acts essential and necessary to constitute a trust. In a transaction therefore where a single person or single firm purchases the business and good will of another and a part of the consideration of the purchase being an agreement on the part of the seller to abstain from engaging in or continuing business at a certain point for a limited period of time, the element of combination being lacking, the provisions of the 1903 act are not violated.

Crimp vs. Ligon, 84 S. W., 250.
Malakoff Gin Co. vs. Riddlesperger et al., 133 S. W., 519.
Wheatley vs. Köllaer, 133 S. W., 903.

III.

However, it has been held that if two or more persons, firms or corporations, or either two or more of them, for the purpose of lessening competition or for any or all of the purposes defined in the statute, combine their capital, skill or acts in the purchase of the business of another, said seller agreeing not to resume business for a specified period of time, such an agreement or contract though valid at common law falls within the prohibitions of the anti-trust statutes, and is therefore illegal and void.

Comer vs. Burton-Lingo Co., 58 S. W., 969.
Malakoff Gin Co. vs. Riddlesperger et al., 133 S. W., 579.

Under the provisions of our anti-trust statutes, as stated above, in order to constitute a trust there must be a combination of two or more persons, firms or corporations or either two or more of them, for any or all of the purposes set out in the statute. Where a single person or firm therefore buys the business of another such transaction being accompanied by an obligation on the part of the seller to abstain from resuming business at a specified place for a limited time, such agreement or contract is not inhibited by the statute because there is no combination. On the other hand, if two or more persons, firms or corporations, or either two or more of them, for any of the purposes defined in the statute purchase the business of another, the seller in said transaction obligating himself not to resume business at a specified place for any period of time, such an agreement would be in violation of law because in such transaction the essential element of the offense exists.

That portion of the statute defining monopoly is not involved in your inquiry for as we assume from your letter neither of the parties to the transaction is a corporation.

You can doubtless apply the foregoing principles to the facts of your case and determine whether or not the agreement which the purchasers of your business desire you to sign is legal. It is not clear from the facts stated by you whether the agreement to which you refer was a part of the consideration of the purchase or whether it is an agreement the purchasers of your business desire you to make with them independent of the original transaction. The principles above announced apply only in cases where the business and good will thereof are sold and as a part of the transaction the seller agrees to abstain from engaging in or continuing business at a specified place for a limited period of time. If the agreement to which you refer was not a part of the consideration of the purchase of your business the rules above set out would not apply and in our opinion such an agreement would be illegal and void.

Yours truly,

C. A. SWEETON,

Assistant Attorney General.

INSURANCE COMPANIES—ANTI-TRUST.

The anti-trust statutes prohibit the formation of a combination on the part of two or more insurance companies for the purpose of jointly executing bonds guaranteeing cotton warehouse receipts.

February 3, 1916.

Hon. Charles V. Johnson, Deputy Insurance Commissioner.

DEAR SIR: Under date of December 9, 1915, you transmitted to this Department a letter from the Hon. W. S. Hunt of Houston, together with a prospectus issued by the U. S. Fidelity & Guaranty Company, the American Surety Company, the Fidelity & Deposit Company of Maryland, and the Maryland Casualty Company, said

letter and prospectus outlining a proposed plan on the part of the above named companies to jointly execute bonds guaranteeing cotton warehouse receipts in the State of Texas, and you desire to be advised as to whether or not said plan in any manner contravenes the laws of this State.

The character of bond proposed to be executed by said companies under the plan submitted is not the bond required by statute, but is an additional bond and is designed to make the cotton warehouse receipts "acceptable collateral under all circumstances wherever offered."

After giving the question careful consideration we have reached the conclusion that the plan is inhibited by the anti-trust statutes of this State.

That portion of the statute defining a trust having application to the question here under consideration 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 fix, maintain, increase or reduce * * * the cost of insurance.

"2. To prevent or lessen competition in the * * * business of insurance.

"3. To fix or maintain any standard or figure whereby the cost * * * of insurance shall be in any manner affected, controlled or established.

"4. 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 make any contract of insurance at a price below a common standard or figure or by which they shall agree in any manner to keep * * * the charge for insurance at a fixed or graded figure or by which they shall in any manner affect or maintain * * * the cost of insurance between them to preclude a free and unrestricted competition among themselves * * * in the business of insurance, or by which they shall agree to pool, combine or unite any interest they may have in connection * * * with the charge for insurance whereby such charge might be in any manner affected."

The companies above named are competitors in the business of writing indemnity insurance contracts and if they should form a combination among themselves to engage in the business of bonding cotton warehouse receipts, as proposed, such a combination, we think, would violate practically every provision of the statute above set out. It must be apparent that such a combination would be the pooling, combining and uniting of the interests of the four companies in the business of writing insurance contracts guaranteeing cotton warehouse receipts, whereby the charge for such insurance might be affected. The combination of the four companies for the purposes proposed would likewise be the making of a contract and agreement among said companies by which they would bind themselves to keep the charge for such insurance at a fixed or graded figure and by which they would affect and maintain the cost of such insurance between themselves to preclude a free and unrestricted competition among themselves in the business of writing said insurance contracts. Such a combination would also of necessity have for its purposes the fixing of the cost of said insurance and the lessening of competition in said line of business.

There is no law forbidding said companies from severally engaging in the business proposed, but the statute above quoted, in our opinion, prohibits them from combining their capital, skill or acts for any of the purposes therein denounced.

We are herewith returning the correspondence and prospectus furnished us.

Yours very truly,
C. A. SWEETON,
Assistant Attorney General.

ANTI-TRUST LAWS—CONSTRUCTION OF STATUTES.

1. A patentee has the exclusive right to make, use and vend the patented article.
2. The patentee may assign his patent, and in that event the assignee has the rights conferred by the Patent Act.
3. The patentee may license another to manufacture and sell the patented article, in which case he may lawfully fix the resale price of said article, or he may lawfully place other restrictions upon the use thereof by the licensee.
4. The patentee may license another as his agent to sell the patented article and may fix the price at which such agent may sell the same.
5. But when the patentee parts with title to the patented article, he loses control over it and therefore has no right to fix resale prices or to place any other restrictions upon the purchaser with respect to the sale, use or disposition of said property.

May 27, 1915.

Hon. H. C. Nash, Jr., County Attorney, Corsicana, Texas.

DEAR SIR: In your letter of date May 19th you submit to this Department, in substance, the following facts:

A patentee of several United States letters patent of certain machinery enters into a contract with a licensee whereby the owner of the patents gives to the licensee the right to manufacture and sell the patented articles in consideration of the royalty of five per cent of the gross retail selling prices of said articles. The contract further provides that the licensor shall have the right to fix the selling prices on said articles and that the licensee shall respect and maintain the same and that the selling prices fixed by the licensor shall be uniform for all parties licensed to manufacture and sell said articles—the intention being, as expressed in the contract, that all licensees shall be upon an equal footing and shall be compelled to maintain the same prices. You desire to know if this contract is in violation of the anti-trust statutes of this State.

The important and material fact in considering your question is, that the contract or agreement above referred to concerns articles protected by letters patent of the government of the United States, and therefore calls for a determination of the rights conferred upon the owner of patents by the Federal Constitution and statutes.

Section 8, of Article 1, of the Federal Constitution, authorizes Congress "to promote the progress of science and useful arts, by securing, for limited times, to authors and inventors the exclusive right to their respective writings and discoveries."

In obedience to the above provision of the Constitution, Congress enacted a statute which is Section 4884 of the Revised Statutes of the United States, which provides that every patent shall contain a grant to the patentee, his heirs and assigns for the term of seventeen years, of the exclusive right to make, use and vend the invention or discovery. As was said by the Supreme Court of the United States, in one of its most recent opinions involving a construction of the Patent Act:

"The right to make can scarcely be made plainer by definition and embraces the construction of the thing invented. The right to use is a comprehensive term and embraces within its meaning the right to put into service any given invention, and Congress did not stop with the express grant of the rights to make and to use. Recognizing that many inventions would be valuable to the inventor because of sales of the patented machine or device to others, it granted also the exclusive right to vend the invention covered by the letters patent. To vend is also a term readily understood and of no doubtful import. Its use in the statute secured to the inventor the exclusive right to transfer the title for a consideration to others. In the exclusive rights to make, use and vend fairly construed with a view to making the purpose of Congress effectual, reside the extent of the patent monopoly under the statutes of the United States."

Bauer vs. O'Donnell, 229 U. S., 10.
Bloomer vs. McQuewan, 14 How., 539, 549.

It has been held in an unbroken line of authority that the Federal Constitution and statutes confer upon the owner of a patent a perfect and complete monopoly with respect to his right to manufacture, use and vend the invention or discovery. By virtue of the provisions of the Constitution and statute above referred to, the patentee of an article has the *exclusive* right to its manufacture, also the exclusive right to its use, and, further, the exclusive right to vend the same. The Patent Act has been construed from time to time by the Supreme Court of the United States and that court has repeatedly held that the statute above referred to confers upon the owner of a patented article a complete monopoly with respect to the manufacture, use and sale thereof. It has been held further in a number of cases that the owner of a patent may assign it or sell the right to another to manufacture and sell the article patented upon condition that the licensee shall respect and observe a fixed re-sale price determined by the licensor. In the event the owner of a patent should assign it to another, the assignee, of course, would have the same rights under the statute as the original owner.

In the case of Bement vs. National Harrow Company, 186 U. S., p. 70, it was held that the owner of a patent had the right to assign it and as a part of the consideration to impose a condition that the assignee should sell said patented article at a stipulated price. In this case, as well as in many others, the doctrine was also announced, or rather re-affirmed, that the owner of a patent has the right to license others to manufacture and sell the patented article upon condition that the licensee would observe and respect the stipulated price in the re-sale of said article.

The contracts under consideration in the case of Bement vs. National Harrow Company, supra, were similar in many respects to the con-

tracts which you submit. In said contracts the provision was expressly made not alone for the manufacture but the sale of the manufactured product and at prices which were particularly stated and which the seller was not at liberty to decrease without the consent of the licensor. The Supreme Court, after a full and thorough discussion of the rights conferred upon the owner of a patent by the Federal Statute, and after applying the rules adduced from a construction of said statute to the contracts under consideration in said case, reached the following conclusion:

"The provision in regard to the price at which the licensee would sell the article manufactured under the license was an appropriate and reasonable condition. It tended to keep up the price of the implements manufactured and sold, but that was only recognizing the nature of the property dealt in and providing for its value so far as possible. This the parties were legally entitled to do. The owner of a patented article can, of course, charge such price as he may choose, and the owner of the patent may assign it or sell the right to manufacture and sell the article patented upon the condition that the assignee shall charge a certain amount for such article."

The conclusion was therefore reached that because the article involved was protected by a patent, the contracts under discussion in that case were not prohibited by the Federal Anti-Trust Act.

In the case of Bauer vs. O'Donnell, 229 U. S., p. 1, the Supreme Court of the United States was called upon to decide the question of how far the Federal Statute extends its protection to a patented article after the owner has parted title to same by sale. In this case the patent act was again very thoroughly and exhaustively discussed and analyzed. The contention was made in this case that the owner of a patented article has the right to fix the re-sale price of same and require the purchaser of said article to observe said re-sale price. The court, however, held to the contrary. It held as all of the other decisions bearing on this question have held, that the owner of a patented article has the exclusive right to manufacture, use and vend the same, that he has the right to assign his letters patent, that he has the right to license another to manufacture and sell said patented article, and in such case to fix and stipulate the price at which the licensee should sell the same, but it was distinctly held in this case that when the owner of a patented article sells said article, thereby divesting himself of the title to said property, the protection given by the statute has been exhausted, and the patented article has been placed beyond the limits of the monopoly secured by the Patent Act. Therefore, the patentee has no right or authority to place or undertake to place any restrictions of any character as to price upon the re-sale of said article or any restrictions of any character upon the right of the purchaser to dispose of said property in any manner he may see proper; that is, when the patentee parts with the property protected by patent by passing title to the purchaser, the property is then the purchaser's and may be sold or disposed of by the purchaser as may seem best to him and the patentee has no authority to place any restrictions on the right of the purchaser, to re-sell said

property at any price he may see proper or to dispose of the same in his own way.

"The right to manufacture, the right to sell and the right to use are substantive rights and may be granted or conferred separately by the patentee. But in the essential nature of things, when the patentee or person having his rights sells a machine or instrument whose sole value is in its use, he receives the consideration for its use and he parts with the right to restrict that use. The article, in the language of the court, passes without the limit of the monopoly; that is to say, the patentee or his assignee having in the act of sale received all the royalty or consideration which he claims for the use of his invention in that particular machine or instrument, it is open to the use of the purchaser without further restriction on account of monopoly of the patentee."

Bauer vs. O'Donnell, supra.
Bloomer vs. McQuewan, supra.
Goodyear vs. Beverly Rubber Co., 1 Cliff, 348, 354; 10 Fed. Cas, 638.
Chaffee vs. Boston Bolting Co., 22 How., 217, 223.
Keeler vs. Standard Folding Bed Co., 157 U. S., 659.

It is clear, therefore, that in cases where the owner of a patented article passes the title of same to the purchaser by sale, he has no right under the Patent Act to undertake to restrict the purchaser in the re-sale price of said article, and if the owner of a patent who sells the patented article agrees with the purchaser upon the re-sale price of said article, such an agreement would be in violation of the anti-trust statutes of this State, or if the owner of the patent and the purchaser, after the title of said property has passed to the purchaser, should make any other restrictive agreement with respect to the re-sale or disposition of said property, same would be in violation of the anti-trust statutes of this State.

Our conclusions with reference to the patentee's rights under the Patent Act are as follows:

(1) The patentee has the exclusive right to make, use and vend the patented article.

(2) The patentee may assign the patent, and in that event the assignee has the rights conferred by statute upon the owner of the patent.

(3) The patentee may licensee another to manufacture and sell the patented article and in such case he may lawfully fix the re-sale price of said article or he may lawfully place other restrictions upon the use thereof by the licensee.

(4) The patentee may license another as his agent to sell the patented article and in such case may lawfully fix the price at which such agent may sell said property, or he may lawfully fix the territorial limits in which the agent may sell the same.

(5) But when the patentee parts title to the patented article, he loses control over it and therefore has no right or authority to fix re-sale prices or to place any other restrictions upon the purchaser with respect to the sale, use or disposition of said property.

Under the facts submitted by you, it appears that the patentee, in consideration of five per cent royalty on gross sales, has licensed another to manufacture and sell certain patented articles, the patentee reserving the right to fix the re-sale prices. Inasmuch as the patent

act, as construed by the Supreme Court of the United States, confers the right upon the owner of a patent exclusively to make, use and vend said article, and inasmuch as said court has held that the owner of a patent may license another to manufacture and sell the patented article, and upon condition that the licensee observe and respect the re-sale price fixed by the licensor, we, therefore, advise you that in our opinion the contract submitted by you is a legal one and is not prohibited by the anti-trust statutes of this State.

Yours very truly,

C. A. SWEETON,

Assistant Attorney General.

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OPINIONS RELATING TO BANKS AND BANKING

BANKS AND BANKING—WORDS AND PHRASES—PREFERRED CREDITORS—DEPOSITORS GUARANTY FUND.

R. S., Articles 453, 456, 457, 458, 460, 466, 468, 469, 470, 486, 487, 489, 490, 551.

1. The Commissioner of Banking, upon taking charge of an insolvent bank, becomes vested with its assets to be converted into money and distributed among its creditors fairly and without preference.
2. The Commissioner is not a purchaser for value, but is rather the personal representative of the insolvent bank, and takes its assets subject to set-offs, liens and encumbrances as they exist at the time the bank comes into his hands.
3. "The preference of one creditor to another" defined.
4. An inhibited preference is one that lessens the amount of the insolvent estate available for the payment of the claims of general creditors.
5. The contributing banks are the owners of the depositors' guaranty fund of this State, and in the distribution of the estate of an insolvent bank this fund must share pro rata with other general creditors.
6. The payment of any particular general creditors of an insolvent bank in such manner as to lessen the fund available for distribution to other creditors would be an unlawful preference, which cannot be made or approved by the Commissioner.
7. The sureties on a bond of an insolvent bank have the right to offset any amount they are compelled to pay by reason thereof against any several obligations they may owe the bank, and such offset would not be a preference.
8. In the present instance, if the sureties on the bank's bond in favor of McLennan county will pay the bank an amount equal to the sum due the bank, such payment being upon the notes of such sureties to the bank, then you may, upon order of the court, pay such sum to the county without creating an inhibited preference.

April 3, 1915.

Hon. John S. Patterson, Commissioner of Insurance and Banking, Capitol.

DEAR SIR: Your communication of April 1st, relates to the affairs of the Farmers & Merchants State Bank of Waco, Texas, recently closed by the department because of its insolvent condition. Mr. B. F. Kean was appointed special agent by you to liquidate the affairs of the bank. The matter of the deposits in this bank secured by the depositor's guaranty fund has been cared for heretofore by your department. In examining into the affairs of the bank, however, Mr. Kean has found that there is an aggregate of deposits of $32,663.39 not protected by the depositor's guaranty fund, these deposits being due as follows:

McLennan county	$20,938.45
Owners of certificates of deposit	3,749.33
Bank deposits	7,975.61
Total	$32,663.39

After the foregoing statement of facts for the purpose of preserving this matter in record, we copy the remaining portion of your communication, as follows:

"Now it has developed that the deposit of McLennan county in the sum of $20,938.45 is secured by a bond signed by the Farmers and Merchants State Bank as principal and the following bondsmen as sureties: R. H. Hill, Abe Gross, H. E. Hulsey, A. R. McCollum, E. C. Street and Joe Pinto. Through Special Agent L. P. Kean, it has come to my knowledge that the county of McLennan, through its proper officers, is demanding payment for their deposit, and that having made the demand for the money from the Farmers and Merchants State Bank, they are contemplating entering suit against the sureties on the bond referred to above. It appears that the bondsmen referred to above are indebted to the Farmers and Merchants State Bank in approximately the amounts set opposite their names:

R. H. Hill	$ 6,000.00
Abe Gross	24,000.00
M. E. Hulsey	7,500.00
A. R. McCollum	3,500.00
E. C. Street	3,500.00
Joe Pinto	15,000.00

"In view of the fact that these gentlemen are sureties on the county bond, they are refusing to pay the county deposit, inasmuch as they contemplate that the county will, within a few days, take a judgment against them separately and severally in the sum of $20,938.45. If this is done, each of these gentlemen will ask for judgment back against the Farmers and Merchants State Bank in this amount. You will see from this situation that Special Agent Kean is powerless to demand either security or the retirement of the notes of these gentlemen. Special Agent Kean has conferred with these bondsmen, and they wish to be relieved on this bond, each of the bondsmen, promising to protect his individual indebtedness in case they are relieved from the bank's obligation to the county. With one exception it also appears that each of these bondsmen are shareholders in the Farmers and Merchants State Bank, liquidating, and that without a judgment against each of them for the amount of the county deposit, their shareholders' liability would be worth something as an asset, if we should find it necessary to levy an assessment against the stockholders of the Farmers and Merchants State Bank.

"Special Agent Kean has proposed that the deposits enumerated above, aggregating $32,663.39, be made preferred creditors by this department and the other creditors of the Farmers and Merchants State Bank. You will recall that while at Waco we appointed an advisory committee to advise Special Agent Kean from time to time, and that this committee is composed of S. J. McFarland, active vice president of the Security National Bank of Dallas, and R. F. Gribble, active vice president of the First National Bank of Waco, and both of these gentlemen have, in writing, advised that the creditors enumerated above be made preferred creditors, and they have submitted the attached amendment to their contract of March 16, waiving their rights as common creditors of the Farmers and Merchants State Bank, and advising that Special Agent Kean be allowed to pay these depositors from the cash now on hand and from the first funds collected by him from the unhypothecated assets of the Farmers and Merchants State Bank.

"I am informed by Special Agent Kean that from the sureties on the county bond who owe the Farmers and Merchants State Bank about $60,000, he can, within a reasonable time, collect $22,000, and that he hopes to reasonably well secure the balance of $38,000.

"If I should see fit to advise Special Agent Kean to make these deposits preferred creditors and allow him to pay them for the cash now on hand and from the first funds collected from the unhypothecated assets, the

condition of the Farmers and Merchants State Bank will be practically as follows:

"It will owe to the First National Bank of Waco, who holds assignments of non-interest bearing and unsecured deposits, about $75,000. It will owe other banks that are now secured by the hypothecation of bills receivable, about $75,000. You will recall that the Farmers and Merchants State Bank will have one year in which to retire its bills payable with its reserve agents creditors, and two years in which to retire the account of the First National Bank of Waco. If I should deem it wise and a matter of good business policy to make these interest-bearing depositors preferred creditors, I wish the opinion of your department as to whether or not I may be allowed to exercise my discretion in the matter, and thank you in advance for your opinion."

Accompanying your letter is a copy of waiver to be executed by the First National Bank of Waco and the Security National Bank of Dallas, the two largest creditors of the insolvent bank, in which they agree that the proposed preferences in the manner specified in your communication, may be carried into effect. It may be said therefore that all the creditors of the bank except its depositors agreed that these preferences may be carried out. It may also be safely assumed that so far as the depositors are concerned the proposed contract is immaterial for the reason that their rights are secured by the depositor's guaranty fund, if indeed they have not all already assigned their claims to the First National Bank of Waco and received the cash and obtained their money therefor. In the waiver to be executed by the First National Bank of Waco it is expressly stated that this waiver is not to be construed as an agreement on its part to consent to the doing of any act or thing which might be construed as waiving any rights whatever which as depositors or assigns of other depositors it has against the guaranty fund provided by law for the depositors of the insolvent bank; that said First National Bank assents to the proposed preferences only in its capacity as a general creditor and that in its capacity as depositor of the insolvent bank or as assignee of the depositors it does not assent to the preferences.

In order to answer your several inquiries it will be necessary for us to examine the banking laws of this State. In the first place the Farmers and Merchants Bank of Waco, Texas, is in your hands under the laws of this State by reason of the fact that it is in an insolvent condition.

Article 453, Revised Statutes, 1911, provides that when any State bank shall become insolvent and be placed in the hands of the Commissioner of Banking he shall proceed to wind up its affairs either through a receiver or some competent person who is required to give bond for the faithful performance of its duties. The bond may be recovered upon for the benefit of the guaranty fund or any party at interest. On taking possession of the property and business of any such bank the Commissioner is required by law to forthwith give notice of such fact to all persons holding any of the assets of the bank.

Articles 456, 457 and 458, Revised Statutes, read as follows:

Art. 456. "Upon taking possession of the property and business of such State bank, the Commissioner is authorized to collect moneys due to such corporation and do such other acts as are necessary to conserve its assets

and business, and shall proceed to liquidate the affairs thereof as provided in this chapter."

Art. 457. "The Commissioner shall collect all debts due and claims belonging to such State bank."

Art. 458. "Upon the order of the district court, if in session. or the judge thereof, if in vacation, of the county in which such State bank was located and transacting business, the commissioner may sell or compound all bad or doubtful debts, and, on like order, may sell the real or personal property of such State bank, on such terms as the court shall direct."

Article 460 authorizes you to appoint a special agent to assist you in the duty of liquidation and distribution.

Article 466 makes it your duty upon taking possession of an insolvent bank to make an inventory of the assets of such bank in duplicate, one to be filed in the office of the commissioner, and one in the office of the clerk of the county court of the county in which such State bank is located; on the expiration of the time fixed for presentation of claims you are required to make a full and complete list of the claims presented including such claims as may have been rejected, and showing fully all claims and amounts paid to the depositors out of the depositors guaranty fund, "and the amount to which said fund is entitled by reason of its subrogation to the rights of such guaranteed depositors so paid," etc.

Article 468, Revised Statutes, requires you to deposit the moneys collected by you for the insolvent bank in some other State bank, then follows Articles 469 and 470, which read as follows:

Art. 469. "At any time after the expiration of the date fixed for the presentation of claims, the Commissioner may, out of the funds remaining in his hands after the payment of expenses, declare one or more dividends, and after the expiration of one year from the first publication of a notice to creditors, he may declare a final dividend, such dividends to be paid to such person and in such manner and upon such notice as may be directed by the district court, if in session, or the judge thereof, if in vacation, of the district in which such State bank was located and transacted business."

Art. 470. "In the declaration and payment of all such dividends, the depositors' guaranty fund shall be entitled to receive, as its dividends, such portions of the amounts due and payable to guaranteed depositors as shall have been paid to them out of the depositors' guaranty fund, together with six per cent interest thereon from the date or dates upon which checks were drawn upon all State banks, as hereinafter provided for the payment of the guaranteed deposits of such State banks; and the Commissioner shall forthwith distribute such dividends to State banks, upon which checks were drawn for such payment of guaranteed deposits, in proportion to the amounts of such checks, respectively."

It will be noted from these two articles of the statute that the moneys collected by you and payable to the general creditors are to be paid in the form of dividends and that in this distribution the guaranty fund of the State must share as a general creditor.

Articles 486 and 487 read as follows:

Art. 486. "In the event the Commissioner of Insurance and Banking shall take possession of any bank or trust company, subject to the depositors' guaranty fund plan of this chapter, as herein provided, the depositors of said bank or trust company, as specified in Article 443, shall be paid in full out of the cash in said bank or trust company that can be

made immediately available from such bank; and the remainder shall be paid out of the depositors' guaranty fund through the said board, in the event the cash available in said institution shall be insufficient; provided, that deposits upon which interest is being paid, or contracted to be paid, directly or indirectly, by said bank, its officers or stockholders, to the depositor and deposits otherwise secured, shall not be insured under this chapter, but shall only receive the pro rata amount which may be realized from the assets, resources and collections of and from such banks and trust companies, its stockholders or directors."

Art. 487. "The State shall have, for the benefit of the depositors' guaranty fund, a first lien upon all assets of such bank or trust company and all liabilities owing or accruing to such bank or trust company in the event of the closing, as provided by law, of any such State bank or trust company operating under the depositors' guaranty fund plan; which lien shall attach and be in force from the time such bank or trust company is legally closed, upon all the property and assets then in possession of such bank or trust company; provided, however, that any deposits on which said bank was paying interest and any other deposits or debts not insured under this chapter, and which are entitled to share in the assets, shall share in the dividends and proceeds of such assets and collections pro rata or as may be provided by law."

These two articles of the statute make it plainer still that the general creditors of an insolvent bank must share in its proceeds pro rata and that in this distribution the depositors guaranty fund must share in the dividends and proceeds the same as any other general unsecured creditor. The ordinary duties and rights of the receiver of an insolvent corporation are to collect all debts, dues and claims and under the orders of the court to pay the various obligations of the insolvent without preference, without authority, however, to compound any of the debts except upon an order of the court authorizing it. Beckham vs. Shackelford, 29 S. W., 204. Your duties and rights are substantially similar, as shown by the statutes just quoted, as well as by Article 458, Revised Statutes which authorizes you to sell or compound bad or doubtful debts on such terms as the court may direct. Your relationship to an insolvent bank is substantially the same as that of the Comptroller of Currency or a receiver appointed under his direction for an insolvent national bank, and our statutes in this respect are substantially copies of the Federal Act. Your powers, as are the powers of the receiver of national banks, are limited. Substantially you are vested with the assets of the bank which are to be converted into money and distributed among the creditors fairly and without preferences. As to the national bank act and the constructions given it, see Beckham vs. Shackelford, 29 S. W., 204. Bank vs. Blye, 4 N. E., 635. When you take charge of an insolvent bank you are not to be regarded as a purchaser of the same for value without notice, but rather as a personal representative of the insolvent institution standing in its shoes as far as its assets are concerned, and take same subject to set-offs, liens and incumbrances as they existed at the time of your taking possession of same. In other words, you stand merely in the shoes of the insolvent bank limited by its contracts in your representative capacity by its obligations, as well as by the law which creates and governs it. Steelman vs. Atchley, 32 L. R. A. (new series), 1061.

In addition therefore to the statutes previously quoted or discussed

which in plain terms prohibit a preference among the creditors of an insolvent bank and requires its assets to be distributed on a pro rata basis, you may likewise look to the terms of Article 551 as applicable to any action taken by you for the insolvent bank, as well as to any action which might be taken by its directors to any institution still in their hands, or, if you may not do it by this act then this article of the statute at least affords some light on the construction of those statutes which do apply to and govern your action. This article of the statute makes all transfers of any property of the bank made with a view of preferring one creditor to another "utterly null and void." It even goes so far as to prohibit an attachment, injunction or execution against any such bank or its property before final judgment in any suit. The sum and substance of the whole matter is that you must administer the insolvent estate in such manner that no preference shall be made to one creditor over another.

It becomes material therefore to inquire what is meant by "the preference of one creditor to another." The provisions of our statutes are largely the same as those of the Federal Bankruptcy Act, for the purposes of that act merely contemplate an equal distribution of the assets without preference among creditors just as the assets of all insolvent concerns and individuals are distributed. The Federal Bankruptcy Act in fact "is simply a declaration of the previously existing rule applicable to the distribution of insolvent estates." Yardley vs. Clothier, 49 Fed., 338, 339.

We may, therefore, look to the decisions of the courts construing the Federal Bankruptcy Act, as well as the general authorities governing insolvent corporations in finding the meaning of our statutory provisions governing the distribution of the estates of insolvent banks. We will particularly inquire as to the meaning of preference of one creditor to another. It may be said that the substance of the holdings of the courts in this respect so far as material to this present inquiry is that an inhibited preference is one that lessens the amount of the insolvent estate available to the payment of the claims of the general creditors.

Dry Goods Co. vs. Bertenshaw, 75 Pac., 1027.
Blyth & Fargo Co. vs. Kastor, 97 Pac., 925.
Herzberg vs. Riddle, 54 So., 637.
Wright vs. Gunsevoort Bank et al., 103 N. Y. Sup., 47, 48.

In the last named case Judge O'Gorman of the New York Supreme Court in determining what character of action would constitute a preference under the bankruptcy act among other things said:

"Under the authorities it is quite apparent, however, that a preference is dependent, not upon the position of the favored creditor alone, but upon his position as compared with that of the other creditors. In other words, the test is not whether the favored creditor has received any advantage, but whether the general creditors have been put at a disadvantage by a payment which reduces or exhausts a fund to which they must look for their payment. The assets of a corporation are a trust fund for the payment of its debts and obligations, upon which its creditors have an equitable lien, both as against the stockholders and all transferees, except those purchasing in good faith and for value. Cole vs. M. I. Co., 133 N. Y., 164; 30 N. E., 847; 28 Am. St. Rep., 615. When funds of an insolvent corporation are so distributed as to violate this principle a preference is effected,

and when this is done its inevitable effect is to deprive some creditors of their pro rata share of the assets. It follows that those creditors who are favored at the expense of the other creditors obtain a preference which is condemned by the statute. Salt vs. Ensign, 79 Hun. 107, 29 N. Y. Supp. 659; Hilton vs. Ernst, 38 App. Div. 94, 57 N. Y. Supp. 908, affirmed 161 N. Y. 226, 55 N. E. 1056; Baker vs. Emerson, 4 App. Div. 348, 38 N. Y. Supp. 576."

The gravamen of an inhibited preference, as stated in this authority, is that act which would place the general creditors of an insolvent at a disadvantage by reducing the amount of the insolvent estate available for the liquidation of the claims of general creditors.

In the case of Dry Goods Company vs. Bertshaw, cited above, the action was brought by a trustee in bankruptcy to recover back from a creditor a partial payment of its claim made by a debtor within four months preceding the time the latter was adjudged a bankrupt. The jury found that the payment did not enable the creditor to obtain a greater percentage of the debt than the bank was able to pay to its other creditors. Upon this finding by the jury the Supreme Court of Kansas held that there was no illegal preference within the meaning of the law. In discussing the principles sustaining this conclusion the court among other things said:

"The question involved is whether a part payment to the Brittain Dry Goods Company of its claim was a preference, when by the receipt of the amount it did not get a larger percentage of its debt than the debtors were able to pay to their other creditors. The language of the bankruptcy act defining a preference answers the question in the negative. The theory of the national bankrupt law is to secure a distribution of the debtor's property among the creditors ratably and in proportion to their respective claims. If the insolvent debtor himself should make such distribution of his assets, the creditors receiving their equitable shares ought not to be required to restore to the trustee in bankruptcy what they have received, in order that it may be repaid to them again, less the cost of administering the trust. The end and aim of the bankrupt law is to secure payment to creditors of an equal percentage of their claims. If the insolvent person does this, we can see no reason why his creditors should contribute to pay the expenses of bankruptcy proceedings to accomplish the same result. If plaintiffs in error had received all of their claims, the payment manifestly would have been a preference, for it was clearly shown that the debtor's assets were insufficient to satisfy all they owed. Johnson v. Wald, 93 Fed., 640; 35 C. C. A., 522. There was a finding that the payment to defendant below prevented the remaining creditors from securing payment of their claims against Ridgeway & Co., but, in the light of other answers of the jury, this means that the payment had the effect to prevent a payment in full to other creditors. In the case of Pepperdine vs. Bank, 84 Mo. App., 234, 242, cited and relied upon by counsel for defendant in error, the principle was recognized that if the debtor making the payment had paid, or made provision to pay, other creditors a proportionable amount, the transaction was not a preference. It is essential to a recovery in cases of this kind that the effect of the payment was to enable one creditor to obtain a greater percentage of his debt than other creditors of the same class. In re Hapgood, 2 Lowell, 200, Fed. Cas. No. 6044; Peterson vs. Nash Bros., 112 Fed., 311, 314; 50 C. C. A., 260; 55 L. R. A., 344; Collier on Bankruptcy, 110 and note."

As previously stated and as will appear from a reading of all the authorities we have cited, as well as from many more available, any distribution of the assets of an insolvent bank which will cause one

or more general creditors to receive a larger proportion of assets than a pro rata distribution of the estate according to the claims would give, would constitute a preference which is prohibited by law, or to state it conversely, any distribution of the estate to one or more creditors which lessens the amount of the insolvent estate available for the payment of the claim of the general creditors on a complete pro rata basis, is a character of preference prohibited by the laws of this State. It follows from what we have said that should the proposed action on the part of your liquidated agent to pay the owners of the certificates of the deposit and the depositor banks their claims in full out of the first moneys coming into his hands, that such action would lessen the amount of the insolvent estate for pro rata distribution among the creditors of the bank, and as such would be giving to the creditors named a preference prohibited by the laws of this State. Therefore you are not permitted by law to pay the claims of the owners of the certificates of deposit and the claims of deposit banks in full out of the first moneys coming into your hands but you must pay these creditors by dividends on a pro rata basis as provided by law. It is true that two other creditors, towit: the First National Bank of Waco and the Security National Bank of Dallas have consented to these suggested preferences, but the waiver executed by them binds them only to the extent that they are general creditors and does not bind either of the banks as to depositor or as the assignee of any depositor.

A third factor, however, must still be considered, towit: the rights of the guaranty fund. The guaranty fund system of this State is substantially a form of credit insurance conducted strictly on a mutual plan operated by the State's officers as trustees. The language of the Revised Statutes, Article 449, concerning this fund, is as follows:

"The fund provided for in this chapter shall be paid to the State Banking Board as follows: Twenty-five per cent of each payment required of each such bank or banking and trust company shall be paid to said board in cash, and shall be by it deposited for safe keeping only with the State Treasurer, as bailee for the State Banking Board, and shall be paid out by the State Treasurer on warrants drawn by the order of said board; and said fund shall never be diverted from the purpose specified in this chapter, nor shall it ever be considered State funds."

Our system is substantially a compulsory form of insurance and the guaranty fund is a trust fund held in trust by the State's officers for the benefit first of eligible depositors in State banks and second, for the benefit of its corporate contributors, or if we should use the language of the law of mutual insurance, of its members. The State must discharge the trust in accordance with the statutes and cannot divert the fund or use it for purposes other than those for which it was collected. That the contributing banks retain a reversionary interest in the guaranty fund is shown by some of the statutes we have already quoted or referred to, but it is made particularly plain by the terms of Article 490, which reads: "In the event of the voluntary liquidation of any bank or trust company operating under

the provision of the depositors guaranty fund when it shall be made to appear to the State Banking Board that all depositors have been paid in full, said Board shall return to such bank or trust company the pro rata part paid by it into such fund, when (then) unused." Besides the statutes quoted, the Supreme Court of the United States in construing the Oklahoma depositors guaranty fund law, has stated that it assumes that the contributing banks retain a reversionary interest in their contribution to the fund so as to be entitled to a return of what remained of it if the purpose were given up. Nobles State Bank vs. Haskell, 219 U. S., 110; Receiver of Danby Bank vs. State Treasurer, 39 Vt., 92. The Texas act was written after the Oklahoma Act and the writers of it had before them the Oklahoma Act, as well as the Vermont law discussed in the cases cited from that State, and they made the statute plain on this question. As suggested the guaranty fund system is merely a method of insuring banking deposits and as such the statutes governing it are largely applicable to the principles of purely mutual insurance. In fact in Article 486, Revised Statutes, in defining the claims of deposits not protected by the fund it is declared that the same "shall not be insured under this chapter." Thus clearly showing that the Legislature had in mind that it was formulating only a plan of method of credit insurance to protect one class of creditors of State banks, towit: those who were creditors by virtue of having in the banks "non-interest bearing and unsecured deposits." Credit insurance, as well as the insurance of bank deposits, is a class of insurance well known in this country.

8th Amer. & Eng. Encyc. of Law, 235.
People vs. Walker, 17 N. Y., 502.
Re Reciprocity Bank, 22 N. Y., 9.
Elwood vs. State, 23 Vt., 701.
Danby Bank vs. State Treasurer, 39 Vt., 92.
Abilene Nat. Bank vs. Dolley, Bank Commissioner, 179 Fed., 461; 32 L. R. A. (new series), 1065.
Nobles State Bank vs. Haskell, 219 U. S., 164.

We are of the opinion, therefore, that so far as our guaranty fund system is concerned and the fund itself the principles of mutual insurance are applicable and the contributors to that fund are entitled under the statutes to substantially the same privileges and rights as the contributors to the insurance fund of the mutual insurance company. Mutual insurance is defined by one of the leading authorities as follows: Mutual insurance is that system of insurance by which the members of the association or company mutually insure each other. The mutual company, therefore, is one in which the members are both the insurers and the insured. The premium paid by them constitute the funds which are liable for losses and expenses and in them is vested the control and regulation of the affairs of the company. The mutual obligation of insurance and all the advantages is the main and essential features of such corporation that must not in any respect be wanting, superseded or impaired. 21 Amer. & Eng. Encyc. of Law, 253. Under this definition the depositors' guaranty fund of this State is essentially a system of mutual insurance by which

the contributing banks mutually insure each other for the use and benefit of their depositors eligible to take benefits under the law. The only material differences between this system and that of an ordinary mutual company is that the control of the fund and its management is not vested in the contributors or someone selected by them, but in the State's officers as bailees or trustees. This difference in management, however, does not create any distinction or difference in the rights of the contributing banks and those of contributing members to a mutual insurance company. The funds of a mutual company are in their nature trust funds to be applied to payment of losses and the directors cannot apply them to any other purpose without becoming personally liable therefor. In fact an injunction will be issued to restrain the use of the fund for any other purpose. 21 Amer. & Eng. Encyc. of Law, 271, 260.

It is likewise the rule that the assets of a mutual insurance company belong to the members as in a stock company they belong to the stockholders, the members being interested therein in proportion to their several contributions. In the same proportion are the members entitled to share in the surplus in excess of losses and expenses and if what a member put in contributed to make a surplus, whether he be in or out of the company when the division is made, it is held that he is entitled to draw his share of such surplus. 21 Amer. & Eng. Encyc. of Law, 269; Carlton vs. Southern Mutual Ins. Co., 72 Ga., 402.

We think therefore that the contributing banks are the owners of the depositors guaranty fund of this State and are entitled to a pro rata share in the distribution of that fund or of any assets which properly are payable to that fund. *This*, upon the principle of mutual insurance as well as upon the various statutes to which we have referred and some of which we have quoted. In other words, when we say, as the law does say, that the depositors' guaranty fund must share pro rata in distribution of the estate of an insolvent member bank what is meant is that all the contributing members to the depositors' guaranty fund are entitled to share in proportion to their contribution to that fund in a pro rata distribution of the estate of the insolvent bank; all State banks in this way become creditors of the insolvent bank. The State does not become the creditor because the State has no property rights in the guaranty fund, but only the rights and privileges of the trustee selected by law to administer the fund. No authority is conferred upon the State or the State's officers to modify the trust as defined by the statutes or to waive the right of the guaranty fund, or to speak with greater accuracy, the right of the contributors of the guaranty fund to share pro rata in the distribution of the estate of an insolvent member bank. Upon the whole, therefore, after a somewhat diligent investigation of the question, we must conclude that the waiver of all creditors of the insolvent bank, as in this case all have either waived or have become the beneficiaries and therefore waivers by estoppel of any rights against the proposed preferences, does not authorize you to make an inhibited preference and distribute the estate other than upon a pro rata basis for the reason as suggested that you are not authorized to waive the

statute which protects the depositors' guaranty fund or rather which protects the contributing banks which own the depositors' guaranty fund.

Reiterating, therefore, the conclusion previously expressed, we advise you that the owners of the certificates of deposit named in your letter, or owners of the bank deposits there named, can not be paid in the manner set forth in your communication because such payment would be a preference of these creditors in violation of the laws of this State.

The inquiry as to whether or not you may pay McLennan county the $20,938.45 due it presents a different question. It appears that Messrs. Hill, Gross, Hulsey, McCollum, Street and Pinto are sureties on the bank's bond to the county to secure the debt above named; it likewise appears that these gentlemen in the aggregate owe the Farmers and Merchants State Bank approximately $60,000. Your communication shows that it is the purpose of these gentlemen to permit a judgment to be taken by the county against them for the amount of the bank's debt to the county and they in turn to ask for a judgment against the bank and upon the payment of the county's debt by them then to offset such payment to the extent thereof on the amount which they may owe the bank. In your communication you state further: "You will see from this situation that Special Agent Kean is powerless to demand either security or the retirement of the notes of these gentlemen. Special Agent Kean has conferred with these bondsmen, and they wish to be relieved on this bond, each of the bondsmen promising to protect his individual indebtedness in case they are relieved from the bank's obligation to the county." In other words, the proposition is just this—if the bank will pay the county the amount of the debt due by it, thereby relieving the bondsmen from that obligation, then these bondsmen will pay the bank an amount of money at least equal to the amount which the bank is compelled to pay the county and will then renew or make some other disposition of the balance due by them respectively of the bank on their obligations to it. Or to quote from your letter on this point: "I am informed by Special Agent Kean that from the sureties on the county bond who owe the Farmers and Merchants State Bank about $60,000.00 he can, within a reasonable time, collect $22,000.00 and that he hopes to reasonably well secure the balance of $38,000.00." The question, therefore, broadly stated, is whether or not the payment of the amount due the county out of any moneys now on hand or which may first be collected by the special agent will constitute a preference under all the facts and circumstances here shown in violation of the laws of this State. In the first place, it is well settled that the exercise of the right of set-off by a creditor of the bank of any claim he may hold against the bank or against any claim the bank holds against him is not a preference within the terms of the statute forbidding preferences by insolvents.

Steelman vs. Atchley, 32 L. R. A. (new series), 1060.
Mercer vs. Dyer, 15 Mont., 329.
Booth, Trustee,, vs. Prete, 20 L. R. A. (new series), 863.
Yardley vs. Clothier, 49 Fed., 337.

New York County Nat. Bank vs. Massey, 192 U. S., 138.
Scott vs. Armstrong, 146 U. S., 499.
Adams, Receiver, vs. Spokane Drug Co., 23 L. R. A., 334.

Under certain circumstances endorsers or guarantors of the obligations of an insolvent are creditors and inhibited dispositions of the insolvent's property may constitute a preference in favor of such endorsers or guarantors.

Kobusch vs. Hand, 18 L. R. A. (new series), 661.
Stern vs. Paper et al., 183 Fed., 228.

We cite the last two authorities which are well sustained by notes shown in the 18th L. R. A. (new series) in order to fix the status of the sureties of the bank's bond in this instance and to show that it is possible that they should become preferred creditors in the event it should be concluded that the payment by the bank to the county of the amount of the obligation heretofore referred to should be a preference payment inhibited by law, but as suggested, the right of set-off is not a preference as shown by above citations.

In the case of Yardley vs. Clothier, the Circuit Court of the United States quotes from the opinion in the case of Wagner vs. Patterson County, 23 N. J. Law, 283, which excerpt substantially sets forth the doctrine of set-off, as applied to insolvent estates, and is as follows:

"I am of opinion, both upon principle and authority, that the debtor of an insolvent corporation loses none of his rights by the act of insolvency; that he has the same equitable right of set-off against the receiver that he had against the corporation at the time of insolvency, and, consequently, that the debtor of a bank, whether his indebtedness has actually accrued or not at the time of insolvency, may in equity set off against his debt, either a deposit in the bank, or the bills of the bank bona fide received by him before the failure occurred. It is said the object of the act is to do equal justice to the creditors, and that equity is equity. But equity of what, and among whom? Clearly of the assets of the bank, among the creditors of the bank. In cases of cross-indebtedness the assets of the bank consist only of the balance of the accounts; that is, all the fund which the bank itself would have to satisfy its creditors, in case no receiver had been appointed. And there is no equality, and no equity, in putting a debtor of the bank, who has a just and legal set-off against the corporation, in a worse position, and the creditors in a better position, by the bank's failure and the appointment of a receiver."

In the case of Scott vs. Armstrong, 146 U. S., 489, Chief Justice Fuller expressly held that the application of the doctrine of set-off between insolvents and their creditors was not preference within the meaning of the insolvents. In that case he among other things said:

"Undoubtedly, any disposition by a national bank, being insolvent or in contemplation of insolvency of its choses in action, securities or other assets, made to prevent their application to the payment of its circulating notes, or to prefer one creditor to another, is forbidden; but liens, equities or rights arising by express agreement, or implied from the nature of the dealings between the parties, or by operation of law, prior to insolvency and not in contemplation thereof, are not invalidated. The provisions of the act are not directed against all liens, securities, pledges or equities, whereby one creditor may obtain a greater payment than another, but

against those given or arising after or in contemplation of insolvency. Where a set-off is otherwise valid, it is not perceived how its allowance can be considered a preference, and it is clear that it is only the balance, if any, after the set-off is deducted which can justly be held to form part of the assets of the insolvent. The requirement as to ratable dividends is to make them from what belongs to the bank, and that which at the time of the insolvency belongs of right to the debtor does not belong to the bank.

"There is nothing new in this view of ratable distribution. As pointed out by counsel, the bankruptcy act of 13 Eliz., c. 7, contained no provision in any way directing a set-off or the striking of a balance, and by its second section, commissioners in bankruptcy were to seize and appraise the lands, goods, money and chattels of the bankrupt, to sell the lands and chattels, "or otherwise to order the same for true satisfaction and payment of the said creditors; that is to say, to every of the creditors a portion, rate and rate alike, according to the quantity of his or their debts." 4 Statutes of the Realm, Part 8, 539. Yet, in the earliest reported decisions upon set-offs, it was allowed under this statute.

"The succeeding statutes were but in recognition, in bankruptcy and otherwise, of the practice in chancery in the settlement of estates, and it may be said that in the distribution of the assets of insolvents under voluntary or statutory trusts for creditors the set-off of debts due has been universally conceded. The equity of equality among creditors is either found inapplicable to such set-offs or yields to their superior equity."

It will follow from these authorities that should the sureties pay the debt due the county by the Farmers and Merchants State Bank that they would undoubtedly have the right to offset the amount of that payment against their several obligations to the bank which in the aggregate amounts to some $60,000. As we understand the facts the county is making insistent demands for its money. Your liquidating agent is insisting that these sureties either pay or secure their debts to the bank. This they are willing to do but they first desire to be relieved in some manner of their obligation as sureties for the bank to the county in order that they may have an unimpaired credit with which to raise funds and pay the bank or to secure it. If the matter is permitted to stand as it now stands the result will be that these sureties will be compelled to pay the county and will offset that payment against their obligations to the bank. If the bank goes ahead now and out of moneys in hand or soon to be in hand pays the county and in turn collects an equal amount of money from these sureties in settlement of their debts to it, then there will be no difference in the amount of funds or properties of the insolvent estate for ratable distribution from what there would be in the event the sureties pay the county and offset the amount of such payment against their obligations to the bank. In either event there will be on the assumption that the facts are as we stated, precisely the same amount for distribution to the general creditors of the bank. In such instance under the authorities which we have cited there would be no preference in paying the county and in turn collecting from these sureties an amount equal to the sum which the bank is compelled to pay the county. The insolvent estate would not be diminished in the least and neither creditors nor the guaranty fund would have any legal complaint to make.

We are of the opinion therefore that in the event these sureties are compelled to pay the county that they may offset the amount

they are compelled to pay against their several obligations to the bank to the extent of the payment they are compelled to make, whether this payment be made voluntarily or at the end of litigation with the county; in view of the fact that these sureties seem to be able to respond to their obligations as such to the county and that they intend to do so and offset the amount thereof against their several debts to the bank, and in view of the fact that rather than to take this course they are willing to pay the bank within a reasonable time a sum of money on their obligations equal to the amount of the bank's debt to the county, provided, the bank will in turn pay its debt to the county and thus relieve them as sureties and they as well to execute new and secured obligations to the bank for the balances due it, we have reached the conclusion that the payment by you to the county of the obligation due the county out of such funds as are now on hand belonging to the bank or as may come to hand will not be a preference in violation of law either as to the county or as to the sureties who are on the county's bond. However, our advice is that before this matter is consummated that an application should be made to the district judge for permission to make this payment and that the facts as to the condition of these sureties and their ability to respond to the county's claim and their ability, purpose and intention to pay to the bank an amount equal to same should be presented to the court and the payment made under the order of the court.

Yours truly,

C. M. CURETON,

First Assistant Attorney General.

BANKS AND BANKING—STATEMENTS, PUBLICATION OF—ATTORNEY GENERAL.

R. S., Arts. 523, 525, 527, 528.

U. S. Rev. Stats., 5211.

1. The provisions of Revised Statutes, Art. 528, requiring the publication of a bank's statement in some newspaper, and requiring that a copy of such statement be posted in the banking house, accessible to all, is mandatory.

2. This statement must be posted and this publication made within a reasonable time after the statement has been made, which means that such posting and publication shall be done as soon as possible in the exercise of ordinary diligence.

3. In the event there is no newspaper published in the county of the bank's domicile, then this statement need not be published, but a copy of the statement must, even in this instance, as well as all others, be posted in the banking house, accessible to all.

4. In the event a bank fails or refuses to publish the statement and post the same, as required by law, the matter should be referred to the Attorney General, whose duty it is to file suit against the bank to require a compliance with the law, or, if necessary, a dissolution of the bank.

August 15, 1916.

Hon. John S. Patterson, Commissioner Insurance and Banking, Capitol.

DEAR SIR: In your communication you request the advice of this Department as to whether or not banks are required to comply with the provisions of the Revised Statutes, Article 528, and in the event of non-compliance therewith, what remedy you have. This statute reads as follows:

"Publication of the statement shall be made by banking corporations in one or more newspapers published in the town, city or county where it is located, if there is one so published; provided, if said banking corporation is located in a town or city having a population exceeding ten thousand inhabitants, then such publication must be in a daily newspaper, if such is published in such city; but if such corporation is located in a town or city having a population of ten thousand inhabitants or less, then said publication may be in either a daily or weekly newspaper published in said city or town as aforesaid; and in all cases, a copy of the said statement shall be posted in the banking house, accessible to all."

It will be appropriate for us to examine some of the other statutes relative to this same subject, in order that we may determine the purpose, effect, and probable meaning of the statute directly under examination. Revised Statutes, Article 527 makes it the duty of the Commissioner, not less than twice each year, to call upon all State banks for the statement defined in the statute, and declares that the Commissioner may call upon the banks for more than the minimum number of statements. That this provision of the law is mandatory is at once apparent when the remaining portion of this article of the statute is examined, for it further provides that upon the failure of the Commissioner to comply with its provisions, he shall be deemed guilty of a misdemeanor, and upon conviction, be punished by removal from office, and by fine. Of this much, therefore, we may be certain, that it is mandatory upon the Commissioner to call for the statements referred to. Revised Statutes, Article 525, which relates to the same subject as the two previous articles of the statutes referred to, reads:

"The board of directors of any such bank, savings bank, or trust company, whenever required thereto by the Commissioner, shall furnish a statement, to be filed in his office, under oath before a notary public, by the president, cashier or secretary, and attested by three of the directors, of the actual condition of the affairs of such bank or trust company at the close of business on the day designated, and which day shall be prior to such call; such statement to be upon the form prescribed by the Commissioner."

An examination of this statute at once discloses that it, too, is mandatory for the reason that a failure to comply with its provisions makes the bank liable to a penalty which is therein specified, the failure to pay which, may subject the bank to suit and recovery on the part of the State. Article 528, which is essentially a portion of the two previous articles of the statute quoted, in that it relates to identically the same subject, and is a mere continuation thereof, is equally as mandatory as the other sections quoted. Sutherland on

Statutory Construction, Section 616. The making and publishing of this statement is not required merely for the information of the Commissioner, but for the guidance of the public, who may have occasion to know the financial condition of the bank. Chesborough vs. Woodworth, 195 Fed., 870; Hill vs. Silvey, 3 L. R. A., 150. From these authorities it is apparent that the purpose of requiring the publication or posting of the statement is a public one, and its compliance by the bank, a condition upon which the corporation is permitted to transact its business. From this viewpoint, the statute is clearly mandatory. Having concluded that the statute is a mandatory one, and that the publication of the statement or posting of the notice are not acts within the discretion of the officers or directors of the bank, but acts which must be performed if the bank is to be permitted to continue to operate, our next inquiry naturally is, when the publication is to be made. The statute itself does not state. We must conclude, therefore, that the statement is to be published within a reasonable time, for, of course, it was not intended by the statute, that the publication should be made at or delayed until the expiration of an unreasonable time. This would be assuming that the Legislature wished to enact an absurd statute, which is never presumed. A well known text on this subject, reads as follows: "Under like limitations, there is a strong presumption against absurdity in the statute, and when the language in an act is susceptible of two senses, that sense will be adopted which will not lead to absurd consequences. The same principles apply in case of an ambiguous statute, one construction of which will lead to great inconvenience, and the courts, presuming that such a consequence could not have been intended, will if possible, adopt some other construction." 26 Amer. & Eng. Encyc. of Law, p. 648. Rather, therefore, than say that it was intended by this statute, that an unreasonable thing should be done or be permitted, one which might prove absurd, inconvenient, or burdensome, we choose rather to say that the Legislature intended that the statement referred to should be published within a reasonable time. Moreover, this construction is consistent with the established practice under the Federal statutes, which is similar to our own. U. S. Revised Statutes, Article 5211.

Having adopted this particular statute from the national banking act, we take it that the established practice under that act may be appropriately looked to as a proper construction and as a proper method of interpreting our own legislative act. 26 Amer. & Eng. Encyc. of Law, 650. It has been for years, the practice of national banks to publish their statements immediately upon having made them. The same practice has been followed by State banks in this State. We should say, therefore, that unless there is some reason for not doing so, the appropriate and correct practice with our banks is to publish these statements as soon after they have been made, as is possible; or, as we have stated it before, within a reasonable time, considering all of the facts and circumstances in each individual case, and having in view, at all times, the public purpose of the statute requiring the publication and posting of these statements. A reasonable time means that the act shall be done as soon as it conveniently can. H. & T. C.

Ry. Co. vs. Roberts, 109 S. W., 982; Claus-Sheer Co. vs. Lee Hardware House, 53 S. E., 433; 6 Annotated Cases 243. In this connection it should be well to bear in mind that a reasonable time is such promptitude as the situation of the parties and the circumstances of the case will allow. It never means an indulgence in unnecessary delay, nor a delay which does not arise reasonably out of the efforts of the party to comply with the law. Frech vs. Lewis, 11 L. R. A. (N. S.), 948; Colfax County vs. Butler County, 120 N. W., 444.

Having determined that the publication of the statement and posting of the notice specified in the statute is mandatory upon the banks, and that this must be done within a reasonable time, we will next inquire as to what action should be taken in the event a bank fails to comply with the law in these respects. Revised Statutes, Article 523, in part reads:

"* * * and whenever any corporation shall refuse or neglect to make any such report, as is hereinbefore required, or to comply with any such orders as aforesaid, or whenever it shall appear to the Commissioner that it is unsafe or inexpedient for any such corporation to continue to transact business, or that extraordinary withdrawals of money are jeopardizing the interest of remaining depositors, or that any director or officer has abused his trust, or been guilty of misconduct or malversation in his official position, injurious to the institution, or that it has suffered a serious loss by fire, burglary, repudiation or otherwise, he shall communicate the facts to the Attorney General, who shall thereupon institute such proceedings as the nature of the case may require. Such proceedings may be for an order of officers or members of the board of directors (or) for any other remedy suggested by the conditions disclosed to the court, and the court, or judge thereof, in vacation, before whom such proceedings shall be instituted, shall have power forthwith to grant such orders, and, in its or his discretion, from time to time, to modify or revoke the same, and to grant such relief as the evidence, situation of the parties and the interests involved shall seem to require."

From this provision it is apparent that when a bank refuses to comply with the law with reference to reports, it is the duty of the Commissioner to refer the matter to the Attorney General, who shall at once bring such action as may be necessary to bring about a compliance of the bank with the law, or else force it out of existence through the instrumentality of the courts. In considering this phase of the case, we desire to direct your attention to the fact that this law, requiring reports, is in effect a part of the corporate charter of each bank and banks are permitted to operate only upon condition of its observance. A failure, therefore, to observe these statutory conditions will subject the bank to whatever judgments or decrees the court may find appropriate and necessary to force it to according to law, or cease to exist.

The last question asked by you, is whether or not a bank was required to publish its statement in the event there was no paper published in the county in which the bank is located. It seems to us that the statute itself answers this question. It provides for the publication of the statement only in the event there is a newspaper published in the town, city or county where the bank is located. See Revised Statutes, Article 528.

You are, therefore, advised: (a) that the provisions of Revised

Statutes, Article 528, requiring the publication of a bank's statement in some newspaper and requiring that a copy of such statement be posted in the banking house, accessible to all, is mandatory; (b) that this statement must be posted and this publication made within a reasonable time after the statement has been made, and that this means that such posting and such publication shall be done as soon as possible by the exercise of ordinary diligence, looking toward this act; (c) in the event there is no newspaper published in the county of the bank's domicile, then the statement need not be published, but a copy of the statement must, even in this instance, as well as all others, be posted up "in the banking house, accessible to all."

Yours very truly,
C. M. CURETON,
First Assistant Attorney General.

BANKS AND BANKING—BANK EXAMINERS—EVIDENCE—PRIVILEGED COMMUNICATIONS—PUBLIC RECORDS.

R. S., Arts. 520, 4493.
P. C., 530.

1. A bank examiner has no authority to disclose information received by him as such concerning any bank examined by him, even after he has left the service of the State; and the court has no authority to require such disclosure.
2. The court cannot require the Commissioner to produce the reports of such bank examiner.
3. However, the Commissioner may, in his discretion, waive the right of privilege for the State, and permit the examiner to testify, or he may, in his discretion, produce the reports or copies thereof, but the court has no jurisdiction to compel him to do so.
4. As to whether or not the waiver of privilege is prejudicial to public interest is one purely for the Commissioner to determine, and is not a judicial question for a court.
5. It is probably prejudicial to the public interest for the Commissioner to waive the State's privilege in a suit between shareholders of a bank, because such litigation has no public phase.
6. The proper course for the examiner to pursue in this case in the event it is sought to take his depositions is for him to forward copies of the questions to the Commissioner, together with information as to what his answers will be thereto, and whether or not such answers disclose information received while the witness was a bank examiner; the Commissioner may then examine such questions and answers, and determine what questions he will permit the witness to answer, and certify his determination to the witness for production before the notary.

March 4, 1915.

Hon. John S. Patterson, Commissioner of Insurance and Banking, Capitol.

DEAR SIR: You request the advice of the Attorney General on the questions submitted to you in a letter from Mr. C. F. Goodnough, a former bank examiner, which letter is, in substance, as follows:

"I am in receipt of a letter from an attorney asking me for certain in-

formation regarding the condition of the San Benito Bank and Trust Company during the year 1913.

"Feeling that it would not be proper for me to divulge such information, I have declined to furnish him with same at this time, but in the same letter he talks of the likelihood of taking my deposition in the matter at a later date.

"Anticipating the request for my deposition, I am writing you to ask that you kindly get a ruling from the Attorney General for me, stating whether or not I shall be required to answer questions in such deposition, which would indicate the condition of this bank as was disclosed by examinations made by me during the year 1913.

"This information is requested in connection with suit to recover on some stock which some party purchased during said year, the claim being that misrepresentations were made as to actual condition of the bank and value of the stock at that time."

Your request involves an examination of some of the statutes of the State as well as a consideration of the question of privilege under the rules of evidence as enunciated by the American and English courts. Mr. Goodnough is no longer a bank examiner, but left the service of the State sometime ago. All information which he has relative to the matter referred to in the letter he obtained as a bank examiner in the performance of his duties and by virtue of his office.

The Revised Statutes, Article 520, prescribing the qualification of bank examiner, declares that they shall be required to take an oath which contains, among other provisions, that such examiner will "not reveal the condition of any bank or trust company examined by him, or any information secured in the course of any examination of any bank or trust company, to any one, except the Commissioner."

The Penal Code, Article 530, reads as follows:

"For any violation of his oath of office or of any duty imposed upon him by law, any examiner shall be deemed guilty of a felony and upon conviction shall be punished by imprisonment in the penitentiary for a term not exceeding five years, and upon indictment of any such examiner for any violation of this law he shall be disqualified from further discharging the duties of such office until such indictment is fully disposed of."

We think the meaning of these two provisions when considered together is, that a bank examiner can not voluntarily reveal the condition of any bank examined by him or voluntarily give any one any information concerning the condition of any such bank, if such information was secured officially. These provisions, however, do not prohibit such examiner from giving his tesimony in a judicial proceeding, as the language of the provisions clearly seek only to prohibit voluntary disclosures on the part of the examiner and do not attempt to prohibit a court from requiring the examiner to disclose such facts, as the court may have a right to require to be disclosed. The question, therefore, finally reduces itself to one of privilege communications. The same rules would govern an examiner in this respect as govern the Commissioner of Banking himself, as an examiner is a public officer who represents the Department of the Government which supervises and controls the banks. Briefly, his business is to make examination of State banks and to transmit to the Commissioner of Insurance and Banking a report of the condition of banks

examined by him, and it is upon the basis of those reports that the Commissioner determines whether the bank shall continue as a going institution or whether it shall close its doors and cease to exist; likewise, as to what requirements shall be made of the bank by the Commissioner of Insurance and Banking. The bank examiner is required to take an oath of office, give bond, possess certain qualifications and his position has all the characteristics of and is a public office.

Revised Statutes, Arts. 520, 521, 522, 523.
Michie on Banks, Vol. 3, p. 1786.
Witters vs. Sowers, 43 Fed., 763.

Aside from the statutes and authorities cited, the court held in the case of Sanders State Bank vs. Hawkins, that the action of one of the bank examiners and that of the Commissioner in closing the Sanders State Bank was the act of public officers in a quasi judicial capacity.

Sanders State Bank vs. Hawkins, 142 S. W., 86.

Section 15 of Article 4493, Revised Statutes, provides that the Commissioner of Insurance and Banking at the request of any person and on the payment of the legal fee shall give certified copies of any record or paper in his office when he deems it not prejudicial to public interest. This is indicative of the authority of the Commissioner and substantially states these occasions when information received by him or those under him in an official capacity may properly be disclosed, and confines it only to those instances when such disclosures would not be prejudicial to public interest. In this respect the statute is only an enactment into law of those general rules which govern privileged communications to public officers. These rules we will now examine and apply to the inquiry.

We are indebted for a comprehensive digest of these rules to Jones Commentaries on Evidence, Volume 4, Section 762. (Edition 1914.)

It may be stated as a general principle that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential and respecting which it will not allow the confidence to be violated. The President of the United States, the Governors of the several States and their cabinet officers are not bound to produce papers or disclose information committed to them, in a judicial inquiry, when, *in their own judgment* the disclosure would on public grounds be inexpedient.

Trotten vs. United States, 92 U. S., 105.
Hartranft's Appeal, 27 Am. Rep., 667.
Thompson vs. German Valley R. R. Co., 22 N. J. Eq., 111.

On the same principle the heads of the departments of National and State governments can not be compelled to produce letters or documents as evidence, when in their judgment such production would be prejudicial to the public service.

Worthington vs. Scribner, 12 Am. Rep., 730.
In re Huttman, 7 Fed., 699.
In re Weeks, 82 Fed., 729.
Boske vs. Comingore, 177 U. S., 459.
In re Lamberton, 124 Fed., 466.
In re Comingore, 96 Fed., 552.

In the leading case in the United States Supreme Court (177 U. S., 459), a Collector of Internal Revenue had been imprisoned by an order of the State court in Kentucky for refusing to produce certain monthly reports to his office of liquor made by a certain manufacturer. His refusal was based on the statutes of the United States, and the rulings of the Revenue Department which did not permit the giving out of anything contained in internal revenue returns or documents for purposes other than those which the United States contemplated. The ruling was made by the Secretary of the Treasurer through the Commissioner of Internal Revenue. In holding the imprisonment improper, Mr. Justice Harlan adopted the opinion of Judge Evans of the district court. This opinion held, in substance,

First. That the reports were executive documents, which the United States, in its sovereign capacity, had acquired for the sole purpose of administering its governmental affairs.

* * *

Third. That such documents are privileged, and to a certain extent quasi-confidential communications, the use of which was limited to the purposes for which they are made, unless the parties interested consent to a more extensive use.

Fourth. That any demand for their use by any outside party must depend for success upon the courtesy of the government and upon its notion as to the public policy of complying with the request.

Fifth. That no litigant has any right to their use in any other way or upon any other basis than such as may be fixed by the government or under its authority.

Sixth. That the reports are property, and their ownership rested in the United States.

* * *

Eighth. That the Secretary of the Treasury had lawful authority to control or make regulations for controlling their property and its custody.

Ninth. That the regulations there made were within his authority and show the only way in which the courtesy of the government respecting the matter there under consideration could be exercised and that the courts had no power to overrule it.

* * *

Eleventh. That the reports were parts of the governmental archives, accumulated through mere executive and administrative processes, and as such were privileged.

Twelfth. That the effort to make the collector testify to their contents was virtually an attempt to make the United States produce them.

The proposition underlying all the others is, that no body can

acquire any control over or right in this class of papers belonging to the government in any manner except by its authority.

See cases cited in Note 99, p. 580, 4th Jones on Evidence.

In an English case it was held in the first instance that the question is to be determined by the officer at the head of the Department and that unless he submits the question to the court, the disclosure will not be compelled by the court unless there is very conclusive evidence that it would not be prejudicial to the public service.

Jones, supra.
Beatson vs. Skene, 29 L. J. Ex., 430.

It appears to be well settled that the question of the expediency or inexpediency of the production of evidence obtained by an executive officer by virtue of his office for the purpose of enforcing the laws is one which is not left to the judgment of a court, but of the officer who has the evidence in his possession. Concerning this matter the Supreme Court of Pennsylvania in Hartranft's Appeal, 27 Amer. Rep., p. 671, among other things said:

"Thus, the question of the expediency or inexpediency of the production of the required evidence is referred, not to the judgment of the court before which the action is trying, but of the officer who has that evidence in his possession. The doctrine that the officer must appear and submit the required information or papers to the court, for its judgment as to whether they are, or are not, proper matters for revelation, is successfully met and settled in the case of Beaton vs. Skene, 5 Hurlst & N., 838, per Pollock, C. B. It was there held that if the production of a State paper would be injurious to the public interest, the public welfare must be preferred to that of the private suitor. The question then arose, how was this to be determined?. It must be determined either by the judge or by the responsible crown officer who has the paper. But the judge could come to no conclusion without ascertaining what the document was or why its publication would be injurious to the public service. Just here, however, occurred the difficulty, that, as judicial inquiry must always be public, the preliminary examination must give to the document that very publicity which it might be important to prevent. The conclusion reached was that from necessity, if for no other reason, the question must be left to the judgment of the officer."

In the case of Worthington vs. Scribner, the petition alleged that the plaintiff was engaged in importing books into the United States, and that the defendants, without probable cause and maliciously and falsely represented to the Treasury Department of the United States that the plaintiff was intending to bring books into the United States in fraud of the revenue laws; that the Department thereupon and induced thereby caused the plaintiff's books to be seized and libeled when entered for import; but that the proceedings were afterwards dismissed and the books released. The defendants denied the allegations made and alleged further that if any communication was made by any person to the Government of the United States as alleged, that the same was privileged communication and not grounds for action against them. The plaintiff propounded interrogatories to the defendants, the effect of which would have been to have elicited the information that they had made the representation alleged to the

officers of the United States Government having charge of the revenue laws. The defendants declined to answer these interrogatories and motion was made that they be required to do so by the court. The Supreme Court of the State of Massachusetts, speaking through Judge Gray, held that they were not required to answer these interrogatories, among other things saying:

"It is the duty of every citizen to communicate to his government any information which he has of the commission of an offense against its laws. To encourage him in performing this duty without fear of consequences, the law holds such information to be among the secrets of state, and leaves the question how far and under what circumstances the names of the informers and the channel of communication shall be suffered to be known, to the absolute discretion of the government, to be exercised according to its views of what the interests of the public require. Courts of justice therefore will not compel or allow the discovery of such information, either by the subordinate officer to whom it is given, by the informer himself, or by any other person, without the permission of the government. The evidence is excluded, not for the protection of the witness or of the party in the particular case, but upon general grounds of public policy, because of the confidential nature of such communications."

In this case the Supreme Court of Massachusetts reviewed some of the English and American cases illuminating the rule of privilege as to information communicated to or received by officers of the government in their official capacities. In a review of the cases, the court, among other things, stated:

The earliest case upon the subject is Rex vs. Akers, 6 Esp., 125, note, in which, on an indictment for obstructing a custom-house officer in the execution of his duty, Lord Kenyon said: "The defendant's counsel have no right, nor shall they be permitted, to inquire the name of the person who gave the information of the smuggled goods." All the English authorities agree that the rule has ever since been held in revenue cases to prevent a witness from answering questions that would disclose the informer, if a third person; and in Attorney General vs. Briant, 15 M. & W., 169, it was held that a witness could not be asked on cross-examination whether he was himself the informer. The rule has been nearly as long established in prosecutions for high treason. Rex vs. Hardy, 24 Howell's State Trials, 199, 753, 816-820, 823; Rex vs. Watson, 32 id., 1, 102-105; S. C., 2 Stark., 116, 136. And it has been often applied in civil actions.

In Home vs. Bentinck, 2 Brod. & Bing., 130, it was held by Chief Justice Abbott, and affirmed in the exchequer chamber, in an action for libel by an officer of the army against the president of a military court of inquiry, that neither their report to the commander in chief, nor an office copy of it, should be admitted in evidence. In the very recent case of Hawkins vs. Eckely, L. R., 8 Q. B., 255, the same court held the statements, oral or written, of an officer, examined before such a military tribunal, to come within the same principle. And in Beatson vs. Skene, 5 H. & N., 838, an action of slander against one military officer for speaking defamatory words of the military conduct of another, it was held that the secretary for war, who objected to produce in evidence the minutes of a court of inquiry, and letters written to the war department by the plaintiff himself, on the ground

that their production would be prejudicial to the public service, was not bound to produce either.

In Earle vs. Vass, 1 Shaw, 229, which was an action for a libel alleged to be contained in a letter to the board of customs before which the nomination of the plaintiff as a custom-house officer was pending, the house of lords, upon the opinion of Lord Eldon, after conference with Chief Justice Abbott, held that the board could not be compelled to produce the letter, "because it is against public policy that you should be compelled to produce instruments and papers which, if persons are compelled to produce, it must shut out the possibility of the public receiving any information as to a person's fitness to be appointed to an office"; and "it would be a very dangerous thing indeed, if this were permitted."

In Marbury vs. Madison, 1 Cranch, 137, 144, the Supreme Court of the United States compelled the acting secretary of state to testify whether certain commissions from the executive had ever been in his office, only because "that could not be a confidential fact"; and declared, that if there was any thing confidential, or the secretary thought any thing was communicated to him in confidence, he was not obliged to disclose it.

Continuing further, the Massachusetts court said:

"The question now before us is not one of the law of slander or libel, but of the law of evidence; not whether the communications of the defendants to the officers of the treasury are so privileged from being considered as slanderous, as to affect the right to maintain an action against the defendants upon or by reason of them; but whether they are privileged in a different sense, so that courts of justice will not compel or permit their disclosure without the assent of the government to whose officers they were addressed. The reasons and authorities already stated conclusively show that the communications in question are privileged in the latter sense and canot be disclosed without the permission of the secretary of the treasury. And it is quite clear that the discovery of documents which are protected from disclosure upon grounds of public policy cannot be compelled, either by bill in equity or by interrogatories at law. Smith vs. East India Co., 1 Ph. Ch., 50; McElveney v. Connellan, 17 Irish C. L., 55; Wilson vs. Webber, 2 Gray, 538. The defendants therefore should not be ordered to answer the interrogatories."

Privileged communications relating to the affairs of government are treated in Volume 10 of the Encyclopedia of Evidence, page 343, et seq., and may be summarized with the authorities cited in support of the rules there laid down as follows:

The Governor of the State can not be compelled to testify as to knowledge acquired by him in discharge of his official duties, nor can he be compelled to produce in evidence the records of his office.

Hartranft's Appeal, 27 Am. Reps., 667.
Thompson vs. German Valley R. R. Co., 22 N. J. L., 111.

The first case cited in support of this proposition has been already referred to.

In the second case the Governor of the State of New Jersey was summoned as a witness to produce certain documents in his custody.

The court, after stating that the dignity of the office of Governor is not sufficient excuse for declining to appear, says:

"Whether the highest officer in the government or State will be compelled to produce in court any paper or document in his possession, is a different question. And the rule adopted in such case is that he will be allowed to withhold any paper or document in his possession, or any part of it, if, in his opinion, his official duty requires him to do so. These were the rules adopted by Chief Justice Marshall in the trial of Aaron Burr. He allowed a subpoena duces tecum to President Jefferson and held that he was bound to appear, but that he should be allowed to keep back any document, or part of a document, which he thought ought not to be produced."

Another case cited by the Encyclopedia of Evidence in support of the proposition first enunciated is that of Gray vs. Pentland, 2 Serg. & R. (Pa.), 23. In that case the Supreme Court of Pennsylvania held that the Governor of the State could not be compelled to produce a certain deposition which had been sent to him to be used in substantiating charges against a certain public official. The court there used the following language:

"Public policy would seem to be in the way of admitting parol evidence as well as producing the original writing, for that would come to the same thing as to the policy. It would be a check on representations to the competent authority. It would restrain the free communications that might be necessary for the public good in case of a candidate for office, or of one who was alleged unworthy to retain an office, to lay it down that a governor, or the competent authority for appointing and removing, should be compellable to produce papers for the purpose of supporting an action in a court of law."

It is also equally elementary that the privilege of the head of a department extends to his subordinates.

Hartranft's Appeal, supra.

The Encyclopedia of Evidence takes up the various public officials, holding that communications made to them in the course of their official duties are privileged, citing in support thereof many English and American authorities. For example it is there stated that the Governor of a colony, the lord lieutenant of Ireland, the Secretary of State, the Secretary of War, the commander-in-chief of army, naval officers; the officers of the United States Treasury, postal and revenue officers, can not be required to disclose communications made to them in the course of their official business. The same rule, of course, applies to the legal department of the government, but it is unnecessary to further pursue the inquiry.

From the various authorities cited and in conformity with the text of Jones' Commentaries on Evidence, we have reached the conclusion that the information received by the bank examiner, being received by him in the performance of his official duties as such, is confidential in its nature, obtained purely for administering the affairs of the government and that it is therefore privileged and he can not be required to disclose the same in the course of a judicial proceeding;

except that he may be required to disclose the same under your direction, you being the head of the Department of which Mr. Goodnough was connected at the time he received this information. If Mr. Goodnough could be required to disclose this information, then by the same rule you could be required to furnish certified copies of his reports as to the condition of this bank; but as seen by the authorities we have cited, you can not be required to produce his reports as to the condition of this bank, except as you may decide that it is to the public interest that they be produced. The same rule will hold as to oral testimony by Mr. Goodnough because his oral testimony was obtained in the same manner that the information was obtained which formed the basis of his reports and to permit oral evidence of the contents of these reports is the same thing as admitting the reports in evidence themselves.

It is quite elementary that the rules governing privileged communications do not relax merely by reason of the fact that the relationship during which the communication was made has ceased to exist, but the doctrine of privilege extends for all time to come until waived by proper party.

10 Ency. of Evidence, 138, 314.

We, therefore, advise you:

(a) That Mr. Goodnough has no authority to disclose any information received by him concerning the condition of the San Benito Bank & Trust Company during the period of time that he was a bank examiner, if such information was received by him in the course of his official duty as such examiner.

(b) That the district court has no authority to require him to testify either in person or by deposition as to any fact concerning the condition of said bank, if the facts stated in such testimony were received by him in his official capacity while he was a bank examiner.

(c) That the court has no authority to require you to produce the reports of the examiners made by bank examiners of this bank for the reasons which we have heretofore given.

(d) However, you have the authority in your discretion to permit Mr. Goodnough to testify to any fact or facts obtained by him in the course of his examination of this bank, when you think that such disclosure would not be prejudicial to public interest.

(e) The same rules would apply to the copies of the examiner's report on file in your Department, or to any other information received by you in your official capacity concerning the affairs of this bank. The next question which will confront you, therefore, is necessarily the one as to whether or not it will be prejudicial to the public interest to permit Mr. Goodnough to testify in the present case. This matter is one which must be largely decided by you after a full consideration of the probable effect which any action taken with reference thereto might have on the administration of your Department. It appears to the writer that it would be prejudicial to the public interest to permit Mr. Goodnough to testify or to furnish the court any information received in an official capacity concerning

the affairs of this bank in the present litigation, for the reason that this litigation is purely between stockholders of the bank and does not concern in the least the public interest. If the controversy was one between a depository and the bank or between a creditor and the bank, then the matter might probably be different, because it would be in the nature of a public matter, but the present suit is purely a suit between private individuals, and it seems to the writer that to disclose the facts would be subjecting the Department to an annoyance and use which might in the end prove prejudicial to the public interest. These last remarks are simply made for your consideration as suggesting the individual view of the writer and are not intended as the advice of the Department, but only for your consideration when you reach the point of determining whether or not you will waive the privilege for the State and permit Mr. Goodnough to testify.

If an attempt should be made to take Mr. Goodnough's depositions, the proper course for him to pursue would be to forward you a copy of the proposed interrogatories to him with a statement of what his testimony would be in answer to each and source of his information and when it was received; after you have received this, it would then be proper for you to go over the questions and answers and certify to Mr. Goodnough under the seal of your Department such questions as you will permit him to answer, and he should answer no further than you permit.

Yours very truly,
C. M. CURETON,
First Assistant Attorney General.

TAXATION—BANKS AND BANKING—NATIONAL BANKS—FEDERAL RESERVE ACT.

R. S., Art. 7521.
Federal Reserve Act, Sec. 7.
U. S. Revised Statutes, 5219.

1. In determining the valuation of shares of stock in national banks for purposes of taxation, the capital of these banks invested in the stock of federal reserve banks should be considered and treated as any other portion of the capital of national banks, and should not be eliminated from the assets of such national banks.

August 12, 1916.

Hon. H. B. Terrell, Comptroller, Capitol.

DEAR SIR: Inquiries have been made of this office from time to time, as to whether or not, in determining the value of national bank stock for purposes of taxation, the interest held by the bank in the federal reserve bank should be deducted. It is our purpose now, to determine this question, and accordingly we are writing you the opinion for the purpose of making it a general one, which may be forwarded to all those who may make inquiry concerning this subject.

Section 1 of Revised Statutes, Article 7521, provides that the shareholders of the stock in national banks shall render to the tax assessor of the county in which said bank is located, the number of their shares

and the true value thereof. The question is whether or not in ascertaining the true value of shares of stock in a national bank, the amount which the national bank has invested in the federal reserve bank should be excluded or included in the calculation. Our opinion is that the amount of the national bank's capital stock which it has invested in the stock of the federal reserve bank should be included in the calculation referred to, just as much as any other part of its capital stock. The question has arisen by reason of the provisions of Section 7 of the Federal Reserve Act, which, in part, reads: "Federal reserve banks, including the capital stock and surplus therein, and the income derived therefrom, shall be exempt from federal, state, and local taxation, except taxes upon real estate." Section 5219, United States Revised Statutes, provides: "Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the association is located; but the Legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exmpt the real property of associations from either State, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed."

Our opinion, then, is that the federal reserve act referred to, in no respect amended this provision of the national bank law, and that the above section remains as vital and effective today, as it was before the passage of the federal reserve act. It has already been determined by the Supreme Court of the United States, as well as the courts of this State, that this provision of the federal law permits the taxation of shares in national banks, even though the capital stock of such national banks is invested in United States bonds or other non-taxable securities. The proposition is that the State may value for taxation, shares of stock in the national bank at their actual value without regard to the fact that part of, or the whole of the capital of the corporation may be invested in non-taxable State and federal securities. Harrison vs. Vines, 46 Texas, 15; Adair vs. Robinson, 6 T. C. A., 275; Brown vs. First National Bank, 175 S. W. 1126; Home Savings Bank vs. Des Moines, 205 U. S., 516; Palmer vs. McMahon, 133 U. S., 666; Van Allen vs. The Assessors, 3 Wall. (U. S.), 581; People vs. The Commissioners, 4 Wall. (U. S.), 244. See also, the notes on page 158, 5 Federal Statutes, Annotated. In the case of Brown vs. First National Bank, which is the latest expression of our courts upon this question, complaint was made that the trial court had erred in giving to the jury a charge in which they were told that in determining the value of shares in the national bank for purposes of taxation, that they should deduct the value of all United States bonds owned by the bank. The Court of Civil Appeals held that this was error, saying:

"The objection to this charge is that it 'instructs the jury to deduct the value of all United States bonds owned by the banks in determining the value of bank stock for taxation.' This objection is well taken. While it is well settled that United States bonds cannot be taxed, it is also well settled that stockholders of banks cannot have deducted, in determining the value of bank stock for taxation, the value of such bonds owned by the bank. Adair vs. Robinson, 6 Texas Civ. App., 275, 25 S. W., 734; Van Allen vs. Assessors, 3 Wall., 573; 18 L. Ed., 229; Home Savings Bank vs. Des Moines, 205 U. S., 516; 27 Sup. Ct., 571; 51 L. Ed., 901. In the case last cited the Supreme Court of the United States, speaking through Mr. Justice Moody, said:

" 'Although the States may not in any form levy a tax upon United States securities, they may tax, as the property of their owners, the shares of banks and other corporations whose assets consist in whole or in part of such securities, and in valuing the shares for the purpose of taxation it is not necessary to deduct the value of the national securities held by the corporation whose shares are taxed.'

"Following this statement of the court is an elaborate discussion of the question, with a citation of many authorities, and it seems that anything we might add thereto would be superflous." (175 S. W., 1126-7.)

In the case of Palmer vs. McMahon, supra, the Supreme Court of the United States, among other things, said:

"We have decided that so much of the capital of National and State banks as is invested in United States securities cannot be subject to State taxation (People vs. Commissioners of Taxes for New York, 2 Black., 620; Bank Tax Case, 2 Wall., 200), but that shares of bank stock may be taxed in the hands of their individual owners at their actual instead of their par value (People vs. Commissioners of Taxes, etc., 94 U. S., 415; Hepburn vs. School Directors, 23 Wall., 480), without regard to the fact that part or the whole of the capital of the corporation might be so invested. * * *" 133 U. S., 666.

In the case of Home Saving Bank vs. Des Moines, cited above, the Supreme Court of the United States, among other things, said relative to this question, the following:

"Although the States may not in any form levy a tax upon United States securities, they may tax, as the property of their owners, the shares of banks and other corporations whose assets consist in whole or in part of such securities, and in valuing the shares for the purposes of taxation it is not necessary to deduct the value of the national securities held by the corporation whose shares are taxed. The right to tax the shares of national banks arises by congressional authority, but the right to tax shares of State banks exists independently of any such authority, for the State requires no leave to tax the holdings in its own corporations. The right to such taxation rests upon the theory that shares in corporations are property entirely distinct and independent from the property of the corporation. The tax on individual in respect to his shares in a corporation is not regarded as a tax upon the corporation itself. This distinction, now setled beyond dispute, was mentioned in McCulloch vs. Maryland, 4 Wheat., 316, where, in the opinion of Chief Justice Marshall, declaring a tax upon the circulation of a branch bank of the United States beyond the power of the State of Maryland, it was said that the opinion did not extend 'to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other properties of the same description throughout the State.' The distinction appears, however, to have been first made the basis of a decision in Van Allen vs. the Assessors, 3 Wall., 573. The National Bank Act, as amended in 1864 (Rev. Stat., Sec. 5219), permitted the States to include in the valuation of personal property for taxation the shares of national banks 'held by any person or body corpo-

rate' under certain conditions not necessary here to be stated. Acting under the authority of this law, the State of New York assessed the shares of Van Allen in the First National Bank of Albany. At that time all the capital of the bank was invested in United States securities, and it was asserted that a tax upon the individual in respect of the shares he held in the bank was, unless the holdings in the United States securities were deducted, a tax upon the securities themselves. But a majority of the court held otherwise, saying, by Mr. Justice Nelson: 'The tax on the shares is not a tax on the capital of the bank. The corporation is the legal owner of all the property of the bank, real and personal; and within the powers conferred upon it by the charter, and for the purposes for which it was created can deal with the corporate property as absolutely as a private individual can deal with his own. * * * The interest of the shareholder entitles him to participate in the net profits earned by the bank in the employment of its capital, during the existence of its charter, in proportion to the number of his shares; and upon its dissolution or termination to his proportion of the property that may remain of the corporation after the payment of its debts. This is a distinct independent interest or property, held by the shareholder like any other property that may belong to him. Now, it is this interest which the act of Congress has left subject to taxation by the States, under the limitations prescribed.'

"In an opinion, in which Justices Wayne and Swayne joined, Chief Justice Chase dissented from the judgment upon the ground that taxation of the shareholders of a corporation in respect of their shares was an actual though indirect tax on the property of the corporation itself. But the distinction between a tax upon the shareholders and one on the corporate property, although established over dissent, has come to be inextricably mingled with all taxing systems and cannot be disregarded without bringing them into confusion which would be little short of chaos.

"The Van Allen case has setled the law that a tax upon the owners of shares of stock in corporations in respect of that stock is not a tax upon United States securities which the corporations own. Accordingly, such taxes have been sustained by this court, whether levied upon the shares of national banks by virtue of the congressional permission or upon shares of State corporations by virtue of the power inherent in the State to tax the shares of such corporations." 905 U. S., 516.

It is not necessary to quote from additional authorities. The proposition is the established law. In other words, it is definitely settled that a tax upon the owners of shares of stock in respect of that stock, is not a tax upon the United States securities which the corporations own. In the light of these authorities, we have reached the conclusion that a tax on the shares of stock in national banks is not a tax upon the capital stock, surplus or income of a federal reserve bank, even though the national bank does own shares of stock in the federal reserve bank, and which shares are within themselves non-taxable securities. We therefore accordingly advise you that in determining the valuation of shares of stock in national banks, the capital of these companies invested in the stock of federal reserve companies should be considered and treated as any other portion of the capital of national banks for purposes of taxation, and should not be eliminated from the assets of such national banks, when it comes to a question of taxation.

Yours very truly,

C. M. CURETON,

First Assistant Attorney General.

BANKS AND BANKING—DEPOSITORS GUARANTY FUND—INSOLVENCY.

Revised Statutes, Articles 445, 486 and 551.

1. A draft, check or bill of exchange drawn by the San Antonio bank prior to the time it was taken charge of by the Commissioner, against a deposit of funds in another bank, is not a deposit within the meaning of the depositors' guaranty fund law of this State and is not protected by that fund.

2. It is immaterial whether the bank against which such check, draft or bill of exchange is drawn is located in this State or in some other State; the rule is the same.

3. The fact that the draft, bill of exchange or check was paid for by a depositor's check upon the San Antonio bank does not render the depositors' guaranty fund liable for the payment thereof; but the liability of the guaranty fund ceased before the depositor drew his deposit and bought the draft with it.

4. The issuance of such a check, draft or bill of exchange, prior to his acceptance by the bank against which it was drawn does not operate as an assignment of any part of the fund against which it is drawn, and that upon the failure of the San Antonio bank after it had issued drafts of this character before their acceptance by the banks against which they may have been drawn the title to the funds of the San Antonio bank in the banks against which the funds were drawn passed to the Commissioner of Insurance and Banking, and the holders of these drafts, checks or bills of exchange in the absence of any special circumstances entitling them to priority are merely general creditors of the bank and must share the loss with other general creditors; and are not entitled to payment out of the depositors' guaranty fund nor to any preference, lien or right of payment out of either the general assets of the bank or out of the funds of the San Antonio bank in the hands of its correspondent banks, against which said drafts, checks or exchange may have been drawn.

5. Cashier's checks issued by the San Antonio bank are not bank deposits and are not entitled to payment out of the depositors' guaranty fund, but the holders thereof are merely common creditors of the insolvent bank.

6. A depositor has the right to set off his deposit against any debts owing by him to the insolvent bank and in the instance of the San Antonio bank depositors who were indebted to it for money borrowed upon promissory notes have the right to set off their debts against their notes.

7. The holders of certified checks on the San Antonio bank are not depositors within the meaning of the depositors' guaranty fund law of this State and are not protected by the depositors' guaranty fund.

8. The mere fact that a deposit is evidenced by a certificate of deposit does not make it any less a deposit; in other words, the holders of certificates of deposit are depositors, and where the deposit is non-interest-bearing and unsecured it is protected by the depositors' guaranty fund, although it may be evidenced by a certificate of deposit, instead of a pass book or deposit slip.

9. With reference to items collected by the San Antonio bank this opinion holds:

(a) Where the course of dealing of the forwarding bank with the San Antonio bank shows affirmatively that the San Antonio bank was to act merely as the agent of the forwarding bank in making collections and that there was no intention that the relationship of debtor and creditor should arise then the moneys collected under these circumstances by the San Antonio bank and which it did not remit, but which passed into its vaults, are still the property of the forwarding bank, although in the possession of the Commissioner, and the Commissioner has the right to pay these moneys to the forwarding bank in full.

(b) The same rule obtains where the forwarding bank has sent special instructions to the San Antonio bank the effect of which is to make the

San Antonio bank its agent only to collect and remit, without authority to appropriate the funds and give the forwarding bank credit therefor.

(c) On the other hand, where no course of dealing between the two banks is disclosed by the facts, or where the instructions were for collection merely, with no instructions as to remittances, then the relationship of debtor and creditor only arises.

Where the San Antonio bank has collected the paper sent it and failed to remit the same, then the forwarding bank would be merely a common creditor, to be paid as other common creditors are paid, and this would be so even though the San Antonio bank had before it was closed attempted to remit the sum collected by exchange, which, however, at the time of closing the bank had not been presented for acceptance or payment by the correspondent of the San Antonio bank.

(d) If, however, the proceeds of collections made by the San Antonio bank were placed on deposit to the credit of the forwarding bank in such manner as to show that the forwarding bank was and became a depositor with a non-interest-bearing and unsecured deposit, then, of course, such a deposit, like any other of that class, would be payable out of the depositors' guaranty fund for the very reason that it is a non-interest-bearing and unsecured deposit.

(e) But unless the proceeds of collections of the class named in subdivision (d) of this syllabus became in fact non-interest-bearing and unsecured deposits, duly made and entered as such, then such proceeds would not be protected by the depositors' guaranty fund.

April 24, 1916.

Hon. John S. Patterson, Commissioner Insurance and Banking, Capitol.

DEAR SIR: In your communication of April 13th, you request the advice of the Attorney General on certain questions arising in the liquidation of the West Texas Bank and Trust Company of San Antonio, which is now in the hands of your Department.

The questions will be stated and answered in the order of their presentation in your letter:

First. Your first inquiry is as follows:

"Is a draft or bill of exchange drawn by the West Texas Bank and Trust Company against a deposit of funds in a correspondent bank in New York a deposit within the meaning of the law, and is it guaranteed by the guaranty fund?"

We beg to answer you and state that such a draft is not a deposit in the meaning of the laws of this State and it is not guaranteed by the depositors' guaranty fund of this State. Our reasons for this conclusion will now be stated: A general deposit in a bank is so much money to the depositor's credit; in legal effect it is a debt to depositor from the bank payable on demand to his order.

Flemings vs. the State, 139 S. W., 600.
2nd Michie on Banks and Banking, 887.

An ordinary bank deposit is where a voluntary credit is taken with the bank and for which no bank note, bill or other similar evidence of debt is given, and for which there exists a right to draw unconditionally.

Catlin vs. Savings Bank, 7th Conn., 487.

A deposit in law, as well as in fact, is the placing or leaving with a banker a sum of money for safe keeping if the agreement between the parties is that the identical coin or currency shall be paid aside or returned it is a special deposit, but if the agreement is that the money shall be returned not in the specific coin or currency deposited by it in an equal sum, it is a general deposit. But in either case the money is deposited for safe keeping as a primary purpose.

Warren vs. Nix, 135 S. W., 896.
State vs. McFetridge, 20th L. R. A., 223.

"Draft" and "bill of exchange" are ordinarily synonymous and it is unnecessary to attempt any distinction in order to answer the present question.

United States vs. Greene, 136 Fed., 618 (648).

Bill of exchange is a written order or request by one person for the payment of a specific sum of money, to a third person.

Vaughn vs. Farmers and Merchants National Bank, 126 S. W., 690 (691).

It may also be said that a check is an inland bill of exchange.

State vs. Fraley, 42 L. R. A. (N. S.), 500.

A check is defined by the authorities in this State as "a check is a draft or order upon a bank or banking house purporting to be drawn on a deposit of funds for the payment at all events of a certain sum of money to a certain person named therein, or to his order, or to bearer, and payable on demand."

Fidelity and Deposit Co. vs. National Bank of Commerce, 48 Texas Civ. App., 301.

Considering these definitions of deposit and of draft, bill of exchange and check, it is at once apparent that the word "deposit" defines an entirely different thing to that comprehended by the terms of "draft," "bill of exchange" or "check" and that the act of making or receiving a deposit is a very different thing to the act of making or receiving a draft, check or bill of exchange. When money is deposited in a bank it is ordinarily payable on demand and the liability created is a direct liability of the bank to the depositor. When a bill of exchange, draft or check is drawn by a bank in favor of a customer, it is ordinarily drawn on another banking institution, which upon acceptance, becomes primarily liable to the purchaser of the draft, check or bill of exchange and the liability of the drawer is secondary and arises only when the draft, check or bill of exchange is not accepted by the party or bank upon whom drawn. The liability of the drawer in such instance is fixed by statute (Revised Statutes, Article 581), or the holder of the bill of exchange may fix the liability of the drawer as provided for in Revised Statutes, Article 579. How-

ever, the matter is too plain for discussion, that a draft or bill of exchange drawn by the West Texas Bank and Trust Co., against a deposit of funds in a correspondent bank in New York, is not a deposit within the meaning of the depositor's guaranty fund law in this State and is not protected by that fund.

Second. Your second question is as follows:

"Would it make any difference in your answer to the above question if the draft had been drawn by the West Texas Bank and Trust Company upon another bank located in the State of Texas?"

We answer this question in the negative and say, that it would make no difference upon what bank or where located; that in all events the draft, bill of exchange or check, is not a deposit under the laws of this State.

Third. Your third question is as follows:

"A depositor in the West Texas Bank and Trust Company purchased therefrom New York exchange for the sum of $500 a few days before the bank closed its doors, and paid the bank therefor with his own check against a deposit of funds in the bank, which check was charged to his account and canceled. The New York draft was not paid before the bank closed, and when presented to the drawee bank, payment was refused. Does the fact that this draft was paid for by the depositor's check upon the West Texas Bank and Trust Company render it liable for payment out of the guaranty fund, or did the liability of the guaranty fund to this depositor upon his balance of $500 cease when his check was charged to his account and canceled by the West Texas Bank and Trust Company?"

In reply to this question, we beg to advise you, that the fact that the draft was paid for by the depositor's check upon the West Texas Bank and Trust Co., does not render the depositors' guaranty fund liable for the payment upon the failure of the bank; but the liability of a guaranty fund ceased when the depositor withdrew his deposit and bought the draft with it. In other words, when the depositor bought the draft by checking against his deposit account, he ceased to be a depositor, for the reason that he no longer had money in the bank subject to be drawn out by him on demand; in lieu thereof, however, he had the bank's check or draft on some bank in New York payable on demand by the New York bank, or payable at the expiration of a specified time by the New York bank, when accepted by that bank. The primary liability would be the liability of the New York bank when it accepted the draft or check and the liability of the West Texas Bank and Trust Co., could only arise upon a refusal of the draft or check. Upon a refusal of the draft or check, the liability of the West Texas Bank and Trust Co., is fixed by statute as being a liability on the check or draft issued by it being dishonored by the New York bank, but this would not be sufficient to reinstate the depositor's account, but only to give him a cause of action, against the West Texas Bank and Trust Company, as a common creditor.

Of course, if the depositor was induced to accept a draft on New York by the West Texas Bank by some fraudulent act on the part of the latter, by reason of which fraud the depositor was induced to accept in lieu of his deposit a draft on New York, then the entire

transaction would be tainted with fraud by the perpetration of which the West Texas Bank and Trust Company would not be permitted to profit; and equity doing that which ought to be done, would reinstate the depositor's account to its original status as a deposit account. But your inquiry does not involve any question of fraud and it is unnecessary for us to discuss that question.

We may say, also, that the issuance of the draft on New York prior to its acceptance by the New York bank does not operate as an assignment of any part of the fund against which it is drawn; and that upon the failure of the West Texas Bank, after it had issued drafts of this character, and before their acceptance by the banks against which they may have been drawn, the title to the funds of the West Texas Bank in the New York banks passed to you as Commissioner of Insurance and Banking, and the holders of these drafts in the absence of any special circumstances entitling them to priority, are merely general creditors of the bank and must share the loss of the bank with other general creditors. It is elementary in this State, that an unaccepted draft or check is not an assignment of any part of the fund against which it is drawn.

Life Insurance Co. vs. Patterson, 80 S. W., 1058.
Writ of Error Refused, 98 Texas, 626.
House vs. Kountze, 43 S. W., 561.
Writ of error refused, 96 Texas, 541.
Games vs. Thompson, 79 S. W., 1083.
McBride vs. American Railway and Light Co., 127 S. W., 229.
Clark vs. Toronto Bank, 2nd L. R. A (N. S.), 83.
Lackledge Bank vs. Schuler, 120 U. S., 511.
Grammel vs. Carmer, 54 Am. Reps., 363.
Harrison vs. Wright, 100 Ind., 515.
Jewett vs. Yardley, 81 Fed., 920.

In the case of Clark vs. Toronto Bank, supra, Clark, a resident of Iowa, sold some cattle in Kansas through an agent who accepted in payment a check drawn on the Bank of Toronto in the county of the sale. The agent presented the check at the bank and upon his request was given in payment a draft payable to the order of his principal drawn by the Toronto bank upon a Kansas City bank against a fund then on deposit to its credit,—shortly afterwards the Toronto bank was closed by the bank commissioner and in due course of time a receiver was appointed,—the draft was presented for payment to the Kansas City bank, which having notice of the failure of the issuing bank, refused for that reason to pay it. Clark, the holder of the draft, brought action against the receiver asserting the right to recover from him the full amount of the draft irrespective of the amount the failed bank might be able to pay its general creditors. He was denied relief and prosecuted an appeal therefrom in which denial, however, the Supreme Court of Kansas concurred. The action as defined by the Supreme Court, was the ordinary one of a purchase of a draft for convenience in the remitting of money. The court held, as suggested, that the issuance of the draft did not transfer to Clark any funds in the Kansas City Bank, and therefore the holder of the draft could not obtain any preference in relation to such funds in the ad-

ministration of the assets of the failed bank which issued it. Concerning the matter, the court, among other things, said:

"Nevertheless, the great weight of authority is to the effect that an unaccepted check or draft in the usual form does not, in the absence of exceptional circumstances, amount to an assignment in law or equity of any part of the drawer's deposit. See 5 Cyc. Law & Proc., 536; 2 Am. & Eng. Enc. Law, 2d ed., p. 1064; 4 Century Dig. Cols., 1247-1250. This rule has frequently been enforced in controversies between the holder of a draft and the assignee or receiver of its insolvent drawer. Fourth Street Nat. Bank vs. Yardley, 165 U. S., 634; 41 L. ed., 755; 17 Sup. Ct. Rep., 439; Covert vs. Rhodes, 48 Ohio St., 66; 27 N. E., 94, and cases cited; Atty. Gen. vs. Continental L. Ins. Co., 71 N. Y., 325; 27 Am. Rep., 55; Akin vs. Jones, 93 Tenn., 353; 25 L. R. A., 523; 42 Am. St. Rep., 921; 27 S. W., 669; Harrison vs. Wright. 100 Ind., 515; 50 Am. Rep., 805; Guthrie Nat. Bank vs. Gill. 6 Okla. 560, 54 Pac., 434; Reviere vs. Chambliss, 120 Ga., 714; 48 S. E., 122. It has the sanction of so great a preponderance of the authorities that we have no hesitation in accepting it. A uniformity of decision in different jurisdictions upon matters of commercial usage is especially to be desired, and the question here presented being of that character affords strong argument in favor of a solution that shall be in harmony with the generally prevailing doctrine." 2nd L. R. A. (N. S.), 87.

In the case of Grammel vs. Carmer, 54, Am. Rep., 363, the facts were as follows:

On May 15, 1883, Angell was doing business as a private banker in Lansing, Michigan, his New York correspondent was the Chase National Bank. On the day named, Grammel, the plaintiff in the case, purchased of Angell the private banker, two small drafts on the Chase National Bank and paid for them. They were ordinary bankers drafts, payable at sight. Two days thereafter, Angell failed and made a general assignment to the benefit of his creditors. Two days subsequent to the assignment, these drafts were presented to the Chase National Bank and payment was refused upon the ground that the Chase National had been notified by the assignee to pay no drafts. The New York bank had moneys belonging to Angell at the date of the drafts, more than sufficient for the payment, and continued to have until their presentation. The New York bank, however, as suggested, declined to pay the drafts and paid the balance due Angell over to his receiver or assignee. On this state of facts, Grammel claimed to be entitled to the payment of his drafts in full from the amount paid over to the receiver by the Chase National Bank. The receiver contested this claim and insisted that Grammel must receive only a proportional part, the same as other creditors. The Supreme Court of Michigan held that Grammel would be entitled to pay only prorata with the creditors and that the draft was not an assignment of any part of the funds which Angell had in the Chase National Bank. The opinion was written by Judge Cooley when he was Chief Justice of the Supreme Court of Michigan. Among other things, Judge Cooley said:

"It is said a draft should be considered an assignment of so much money in the drawee's hands. If this were so, then drafts would operate as assignments in the order in which they were given, and should be paid in that order. But to so hold would be to introduce a new and vicious

rule into the law of commercial paper. The well-understood rule—and we may add the convenient rule—now is that the drawee, when a draft is presented, should pay it if he has funds, and is not concerned with the question whether drafts of prior issue do not remain unpaid. But if a draft operates as an assignment, then either he would pay at his peril, or the payee receiving payment would be liable over to the holder of a prior unpaid draft for money received to his use. This rule would greatly and injuriously affect the value of this class of paper for commercial purposes." 54 Am. Rep., 366.

The authorities cited lay down the general rule which obtains in this State as well as other States, and which is neither without weight or authorities as shown in the text books.

1st Michie on Banks and Banking, 26.

You are advised, therefore, that a depositor who has purchased New York exchange and paid therefor out of his deposit at the time ceased to be a depositor and beame the owner of the New York exchange, that upon the failure of the San Antonio bank the assets in the New York bank against which the exchange was drawn, passed into the hands of the Commissioner of Insurance and Banking; and that the owner of the unaccepted exchange becomes only a common creditor of the bank and is not entitled to be paid out of the depositors guaranty fund, nor does he have any preference, lien or right of payment out of either the general assets of the bank or out of the funds of the San Antonio bank in the hands of the New York bank, and against which the draft was drawn.

This rule is subject only to the qualification suggested above in the case of fraud.

Fourth. Your fourth question is as follows:

"There are a number of persons holding cashier's checks issued by the West Texas Bank and Trust Company, and who are claiming that such should be paid out of the guaranty fund. Is a cashier's check, which is the bank's own obligation to pay an amount of money to a person or order upon demand, a deposit within the meaning of the law, and should it be paid by the guaranty fund?"

A cashier's check is the bank's own check which is issued by the cashier at the request of a depositor against whose account it is charged. Such a check is strictly commercial paper and is merely a bill of exchange drawn by a bank on itself and accepted in advance by the act of its issuance. It is not subject to countermand by the payee after endorsement as is an ordinary check by the endorser and the relations of the parties to such an instrument are analogous to those of the parties to a negotiable note payable on demand.

2nd Michie on Banks and Banking, 1168-1105.
Penn Bank vs. Frankish, 91st Penn., 339.
Drinkall vs. Movius State Bank, 57 L. R. A., 341.
95 American State Rep., 663.
Henry vs. Allen, 36 L. R. A., 658.

In the case of Drinkall vs. Movious State Bank cited above, the court defines the status of a cashier's check, as follows:

"A cashier's check is an entirely different nature. It is a bill of exchange drawn by the bank on itself and is accepted by the act of issuance; and, of course, the right of countermand as applied to ordinary checks does not exist as to it.
2nd Randolph on Commercial Paper, Sec. 588.
1st Daniels on Negotiable Instruments, 444.
1st Parson on Notes and Bills, 288.
The bank in such case is the debtor, and its obligation to pay the cashier's checks is like that of the maker of any other negotiable instrument payable on demand. As applied to the case under consideration, the rights and obligations of the plaintiff and defendant as to the cashier's check in question, were those of a payee and maker of a negotiable promissory note, payable on demand."

In view of the definition of a bank deposit and the legal relations which it creates between the depositor and the bank comprehending the respective rights of each relative thereto as compared to the legal relation created by a cashier's check, we are of the opinion that a cashier's check is not a bank deposit and that such checks are not entitled to payment out of the depositors' guaranty fund created by the laws of this State.

Fifth. Your fifth question is as follows:

"A large number of depositors of the West Texas Bank and Trust Company having funds standing to their credit upon the books thereof at the time it closed its doors, were indebted to the bank for money borrowed upon promissory notes. These depositors are claiming the right to offset their deposit against their notes. Have they such right?"

In reply to this question we beg to advise you, that a depositor has the right to set off his deposit against any debts owing by him to the insolvent bank.

3rd Ruling Case Law, p. 647, Sec. 276.
2nd Michie on Banks and Banking, p. 1059, Sec. 135; p. 1061, Sec. 135 (3); p. 1062, Sec. 135 (3bb).
Colton, Receiver, vs. Dover, etc., Building and Loan Assn., 388.
Scott vs. Armstrong, 146 U. S., 499.
Davis vs. Industrial Mfg. Co., 23 L. R. A., 322.

The rule referred to is variously stated in Michie on Banks and Banking, as follows:

"Where a depositor is indebted to a bank he can set off his deposit against a debt due from him to the bank in the same right or capacity, on the principal that mutual claims which are between creditor and debtor may be set off against each other." 2nd Michie on Banks and Banking, p. 1059.

"A depositor indebted to an insolvent bank may, when sued to recover the money due from the bank, set off deposits due from the bank at the time of its insolvency." 2nd Michie on Banks and Banking, p. 1061.

"Where the assets of the bank are assigned for the benefit of the creditors only the direct and ascertained indebtedness of the depositors can be properly set off against their ascertained claims for shares and the money to be distributed." Id., p. 1061.

"A depositor is entitled to set off his deposit against his indebtedness

to an insolvent bank where both claims are due. * * * Where the depositor's liability has not matured, he may, nevertheless, set off his deposit against such liability, as, for instance, notes payable to the bank, but not then due." Id., p. 1062.

"A correspondent bank indebted to an insolvent bank on open account is entitled to apply the amount thereof on an indebtedness due to the correspondent bank from the insolvent bank." 1st Michie, p. 501, Sec. 73.

In the case of Colton, Receiver vs. The Building and Loan Association cited above, the bank held a promissory note of the building and loan association for a thousand dollars and then later had a deposit with the bank, approximately three hundred and seventy-five dollars, and in the adjustment of these respective claims the building and loan association sought to setoff its deposit against its note and tendered only the balance due after deducting the amount of the deposit from the note. The question for consideration is whether or not the building and loan association was entitled to this setoff. In passing on the question, the court held:

"(a) No demand for a deposit in an insolvent bank is necessary as a condition of making a setoff of the deposit, if otherwise allowable, against a note of the depositor which is assets in the hands of a receiver of the bank.

"(b) The fact that a note held by a receiver of an insolvent bank as assets did not mature until after his appointment does not prevent setting off against it a deposit which the maker had in the bank.

"(c) That a receiver of an insolvent bank does not occupy the position of a bona fide purchaser for value of a note included in the assets, which matures after his appointment, so as to prevent setting off against it a deposit in the bank."

Concerning the matter the court, among other things said:

"It would sometimes work great injustice to customers of banks if they should be required to pay in full their indebtedness to the bank, and only receive a dividend on their deposits. A customer might from time to time make deposits in bank with a view to meet his note held by it, and it would manifestly be a great hardship if, under these circumstances, he could not apply his deposit towards the payment of the note, because the bank had failed and a receiver had been appointed. A court of equity would certainly not permit such unjust results in the distribution of funds before it if such facts were proved; and although in this case there is no evidence that the deposit was made with special reference to the maturity of the note, yet, as it became due a few days after the receiver was appointed, it might well be inferred that the appellee had that fact in view in making the deposits. If the bank had not failed, it could have applied the deposit of the appellee towards the payment of the note (3 Am. & Eng. Enc. Law, 2nd ed., pp. 828 and 835; Miller vs. Farmers & M. Bank, 30 Md., 392), and it would be unreasonable to permit a receiver of an insolvent bank to collect the note in full without allowing the setoff, particularly as the bank had a lien on the deposits. 'The bank holds a lien upon the deposits in its hands to secure the repayment of the depositor's indebtedness, and may enforce that lien as the debts mature, by applying the debtor's deposits upon them, thus setting the two off against each other.' 3 Am. & Eng. Enc. Law, 2nd ed., p. 835; Miller vs. Farmers & M. Bank, 30 Md., 392. If the appellee was not financially responsible, and had attempted to assign its claim for deposits against the bank to a third person, could there have been any question about the right of the receiver to insist upon the application of the deposit to the payment of the note? Clearly not, as the assignee of the claim would have taken it subject to equities existing between the appellee and the bank, and a court of equity

would have protected the bank or its representatives, the receivers. Marshall vs. Cooper, 43 Md., 46. It would seem clear, then, that at least in equity the deposit should be allowed as a counterclaim or set off."

In the case of Davis, Receiver, vs. Industrial Mfg. Co., 23 L. R. A., 322, supra, the rule is stated as follows:

"Having thus stated what we here mean by debtors and creditors of the bank, we declare that, in our opinion, equity and justice require that the receiver, when he comes to make a settlement with the one who is a creditor of the bank, shall deduct from his credit all those sums for which he is debtor; and when he settles with a debtor to the bank, he shall allow him credit for all sums for which he is a creditor of the bank."

In the case of Scott vs. Armstrong, cited above, the argument was made against the right of the debtor to have his deposit setoff against his indebtedness at the bank; that the Federal Banking Laws prohibiting preferences by implication, forbid the setoff; that the statute provided that the assets should be rateably distributed among the creditors and that no preference could be given or shown in contemplation of insolvency. In this respect the federal statute is similar to our own. (Revised Statutes, Article 551; Collier's Banking Laws, 165.)

Concerning this matter the Supreme Court of the United States in the case referred to said:

"We do not regard this position as tenable. Undoubtedly, any disposition by a national bank, being insolvent or in contemplation of insolvency, of its choses in action, securities or other assets, made to prevent their application to the payment of its circulating notes, or to prefer one creditor to another, is forbidden; but liens, equities or rights arising by express agreement, or implied from the nature of the dealings between the parties, or by operation of law, prior to insolvency and not in contemplation thereof, are not invalidated. The provisions of the act are not directed against all liens, securities, pledges or equities, whereby one creditor may obtain a greater payment than another, but against those given or arising after or in contemplation of insolvency. Where a setoff is otherwise valid, it is not perceived how its allowance can be considered a preference, and it is clear that it is only the balance, if any, after the setoff is deducted which can justly be held to form part of the assets of the insolvent. The requirement as to ratable dividends is to make them from what belongs to the bank, and that which at the time of the insolvency belongs of right to the debtor does not belong to the bank."

"There is nothing new in this view of ratable distribution. As pointed out by counsel, the bankruptcy act of 13 Eliz., c. 7, contained no provision in any way directing a setoff or the striking of a balance, and by its second section, commissioners in bankruptcy were to seize and appraise the lands, goods, money and chattels of the bankrupt, to sell the lands and chattels, 'or otherwise to order the same for true satisfaction and payment of the said creditors a portion, rate and rate alike, according to the quantity of his or their debts.' 4 Statutes of the Realm, Part 1, 539. Yet in the earliest reported decision upon setoff, it was allowed under this statute. Anonymous, 1 Mod., 215; Curson vs. African Co., 1 Vern., 121; Chapman vs. Derby, 2 Vern., 117.

"The succeeding statutes were but in recognition, in bankruptcy and otherwise, of the practice in chancery in the settlement of estates, and it may be said that in the distribution of the assets of insolvents under voluntary or statutory trusts for creditors the setoff of debts due has been universally conceded. The equity of equality among creditors is either found inapplicable to such setoffs or yields to their superior equity.

"We are dealing in this case with an equitable setoff, but if on June 20 the note had matured and each party had a cause of action capable of enforcement by suit at once upon the argument for the receiver, the legal setoff would be destroyed just as effectually as it is contended the equitable setoff is. We cannot believe Congress intended such a result, or to destroy by implication any right vested at the time of the suspension of a national bank.

"The state of case where the claim sought to be offset is acquired after the act of insolvency is far otherwise, for the rights of the parties become fixed as of that time, and to sustain such a transfer would defeat the object of these provisions. The transaction must necessarily be held to have been entered into with the intention to produce its natural result, the preventing of the application of the insolvent's assets in the manner prescribed. Venango National Bank vs. Taylor, 56 Penn. St., 14; Colt vs. Brown, 12 Gray, 233.

"Our conclusion is that this setoff should have been allowed, and this has heretofore been so held in well-considered cases. Snyder's Sons Co. vs. Armstrong, 37 Fed. Rep., 18; Yardley vs. Clothier, 49 Fed. Rep., 337; Armstrong vs. Warner, 21 Weekly Law Bull., 136; 27 Weekly Law Bull., 100."

The general right of set off is annotated in Vol. 23, L. R. A., page 313, and we copy therefrom additional authorities as follows:

"The general rule is that a receiver takes subject to the right of setoff. Van Wagoner vs. Paterson Gas Light Co., 23 N. J. L., 283; Darby vs. Freedman's Sav. & T. Co., 3 McArth., 349; Re Middle Dist. Bank, 9 Cow., 413; 1 Paige, 585; 2 L. ed., 762; 19 Am. Dec., 452; Farmers Deposit Nat. Bank vs. Penn Bank, 2 L. R. A., 273; 123 Pa., 283; Smith vs. Felton, 43 N. Y., 419; Smith vs. Fox, 48 N. Y., 674; Miller vs. Franklin Bank, 1 Paige, 444; 2 L. ed., 708; Mel vs. Holbrook, 4 Edw. Ch., 539; 6 L. ed., 967; Hughitt vs. Hayes, 136 N. Y., 163; Jones vs. Robinson, 26 Barb., 310; Re New Amsterdam Sav. Bank vs. Tartter, 54 How. Pr., 385; Re Van Allen, 37 Barb., 225; Armstrong vs. Warner, 17 L. R. A., 466; 49 Ohio St., 376; Cook vs. Cole, 55 Iowa, 70.

"Under the New Jersey statute, the receiver is bound to allow all just setoffs. State Bank at New Brunswick vs. Receivers Bank of New Brunswick, 3 N. J. Eq., 266.

"If there has been an appropriation of deposits to a debt prior to the insolvency, the receiver is bound by it. Chase vs. Petroleum Bank, 66 Pa., 169.

"The receiver of an insurance company which becomes insolvent holding an unpaid premium note and owing an unadjusted loss, takes the note subject to a setoff for the loss. Osgood vs. DeGroot, 36 N. Y., 348; Holbrook vs. American F. Ins. Co., 6 Paige, 220; 3 L. ed., 962.

"But the receiver is not bound to allow in setoff debts or credits which are not so mutual as to have been proper subjects of set-off against the insolvent. Gray vs. Rollo, 85 U. S.; 18 Wall., 629; 21 L. ed., 927.

"A right of setoff perfect and available against a bank is not affected by the bank's becoming insolvent and the appointment of a receiver. Hade vs. McVay, 31 Ohio St., 231.

"The assignee of a bank takes subject to setoff. Terry vs. Wooding, 2 Patton & H. (Va.), 178.

"A receiver of a bank takes to a right of a depositor to set off deposits against the amounts which become due on his note to the bank, after it passes into the receiver's hands. Platt vs. Bentley (N. Y.), 11 A. M. L. Reg. N. S., 171.

"A debtor of a bank whose charter is repealed has an equitable right to set off every demand which he had against the bank at the time, but not demands subsequently purchased. McLaren vs. Pennington, 1 Paige, 102; 2 L. ed., 577.

"The receivers of a bank, appointed under Mass. Stat., 1851, Chap. 127,

in a suit upon a debt contracted before the institution of insolvency proceedings, must allow as a setoff debts held by the debtor prior to the commencement of such proceedings. Colt vs. Brown, 12 Gray, 233.

"Under the Kentucky act for winding up insolvent banks, the commissioners must allow setoffs. Finnoll vs. Nesbit, 16 B. Mon., 351."

There are of course some limitations on the rule stated, the principle of which is, that a debt of an insolvent bank procured by assignment or otherwise after the appointment of a receiver or insolvency, or after the same has been taken over by you, can not be set off. To sustain such a transfer, it would defeat the very object of our statute.

Scott vs. Armstrong, 136 U. S., 511.

Other authorities sustaining the same proposition are cited in the notes on page 314, 23 L. R. A. as follows:

"The general rule is that a receiver takes subject to the right of setoff. Van Wagoner vs. Paterson Gas Light Co., 23 N. J. L., 283; Darby vs. Freedman's Sav. & T. Co., 3 McArth., 349; Re Middle Dist. Bank, 9 Cow., 413; 1 Paige, 585; 2 L. ed., 762; 19 Am. Dec., 452; Farmers Deposit Nat. Bank vs. Penn Bank, 2 L. R. A., 273; 123 Pa., 283; Smith vs. Felton, 45 N. Y., 419; Smith vs. Fox, 48 N. Y., 764; Miller vs. Franklin Bank, 1 Paige, 444; 2 L. ed., 708; Mel vs. Holbrook, 4 Edw. Ch., 539, was settled prior to any statute that if a distributee owed the estate anything, the debts were to be offset. The fact that it might be uncertain until the debts were paid whether there would be any distributive share did not prevent the offset.

"An assignee for creditors does not take subject to setoffs procured after the assignment. Johnson vs. Bloodgood, 1 Johns. Cas., 51; 1 Am Dec., 93; Spencer vs. Barber, 5 Hill., 568.

"Debts procured after the appointment of a receiver cannot be used in setoff. Clarke vs. Hawkins, 5 R. I., 219.

"A claim procured by a debtor to an insolvent bank after its insolvency is not available as a setoff. Benango Nat. Bank vs. Taylor, 56 Pa., 14.

"Bills of a bank obtained after it becomes insolvent cannot be used as a setoff in a suit by the receiver. Diven vs. Phelps, 34 Bard., 224.

"Bills of an insolvent bank acquired after the insolvency are not available as setoffs. Exchange Bank of Virginia vs. Knox, 19 Gratt., 739; Saunders vs. White, 20 Gratt., 327.

"Notes of a bank purchased after it is insolvent and after notice of the assignment of its claim against defendant, are not a proper setoff against a claim in the hands of an assignee. Philips vs. Bank of Lewistown, 18 Pa., 394.

"In a suit by a receiver of a bank. one seeking to set off a certificate of deposit has the burden of showing that he obtained it before the proceedings of insolvency were begun. Smith vs. Mosby, 9 Heisk., 501; Lanier vs. Gayoso Sav. Inst. of Memphis, id., 506."

It is likewise the law, that the general rule that set offs must be mutual and due in the same right, has no application where the party against whom the set off is claimed can be shown to be insolvent; and that a court of equity will set off mutual demands independent of any statute.

Hamilton vs. Van Hook, 26 Texas, 302.
Duncan vs. Magette, 25 Texas, 245.
Boust vs. Cessna, 24 S. W., 962.

We are of the opinion, therefore, that in the instance of the West Texas Bank and Trust Company that depositors who are indebted to the bank for money borrowed upon promissory notes, have the right to offset their debt against their notes.

1st Morse on Banks and Banking, 4 ed., Sec. 338, p. 617.

Sixth. Another question as propounded by you in your several communications, is whether or not the holder of a certified check is a depositor within the protective features of the depositors' guaranty fund law of this State. In the letter of Mr. Roberts of April 19th, it is stated:

"Certified checks are created by both the drawer and, sometimes, the payee, or holder, the certification of same by bank merely meaning that the drawer of the check has been charged with the amount, and the proceeds placed to the credit of the account of certified checks."

This statement of the actual practice seems to be the general state of facts which the courts have passed upon in determining the purpose and effect of certified checks. After a check has been certified, the bank is bound as a direct and original promisor to the payee; it and he are parties to a contract upon which he has his right of action directly against the bank without any regard whatsoever to its relations with the depositor or the state of the depositor's account, either at the time of, or, at any time after the acceptance.

1st Morse on Banks and Banking, Sec. 414, p. 725.
2nd Michie on Banks and Banking, p. 1180-1181.
Deposits Co. vs. National Bank, 48 Texas Civ. App., 305.
People vs. St. Nicholas Bank, 84 N. Y., 164.

Mr. Morse in his work quotes from an opinion of the Supreme Court of the United States, which describes the purpose and effect of certifying a check, which seems appropriate in this discussion and we quote therefrom as follows:

"All the authorities, both English and American, hold that a check may be accepted, though acceptance is not usual. By the law merchant of this country, the certificate of the bank that a check is good is equivalent to acceptance. It implies that the check is drawn upon sufficient funds in the bank of the drawee, that they have been set apart for its satisfaction, and that they shall be so applied whenever the check is presented for payment. It is an undertaking that the check is good then, and shall continue good, and this agreement is *as binding on the bank as its notes of circulation, a certificate of deposit payable to the order of the depositor, or any other obligation it can assume.*

"The object of certifying a check, as regards both parties, is to enable the holder to use it as money. The transferee takes it with the same readiness and sense of security that he would take the notes of the bank. It is available also to him for all the purposes of money. Thus it continues to perform its important functions until in the course of business it goes back to the bank for redemption, and is extinguished by payment. It cannot be doubted that the certifying bank intended these consequences, and it is liable accordingly. To hold otherwise would render these important securities only a snare and a delusion. A bank incurs no greater risk in certifying a check than in giving a certificate of deposit. In well-regulated

banks the practice is at once to charge the check to the account of the drawer, to credit it in a certified check account, and when the check is paid, to debit that account with the amount. Nothing can be simpler or safer than this process.

"The practice of certifying checks has grown out of the business needs of the country. They enable the holder to keep or convey the amount specified with safety. They enable persons not well acquainted to deal promptly with each other, and they avoid the delay and risks of receiving, counting, and passing from hand to hand large sums of money."

1st Morse, p. 726.

Judge Swayne who wrote the opinion of the Supreme Court quoted above, defines as a custom of well regulated banks with reference to certified checks the identical custom followed by the West Texas Bank and Trust Company, towit: That when a check was certified by the bank, it was immediately charged to the deposit account of the drawer and the check credited in the certified check account and when the check is paid, to debit that account with the amount thereof.

Mr. Morse in his work remarks that it has been said that the effect of the legal acceptance by the bank is to place the holder of the check in the position of a depositor, but as shown by him this conclusion is an incorrect one. His statement relative to the matter, is as follows:

"It has been said that the effect of a legal acceptance by the bank is to place the holder of the check in the position of a depositor; that in fact and in law he himself becomes thereby a depositor of the bank. It was not, of course, intended by this remark to signify that he stands precisely on the footing of one who has opened an ordinary deposit account with the bank. For example, he cannot draw checks against the amount standing to his credit. But, like an ordinary depositor, he is a simple contract creditor of the bank, which is bound to pay on demand to him or to his order the amount of the debt. However certain it may be considered that in his character simply as a check holder he has no right to sue the bank for the amount of his check, at least there is no doubt of his right of action after acceptance. The acceptance is in itself a new and perfect contract between himself and the bank, superseding the previous peculiar rights of all parties. It has been said that its technical operation is to transfer to the holder the drawer's right of action against the bank. It is an inference from the language used in this case that the transaction effects a literal transferring, in the sense of depriving the former possessor of his rights; that is to say, that the right of action given to the holder is not co-existent with another right of action still remaining in the drawer, but is identical with it, and is by the act of the bank passed over from the one to the other.

"The drawer can no longer sue, though the bank should finally refuse to pay the check. For he has originally only a right to demand that the check shall be duly paid on presentment, and his action lies for the damage resulting to him or to his credit from not having his debt duly discharged in the manner he has led his creditor to suppose would be sufficient. But if the holder waives his right to immediate payment, by expressly asking for or even by accepting the offer of a certification by the bank, it follows that since his act acquits the debt due him from the drawer, the drawer can thereafter have no cause or basis whatsoever on which to sue. The matter is voluntarily taken out of his hands by the other parties, who make their arrangements to suit their own convenience. Even if the drawer has suggested or requested the arrangement, the assent of the payee and holder must be regarded as at his own sole risk. He is not obliged to take the bank's promise in place of the drawer's indebtedness. The promise of the bank on the drawer's account, accepted as satisfactory by the creditor,

discharges the debtor, and at the same time deprives him of all further concern or possible right of action in the premises."
1st Morse, 727-728.

To illustrate the rule laid down by Mr. Morse, we will assume that John Doe went to the West Texas Bank and Trust Company during its life time, and having a deposit there, drew his check in favor of Richard Roe for one thousand dollars; when Roe presented the check at the counters of the West Texas Bank and Trust Company, he had the right to receive the money on the same, it being payable on demand; if he demanded the money on check and the bank declined to pay it, he would immediately have a right or cause of action against John Doe, the drawer of the same; but he does not choose to demand the money on the check, neither does he deposit it with the bank and open up a deposit account with the bank; on the contrary, he presents it to the proper officer and the officer in the usual manner accepts or certifies the check and Roe goes away with the check in his possession; upon the certification of the check the bank officer properly charges the account of John Doe with the amount thereof and credits the certified check account which is a private bookkeeping account of the bank itself, with the amount of the check; thus far the deposit account of John Doe has been lessened one thousand dollars, by the charge against it of the certified check; the obligation of the bank to Doe has been lessened that amount, but it still has outstanding an obligation of one thousand dollars to the holder of this certified check, whoever the holder may be. However, when the check was certified no deposit account was opened with Richard Roe, or with anyone else; the deposits of the bank were not in the least increased. On the contrary, the deposit account of the bank had decreased to the amount of the certified check. Mr. Roe, the owner of the certified check, was in no sense of the word a depositor in the bank, he merely held the bank's obligation to pay this certified check or as Mr. Morse, says, relative to those authorities which have stated that the holder of a certified check becomes a depositor:

"It was not, of course, intended by this remark to signify that it stands precisely on the footing of one who has opened an ordinary deposit account with the bank; for example, he cannot draw checks against the amount standing to his credit. But, like an ordinary depositor, he is a simple contract creditor to the bank."

The similarity of the legal status of one who holds a certified check to that of a depositor, is summed up in the last sentence quoted; he is a simple contract creditor to the bank. A depositor under our view of the matter, is one who makes a deposit and has a deposit account opened up to his credit. In the case of a certified check, the holder of the check does not make a deposit but simply holds the obligation of the bank to pay and accept the certified check which some one else has drawn on a deposit in the bank. Mr. Morse says, with reference to a certified check:

"There is no difference between the liability created by a certified check and by a note of the bank payable on demand. Each is intended to circu-

late as money. The object is to enable the holder to use the check as money. By certifying the bank meant to give the check a currency and value that would not otherwise belong to it, and this additional value can only be given by holding the certificate to be an unconditional promise of payment."

1st Morse on Banks and Banking, p. 733.

We are convinced that the purpose of the depositors' guaranty fund law, is to protect depositors and not those whose obligations arise in some other manner. The first section of the deposit guaranty law, declares that all State banks shall provide in one of the two methods defined, and "protect its depositors in the manner hereinafter prescribed, either by availing itself of the depositors' guaranty fund herein provided for, or by the depositors bond security system hereinafter set forth."

R. S., Art. 445.
Collier's Banking Laws, Sec. 79.

Throughout the whole guaranty act the claim or obligations to be protected, are constantly referred to as deposit obligations and the fund raised under the guaranty fund plan is designated in the law, depositors' guaranty fund. The word "depositor" in the act is evidently used in its general and ordinary signification which has been followed by the courts of the country. A depositor is one who delivers to or leaves, with the bank money subject to his order either upon time deposit or subject to check.

State vs. Corning State Savings Bank, 113 N. W., 500.

Depositors are defined in the case cited as follows:

"All the claims of persons whose claims are based upon the balance due them, as depositors, in their respective general checking deposit accounts with said bank. All persons whose claims are based upon sums due them as depositors, upon certificates of deposit issued by said bank, as such, for deposits of money in the usual course of business."

We are of the opinion, therefore, that the holders of certified checks are not depositors within the meaning of the guaranty fund law of this State and are not protected by the depositors guaranty fund.

Seventh. Certificates of deposit.

We desire also to advise you that the mere fact that a deposit is evidenced by a certificate of deposit does not make it any the less a deposit; in other words, the holders of certificates of deposit are depositors, and where the deposit is non-interest bearing and unsecured it is protected by the depositors guaranty fund, although it may be evidenced by a certificate of deposit, instead of a pass book or deposit slip.

Wilkes & Co. vs. Arthur, 74 S. E., 366.

Eighth. Collections.

The general rule is that if a bank to which paper is entrusted for

collection makes collection before it makes an assignment or is taken over by the Department, even though it be in fact solvent at the time of collection, simply becomes an ordinary contract debtor of the owner of the paper, and it can impress no character of trust upon the proceeds.

The rule is stated by the Texas courts as follows:

"The collection of checks, bills of exchange, drafts, notes and accounts is within the ordinary business of banks, in behalf of their customers. As a general rule, after the collection is made the bank becomes a simple contract debtor for the amount, less any commissions which may be charged. If the party for whom the collection was made was a regular depositor, the sum would be placed to his credit upon his regular deposit account, unless some peculiar usage or special instruction should demand a different course of dealing. If the party has no deposit account, the bank simply owes him the amount on demand." Morse on Banks and Banking, p. 322; Planters Bank vs. Union Bank, 16 Wall., 501; in re Bank of Madison, 9 Nat. Bank, Reg. 184; Duncan vs. Magette, 25 Texas, 248.

However, the rule is also one of practically universal application.

2nd Michie on Banks and Banking, p. 1421, and cases cited in Note 49.

This general rule, with the qualifications pointed out by the authorities, is discussed in a general but rather comprehensive manner in Michie on Banks and Banking, cited above, and we quote therefrom, as follows:

"Where a collection made before assignment.—The decisions in a few jurisdictions apparently hold that money collected by a bank for another on notes or drafts is held in trust for the owner, who is a preferred creditor in case the bank goes into liquidation, and such money does not become a part of the assets of the bank or pass to the receiver of such bank. The general rule, however, would seem to be well established that if a bank to which paper is entrusted for collection makes collection before it makes an assignment, even though it be in fact insolvent, such bank simply becomes an ordinary contract debtor of the owner of the paper, and it cannot impress any trust character upon the proceeds. Though there may be special facts which will take the case out of the general rule, and create a trust in the funds collected, the rule undoubtedly is that, unless there is some agreement on course of dealing whereby the funds are to be held separate and the identical proceeds remitted, the owner of the paper stands upon no higher ground than the other creditors of the bank in a case where the bank collects the paper prior to making a general assignment. The collecting bank, generally speaking, in the absence of any agreement to the contrary, becomes the owner of the money collected, and is under an obligation to pay or remit, not the very money received, but an amount of equal value; and, while a collecting bank, it is true, receives the paper or claim for collection as the agent of the holder, still, when the money is collected and the proper credit given to such holder or owner, then, as a general rule, the relation of debtor and creditor is created between the parties and the relation of trustee and cestui que trust does not arise. Any agreement or course of dealing upon the part of a collecting bank, whereby it appears that the latter was at liberty to use the money collected as its own, or substitute its own obligation instead thereof, must necessarily destroy all features or elements of a trust in any particular case. One who sends a note and mortgage to a bank for collection with the direction to the bank to "forward draft to me for balance," less its fee, is not entitled to a preferential claim on the funds of the bank upon its failure a few days after the collection is made, although it is hopelessly insolvent, and its

officers knew the fact, when it received the note for collection. The bank becomes a debtor, not a trustee, in such case. A customer for whom a bank makes a collection and remits the fund collected by check upon another bank, which is not paid on presentation, becomes a mere creditor of the collecting bank for the amount of such fund, and entitled to share only pro tanto with other general creditors under the general assignment subsequently made by the bank, unless, by special contract, express or implied, the bank was constituted the trustee of such fund for its customer and the fund remained susceptible of identification. Collection by a bank to which a note is sent for collection, in a check upon itself, is equivalent to collection in cash, even if the bank failed on the same day, and the owner of the paper becomes a mere creditor of the collecting bank. It is a well settled doctrine in a number of States in this country that where a special agency is created, and the bank has no authority to hold and credit proceeds of paper, but is bound by the agreement to remit them immediately to its correspondent, the relation of trustee and beneficiary is created, and the money collected, or its equivalent, can be recovered from the assignee of the insolvent bank. Where a person who sends paper to a bank for collection has no general deposit in the bank, it has been held that the money collected upon such paper cannot become even a special deposit, and the relation of debtor and creditor between the bank and the one transmitting the note for collection and return was never contemplated. The character of such transaction and the nature of the services required place the collecting bank and the owner of the paper in the attitude of principal and agent, and the money collected does not belong to the bank, nor does its retention create, in a legal sense, the relation of debtor and creditor. The relation of bailor and bailee continues after the mingling of the funds, and, as the money never became assets of the bank, the general creditors are entitled to no share in its distribution. Where a check is sent to a bank for collection and such bank, after collection, retains and uses the proceeds of the check in its general business, it will be deemed to be an agent and trustee of the owner of the check, and the money so wrongfully retained and used to be a trust fund, which the owner may follow and reclaim, if it can be identified, and the rights of no innocent third parties have intervened.

"Necessity that proceeds be shown to have passed into assets of bank.— It would seem to be the general rule that to entitle a claimant to a priority over other creditors of an insolvent bank on the ground that he is a cestui que trust, and not a creditor, as to the proceeds of papers sent by him to the bank for collection, and collected by the bank, but not remitted, he must show that such proceeds, in some form, have gone into the assets of the bank; and if he fails to do so, he must share ratably with other creditors in the distribution of the assets."

Michie on Banks and Banking, Vol. 11, pp. 1420-1428.

We deduce from this authority and from many of the cases cited in support of the same which have been read and considered by us that where the manner of dealing between the two banks creates the relation of debtor and creditor when the collection is made by the bank which becomes insolvent that then the forwarding bank is a mere general creditor of the insolvent bank which handled its collections; on the other hand, where the manner of dealing between the forwarding bank and the collecting bank shows that an agency only is created and that the collecting bank has no authority to hold and credit the proceeds of the paper, but is bound by the agreement to remit them immediately to its correspondent then the relation of trustee and beneficiary is created, and the money collected, or its equivalent, can be recovered by the insolvent bank, and that in so far as the proceeds of the collection have actually passed into the assets

of the insolvent bank that the forwarding bank has a prior claim on such assets, to the extent of the collection made.

The case of Hunt vs. Townsend, 26 S. W., 310, illustrates the last proposition. The action was against Hunt as receiver of the Texas National Bank of San Antonio, and the allegations were in substance that Townsend had sent to the bank for collection and remittance a draft drawn on the San Antonio Brewing Association, in the sum of $223, which was by the bank collected and not remitted, but retained in its vault. That the same had come into the possession of the receiver of the bank and the action was to require the receiver to pay the amount thereof over to the plaintiff, Townsend, and others who had forwarded the draft to the insolvent bank. The defense of the receiver was that the plaintiff had sent the draft for collection merely, and without other instructions and that the relation between the plaintiff and the bank with reference to the collection was that of creditor and debtor, and therefore plaintiff was entitled to no greater rights than those of ordinary creditors.

It was held by the Court of Civil Appeals that the plaintiff was entitled to be paid the entire proceeds of the draft out of the assets in the receiver's hands, on the theory that the bank was the plaintiff's trustee and not his debtor.

Concerning the matter the court in part said:

"The sole question presented to us is whether the facts show the relation to have been that of creditor and debtor respecting this fund, or that of trustee and beneficiary, as the district court declared it to be. The instruction which accompanied the draft when received by the bank was as follows: 'Inclosed herein please find our draft for collection, which we have made on the San Antonio Brewing Association of your city. Kindly give this your immediate attention, and oblige, yours truly, Townsend, Hostetter & Co.' This testimony discloses, in addition to this, that this bank had previously made similar collections for the plaintiff, and that in no instance was the collection carried to plaintiff's credit, as depositor, by the bank, but the entries were confined to a collection register, and remittances made promptly without further communications. It appears that the proceeds of this collection were not remitted, and became mingled with the general funds of the bank, and that more than the amount thereof was on hand of such funds when the property of the bank passed into the hands of the receiver. It is clear to our minds, from the discussion of this subject in Bank vs. Weems, 69 Texas. 489, 6 S. W., 802, that the facts will admit of no other conclusion than the one reached by the district judge. The course of dealing between these parties, and the acts of the bank in reference to such transactions, necessarily involved an understanding that the collection should be made and remitted without unreasonable delay. There is nothing from which could be implied an authority for the bank to hold the money and treat it as a deposit. The amount of this collection was on hand of the general funds of the bank, when the receiver took possession, and plaintiff is entitled to receive the same, instead of a pro rata with creditors."
26 S. W., 310.

Other cases illustrating the same principle will be briefly referred to as follows:

Where a mortgage is sent to a bank for collection, with direction to remit. the relation of creditor and debtor is not established between the sender and the bank, where the latter fails to remit, and there-

fore, on the insolvency of the bank, a trust will be imposed on its assets in favor of the sender, as against general creditors of the bank. Wallace vs. Stone, 107 Mich., 190, 65 N. W., 113.

Where a bank collected a certificate of deposit left with it for collection, and subsequently, without paying over the proceeds made an assignment for the benefit of creditors, the assigned property is impressed with a trust in favor of the owner of the collection, entitling him, in equity, to a priority over general creditors. First National Bank vs. Sanford, 62 Mo. App., 394.

In the course of dealings, between a New York and Texas bank, the New York bank was in the habit of discounting notes for the latter, and of forwarding the same, on maturity, to the latter, "for collection and returns," with the understanding that the proceeds of such discount notes should be preserved by the Texas bank as the property of the New York bank, and should be returned to it as such. Such being the habit of business between the banks, the Texas bank received notes from its New York bank correspondent "for collection and return of proceeds." Held, the Texas bank became as to such collection, when made by it, a trustee for the New York bank. After their collection was made the relation of creditor and debtor as between the banks did not exist. The Texas bank had no authority to credit on its books the amount collected, but was legally bound to remit the money to its correspondent. The trust fund collected was credited by the Texas bank to its New York correspondent and mingled with other money of the Texas bank; thereafter, and before an adjustment of accounts, the Texas bank became insolvent, and was placed in the hands of a receiver. Held, that the trust attached to whatever money remained, when the receiver was appointed, in the bank vaults. Continental National Bank vs. Weems, 69 Texas, 489, 6 S. W., 802; 5 Am. St. Rep., 85, citing City Bank vs. Weiss, 331 S. W., 299.

Plaintiff deposited a check with defendant bank for collection as plaintiff's agent. Defendant forwarded it to the F. bank for collection, with the instruction, "remit New York exchange." The F. bank remitted the proceeds of the collection by its own draft on a New York bank, which the New York bank, at direction of the receiver of the F. bank, who in the meantime had been appointed, refused to pay. Held, that the F. bank was liable as trustee for the money collected, there being no authorization by defendant that its relation should be changed to that of debtor so that defendant was not liable. Judgment (C. C.) 132 Fed., 187. affirmed. Holder vs. Western German Bank, 68 C. C. A., 554, 136 Fed., 90.

A bank forwarding a draft for a customer for collection by another bank did not, by giving directions that the proceeds be remitted in New York exchange, change the relation between the two banks from that of principal and agent to one of creditor and debtor, with respect to the money collected, so as to render it liable to the owner of the draft for the proceeds on the failure of the receiving bank after making the collection, but before remittance, on the theory that it had by such direction deprived him of the right to recover the proceeds from the receiver of the insolvent bank, as a trust fund. (C. C.),

Holder vs. Western German Bank, 132 Fed., 187, judgment affirmed in 68 C. C. A., 554, 136 Fed., 90.

Defendant bank collected a ncte forwarded to it for collection and remittance and sent its draft in payment therefor. A few days later defendant assigned for the benefit of creditors, and the proceeds of the note passed into the hands of the assignee. Plaintiff presented the draft for payment, which was refused. Held, that the proceeds of the note were impressed with a trust in plaintiff's favor. Mad. River National Bank vs. Melborn, 8 O. C. C., 191, 4 O. C. D., 401.

Where sight drafts attached to bills of lading were delivered to a bank for collection and remission of proceeds, the relation of trustee and cestui que trust was established between the bank and the owner of such proceeds, which might be followed, on the bank's insolvency, into the hands of its receiver, if they could be traced. American Can Co. vs. Williams, 178 Fed., 420, 101 C. C. A., 634, affirming judgment in 187 Fed., 816.

On the other hand it must be borne in mind that unless the facts disclose either specific orders and directions or a course of dealing between the remitting bank and the insolvent bank which is sufficient to show affirmatively that the San Antonio bank was merely to act as an agent of the remitting bank sending the collections, and then the bank forwarding the collections to the San Antonio bank upon the insolvency of the latter is merely a common creditor.

The rule is stated as follows:

"When the funds are collected and in the collecting bank, whether or not these funds become a general deposit in the bank depends upon the course of dealing between the parties, if there has been one, or if there has been no course of dealing and no express contract except to collect has been made, the funds after collection belong to the bank, and the relation of debtor and creditor exists between the bank and its depositor."

Peters Shoe Co. vs. Murray, 71 S. W., 978, citing Zane on Banks and Banking, Sec. 133.

Bank vs. Weems, 69 Texas, 489.

Bank vs. Armstrong, 148 U. S., 50.

Bank vs. Hubble, 7 L. R. A., 852.

In the Peters case cited supra the facts are epitomized in the syllabus as follows:

"Plaintiff drew a draft on its debtor, and sent it to defendant's assignor, a banker, for collection. The drawee paid it with a check on the bank of such banker where the drawer had sufficient funds to meet it, and the amount was charged to the account of such drawer, and a draft issued on another bank, and mailed to plaintiff. Before such draft reached plaintiff, the banker assigned to defendant, and the bank on which the draft was drawn refused to pay it. When the bank failed, money more than sufficient to pay such draft passed to the assignee. *There was no evidence of the course of dealing between plaintiff and defendant's assignor, or of any instructions given by plaintiff.*"

On this state of facts the court held that the relation between plaintiff and defendant's assignor was merely that of debtor and creditor and plaintiff had no claim for the money received by defendant or assignee as a trust fund. In other words, the transaction was merely sending the draft to the bank for collection, without any former

course of dealing or special instructions to take it out of the general rule which would raise the relation of debtor and creditor between the bank and the owner of the draft, instead of the relation of trustee and cestui que trust.

Our conclusion, from a study of the authorities may be stated as follows:

Where the course of dealing of the forwarding bank with the San Antonio bank shows affirmatively that the San Antonio bank was to act merely as the agent of the forwarding bank in making the collection and that there was no intention that the relationship of debtor and creditor should arise between the two banks then that the moneys collected under these circumstances by the San Antonio bank and which passed into its vaults are still the property of the forwarding bank, although in your possession, and that you therefore have the right to pay these moneys to the forwarding bank in full. The same rule obtains where the forwarding bank sends special instructions to the San Antonio bank, the effect of which is to make the San Antonio bank its agent only to *collect and remit* without any authority to appropriate the funds and give the forwarding bank credit therefor; on the other hand, where no course of dealing between the two banks is disclosed by the facts or where the instructions were for collection merely, with no instructions as to remittances, then the relationship of debtor and creditor only would arise where the San Antonio bank has collected the paper sent to it and failed to remit the same and the forwarding bank would be merely a common creditor to be paid as other common creditors are paid; and this would be so, even though the San Antonio bank had, before it was closed, attempted to remit the sum collected by exchange, which, however, at the time of the closing of the bank had not been presented for acceptance or payment by the correspondent of the San Antonio bank.

If, however, the proceeds of collections made by the San Antonio bank were placed on deposit to the credit of the forwarding bank, in such manner as to show that the forwarding bank was and became a depositor with a non-interest bearing and unsecured deposit, then, of course, such deposit, like any other of that class, would be payable out of the depositors guaranty fund, for the very good reason that it is a non-interest bearing and unsecured deposit.

But, unless the proceeds of collection became in fact non-interest bearing and unsecured deposits, duly made and entered as such, then such proceeds would not be protected by the depositors guaranty fund.

Yours very truly,

C. M. CURETON,

First Assistant Attorney General.

DIGEST OF OPINIONS RELATIVE TO BANKING LAWS.

BANKS AND BANKING—DEPOSITORS GUARANTY FUND—INSOLVENCY AND LIQUIDATION.

By C. M. Cureton, First Assistant Attorney General.

1. The Banking Board should return its proportionate share of the guaranty fund to the bank when the board of directors have, in accordance with Revised Statutes, Article 561, taken the necessary steps to put such bank into a state of voluntary dissolution, or liquidation, and it is unnecessary that they should have actually filed a certificate of dissolution, it being only necessary that it be made to appear that the bank is in the process of dissolution, and that all its depositors have been paid.

2. The guaranty fund does not become the property of the State, nor of the Banking Board, but though deposited with the State Treasurer for a certain purpose, it nevertheless remains the property of the bank, to be used only in the payment of guaranty deposits. When the depositors have been paid, and the bank ceases to be a going concern, the trust impressed upon the guaranty fund ceases to exist and the fund is returnable to the bank for distribution among its shareholders and creditors.

3. Nor is the rule in substance different when a bank is liquidated by the commissioner. When the point has been reached in the liquidation, that all the depositors in the bank entitled to protection in the guaranty fund have been paid, so that the bank's money placed in the guaranty fund remains only as assets for general creditors, the banking board should return such of the bank's funds as it may be entitled to withdraw from the guaranty fund to the liquidating agent or officer having charge of the bank for distribution among its other assets.

4. Statutes cited or construed:

R. S., Arts., 449, 470, 490 and 561.
(46 Op. Atty. Gen., 1.)

BANKS AND BANKING—DEPOSITORS GUARANTY FUND.

By C. M. Cureton, First Assistant Attorney General.

1. Certificates of deposit are deposits within the meaning of the depositors' guaranty fund law requiring a percentage of the deposits of a State bank to be placed in such fund.

2. A State bank and trust company is not entitled to have its interest in the guaranty fund returned to it until it ceases to have depositors of any sort, and amends its charter in such a way that it will no longer be authorized to receive deposits.

3. Statutes cited or construed:

R. S., Art. 448.

Authorities cited:

2nd Michie on Banks and Banking, Sec. 152.
First National Bank of Farmersville vs. Greenville National Bank, 84 Texas, 40.
(47 Op. Atty. Gen., 231.)

BANKS AND BANKING—JUDGMENTS—DEPOSITORS GUARANTY FUND.

By C. M. Cureton, First Assistant Attorney General.

1. A judgment of the district court in which one bank recovers title to all the assets of a liquidating bank carries with it title to the latter's interest in the depositors' guaranty fund.
2. Under such circumstances, when proof is made to the Banking Board that all depositors of the liquidating bank have been paid, it should pay to the plaintiff bank such pro rata share of the guaranty fund.
3. Such proof need not be in any particular form, nor by any particular party, but must be sufficient to show that the depositors have been paid.
4. Statutes cited or construed:

R. S., Art. 490.
(46 Op. Atty. Gen., 10.)

BANKING—SAVINGS DEPOSITS.

By C. M. Cureton, First Assistant Attorney General.

1. No incorporated bank or trust company, chartered under the laws of this State, shall loan its money to any individual, corporation, company or firm, directly or indirectly in excess of 25 per cent of the capital stock.
2. Only a bank incorporated under the laws of the State of Texas, or chartered and operated under the laws of the United States, or of some other State of the Union, may become the reserve agent of a bank chartered under the laws of the State of Texas.
3. Article 443 (Revised Statutes of 1911) makes it unlawful for any director of a State bank that maintains a savings department to use or consent to the use of any such funds, otherwise than for the payment of lawful demands of savings depositors and in the making of such investments as are prescribed in this chapter, or in the payment of dividends, etc.
4. The Commissioner of Insurance and Banking has no authority to approve any institution of any character as reserve agent for the savings department of a State bank, and that the funds of the savings department cannot be carried in anything except cash and the statu-

tory securities, and may not be placed on deposit with any other banking institution, whether incorporated or unincorporated.

5. Statutes cited or construed:

R. S., Arts. 406, 432, 435 and 443; Sec. 3, Chap. 3, Gen. Laws, 3d Called Session, 33d Leg.

Authorities cited:

Roberts vs. Kidansky, 97 N. Y. Supp., 913.
The Kate Herron, 6 Sawyer (U. S.), 111.
Home Insurance Co. vs. Railway Co., 52 N. E., 863.
McElfresh vs. Kirkendall, 36 Ia., 226.
State ex rel. Breeden, Atty. Gen., vs. Sheets, 72 Pac., 335.
(46 Op. Atty. Gen., 42.)

OPINIONS CONSTRUING ELECTION LAWS

ELECTIONS—PRIMARY ELECTIONS—CANDIDATES' EXPENSES—CANDIDATES FOR UNITED STATES SENATOR—SECOND PRIMARY—CONSTRUCTION OF LAW.

March 24, 1916.

Hon. Paul Waples, Chairman State Democratic Executive Committee, Fort Worth, Texas.

DEAR SIR: The Department is in receipt of your letter of the 23rd instant, in which you submit the following question:

"Referring to the decision of the Supreme Court wherein the Presidential Primary Act of the Thirty-third Legislature was held to be unconstitutional, the question now arises whether or not this does not render it impossible to hold a run-off primary for senatorial candidates, since the law makes no provision for the expense of holding a primary?"

Replying, I beg to say that, in my opinion, the decision of the Supreme Court referred to does not render it impossible for the Democratic Party of this State to hold a second primary for nominations of candidates to the United States Senate.

Section 3, Chapter 39, Acts of 1913, Called Session, provides:

"Every law regulating or in any manner governing elections or the holding of primaries in this State shall be held to apply to each and every election or nomination of a candidate for a United States Senator so long as they are not in conflict with the Constitution of the United States or any law or statute enacted by the Congress of the United States regulating the election of United States Senators or the provisions of this act.

"The returns from any election held for United States Senator shall be made, the result ascertained and declared, a certificate of election issued, as is provided for the election of Representatives in Congress by Chapter 7, Title 49, Revised Civil Statutes of 1911."

Section 10, of Chapter 39, provides, in part, as follows:

"* * * If at the first primary election no candidate receives a majority of the vote polled by his party for all the candidates for United States Senator before said party, the State executive committee or State chairman thereof shall call a second primary election for the purpose of determining the choice of the party as between the two candidates receiving the largest number of votes at the first primary election. Said second primary shall be held on the fourth Saturday in August, immediately after the first primary is held. At such second primary only the two candidates in each party receiving the highest votes shall be voted upon." See also Section 38.

It will be observed that no second primary would be necessary where any candidate for United States Senator "receives a majority of the vote polled by his party for all the candidates."

The law further provides that the primary *elections* held for the purpose of nominating candidates for the United States Senate are to be "conducted by the duly appointed and constituted election offi-

cers of the several polling places and voting precincts throughout the State *who shall be paid as provided by law for holding elections in other cases.*''

A ''primary election,'' as that term is used in our election law, is an election held by an organized political party for the purpose of naming candidates of such party to be voted on at a general or a special election (Article 3085). The legal primary election day is on the fourth Saturday in July, 1916, and ''any political party may hold a second primary election on the *second Saturday in August* to nominate candidates for county and precinct offices, where a majority vote is required'' by the executive committee of that county. (Article 3086; see also, Articles 3091 and 3092.)

The cost of holding primary elections in this State is provided for at the meeting of the county executive committees of the various counties, at which meeting such committee shall carefully estimate the cost of printing the official ballots, and other necessary expenses of holding ''such *primaries* in such counties, and shall apportion such cost among the various candidates for nomination for *county and precinct offices* * * * and offices to be filled by the voters of such county, or precinct only (*candidates for State offices excepted.*)'' (Article 3094.) And the name of no candidate can be properly placed on the official ballot for a county or precinct office unless he has paid to the county executive committee the amount of estimated expenses of holding the primary, but a candidate for a State or district office, unless the district is composed of only one county, is not required to pay any part of such cost, ''unless the county executive committee shall so direct,'' but not more than one dollar apiece can be assessed against any candidate for a State or district office, unless, as stated, the district is composed of only one county. (Article 3104.)

Where the county executive committee decides that the nomination of county officers shall be by a majority vote, it may call as many primary elections as may be necessary to make such nominations. (Articles 3086, 3091 and 3092.) But the cost for holding ''such primaries'' can only be assessed at the meeting of the county executive committee on the third Monday in June preceding the general primary.

The law providing for the nominations of candidates for the United States Senate makes no direct provision as to how the expenses of holding the second primary are to be met. Section 7, Chapter 39. Acts of 1913, provides that when the law relative to holding such primaries is silent the election officers in securing supplies, conducting the elections, and making returns, shall in *every particular* be governed by the method provided by law covering primary or *general elections* in this State. This, however, is not susceptible of the construction that such expenses can be paid by the counties.

The Legislature of Texas, in pursuance of an amendment to the United States Constitution, passed a law providing for the election of United States Senators by a direct vote of the people. It was provided in this law that no person shall be declared his party's nominee unless he receives at the first primary a majority of all the votes cast at the first primary election for all candidates for that

party for United States Senator. How is this to be determined? Only by the second primary, where no candidate received a majority at the general primary. But, in the absence of a provision relative to the expense for holding such second primary how can it be held? The State Executive Committe, and county committees of the various counties, do not have authority to make an assessment on the candidates in such second primary. The law emphatically states that no candidate in the second primary shall expend more than $1,000; (Section 28). No method or scheme for payment can be devised other than that set forth in the law. Such expense certainly can not be paid out of the public revenues. Section 34 declares that "at each and every primary held for the nomination of a candidate for United States Senator the election shall be conducted by the duly appointed and constituted election officers * * * throughout the State who shall be paid as provided by law for holding elections in other cases."

A county executive committee can only make one assessment. This must be done at the meeting provided for in Article 3106. At this meeting the executive committee must estimate the expense of holding *all primaries* in that county, and where it is decided to hold a second primary in such county the expense therefor must be paid out of any funds remaining in the hands of the county executive committee after the first primary.

You are, therefore, advised that inasmuch as the Legislature failed to provide a method by which the expense for holding the second primary for nomination to the United States Senate can be paid, and if the county executive committee of the various counties has no funds with which to pay such expenses, then the election officers would be required to perform their duties without charge, and the county executive committee must make the best arrangements it can, under the circumstances, for printing the ballots and procuring all election supplies. This will doubtless work a hardship in many instances, but we must construe the law as it is written and rely upon the election officers and executive committeemen to make the best of the situation.*

Yours truly,

B. F. LOONEY,
Attorney General.

PRIMARY ELECTIONS—COUNTY EXECUTIVE COMMITTEES—CANDIDATES.

May 5, 1916.

Hon. C. E. Florence, County Attorney, Gilmer, Texas.

DEAR SIR: The Attorney General is in receipt of your favor of the 2nd instant, propounding certain questions relative to the authority of the County Democratic Executive Committee.

Replying thereto I beg to say that:

"Any person desiring his name to appear on the official ballot for the

*The conclusion reached in this opinion was upheld by the Supreme Court in Beene vs. Waples, 187 S. W., 191.

general primary as a candidate for the nomination for any office to be filled by the qualified voters of a county * * * shall file with the county chairman * * * not later than the Saturday before the third Monday in June preceding such primary, a written request for his name to be printed on such official ballot. * * *" Art. 3101, R. S. 1911.

The test prescribed by Article 3096 is as follows:

"I am a.........(inserting the name of the political party or organization of which the voter is a member) and pledge myself to support the nominees of this primary."

It is also provided in Article 3093 that the executive committee of any party or any county may prescribe additional qualifications *for voters* in such primary not inconsistent with this title.

After a careful study of our election law we have been unable to find any provision that confers authority on the county executive committee to prescribe a test for candidates for the nomination for any office.

The Legislature in the passage of our election laws sought to prevent a participation in party primaries by those who are not in sympathy with or who are unfriendly to the principles of the party, but it clearly appears to our minds that it reserved to the members of the party the right to vote for any one they desired to serve them in an official capacity. This Department has repeatedly held that if the name of a person for whom one desires to vote did not appear upon the official ballot the voter could write it on the ballot and it would be the duty of the election officers to count such ballot and credit the party whose name appears on the ballot with the vote cast.

You are therefore advised that in the opinion of this Department it would not be within the province of the county executive committee to decline to place a candidate's name on the official ballot because such candidate's party loyalty is in question. If proper application is made the committee should place the name of the candidate on the ballot and the members of the party—the voters themselves—would be the best judges of his fidelity to the party and should make that decision at the polls.

Very respectfully,
W. P. DUMAS,
Chief Clerk to Attorney General.

UNITED STATES SENATOR—VOTERS—ELECTIONS—PRIMARY ELECTIONS EXECUTIVE COMMITTEES—CANDIDATES.

1. A voter in the general primary election can be required to make oath that he is a Democrat, voted the Democratic ticket at the last general election if he voted, and will support the nominees of the party whose ticket he desires to vote.
2. Executive committees have no authority to determine, by test, a candidate's Democracy. If the candidate complies with the election laws, his name must be printed on the ballot.

June 27, 1916.

Hon. James M. Taylor, County Attorney, Corpus Christi, Texas.

DEAR SIR: You propound to this Department, the following ques-

tions: (1) If the Executive Committee of Nueces County should prescribe a test whereby they require a voter to swear before he is permitted to vote in said Primaries, that he voted the Democratic ticket from Governor to constable at the General Election of 1914, that he will vote the Democratic ticket from President to constable in the General Election of 1916, could such test be enforced? (2) Can said executive committee require all candidates or any candidate to subscribe to the same test and take the same oath before they permit his name to be placed upon the Democratic ticket as a candidate for office?

In answering your inquiry it has been necessary to consider and construe the recent act of the Legislature relative to the election of United States Senators by direct vote, and nominating them in the primary elections. This Department has heretofore ruled that under the authority granted in Article 3093, Revised Statutes, the executive committee of any party for any county may prescribe additional qualifications for voters in such primary, not inconsistent with other provisions of the act. Under this authority we have held that the executive committee would have the right to prescribe that only white Democrats could participate in the primary, and could further prescribe that only such Democrats take part in the primary as remained loyal to the Democratic ticket at the last preceding election.

Had no law been enacted on this subject, there is no doubt that the executive committees would have full and complete authority to prescribe additional tests, designating who should have the right to participate in the primary. This power is inherent in every political party, unless it is dislodged and taken from them by some statutory enactment. Political parties have the unquestioned right in a Democratic government to exist; having the right to exist, they have the natural right to prescribe their membership, to safeguard in any manner they see fit the political right of their party to exist. For a misuse or abuse of any power, right or privilege they assume to exercise, they are answerable in a political way to the qualified voters of the county, to whom is delegated the right to settle ultimately every political question. Since, without statutory enactment, political parties could have regulated their own internal affairs, according to their own judgment, selecting their own members, and making their own nominations, we do not believe that the enactment of Article 3093 abridged this right, but on the contrary, we think it emphasized or called attention to the right of the executive committees of the counties to prescribe additional tests, such as in the judgment of the political party, is necessary to preserve its principles and its political integrity.

This brings us now to the further consideration of the effect of the enactment of the senatorial primary act. Being convinced that it was necessary to have a complete primary system regulating the nomination of all state, district, county, and precinct officers, and having already enacted a system providing for the election of other officers except United States Senators and presidential electors, the Legislature completed the task by legislative enactment, providing for the nomination of United States Senators and presidential electors. These

were two separate and distinct acts. The act providing for the nomination of presidential electors was declared by the Supreme Court, in the case of Marrast vs. Waples (184 S. W., 180), to be unconstitutional, while the act providing for the nomination of United States Senators was declared constitutional, in the case of Beene vs. Waples, et al., (187 S. W., 191) decided on the 24th day of June. The court, in the above case, held that the act providing for the nomination of United States Senators completed an election system for party nominations, and was to be construed with all other laws affecting party nominations, just as if it had been written at one and the same time. The language of the court is as follows:

"* * * Because those two statutes deal with the one general subject of party primaries for the making of party nominations, and are, therefore, essentially cognate, and because, obviously, the latter was intended to supplement the former, thereby completing one general scheme of legislation upon a particular subject, and because the latter statute presents strong and conclusive intrinsic evidence of a legislative purpose and intent that in so far as their phraseology will permit, the two statutes are to be treated, construed, applied and enforced as one, we regard it as too plain for argument that, accordingly, said two statutes should be read and construed together. Certainly they are statutes in pari materia, and in their interpretation the settled rules of statutory construction which are applicable in such instances should prevail. Conley vs. Daughters of the Republic, 106 Texas, 80; 156 S. W., 197; 157 S. W., 937. * * *"

The Senatorial Primary Act, in Section 5, provides for the holding of the senatorial primary on the general primary election day. In Section 34 it provides for the same officers holding the same election. Construing the two acts together, according to the rule laid down by the Supreme Court, senatorial candidates are placed on the general primary election ballots; the same officers hold the election for United States Senator as for other State, district, county, and precinct officers; all names are printed on the same ballot; the same pledge is printed on the ballot, and in fact, it is one election for the purpose of nominating United States Senators and all State, district, county, and precinct officers. This brings us face to face with the question as to the force and effect of Section 319 of the Senatorial Primary Act, which section is as follows:

"At each and every primary held for the purpose of nominating a candidate for United States Senator no person not a qualified elector to vote for United States Senator under the Constitution of the United States shall be permitted to vote, and no person shall vote for any candidate for the nomination for United States Senator who does not belong to the same political party with which the voter affiliates, and when any voter attempts to vote for any person as a candidate for the nomination for United States Senator, and is challenged, he shall, before being permitted to vote, make an affidavit that he is a bona fide member of said party and, if he voted in the preceding general election held for the election of State officials, he voted for the nominees of the party whose ticket he desires to vote. Upon making such an affidavit he shall be permitted to vote."

Section 187 of the Election Law is as follows:

"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

the name of the political party or organization of which the voter is a member) and pledge myself to support the nominee 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 can construe Section 187 together with Section 35 of the Senatorial Primary Act, and we find no conflict therein, since the Senatorial Primary Act does not provide for the printing upon the ballot of any test in conflict with that prescribed in Section 187 but in addition thereto, it is provided that the voter *when challenged* shall before being permitted to vote make an affidavit that he is a bona fide member of said party and if he voted in the preceding general election held for the election of State officials he voted for the nominees of the party whose ticket he desires to vote. Upon making such an affidavit he shall be permitted to vote. The Legislature, in the proper exercise of its powers, has a right to safeguard the integrity of political parties by the enactment of legislation along the line of that provided in Section 35, above quoted, the question then arises, does this right to require a person who votes to make an affidavit when challenged apply to other officers than United States Senators? We conclude that it does, and that any person offering to vote at an election at which a United States Senator is to be nominated shall not be permitted to cast his vote in said election for any candidate unless he be required to take the oath prescribed in Section 35, when a proper challenge is made. We are driven to this construction by the duty that is laid upon us, to give to all parts of an act a meaning, if possible, and we are to give to the various provisions of the act such a meaning as will not lead to an absurdity in the operation of the statute. The construction above suggested is the only construction that can be given that will preserve the legislative intent and at the same time not lead to an absurdity. To illustrate: A man offers to vote and is handed a ticket which has printed upon it candidates for the United States Senate and candidates for all State, district, county and precinct offices, and is challenged. It would be absurd to say that this person so offering to vote could vote for a part of the candidates on that ballot and not be permitted to vote for any he desires. In other words, it would appear absurd to hold that he was qualified to vote in the democratic primary for a portion of the candidates only. We do not think that a person so offering to vote and challenged would have the right to avoid taking the oath to support the nominees, and that he has supported the nominees of the party to which he belongs at the last election, if he voted, by simply saying to the election officers: "I will not vote for United States Senator," since he goes in private, under our election system, and makes his ballot, hands it to the election officers to be deposited in the ballot box, and the law makes it a crime for any election officer to see whether or not he carried out his promise that he would not vote for Senator. The law will not be given such a construction as would open up a field of fraud as might be practiced in this way. We can, on the other hand, make Section 35 applicable to the entire democratic ticket without any conflict, and in this way preserve the legislative intent

and give every word and sentence a proper and sensible meaning. Therefore we conclude that this is the proper construction to give to the act. The first part of Section 35 is as follows:

> "At each and every primary held for the purpose of nominating a candidate for United States Senator, no person not a qualified elector to vote for United States Senator under the Constitution of the United States shall be permitted to vote. * * *"

In order to determine who are qualified electors to vote for United States Senator, we must refer to the recent amendment to the Constitution of the United States providing for the election of United States Senators by a direct vote of the people. In this amendment it is provided: "The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislature." We therefore conclude that any person qualified to vote for a member of the State Legislature would be qualified to vote for a United States Senator. The writer mentions this more for the reason that the language appears somewhat ambiguous and necessitates an inspection of the amendment to the Constitution of the United States.

Answering your questions, then, you are advised:

1. That the proper test to be applied to all voters who offer to vote in the primary election will be, if the voter is challenged, that test prescribed in Section 35 of the Senatorial Primary Act discussed above, which shall be embraced in an affidavit that he is a bona fide member of said party, and if he voted in the preceding general election held for the election of State officials, he voted for the nominees of the party whose ticket he desires to vote.

2. We think the executive committee cannot decline to place the name of a candidate on the official ballot, who has complied with the law in getting his name on the ballot, simply because his democracy is in question; that is to say, because he is not a good democrat, because he did not vote for the nominee of the party at the last preceding general election. That which goes to the final test of a candidate's democracy must be determined by the democrats participating in the primary. There is no power given to an executive committee to determine who are democrats with reference to candidates in the primary. The law, for reasons which seem to the writer to be obvious, declines to repose in any committee the ultimate right to pass upon a candidate's democracy. That right is inherent in the sovereign voters of such political party to determine that question. and if a majority of the democrats nominate a man as the democratic nominee he is the nominee of the democratic party, and is entitled to be placed on the general election ticket as their nominee even though he might not meet with the requirements laid down by an executive committee.

Yours very truly,

W. A. KEELING,
Assistant Attorney General.

ELECTIONS—UNITED STATES SENATOR—PERSONAL CAMPAIGN COMMITTEE—CAMPAIGN EXPENSES.

May 29, 1916.

Hon. John G. McKay, Secretary of State, Capitol.

DEAR SIR: In your communiction of the 18th instant you state:

"I am in receipt of a communication from the campaign manager of one of the candidates for United States Senator in which he desires to know the construction placed by this Department upon certain provisions of the law passed by the first called session of the Thirty-third Legislature, providing for the election of United States Senators by direct vote.

"The questions submitted upon which he desires a ruling are as follows:

" 'Section 302 of the law provides that the candidate shall not make any disbursements except for specific reasons. Section 303 provides that the personal campaign committee shall not make any disbursements except for specific reasons. In making reports under these sections, shall the candidate make a report to you and the personal campaign committee make a separate report to you, or shall the expenditures of the candidate be reported in my report?

" 'Paragraph 4 of Section 302 provides that the candidate may make contributions to his party committee; paragraph 5 provides he shall not make any disbursements "for other purposes enumerated by law when such candidate has no personal campaign committee, but not otherwise." The general primary law provides that the party committee in each county may assess the candidate a sum not to exceed $1 to have his name printed on the ticket. Section 303 of this law does not permit a campaign committee making this disbursement. What shall I do? How am I to comply with the letter of the law?

" 'Paragraph 2 of Section 303 provides for necessary clerical assistance, etc., in headquarters. Paragraph 3 provides for the printing of literature, etc. Section 308 provides that "each and every person who shall receive any payment, etc., shall make a sworn statement, showing in detail said payment, by whom made, what services were rendered for same," and provides penalty. Does this mean that employes in headquarters, as provided in Paragraph 2 of Section 303, that all payments made to stationers, printers, etc., as provided in Paragraph 3 of Section 303, shall file a sworn statement with you?'

"Inasmuch as this act has never been passed upon or construed by the appellate courts of this State, and as I am in doubt as to the construction that should be placed upon the provisions of said act, I will thank you if you will furnish me a ruling at your earliest convenience upon the above questions."

We will endeavor to answer your questions in the order in which they are propounded.

1. A candidate for the nomination or election for United States Senator is prohibited from making any disbursements for political purposes, except those enumerated in Section 302, Revised Election Laws; and the party committee or personal campaign committee is prohibited from making any disbursements, except those enumerated in Section 303. In making reports under these two sections, the candidate shall make a separate report showing disbursements made by him, and the personal campaign committee shall make a separate statement of disbursements made by it. The report of disbursements made by the candidate must be separate and apart from all other reports. Section 305 provides, in part, as follows:

"Every candidate for United States Senator * * * shall, on the second

Saturday occurring after such candidate for United States Senator * * * has first made a disbursement or first incurred any obligation, express or implied, to make a disbursement for political purposes, and thereafter on the second Saturday of each calendar month, until all disbursements shall have been accounted for, and also on the Saturday preceding any election or primary, file a financial statement verified upon the oath of such candidate for United States Senator, * * * which statement shall cover all transactions not accounted for and reported upon in statements theretofore filed. * * * On or before the second Saturday after the election, a final statement shall be filed by said candidate for United States Senator, * * * which said statement shall include all former statements and be as full and complete as that required for the statements required to be made on the last Saturday before the election and required by this act."

And Section 306 provides:

"*The statement of every candidate for United States Senator* and the statement of his personal campaign committee shall be filed with the county clerk of the county where such candidate resides and with the Secretary of State."

2. Paragraph 4 of Section 302, in our opinion, means the payment of the $1 assessed by the county executive committees, (the same being party committees) and it also means any contribution made by a nominee to his party committee *after his nomination* by a majority vote. The last mentioned disbursement, however, would not now be necessary owing to the numerical strength of the dominant political party. Paragraph 5, providing "For other purposes enumerated by law when such candidate has no personal campaign committee, but not otherwise," we think means that a candidate having no personal campaign committee may make the disbursements that such a committee would be authorized to make; but, if the candidate has a personal campaign committee this paragraph would be inapplicable.

3. Section 308 does not apply to clerks employed at campaign headquarters, nor to stationers, printers, or postmasters from whom postage stamps are purchased. The salaries of clerks and stenographers at headquarters, the amounts received by respective parties for supplying the stationery, printing, and postage, are not received, "directly or indirectly, for *political purposes*," but are received for labor actually performed and for supplies actually sold. This section, however, does apply to those who are working in the political interest of a candidate: in other words, it applies to those who electioneer, or who make public speeches, or who do any other kind of political work in the interest of a candidate and for which compensation is paid.

Yours truly,

B. F. LOONEY,
Attorney General.

UNITED STATES SENATOR—ELECTIONS—SECOND PRIMARY.

May 16, 1916.

Hon. F. M. Savage, County Chairman, Gainesville, Texas.

DEAR SIR: In your communication of the 15th instant, you propound the following question:

"Should a county executive committee decide to hold a second primary for local officers, can we hold it on the fourth Saturday in August in connection with the senatorial primary, or will we have to go to the trouble and expense of holding (two) second primaries?"

Replying, I beg to say:

Article 3086, R. S. 1911, contains the following provision:

"Any political party may hold a second primary election on the second Saturday in August to nominate candidates for a county or precinct office, where a majority vote is required to make a nomination."

It is within the province of the county executive committee to decide whether the nomination of county officers shall be by majority or plurality vote, and, if by a majority vote, "the committee shall call as many such elections as may be necessary to make such nomination." (Article 3091.)

The law providing for the election of United States Senator by direct vote of the people provides that if no candidate receives a majority at the first primary, the State Executive Committee or State Chairman thereof shall call "a second primary election for the purpose of determining the choice of the party as between the two candidates receiving the largest number of votes at the first primary election." This second primary *shall* be held on the fourth Saturday in August. (Section 10, Acts of 1913, First Called Session.)

You call attention to the fact that Article 3086 states that "any political party *may* hold a second primary election." This, of course, means that it is not mandatory on the county committee to call a second primary, but that, if it deems the holding of a second primary as the prudent thing to do, then it "may hold a second primary" for county and precinct officers, but no authority, directly or indirectly, is vested in the county committee to hold such second primary on any date other than the second Saturday in August.

It is to be regretted that there exists a conflict in the dates for holding these second primaries, and it is to be hoped that the Thirty-fifth Legislature will see proper to amend the law with reference to the election of United States Senator and thereby correct many invidious discrepancies.

Very respectfully,

W. P. DUMAS,

Chief Clerk to Attorney General.

ELECTIONS—POLL TAX—VOTING PRECINCT.

1. Error by tax collector in placing wrong voting precinct on poll tax receipt would not deprive voter from voting in an election held in his precinct, but voter cannot vote in precinct designated on his receipt, such not being his legal residence.

2. Ballots must be numbered and bear signature of presiding officer.

August 31, 1916.

Hon. Henry J. Dannenbaum, Judge, Sixty-first Judicial District, Houston, Texas.

DEAR SIR: Your communication of the 25th instant, addressed to

the Attorney General, has been referred to me. You state that you are engaged in the hearing of a primary election contest involving the nomination to the office of county commissioner. You submit the following:

"* * * Among the issues is whether a vote cast by an elector at a voting precinct other than that of his residence, under the circumstances hereinafter mentioned, is a valid vote, and I would very much appreciate the assistance of your opinion in the matter.

"A voter duly paid his poll tax to the tax collector, giving his correct residence address. The collector, through oversight or mistake of the precinct lines, made out the poll tax receipt for the wrong voting precinct, and in the list of qualified voters delivered at the precincts the name of the voter appeared on the list of a precinct different from that of actual residence. In other words, both the poll tax receipt and the tax collector's list for use at elections stated the voting precinct of residence incorrectly. The voter voted at the box mentioned in the receipt and list. The question is whether, the voter being in no wise to blame, such vote is valid under the constitutional provision. * * *"

"I also desire to know whether the requirement that the presiding officer should indorse his name on the ballots applies to primary elections as well as general elections."

Replying thereto, I beg to say that the Constitution, Article 6, Section 2, provides, in part, as follows:

"* * * all electors shall vote in the election precinct of their residence; provided, that electors living in any unorganized county may vote at any election precinct in the county to which such county is attached for judicial purposes. * * *"

In ex parte White, 28 S. W. 544, The court used the following language with reference to the above constitutional provision:

"The object of a provision of this character is to insure a fair and honest election, by requiring each voter to cast his ballot at the same place where his neighbors voted, and those to whom his qualifications were best known and by whom, if necessary, they could be challenged. Cooley, Const. Lim., 754. Hence, the inhibition is against a voter voting at any other poll than that of his own voting precinct; that is, the precinct of his residence. Indeed, this inhibition was the very purpose of the constitutional provision under discussion. Under the prior constitution of 1869 (Art. 6, Sec. 1), a voter could vote in any voting precinct in the county of his residence, but the evils resulting from the exercise of this right became so manifest that they led to the adoption of the present provisions."

The error on the part of the tax collector in placing the wrong voting precinct on the poll tax receipt and on the list of qualified voters would not deprive the voter from voting in an election duly held in his voting precinct, but where the voter votes in the precinct designated on his poll tax receipt, such not being his legal voting precinct, his vote would be illegal and should not be counted. Article 3144. R. S. 1911, cited by you, would not apply in such instances. This article has reference to vitiating any election, or the throwing out of the vote of an election precinct, and not the vote of one or more electors.

In answer to your second question, will say that in my opinion Article 3011, R. S. 1911, providing that

"The counting judges and clerks shall familiarize themselves with the signature of the judge, who writes his name on each ballot that is voted, and shall count no ballots that do not bear his signature or are unnumbered, or if on examination by the judges such signature is found to be a forgery"—

applies to primary elections. This article was Section 78, of Chapter 11, Called Session, Acts 1905, which was "an act * * * regulating elections, general, special and *primary*," and all its provisions should be treated in *pari materia*.

Article 2965, R. S. 1911, provides that:

"No ballot shall be used in voting at any general, *primary* or special election held to elect public officers, select candidates for office or determine questions submitted to a vote of the people, *except the official ballot*, unless otherwise authorized by law. * * *"

And Article 3095, R. S. 1911, provides that

"The vote at all general primaries shall be by *official ballot*. * * *

Judge Brown, in the case of Walker vs. Mobley, 103 S. W., 491, used the following language:

"In elections to which the official ballot applies, the presiding judge has possession of all ballots, and is required to place his signature upon each ballot before it is handed out to the voter."

I think the provisions of Article 3011 are *direct prohibitions* against counting any ballots cast in a primary election that are not numbered or that do not bear the signature of the presiding officer. In Kulp vs. Railey, 99 Texas, 316, the court said that "in some instances it is expressly provided that votes shall not be counted if certain rules are not observed."

Inasmuch as the opinions of this department are limited by law to giving advice to county and district attorneys and certain State officials, you will, therefore, not consider this as an official opinion from this Department, and is not to be regarded or quoted as such. I have merely given you my views and the benefit of my investigation of this question and trust this letter may prove of some assistance to you in the premises.

Very respectfully,

W. P. DUMAS,
Chief Clerk to Attorney General.

RESIDENCE—CANDIDATES—ELECTIONS — PRIMARY ELECTIONS—COUNTY EXECUTIVE COMMITTEE.

1. In order to constitute a change of residence of a voter, there must be an actual removal, coupled with an intention to abandon the former residence and acquire a new one.

2. A county executive committee held not authorized to resolve itself into a court of inquiry to determine the eligibility of a candidate on account of his residence in the county. The election law is silent as to length of

residence required for candidates previous to primary elections. Article 3082 does not refer to primary elections.

June 21, 1916.

Hon. B. F. Dent, County Attorney, Crockett, Texas.

DEAR SIR: We are today in receipt of your letter of the 19th instant, in which you submit the following:

"A protest was filed today before the Democratic executive committee of Houston county to the name of Mr. S. R. LeMay being placed on the official ballot of the primary election for the office of county attroney of this county, for the reason that Mr. LeMay had not been an actual good faith resident of Houston county for the past six months.

"The facts are substantially as follows:

"Mr LeMay attended school at the State University from September, 1911, to May, 1915, and during the year of 1915 was elected to teach school in the public schools in the town of Jasper, in Jasper county, Texas, taking charge of such schools on the 13th day of September, 1915, and remained in said town of Jasper continuously from September, 1915, to about May 18, 1916, at which time he returned to Houston county. Mr. LeMay is a single man and his father and mother reside in Crockett. Prior to Mr. LeMay's entrance into the State University, and prior to the taking up of his duties as teacher in the public schools of Jasper, Texas, he has always been a resident of Houston county, Texas, and has always paid his poll tax in this county, and claimed same as his residence.

"The question submitted to you under the above statement of facts is, 'Was Mr. LeMay an actual good-faith citizen of Houston county, Texas, for six months next immediately preceding the primary election to be held July 22, 1916, and is Mr. LeMay entitled to qualify as county attorney of Houston county, Texas, should he be elected to that office, and is he entitled to have his name on the ticket as candidate for the office of county attorney?"

Replying, I beg to say:

A man's residence is his home or habitation, where that residence is fixed, and at a particular place, and he does not entertain a present intention of removing therefrom. Words and Phrases, Second Series, Volume 4, p. 349.

Residence is lost by leaving a place where one has acquired a permanent home and removing to another place "*without* a present intention of returning." "A temporary sojourn within a State for pleasure or business, accompanied by an intention to return to the State of one's former inhabitance, does not constitute 'residence.'" Words and Phrases, Second Series, Volume 4, p. 344, citing in re Mulford, 75 N. E., 345, 346, 217 Ill., 242, 1 L. R. A. (N. S.), 341, 108 Am. St. Rep. 249, 3 Ann. Cas. 986 (citing Pells vs. Snell, 23 N. E. 117, 130 Ill., 379).

In the case of Willingham vs. Swift & Co., 165 Federal, 223, the court said:

"The term 'residence' is flexible and may be given a restricted or enlarged meaning, considering the connection in which it is used. It involves, however, some idea of permanency and fixed intention to remain."

In Bicycle Stepladder Co. vs. Gordon, 57 Federal, 529, the court, with reference to the term "resident," said:

"It comprehends locality of existence; the dwelling place where one maintains his fixed and legal settlement, not the casual and temporary abiding place required by the necessities of present surrounding circumstances."

In Hislop vs. Taaffee, 125 N. Y. Sup., 614, it was held that permanent "residence" is not affected by a "temporary sojourn for business purposes."

A provision of the North Carolina statute that an action against a railroad shall be tried in one of certain counties, including that in which plaintiff "resided" when the cause of action arose, includes the idea of permanency; but the court in that State held that the plaintiff having previously resided in W. county till he went to live in R. county, when employed as a car repairer by defendant under a contract terminable at the will of either party, where he lived two months till injured, *and having never intended* to change his residence from W. county, he retained his residence in the latter county. Watson vs. Railway Co., 67 S. E., 502, 152 N. C., 215.

In Allgood vs. Williams, 92 Ala., 551, 8 So., 722, the question arising as to the proper place of appointment of a guardian of a minor son, it was held that a preacher who, on the death of his wife, breaks up house-keeping and rents out his plantation, does not lose his domicile, in the absence of an intention to the contrary, by the mere fact that he is sent to another county to preach by the conference of his church.

In Denver vs. Sherret, 31 C. C. A., 499, 60 U. S. App., 104, 88 Fed., 226, it was held that one who had always resided in one State as a member of her father's family does not lose her citizenship for the purpose of suit in a Federal court, by taking an examination in another State for the position of school teacher, intending, if successful, to remain there, but, if not, to return, where it appears that, before the result of her examination was known, she sustained personal injuries, upon the recovery of which she returned to her father's home.

The statutes of Illinois require a citizen to be a resident of the State one year, the county ninety days, and voting precinct thirty days. The Supreme Court of that State, in the case of Carter vs. Putnam, 141 Ill., 133, said:

> "An absence for months, or even years, if all the while the party intended it as a mere temporary purpose, to be followed by a resumption of the former residence, will not be an abandonment of such residence."

Coming now to the holdings of our Texas courts, attention is first directed to Savage vs. Umphries, 118 S. W., 905, holding that "one's residence must be actual, and determined by actual facts, and not by the intention of the voter." This holding, we think, is correct as applied to the facts in that case. We also think the court's opinion in the Linger vs. Balfour case (149 S. W., 802) may be correct, but that holding should not, in connection with the question you propound, be given too much credence in the absence of substantial facts. The election in the Linger case was held on November 8, 1910, and on September 5, 1910, the voter in question moved to another county. It is not stated whether he intended to permanently reside in this other county or not. The court used this significant language: "*We think the evidence on the whole* conclusively shows that from September 5, 1910, until the election, November 8, 1910, he usually slept at night

in" the other county. As stated, it does not appear that this party intended to permanently reside in Amarillo, nor does it appear that he intended to return to Oldham county, and in view of quite a number of opinions by learned judges of other courts, including the Federal courts, the brief statement disposing of this question in the Linger case cannot be considered by us as conclusive authority.

It is therefore the opinion of this Department, that in order to constitute a change of residence of a voter, there must be an actual removal, coupled with an intention to abandon the former residence and acquire a new one. This may be proven by all the facts and circumstances surrounding the transaction; as to whether or not this has been done in the case submitted by you, we must decline to answer, for the reason that it is not proper for this Department to pass upon questions of fact, but to lay down rules of law to which the facts, when found, can be applied. This we have done.

The filing or presenting of this protest to the county executive committee is not authorized by statute. The county executive committee has no authority under the law to resolve itself into a court of inquiry to determine whether or not a candidate's name should be placed on the primary ballot by reason of allegations to the effect that such candidate has not resided in the county for six months previous to the primary election.

The election law of this State is silent as to the length of residence required for candidates previous to primary elections. Article 3082, R. S. 1911, providing that

"No person shall be eligible to any county or State office in the State of Texas unless he shall have resided in this State for the period of twelve months, and six months in the county in which he offers himself as a candidate next preceding any *general* or *special* election * * *"—

does not refer to primary elections. A primary election is not a "general election," or a "special election." It is a method prescribed by which certain political parties polling a certain number of votes select their nominees. Hodge vs. Bryan, 148 S. W., 21, 149 Ky., 110. A "primary election" is merely a substitute for a convention, and the only thing accomplished by it is that of selecting candidates for the several parties whose names shall go on the official ballot for the general election. Lansdon vs. State Board, etc., 18 Idaho, 596; 111 Pac., 133. See, also, Line vs. Board of Election Canvassers, 117 N. W., 730; 18 L. R. A. (N. S.), 412; 16 Ann. Cas., 248, and Article 3085, Revised Statutes of Texas, 1911.

Yours very truly,

W. P. DUMAS,
Chief Clerk to Attorney General.

ELECTIONS—RESIDENCE—VOTERS—SCHOOL TRUSTEES—VOTING PRECINCT.

A qualified voter in the county would be entitled to vote in a general election for school trustees for the county, although he has not resided

in the voting precinct in which he offers to vote for six months prior to the election.

May 10, 1915.

Hon. W. F. Doughty, State Superintendent of Public Instruction, Capitol.

DEAR SIR: In your communication of the 6th instant, you submit the following question:

"How long must an otherwise legally qualified voter have resided in a common school district in order to qualify as an elector for the office of school trustee?"

Replying, I beg to say:

Article 2939, R. S. 1911, provides, in part, as follows, to-wit:

"* * * in any election held only in a subdivision of a county for the purpose of determining any local question or proposition affecting only such subdivision of the county, then, in addition to the foregoing qualifications, the voter must have resided in said subdivision of the county for six months next preceding such election."

In an opinion, formerly rendered by this Department, this section of the law was construed as follows:

"In an election held in any subdivision or designated precinct of a county to determine a local question, a person must have resided within the particular subdivision of the county or precinct for six months before he will be entitled to vote. If, however, the election is general for the county, it is not necessary that he shall have resided within the precinct for six months, but he must have resided in the county for six months preceding the election."

We think the latter part of the above paragraph is a direct answer to your inquiry, for the reason that Article 2818, R. S. 1911, provides that "on the first Saturday in April of each year, the qualified voters of each school district, at a school district meeting for that purpose, shall elect three trustees for said district, who shall enter upon the discharge of their duties on the first of May next following." The election above provided for is a school trustee election to be held in each county throughout the State, and the election is, therefore, general for the entire county. Article 2959, R. S. 1911, deals with the question of a voter's change from one voting precinct to another, and provides, in part, as follows:

"If a citizen, after receiving his poll tax receipt or certificate of exemption, removes to another county or to another precinct in the same county, he may vote at an election in the precinct of his new residence in such other county or precinct by presenting his poll tax receipt or his certificate of exemption or his written affidavit of its loss to the precinct judges of election, and stating in such affidavit where he paid such poll tax or received such certificate of exemption, and by making oath that he is the identical person described in such poll tax receipt or certificate of exemption, *and that he then resides in the precinct where he offers to vote and has resided for the last six months in the district or county in which he offers to vote* and twelve months in the State. * * *"

In the case of Hendricks vs. State, 49 S. W., 705, it was held that

a school trustee is a county officer, and we think all legally qualified voters of the county are entitled to vote for all county officers, including school trustees, in the election precinct where they live, regardless of the fact whether they had lived in the particular school district in which they offer to vote six months prior to such election.

You are, therefore, advised that a qualified voter in the county would be entitled to vote in a general election for school trustees for the county, even though he may not be a resident of the school district in which he offers to vote for six months prior to the election.

Yours truly,

B. F. LOONEY,
Attorney General.

OPINIONS ON FEES OF OFFICE

FEES OF OFFICE—SHERIFFS' FEES—ELECTION NOTICES—FEES FOR SERVING—SCHOOL ELECTIONS.

Revised Statutes, Arts, 2827, 2828 and 2987.
Terrell election law, Sec. 145 (Chap. 11, Acts First Called Session 29th Legislature).
Revised Statutes, Article 2987, governs the fees of sheriffs for serving election notices under Revised Statutes, Articles 2827 and 2828.

February 14, 1916.

Hon. C. L. Stavinoha, County Attorney, Halletsville, Texas.

DEAR SIR: Hon. E. H. Houchins, Sheriff of your county, presented to us some time since the previous correspondence of this Department with you, relative to the payment of certain fees for services performed by him.

The matter was presented to the writer by Mr. Houchins and Mr. W. T. Bagby and it is only now that I have had the opportunity to carefully consider the matter and lay the question before the Attorney General.

The question, as stated in your original letter to the Attorney General, is as follows:

"Our commissioners court has directed me to ask your valued opinion on the following question:

"Is the sheriff entitled to compensation (other than the ex officio salary allowed him under Article 3866, R. S. 1911) for posting notices of school tax elections?

"We have read your letter of August 14, 1915, to our sheriff in which you quote from the letter of your Department of May 22, 1915, to Glenn W. Smith, county judge of Mason county. That letter deals with the question of the pay of sheriffs for service of notices and of elections held under the provisions of the general election laws; whereas the question confronting our court concerns school tax elections. Art. 2987, Title 49, R. S. 1911 (under which compensation is claimed in this instance), provides: '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 title*, shall be paid the amounts allowed by statutes for serving process.'

"But inasmuch as school tax elections are not held, nor are its writs or notices prescribed by Title 49, but under Title 48, R. S. 1911, Art. 2827, et seq., our court is in doubt as to the validity of the claim."

In reply we beg to advise you that the provision of Revised Statutes, Article 2987, applies in this case and that the Sheriff for serving copies of the order designating the bounds of election precincts, or the election judges, and posting notices should be paid the amounts allowed by statute for serving civil process. The phrase in this statute, namely, "for serving all other writs or notices prescribed by this ballot," is not a limitation on that which goes before, but has reference to the various writs and notices required to be served in the original act, of which this article of the statute was a part. This article of the

statute was Section 145 of Chapter 11, First Called Session of the Twenty-ninth Legislature, commonly known as the Terrell Election Law, and as originally enacted the word "act" was used instead of the word "title," as it now stands in the statute, and had reference, of course, to compensation for the various writs or notices prescribed generally by the Terrell Election Law.

On the 5th day of April, A. D. 1895, there was presented to the Governor for approval an Act of the Regular Session of the Twenty-ninth Legislature, fixing the ex officio compensation of sheriffs, in which act the Commissioners were authorized to embrace within the ex-officio compensation payment for such officer for serving "all election notices." This act, as suggested, was passed at the Regular Session of the Legislature and was presented to the Governor for approval on the 5th day of April, 1905. The Governor did not approve the act, but nevertheless it became a law ninety days after adjournment. However, at the First Called Session of this Legislature the Terrell Election Law was passed and presented to the Governor for his approval on the 15th of May, but was not approved and took effect ninety days after the adjournment of the Called Session of the Legislature. The purpose of the Terrell Election Law was to substitute for the many incomplete statutes of the State relating to this subject substantially a new and definite code, the purpose of which was to govern in all instances, except where definite and special provision was otherwise made. It is true that where special provision was made for conducting a special election, as for instance a school election, that this was not changed by the Terrell Election Law. Clarke vs. Willrich, 146 S. W., 947. But Article 2987, which was Section 145 of the Terrell Election Law, has a provision the purpose of which was to fix the compensation of sheriffs and constables for serving the various processes connected with the holding of elections in this State, and unless special provision could be found in the special law relating to particular elections the general provision must be held to control. It is, of course, superior, so far as elections are concerned, to the ex officio statute heretofore referred to, because it was passed by the Legislature subsequent to the passage of the ex officio act and in so far as it relates to compensation for posting election notices must be held to have modified such ex officio statute. Unless this is its meaning it would have no meaning; its purpose was to do exactly what the ex-officio statute did with reference to payment for serving election processes, and unless it is to be held to have taken the place of the ex-officio statute, so far as such compensation is concerned, then it had no place and can have no meaning in the law.

In such instances the rule is that the last statute expresses the legislative purpose and is the law. We advise you therefore that Mr. Houchins for serving the notices of election or performing the duties required of him under Article 2827 and Article 2828 is entitled to the compensation specified and permitted by Revised Statutes, Article 2987.

Yours very truly,

C. M. CURETON,

First Assistant Attorney General.

FEES OF OFFICE—EX OFFICIO—CONSTRUCTION OF STATUTES.

1. In passing a law the Legislature is presumed to have in mind existing laws on same subject.
2. "Excess fees" defined.
3. Article 3893, R. S. 1911, as amended by Chapter 121, Acts of 1913, held to be only law now authoritatively dealing with ex officio compensation.

February 24, 1916.

Hon. B. Gayle Prestridge, Assistant County Attorney, Cleburne, Texas.

DEAR SIR: In your communication of the 18th instant, you submit the following question:

"I desire an opinion from your Department, first, as to whether or not Article 3866 of the Revised Civil Statutes was repealed by the act of the Thirty-third Legislature, relating to the fees of the sheriffs of certain counties; second, how are we to determine the amount to be allowed a sheriff as ex officio; third, can a sheriff lawfully receive more than $3000 salary and ex officio combined per annum."

We will endeavor to answer your questions in the order in which they are propounded:

(1) Article 3866, above, provides as follows, to-wit:

"For summoning jurors in district and county courts, serving all election notices, notices to overseers of roads, and doing all other public business not otherwise provided for, the sheriff may receive annually not exceeding five hundred dollars, to be fixed by the commissioners court at the same time other ex officio salaries are fixed; provided, that in counties exceeding twenty-five thousand population at last decennial census, sheriffs may receive an additional amount not exceeding fifty dollars for each five thousand population in excess of twenty-five thousand up to fifty thousand population, to be paid out of the general funds of the county on the order of the commissioners court. Provided, that the total amount of compensation which may be paid annually under the provisions of this act shall not exceed the sum of eight hundred dollars."

The above article was originally passed by the Twenty-ninth Legislature (1905) at its regular session. (Acts of 1905, p. 91.)

Article 3893, Revised Statutes, 1911, provided:

"It is not intended by this chapter that the commissioners court shall be debarred from allowing compensation for ex officio services to county officials not to be included in estimating the maximum provided for in this chapter when, in their judgment, such compensation is necessary; provided, such compensation for ex officio services shall not exceed the amounts now allowed under the law for ex officio services; 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 chapter."

This article was amended by Chapter 121, Acts of 1913, so as to read as follows:

"The commissioners court is hereby debarred from allowing compensation for ex officio services to county officials *when the compensation and excess fees which they are allowed to retain shall reach the maximum provided for in this chapter. In cases where the compensation and excess fees* which

the officers are allowed to retain *shall not reach the maximum* provided for in this chapter, the commissioners court *shall allow compensation for ex officio services when,* in their judgment, *such compensation is necessary;* provided, such compensation for ex officio services allowed shall not increase the compensation and excess fees allowed to be retained by him under this chapter."

In the passage of an act, the Legislature is presumed to have had in mind and in contemplation existing laws on the same subject, and to have shaped the new law with reference thereto. Black's Int. Laws, p. 204.

It will be observed that the Act of 1913, and which is a part of the present Fee Bill, declares that "the Commissioners Court is * * * debarred from allowing compensation for ex officio services to county officials when the compensation and excess fees * * * shall reach the maximum." Evidently it was then the intention of the Legislature to provide that all officers named in the fee bill shall be compensated by reason of *fees* until the maximum amount of *such fees* for any particular county is reached, and then if there be an excess in the fees accruing to the office such officer would be allowed to retain one-fourth. By the term "excess fees" is meant those fees of office collected by an officer in excess of the amount needed to pay the amount allowed the officer and his assistants or deputies. (See Article 3889, Revised Statutes, 1911, as amended by Chapter 121, Acts of 1913.) And, furthermore, the Legislature intended that in the event the fees accruing to an office do not reach the maximum provided for that particular county, the commissioners' court could allow an ex officio *to make up the difference between the total amount of fees collected for that year and the maximum.* When such fees do reach the maximum, then, in the language of the act itself, "the Commissioners' Court is * * * debarred from allowing compensation for ex officio services to county officials."

With reference to this article (3893) this Department has held as follows:

"The use of the language 'and excess fees' in conection with the word 'compensation' so as to read 'compensation and excess fees' is confusing, unintelligible, and its use in this connection was evidently a legislative mistake. There cannot, in the nature of the case, exist excess fees until the fees collected by the officer after deducting the salaries of deputies and assistants and expenses such as may be allowed by law amount to more than the maximum fee provided for officers of the particular county, and there is no way to determine in advance the amount of excess fees." (41 Op. Atty. Gen., 20.)

In my opinion, therefore, inasmuch as the commissioners court is debarred from allowing an ex officio where the fees an officer is allowed to retain reach the maximum, Article 3866, above quoted, was superseded by Article 3893, as amended by Chapter 121, Acts of 1913, and the latter is now the only article of our statutes that authoritatively deals with this subject of ex officio compensation.

(2) In answer to your second question will say that the Legislature, for the sake of convenience and uniformity, prescribed a fiscal year beginning on December 1st of each year, and it is my opinion

that the safest course for the commissioners court to pursue is not to allow any ex officio until the end of the fiscal year, or December 1st, at which time all officers mentioned in Articles 3881 to 3886, and also the sheriff, shall make the sworn report required to the district court showing the amount of fees collected by each officer during such fiscal year, and then, in the event that the amount of fees any officer collects does not reach the maximum prescribed for that office in that particular county, the commissioners court could allow the difference by way of ex officio.

(3) Your third question should be answered in the negative, provided, of course, the sheriff is not in a county containing a city of over 25,000 inhabitants, or, in a county which the last United States Census shows contains as many as 38,000 inhabitants. (See Article 3883, Revised Statutes, 1911, as amended by Chapter 121, Acts of 1913.)*

Yours very truly,
B. F. LOONEY,
Attorney General.

OFFICERS—COSTS.

Where the funds of a county are exhausted and there are outstanding registered warrants against the various funds upon the payment of a convict bond, the warrants issued to the respective officers for their costs should be paid without registration from the proceeds of the bond deposited with the treasurer, and they would not be compelled to have such warrants registered and await their turn in the payment thereof.
Articles 6249, 6256, R. S. 1911.

November 11, 1915.

Hon. W. O. Seale, County Attorney, Groveton, Texas.

DEAR SIR: In your favor of recent date you state that all county funds of your county are exhausted with the exception of jury, courthouse and jail funds, and that there are outstanding warrants aggregating several thousand dollars against the road and bridge fund. Upon this state of facts you desire to know if upon payment of a convict bond the warrants issued to officers entitled to costs in the case would be entitled to priority of payment over other outstanding warrants against the road and bridge fund. You state that in your opinion from a reading of Article 6256 the officers are entitled to receive their fees under the circumstances and should not be forced to await the payment of their vouchers in due order of registration.

Under the provisions of Article 6256, whenever the amount realized from the hire of convict is sufficient to discharge in full the fine and costs adjudged against him it is made the duty of the County Judge to issue warrant upon the county treasury in favor of each officer to which cost may be due in the case wherein the convict bond was executed, which warrants are to be paid out of the road and bridge fund of the county or out of any other funds in the county treasury not otherwise appropriated. The jury, courthouse and jail funds having been set apart for the specific purposes, warrants issued

*See Anderson Co. vs Hopkins, 187 S. W., 1019.

in payment of costs could not be paid from these funds, and therefore unless the identical money paid in upon a convict bond could be appropriated to the payment of cost, the officers would be compelled to take their turn with other holders of registered warrants.

We find, however, in Article 6249, Revised Statutes, the following provisiòn:

"And the proceeds of said hiring when collected shall be applied, first, to the payment of costs, and second, to the payment of the fine."

In our opinion this is a recognition on the part of the Legislature that the officers of court are entitled to receive their conpensation for services rendered out of the identical money paid in by thè hirer of the convict, and construing this article, together with Article 6256 above referred to, we are of the opinion that the warrants issued by the county judge to the respective officers for their costs would take precedence over other outstanding registered warrants and should be paid by the treasurer out of the fund deposited with him as the proceeds of the convict bond.

Yours truly,
C. W. TAYLOR,
Assistant Attorney General.

FEES—MILEAGE.

Where a sheriff conveys a prisoner from a point of arrest to the court or jail of the county wherein the prosecution is pending, traveling by railway and using a pass, he should deduct from his mileage account three cents per mile.

The word "litigants" used in Article 1533, Penal Code, in that portion of same requiring sheriffs or other peace officers to deduct the money value of free passes used by them from any mileage accounts against the State and litigants comprehends a defendant in a criminal case.

Article 1533 of the Penal Code.

October 18, 1915.

Hon. J. A. Johnson, County Attorney, Stephenville, Texas.

DEAR SIR: The Attorney General has your letter of recent date, reading as follows:

"A man against whom the State had a complaint, a petty offense, went from Stephenville to Brady, Texas, a distance of something like seventy-five miles. The sheriff went from Stephenville, arrested this man and brought him back to Stephenville, and charged the usual fees for this trip, but did not make any deduction from his fees. The sheriff rode on a pass issued to him by the railway company in going and coming from Brady.

"Referring to White's Penal Code, Vol. 2, Art. 1263, pp. 1608 and 1609, Act of 1907, p. 93, Sec. 2.

"That portion of the article in question reads as follows:

'"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 accounts against the State and litigants earned by them in executing process when such pass was used or could have been used.'

"The question is: In arresting this man and bringing him back to Ste-

phenville, when the sheriff used a pass or could have done so, should the sheriff have deducted three cents per mile in going and coming from Brady, or does the word litigants include a defendant in a criminal prosecution, or relate only to civil actions?"

Replying thereto I beg to say that in our opinion that portion of what is known as the anti-free pass law contained in Article 1523 of the Penal Code, which you quote above, is intended to and does cover all instances where mileage is allowed to peace officers of this State, and it would be the duty of the sheriff in the case presented by you to deduct from the mileage charged against defendant in this case an amount equal to three cents per mile for the actual number of miles traveled.

The word "litigants" used in that portion of Article 1533 is intended to cover all parties to litigation either of a civil or criminal nature other than the State, which is expressly enumerated in the act.

A litigant is defined by Bouvier to be one engaged in a suit. Ralls 3rd Rev., 2036.

The same authority defines a suit as follows:

"In its most extended sense the word "suit" includes not only a civil action, but also a criminal prosecution, as indictment, information and conviction by a magistrate."

We can find nowhere in this act an intention on the part of the Legislature to place a restricted meaning on the word "litigants" but on the other hand there is every indication that it was the purpose of the Legislature to require a peace officer traveling upon a pass in all instances where mileage is allowed to deduct from such accounts the amount saved to him by the use of the pass. We do not believe it was the intention on the part of the Legislature to permit a sheriff or other peace officer to use free transportation to his own benefit, and yet charge the expense thereof to a defendant in a criminal case.

You are, therefore, advised that in the opinion of this Department the sheriff should deduct from mileage charged against the defendant the sum of three cents per mile in the going and coming from a point of arrest when traveling upon a railroad pass.

Very truly yours,

C. W. TAYLOR,
Assistant Attorney General.

FEES OF SHERIFFS—LUNACY CASES.

Sheriff would not be entitled to $2 per day for waiting upon the court in the trial of a lunacy case.

Articles 163, 164, 3864, 7129, Revised Statutes of 1911.

October 18, 1915.

Hon. E. R. Yellott, County Attorney, Lockhart, Texas.

DEAR SIR: The Attorney General is in receipt of your letter of October 12, 1915, reading as follows:

"I write to ask your opinion in regard to the sheriff's fees in lunacy cases. You know that the sheriff, under the general law, is entitled to $2 for each day he waits upon the court. Under the lunacy law of the acts of the Legislature for 1913, regular session, the law limits the sheriff's fees to from one dollar to five dollars. The question is, is he entitled to $2 in addition to this for waiting upon the court while the lunatic is being tried or not?"

The last paragraph of Article 3864 of the Revised Statutes of 1911 is in the following language:

"For every day the sheriff or his deputy shall attend the district or county court, he shall receive two dollars per day, to be paid by the county, for each day that the sheriff, by himself or a deputy, shall attend said court."

If the above quoted provision of the statute was the only statute upon the subject of fees of the sheriff in lunacy cases, then this Department would hold that a sheriff would be entitled to $2.00 per day for attendance upon the court, as a lunacy proceeding is a trial in the county court. (Robinson vs. Smith County, 76 S. W., 584.) However, by Article 163 of Vernon's Sayles' Texas Civil Statutes, it is provided that "in judicial proceedings in cases of lunacy under this act, in each case there shall be allowed by the commissioners court of the county such fees as the commissioners court may deem just; * * * the fee of the sheriff or constable, exclusive of the fee for conveying a lunatic to an asylum, to be not less than $1.00 and not more than $5.00 * * *."

It is made the duty of the sheriff, in Article 7129 of the Revised Statutes of 1911, to attend upon all district and county courts of his county and his compensation for so doing is, by the latter paragraph of Article 3864, fixed at the sum of $2.00 each day, to be paid by the county. It will be noted that the compensation of the sheriff for the services performed by him in lunacy proceedings is such an amount as in the discretion of the commissioners court they may deem just and proportionate to the amount of service performed, not to be less than $1.00 nor more than $5.00 in each case, exclusive of the fee for conveying the lunatic to the asylum. It is contemplated by this act that the county should be reimbursed, provided the lunatic is possessed of an estate exempt from forced sale, or that the county shall be reimbursed by the person liable for his support, as shown by the report of the commission, for it is provided by Article 164 (Vernon's Sayles' Texas Civil Statutes), in part, as follows:

"The amount of all of said fees as allowed by the commissioners court shall be reimbursed to the county out of the estate of the respondent when the report of the commission shows that he is possessed of an estate exempt from forced sale, or shall be reimbursed to the county by the person liable for his support as shown by said report."

We think it clearly the purpose of the Legislature, as evidenced by the wording of Article 163 and that portion of Article 164 above quoted, that the fees allowed by the commissioners court to sheriffs in lunacy cases are exclusive and that he would not be entitled to the additional $2.00 per day for waiting upon the court. This is a special

statute dealing with fees of all officers in lunacy cases and is intended to control all other fee bills or statutes authorizing fees of officers.

The commissioners court is given the discretion to fix the fees of the sheriff at from $1.00 to $5.00, and the wording of the act clearly shows that in the fixing of the fees the commissioners court must take into consideration all services performed by that officer.

We, therefore, advise you that the sheriff would not be entitled to $2.00 per day for waiting upon the court, in addition to the amount allowed by the commissioners court.

With respect, I am

Yours very truly,
C. W. TAYLOR,
Assistant Attorney General.

COUNTY TREASURER'S COMMISSION.

When the commissioners court has fixed the percentage allowed as commission to the treasurer, it has exhausted its power and has no authority to limit the total amount that may be received by the treasurer.

The treasurer is entitled to a commission fixed by the commissioners court on funds of road districts. The commissioners court has no authority to allow a specific sum to the treasurer on road district funds. The treasurer is entitled to a commission of one-fourth of one per cent for receiving and one-eighth of one per cent for paying out drainage district funds, which must be considered in making up his maximum of $2000.

Articles 3873-3875 and Chapter 36, General Laws, First Called Session of the Thirty-third Legislature.

September 9, 1915.

Hon. C. H. Cain, County Attorney, Liberty, Texas.

DEAR SIR: You transmit to this Department for an opinion thereon a letter addressed to you by a special auditor for your county wherein he desires to know if the commissioners court having fixed the treasurer's commission at one per cent and limited the amount of his compensation to $1000 per year, they could thereafter allow him for handling bond money of two road districts the sum of $500 each for the year 1914.

Replying thereto, we beg to advise you that the only method of fixing the compensation for the treasurer of the county is that prescribed by Article 3873, that is, the commissioners court may allow as compensation to the treasurer a commission not exceeding two and one-half per cent for receiving all moneys other than the school funds and not exceeding two and one-half per cent for paying out the same, with the limitation thereon fixed by Article 3875 that the commissions allowed shall not exceed two thousand dollars annually. When the commissioners court of a county has within its discretion determined the rate of commissions upon receipts and disbursements they will allow the county treasurer, they have exhausted their powers under the statute and they have no authority to place any other limitation thereon than the fixing of the rate of commission, governed, of course, by the article last named above fixing the maximum at

$2000 per year. In the case of Montgomery County vs. Talley, et al., 169 S. W., 1141, the Court of Civil Appeals in construing Article 3873, said:

"Under this article of the statute the commissioners court is expressly authorized and directed to fix the commission of the county treasurer upon moneys received and paid out by him, and neither express nor implied authority is conferred upon such court to limit or fix the compensation of the county treasurer otherwise than by fixing the commissions to be paid him on receipts and disbursements. The order of March 30, 1910, before set out, does not fix the commissions of the county treasurer of Montgomery county, but provides that he shall receive a salary of $600 per year. We think it clear that a statute which directs the commissioners court to fix the compensation of an officer by allowing him commissions on moneys handled by him does not authorize such court to pay the officer a fixed yearly salary, but on the contrary, by necessary implication, prohibits his being paid in this way."

The order of the commissioners court allowing the treasurer the sum of $500 on each of two road district bond issues was equivalent to fixing the salary of the county treasurer and was in violation of Article 3873, Revised Statutes of 1911, and the authority above cited.

If the commissioners court have decided that a commission of one per cent upon funds received and disbursed does not produce a sufficient compensation for the services performed by the county treasurer, they may at any time increase the rate of commission not to exceed two and one-half per cent for receiving and two and one-half per cent for paying out the county fund, which order would take effect and be in force from the date of its passage, and the county treasurer would thereafter be entitled to receive the increased rate of commission.

Bastrop Co. vs. Hearne, 70 Texas, 563.

Moneys arising from bond issues in road districts are treated as county funds for the use of the particular district, and the county treasurer would be entitled on funds belonging to the road districts to the commission allowed for receiving and disbursing other county funds. If when the funds of the two road districts are added to other county funds the commissioners court should still be of the opinion that the commisson of one per cent upon the increased amount was inadequate to compensate the treasurer, then, as above stated, they would have the power to at any time enter an order increasing the rate of commission allowed to the treasurer.

We, therefore, advise you that the county treasurer of your county would be entitled to a commission of one per cent upon all county funds, including road district funds, and that the order of the commissioners court allowing such treasurer the sum of $500 from each of the two road districts is invalid and that the amount the treasurer may receive is one per cent on county funds until an order of the commissioners court is made increasing the rate, provided that he shall not receive more than $2000 per annum, as provided in Article 3875.

The question is also asked if the treasurer's commissions on the drainage district funds are limited by the law.

Replying thereto, we beg to say that Section 36 of Chapter 118, General Laws of Thirty-second Legislature, as amended by Chapter 36, General Laws, First Called Session of the Thirty-third Legislature, fixes the compensation of county treasurer for receiving and paying out moneys of a drainage district in the following language:

"The treasurer shall be allowed as compensation for his services as treasurer one-fourth of one per cent upon all money received by him for the account of such drainage district and one-eighth of one per cent upon all moneys by him paid out upon the order of said court, but he shall not be entitled to any commissions on any moneys received by him from his predecessor in office belonging to such drainage district."

The amount received by the treasurer under the above statute must be taken into consideration in arriving at the maximum, and the total of all commissions received by him is limited to $2000 by Article 3875, Revised Statutes.

With respect, I am,

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

FEES—COUNTY ATTORNEY—EXAMINING TRIALS—JUSTICE OF THE PEACE.

The county attorney is not entitled to a commission of ten per cent on trial fees.

Upon an examining trial it is the duty of the justice of the peace to either order the defendant committed to jail, discharge him or admit him to bail, and he would have no right upon an examining trial where defendant is charged with felony, if the facts show the defendant guilty of a misdemeanor, to certify the costs to the county court and charge up a fee for the examining trial to be taxed as costs against defendant in the county court.

If a complaint be filed in a justice court and it develops that the county court has jurisdiction and not the justice court, the justice would have no authority to transfer the case to the county court and tax the costs in the justice court. It would be his duty to dismiss the case, whereupon complaint could be filed in the county court, in which event the justice nor any of the officers would be entitled to any fees in the justice court.

Articles 308, 1184, 1193, 347, C. C. P.

August 11, 1915.

Hon. M. W. Burch, County Attorney, Decatur, Texas.

DEAR SIR: The Department has your favor of the 5th inst., reading as follows:

"Will you kindly answer the following interrogatories:

"1. Is the county attorney entitled to a commission of 10 per cent on collection of a trial fee in the county court? I call your attention to Article 1184 of the Code of Criminal Procedure, 1911, which provides for the collection of the trial fee, and then refer you to Article 1193, C. C. P., 1911, which provides for the payment of commissions on certain moneys to county attorneys.

"2. Suppose a justice of the peace is conducting an examining court, and it develops in the proceedings that the defendant is only liable for a misdemeanor, of which the county court has jurisdiction, is the justice entitled

to make out an examining trial fee, certify same to the county court and have same taxed as costs against the defendant? See Article 347, C. C. P., 1911.

"3. Where a complaint has been filed by a constable in a justice court, and it afterwards develops that the county court, and not the justice court, has jurisdiction, is it legal for the justice to transfer said case to the county court and tax the justice costs and constable's costs against defendant?"

Replying to your questions in the order propounded, we beg to advise:

1. That the County Attorney would not be entitled to a commission of ten per cent on the collection of a trial fee in the county court. This fee is taxed and collected as any other cost and is not a judgment recovered by the county attorney as contemplated by Article 1193 C. C. P. It is not the result of any effort on the part of the county attorney and he would not be entitled to receive compensation therefor. This has been expressly decided in the case of Fears vs. Ellis County, 20 Texas Civil Appeals, 159, wherein the court said:

"The trial fee is a sum arbitrarily fixed by the Legislature as costs which should go to the county in every criminal action tried in the county court. The counties are at large expense in maintaining and operating the judicial machinery, and this item is doubtless intended to reimburse in some degree for this outlay. While it is not cost in the sense of being fees to be paid officers for services rendered in the particular proceeding, or witnesses for attendance upon the trial, it is designated as costs by the Legislature and is directed to be paid into the county treasury. It is clearly not a fine or forfeiture as contemplated in Article 1143, and unless it is embraced in the terms 'moneys collected for the State or county upon judgments recovered by him,' as used in this article, the county attorney is not entitled to commissions upon it. The judgment which is entered in such criminal actions is that the State shall recover a certain sum, as such fine, and all costs, the amount of which is not set forth in the judgment. The costs follow the judgment and are incident to it, but are not such an element in the judgment as we think the Legislature had in mind in the passage of this statute. The statute having already provided for commissions upon fines and forfeitures expressly, we think this general language was used to cover all recoveries of money for the State or county for which a particular proceeding is instituted and prosecuted to judgment of recovery in favor of the State or county."

We therefore answer your first question in the negative.

2. Where an examining trial is held before the justice of the peace it becomes his duty under Article 308, C. C. P., to either commit the defendant to jail, discharge him or admit him to bail as the law and the facts of the case may require. It does not devolve upon the justice of the peace to adjudicate the character of offense of which the defendant may be guilty, but his duties in this respect are, as above set out, defined by Article 308. It is true that Article 347 provides in effect that it is the duty of the magistrate to certify to all proceedings had before him and transmit them to the court before which the defendant is subject to be tried upon indictment or information, but this contemplates that there shall have been filed a complaint alleging some character of offense known to the law, and it is the duty of the justice of the peace or magistrate to transmit the certified proceedings of the court having jurisdiction of the offense of which the defendant stands charged. It would be the duty

of the justice of the peace in event of holding an examining trial where the offense charged was a felony, and it appeared from examination that the offense was a misdemeanor, to either admit the defendant to bail and file proceedings with the district court or else discharge him, in which latter event complaint could then be made charging him with a misdemeanor, but the justice of the peace would have no authority to file the proceedings with the county court and charge an examining trial fee therefor.

3. Where a complaint has been filed by a constable in the justice court and it develops that the county court and not the justice court has jurisdiction of the offense, the justice should dismiss the cause, whereupon complaint should be filed in the county court. The justice would have no legal authority to transfer the case to the county court and tax the cost of the justice court. The filing of the case in the justice court was without authority of law and no costs can attach to the proceedings therein. The whole proceeding was a nullity and the claim of officers of the justice court for fees cannot be vitalized by a transfer from the justice court to the county court which is a proceeding unkown to law.

Yours truly,

C. W. TAYLOR,

Assistant Attorney General.

FEES OF OFFICE—TAX COLLECTOR—DELINQUENT TAX RECORD.

The compensation of five cents for each and every line of yearly delinquencies entered by tax collectors on the delinquent tax record or supplement thereto should not be considered in determining the maximum amount tax collectors should receive.

November 19, 1915.

Hon. H. B. Terrell, Comptroller, Capitol.

DEAR SIR: You have requested an opinion of this Department as to whether the compensation provided in House Bill 40 to tax collectors of 5 cents per line for the original and 5 cents per line for the duplicate, in preparing delinquent tax records, should be included in determining the maximum amount tax collectors should receive under the Fee Bill.

A determination of this question depends upon the construction which should be given to the phrase "in addition to the compensation and costs now allowed by law" contained in Section 3 of House Bill 40. This phrase is there used in the following connection:

"The tax collector shall, in addition to the compensation and costs now allowed by law, be entitled, for making up the delinquent record or supplements thereto where necessary under this act, the sum of five cents for each and every line of yearly delinquencies entered on said delinquent record or supplement, such compensation to be paid out of the general fund of the county upon the completion of said record or supplement. The tax collector shall also receive a commission of 5 per cent on the amount of all delinquent taxes collected in addition to the commissions now allowed him by law."

Does this phrase mean that the tax collector shall receive 5 cents per line for each and every line of yearly delinquencies entered by him on the delinquent tax record in addition to compensation and costs allowed him by law for such work prior to the passage of House Bill 40? Let us then first determine whether, prior to the passage of House Bill 40, the duty of preparing the delinquent tax record was imposed by law upon the tax collector, and if so, what compensation was provided for the service.

Prior to the passage of House Bill 40 the fees and commissions allowed by law to tax collectors were as follows:

Article 7654. "There shall be paid for the collection of taxes, as compensation for the services of the collector, beginning with the first day of September of each year, five per cent on the first ten thousand dollars collected for the State, and four per cent on the next ten thousand dollars collected for the State, and one per cent on all collected over that sum; for collecting the county taxes, five per cent on the first five thousand dollars of such taxes collected, and four per cent on the next five thousand dollars collected, and one and one-fourth per cent on all such taxes collected over that sum; and in counties owing subsidies to railroads the collectors shall receive only one per cent for collecting such railroad tax; and in cases where property is levied upon and sold for taxes, he shall receive the same compensation as allowed by law to sheriffs or constables upon making a levy and sale in similar cases, but in no case to include commissions on such sales."

Article 3872 is the same as Article 7654, except it adds another commission in the following language: "and on all occupation and license taxes collected, 5 per cent."

In Article 7691 it was also provided:

"The collector of taxes, for preparing the delinquent list and separating the property previously sold to the State from that reported to be sold as delinquent for the preceding year, and certifying the same to the commissioners court, shall be entitled to a fee of one dollar for each correct assessment of the land to be sold, said fee to be taxed as costs against the delinquent."

Clearly none of the fees mentioned in Articles 7654 and 3872 is intended to compensate tax collectors for any service performed in the preparation of delinquent tax records. This leaves for our determination only the question as to whether the fee of $1 provided in Article 7691 was intended to compensate him for preparing delinquent tax records. To determine this it will be necessary to review somewhat at length all the legislation relating to the preparation of delinquent tax records.

Article 7685 provides:

"It shall be the duty of the *commissioners court* of each county in this State, immediately upon the taking effect of this chapter, *to cause to be prepared* by the tax collector, at the expense of the county (the compensation for making out the delinquent tax record to be fixed by the commissioners court), a list of all lands, lots or parts of lots sold to the State for taxes since the first day of January, 1885, and which have not been redeemed, in their respective counties and unorganized counties attached thereto, and to have such lists recorded in books to be called the 'delinquent tax record.' * * * This delinquent tax record for each county shall

be delivered to and preserved by the county clerk in his office; and the commissioners court shall cause a duplicate of same to be sent to the Comptroller; provided, that where the records are incomplete in any county, it shall be the duty of the Comptroller to furnish such county with a certified copy of the delinquent list for any year or years."

It will be seen from the language used in Article 7685 that it does not become the duty of the tax collector to prepare the delinquent tax record until he has been requested to do so by the commissioners court and until that court has fixed a reasonable compensation for the work.

This view is upheld by the Texarkana Court of Civil Appeals in the case of Springer vs. Franklin County, in the following manner:

"The question then is, was the county limited in the persons whom it might contract with, or employ, to perform this work, to the tax collector? In other words, did this act make it a part of the official duty of the tax collector to prepare those delinquent lists? Or did it merely empower the commissioners court to make it a part of his official duty? An affirmative answer to the latter question would not necessarily imply the same answer to the first. If the statute intended, or had the legal effect, to make the preparation of those lists a part of the official duty of the tax collector, and also made it the duty of the commissioners court to 'cause' him to perform it, it follows that it would, upon the taking effect of the law, have become his duty to proceed with the work without any action on the part of the commissioners court in that respect. If this was the intention of the statute, then this purpose could have been made plain by the use of much less verbiage than was used. We rather incline to the opinion that in this instance the words actually employed are such a departure from those which would naturally have been used, if such had been the intention of the Legislature, that we may infer that no such intention existed. The question may then be asked, Why did the law make it the duty of the commissioners court to cause the tax collector to perform this work? The significance of this question may be met in part by the observations we have just made. If such was the intention, why did not the law so state without the circumlocution actually employed? If the law imposed the duty, then why require the commissioners court to cause him to do it? We think the purpose of the statute was to empower the commissioners courts of the different counties to require this work to be done by the tax collector, for the reason that the records from which the data were to be collected were mainly in his custody, and naturally he would be the person who could most conveniently and accurately compile it. But it did not become his duty till its performance was demanded by the commissioners court. It was not one of the governmental functions annexed to his office, but the performance of a purely clerical service. It was not the doing of some acts which in themselves were thereafter to form a public record, or the making of a public record de novo, but the collection of data from pre-existing records. The lists when completed did not acquire any legal sanctity by reason of having been prepared by him; no authentication was required from him; neither was the work to be taken as prima facie correct. After their preparation the lists were to be filed with the county clerk, and by him certified to the commissioners court. This body was then required to examine the lists and make such corrections as were necessary, after which they were to be published, and then recorded in a book called 'The Delinquent Tax Record' in the office of the county clerk. Again, this work was to be done but once. * * * The fact that the work was to be done but once furnishes to us very cogent reasons for holding that it was not an official act which could only be performed by the tax collector. * * * We have therefore concluded that the commissioners court had the power, under the provisions of this law, to contract with some person other than the tax collector for the performance of this service.

We can see no reason why this could not be done, in view of the fact that the service to be performed cannot, in any sense, be regarded as the exercise of any of the governmental functions attached to a public office." (123 S. W., 1171-1172.)

That the Legislature did not regard the preparation of the delinquent tax record as a duty adhering to the office of tax collector becomes clear upon going further into the history of legislation on this subject.

Article 7685 is Section 3 of Chapter 42 of the Acts of the Regular Session of the Twenty-fourth Legislature passed in 1895, as same was amended by Section 3 of Chapter 103 of the Acts of the Twenty-fifth Legislature passed in 1897. Section 3 of the original act passed in 1895, among other things, provided:

"It shall be the duty of the *Comptroller of Public Accounts*. immediately upon the taking effect of this act, to prepare a list of all lands, lots or parts of lots sold to the State for taxes since the first day of January, 1885, and which have not been redeemed in each of the counties in this State, and to record such land in books to be called the 'Delinquent Tax Record.'"

In other words, the Legislature in 1895, in clear and unambiguous language, imposed the duty of making the delinquent tax record upon the Comptroller of Public Accounts. That the Legislature did not regard the making and keeping of the delinquent tax record as a duty of the office of the tax collector is also clearly shown in Section 10 of the same act. In said section it is provided that it shall be the duty of the tax collector "to make up a list of the lands and lots on which the State and county taxes for the *preceding* year remain unpaid and file a copy of the same with the county clerk and another copy with the Comptroller of Public Accounts." But immediately after imposing this duty, the act provides that "the *county clerk* and *Comptroller* shall enter said list in the delinquent tax record as provided in Section 3 immediately upon receipt of the same from the tax collector."

Section 3 of the act of 1895 was amended in 1897, as above stated. By the amendment the Comptroller of Public Accounts was relieved of the duty of preparing delinquent tax records, the amendment to that portion of the act being in the following language:

"It shall be the duty of the *commissioners court* of each county in this State * * * to cause to be prepared by the tax collector, at the expense of the county (the compensation for making out the delinquent tax record to be fixed by the commissioners court) a list of all lands, lots or parts of lots sold to the State for taxes since the first day of January, 1885, and which have not been redeemed * * * and (it was the duty of the commissioners court) to have such lists recorded in books to be called the 'Delinquent Tax Record.'"

This is the law as it is at present.

Nor did the tax collector prior to the passage of House Bill 40 have anything to do with the delinquent tax record after the same was prepared. By Article 7686 it was made the duty of the county clerk to record the same in a book and to prepare an index for the same. By Article 7687 it was made the "duty of the commissioners court to

cause the same to be published in some newspaper published in the county for three consecutive weeks." . By Article 7688 it was made "the duty of the commissioners court, or by the county judge acting for said court," twenty days after such publication to "file a list of 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 in which such lands are located." By Article 7691 is was made the duty of the county attorney, or district attorney in counties having no county attorney, to represent the State in suits against delinquent taxpayers. The only duty imposed upon tax collectors in reference to such suits was to "furnish all affidavits, certified copies of the records of their respective office, and such other evidence as may be in their possession by virtue of such office, as may be applied for by the county attorney."

If the foregoing is not convincing that the Legislature did not intend to impose upon tax collectors the duty of preparing the delinquent tax record, then later legislation clearly shows they had no such intention. Thus an act was passed in 1905, of which Articles 7702, 7707 and 7709 of the Revised Statutes of 1911 constitute a part. Article 7709 is as follows:

"The various *counties* of this State *which have not heretofore made and published a delinquent tax record.* under the provisions of Chapter 103, Acts of the regular session of the Twenty-fifth Legislature, *are hereby authorized, and it shall be their duty, to make and publish the same to date hereof.* and when so done it shall have the same force and effect as if made and published under this act; and any *county* which has *heretofore* made a delinquent tax record for any number of years is *hereby authorized and empowered to recompile* the same to date hereof. and may compile each year thereafter under the provisions of said act."

Article 7702 provides that "whenever the *commissioners court* of any county in this State shall discover, through notice from tax collector or otherwise, that any real property has been omitted from the tax rolls for any year or years since 1884, or shall find that any previous assessment on any real property for the years mentioned are invalid, or have been declared invalid for any reason by any district court in a suit to enforce the collection of taxes on said properties, they may, at any meeting of the court. order a list of such properties to be made in triplicate and *fix* a compensation therefor. * * *"

Article 7707 provided:

"If the *commissioners court* of any county in this State shall deem it expedient to contract with any person to enforce the collection of any delinquent State and county taxes, *or to make up a list of properties referred to in this chapter* (that is, the list required by Article 7702) and to enforce the collection of taxes thereon for a *per cent* of the taxes, penalty and interest actually collected and paid to the collector of taxes, the State Comptroller shall be authorized to join in said contract and allow the same per cent for State taxes that is contracted to be paid by the commissioners court for the collection of county taxes, which 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 the 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."

Our conclusion, therefore, is, that the duty of making the delinquent tax record, prior to the passage of House Bill 40, was not imposed by law upon tax collectors and was not one of the governmental functions annexed to the office of tax collector. If it was not a duty imposed by law upon that office, then it follows that the fee of $1 provided for in Article 7692 was not intended to compensate tax collectors for making delinquent tax records. From the very fact also that in all of the statutes relating to the preparation of delinquent tax records it is provided that the compensation for the work shall be fixed by the commissioners court is conclusive that the $1 fee was not intended as compensation for such work.

Aside from this, however, an examination of the provisions of Article 7692 will disclose that the fee there provided was intended as compensation to tax collectors for work not connected with the preparation of the delinquent tax record. The statute clearly shows the different services which must be rendered by the tax collector to entitle him to this fee. The language used is as follows:

"The collector of taxes for (1) preparing the delinquent list and separating the property previously sold to the State from that reported to be sold as delinquent for the *preceding* year, and (2) certifying the same to the commissioners court, shall be entitled to a fee of $1 for each correct assessment of the land to be sold, said fee to be taxed as costs against the delinquent."

Clearly the services enumerated are not services required by the law in the preparation of the delinquent tax record. In the preparation of the delinquent tax record it is not required that there shall be a separation of the property previously sold to the State from that reported to be sold as delinquent for the preceding year, nor is it required that the tax collector shall certify the same to the commissioners court. Then it is necessary to look elsewhere to determine for what services of the tax collector this $1 fee is provided.

We find that Article 7692 places upon tax collectors the very duties, the performance of which $1 fee is provided. Said article is, in part, as follows:

"If no personal property be found for seizure and sale, as above provided, the collector shall, on the thirty-first day of March of 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. Said *list* shall be made in *triplicate and shall be presented to the commissioners court for examination and correction of any errors that may appear:* and when so examined and corrected by the commissioners court, such lists, in triplicate, shall be approved by said court, and one copy thereof shall be filed with the county clerk, and one copy retained and preserved by the collector, and one copy forwarded to the Comptroller *with his annual settlement reports.* When such list of lands and lots, delinquent for the preceding year only, is corrected, as provided for in Section 5 of this act (Article 7687 of this chapter), and, after such advertisement, suit shall be instituted against delinquents for all taxes and penalties due, in the district court as above provided. * * * In the counties where the delinquent tax record for former years has not been furnished, as provided for in Article 7685, the collector of taxes shall also at the same time make, in triplicate, a *list* of all lands and lots that have been previously sold to the State for taxes of

former years, which have not been redeemed and on which the taxes are delinquent for the *preceding year*, and *shall present the same to the commissioners court for examination and correction* of any error that may appear; and when so examined and corrected by the commissioners court, such lists, in triplicate, shall be approved by said court, and one copy thereof shall be filed with the county clerk, one retained and preserved by the collector, and *one copy forwarded to the Comptroller with his annual settlement reports.*"

These are the lists which the tax collector has to make each year in order to have a settlement with the Comptroller. One list is composed of lands and lots on which the taxes for the *preceding* year only are delinquent. The other list is required only in counties where the delinquent tax record for former years has not been furnished. It is composed of lands and lots that have been previously sold to the State for taxes of former years, which have not been redeemed and on which the taxes are delinquent for the *preceding* year.

By the act of 1885 it was provided that, as to the first of these lists, "the *county clerk* and *Comptroller* shall enter said list in the delinquent tax record," but when said act was amended by the act of the Twenty-fifth Legislature in 1897 this provision that said list should be added to the delinquent tax record by the county clerk and Comptroller was left out. It therefore cannot be considered that in performing the duty of preparing this list the tax collector was performing any duty in reference to the delinquent tax record.

In making these two lists it is necessary for the tax collector to separate "the property previously sold to the State from that reported to be sold as delinquent for the preceding year" and this is one of the elements which goes to make up the $1 fee. The statute also plainly requires that each of these lists shall be certified to the commissioners court for correction and this is the other element which goes to make up the $1 fee.

Therefore, the $1 fee provided by Article 7691 is not in any sense a fee for the services of the tax collector in preparing the delinquent tax record. This being true, no particular fee or compensation, prior to the passage of House Bill 40, was provided for the services of the tax collector or any one else in preparing the delinquent tax record. The only compensation provided for such work is such compensation as the commissioners court might fix.

Our conclusion, therefore, is that the phrase used in House Bill 40 "in addition to the compensation and costs now allowed by law" does not refer to any compensation or costs theretofore provided by law for making the delinquent tax record.

It is therefore the opinion of this Department that the Legislature intended by the use of said phrase to exclude the compensation of five cents per line provided therein to tax collectors from the operation of the provisions of the Fee Bill, and you are advised that such compensation should not be taken into consideration in determining the maximum amount tax collectors should receive.

Yours very truly,

JNO. C. WALL,
Assistant Attorney General.

FEES OF OFFICE—SHERIFF—WORDS AND PHRASES.

The word "fees" means the reward, compensation or usages allowed by law to an officer for services performed by him in the discharge of his official duties.

The "charges" allowed a sheriff for the support of prisoners by Article 1142 of the Code of Criminal Procedure of 1911, as amended by Chapter 64 of the General Laws of the Regular Session of the Thirty-second Legislature, cannot be considered fees of office in estimating the maximum amount of fees a sheriff may retain under the provisions of the Fee Bill, as amended by the Thirty-third Legislature.

January 29, 1915.

Hon. John E. Davis, House of Representatives, Capitol.

DEAR SIR: We have been handed by you a telegram from Charles E. Groce, County Auditor of Dallas county, as follows:

"Obtain, if possible, an opinion whether feeding prisoners is a fee of office, and if Article 3881 includes feeding of prisoners as a fee of office."

Article 1142, Code of Criminal Proceedure of 1911, is as follows:

"For the safe keeping, support and maintenance of prisoners confined in jail or under guard, the sheriff shall be allowed the following charges:

"1. For any number of prisoners not exceeding four he shall be paid for each prisoner, for each day, not exceeding forty-five cents.

"2. For any number of prisoners exceeding four, for each prisoner, for each day, not exceeding thirty cents.

"3. For necessary medical bill and reasonable extra compensation for attention to a prisoner during sickness, such an amount as the commissioners court of the county where the prisoner is confined may determine to be just and proper.

"4. The reasonable funeral expenses in case of death."

Article 1144, Code of Criminal Procedure, is as follows:

"It is the duty of the sheriff to pay the expenses of jurors impaneled in cases of felony (except when they are paid by the juror himself), the expense of employing and maintaining a guard, and to support and take care of all prisoners, for all of which he shall be reimbursed by the proper county according to the rates fixed in the two preceding articles."

Article 1148, Code of Criminal Procedure, is as follows:

"At each regular term of the commissioners court, the sheriff shall present his account to such court for the expenses incurred by him since the last account presented for the safe keeping, support and maintenance of prisoners, including guards employed, if any. Such account shall state the name of each prisoner, and each item of expenses incurred on account of such prisoner, and the date of each item, the name of each guard employed, the length of time employed, and the purpose of such employment, and shall be verified by the affidavit of the sheriff."

It will be noted that the Legislature, in Article 1142 of the Code of Criminal Procedure of 1911, did not use the word "fees," but instead the word "charges." This article was amended by Chapter 64 of the General Laws of the Regular Session of the Thirty-second Legislature so as to read as follows:

"Article 1097. For the safe keeping, support and maintenance of prisoners confined in jail or under guard, the sheriff shall be allowed the following charges:

"1. For each prisoner, for each day, such amount as may be fixed by the commissioners court; provided, the same shall be reasonably sufficient as compensation for such service, and in no event shall it be less than forty cents per day for each prisoner, nor more than fifty cents for each prisoner per day.

"2. For necessary medical bill and reasonable extra compensation for attention to a prisoner during sickness, such an amount as the commissioners court of the county where the prisoner is confined may determine to be just and proper.

"3. The reasonable funeral expenses in case of death."

It will be noted that in this amendment the Legislature again used the word "charges" instead of the word "fees." It will also be noted that this amendment does not affect the nature of the "charges" allowed to sheriffs, but merely fixes different limits and leaves the "charges" a sheriff may make to the discretion of the commissioners court within the limits named. Therefore, any construction original Article 1142 has received, if correct, would be the construction which should apply to said article as amended.

In that portion of the Act of 1897—commonly known as the Fee Bill—which is now Article 3897, Revised Statutes, Article 1142, Code of Criminal Procedure of 1911, received the following construction:

"Nor shall said item (the item for support of prisoners) be regarded as fees of office within the meaning of this chapter, to be included in making up the sheriff's maximum."

It is true that this Article, 3897, of the Fee Bill was amended in Chapter 121 of the General Laws of the Regular Session of the Thirty-third Legislature, yet we think the Legislature, by such amendment, can not be said to have placed a different construction upon the meaning of the "'charge" allowed sheriffs for the support of prisoners under Article 1142 of the Code of Criminal Procedure, for the amendment of Article 3897 is merely to the effect that each officer mentioned in Articles 3881 to 3886 of the Fee Bill, in making his report, shall include "an itemized and sworn statement of all the actual and necessary expenses incurred by him in the conduct of his said office, such as stationery, stamps, telephone, traveling expenses, and other necessary expense. * * * The amount of such expense shall be deducted by the officer in making each such report from the amount, if any, due by him to the county under the provisions of this act." In other words, the Thirty-third Legislature merely substituted for original Article 3897, Revised Statutes, a new article of the same number, allowing certain expenses to all officers affected by the act as amended, without in any manner using language which would indicate that the "charge" allowed sheriffs for the support of prisoners should receive a different construction from that given to it by the Legislature in the Act of 1897.

Then, at least, from 1897 to 1913, the legislative construction has been that the "charge" allowed sheriffs for the support of prisoners is not a fee of office, and nothing in the Act of 1913 indicates that the

Legislature placed a different construction upon this "charge." After investigation we have been unable to find where a different construction has ever been attempted to be placed upon the provisions of Article 1142 of the Code of Criminal Procedure.

We think by no reasonable construction of the provisions of Article 1142 of the Code of Criminal Procedure it could be said that the "charge" allowed sheriffs for the support of prisoners is a fee of office.

The only case we have found in which the word "fees" is defined by the higher courts of this State, is the case of the City of Austin vs. Johns, 62 Texas, 182, where the following definition is given:

"The word 'fees,' as defined by Burrill (see Burrill's Law Dict., Vol. 1, p. 474, verb. 'Fee.' See also Bouvier's Dict., Vol. 1, p. 577, verb 'Fee') is said to be the reward or compensation or wages allowed by law to an officer for services performed by him in the discharge of his official duties. The latter author cites cases showing the difference between fees of an attorney, counselor and physician and the costs of a suit.

"Webster, in his Unabridged Dictionary, p. 444, word 'Fee,' following the elementary law writers, also gives, in substance and quite fully, the same definition of this word.

"Under this, the well-known and correct legal definition of the word 'fee' as used in the charter, we have no doubt that the city council has authority to allow the appellee, as city attorney, by way of compensation and remuneration for his official services, commissions on all sums of money collected for the city, where he has rendered professional services in that behalf, and through his official instrumentality such sums of money have been in fact collected and paid into the city treasury."

In almost all jurisdictions the term "fees" has been defined as the compensation, wages, or reward, allowed public officers for particular *services* rendered.

St. Louis vs. Meintz, 18 S. W., 30; 107 Mo., 611.
Commonwealth vs. Bailey, 3 Ky. L. Reps., 116.
State vs. Russell, 71 N. W., 785; 51 Neb., 774.

Fees are distinguished from costs in being always the compensation for *services*, while costs are an indemnification for money paid out and expended in a suit.

Crawford vs. Bradford, 2 South., 782; 23 Fla., 404.

Fees mean the fees of the clerk in a strict sense of the word, and do not relate to his disbursements.

Columb vs. Webster Mfg. Co. (U. S.), 76 Fed. 198.

In Nevada it was held that a constitutional provision prohibiting judges from receiving to their own use "any fees or perquisites of office" does not include the necessary expenses actually paid by them in traveling by public conveyance in going to and from the place of holding court.

State vs. Atherton, 10 Pac., 901; 19 Nev., 332.

The meaning of the word "fees" is the recompense allowed by law to officers for their *labor* and *trouble*.

City of Mobile vs. Southerland, 47 Ala., 511.

Fees are distinguished from wages in being a compensation for particular *services.*

Crawford vs. Bradford, 2 South., 782; 23 Fla., 404.

If the foregoing definition of the term "fees" is correct, that is—compensation for particular *services* rendered by public officers—then the "charge" which the statute permits sheriffs to make of 40 cents or 50 cents per day for the support of each prisoner is not properly a fee of office, because such a "charge" does not merely involve the *services* to be rendered by the sheriff. It involves actual expenditures of money made by the sheriff in the purchase of food for prisoners and in having the same prepared and served to them. It could not be considered a fee of office under the Act of 1897, as amended by the Act of 1913, so as to affect the maximum amount of fees of office a sheriff might retain. It would be impossible to determine what portion of the "charge" allowed by law for supporting prisoners would represent compensation for any actual services performed by the sheriff as a public officer. It certainly was not intended by the law that the support of prisoners should be at the expense of the sheriff. If the "charge" allowed by the statute for this purpose is classed as a fee of office, at least a portion of the expense for supporting prisoners would necessarily fall upon the sheriff and the anomalous condition would exist, that the greater the number of prisoners and the heavier the responsibility of the sheriff the less would be his remuneration.

You are, therefore, advised that in the opinion of the Department the "charge" allowed by the statute to sheriffs for the support of prisoners is not a fee of office and can not be included in estimating the maximum amount of fees the sheriff may retain.

Very truly yours,

JNO. C. WALL,
Assistant Attorney General.

FEES OF OFFICE—COUNTY ATTORNEY.

1. Article 3893, Revised Statutes, empowers commissioners court to give county attorneys compensation for ex officio services rendered, for which no fee is otherwise provided.
2. Commissioners court cannot pay county attorney a salary as legal adviser to the court. It is merely empowered to grant ex officio compensation for services which by law it is made his duty to perform and for which no fee is provided by law.
3. Commissioners court is empowered to pay expense for stationery for county attorney. It is not empowered to purchase a library and office fixtures for him.

December 18, 1914.

Hon. J. W. Darden, County Attorney, Clairemont, Texas.

DEAR SIR: In a letter to this Department you ask the following questions:

(1) "Was, in your opinion, Article 3893, R. S. (as amended by the act

of the regular session of the Thirty-third Legislature), enacted in order to provide adequate compensation to county attorneys?"

Replying to this question, we beg to state that Article 3893, as amended by the Act of the Regular Session of the Thirty-third Legislature, authorizes commissioners courts to allow county attorneys "compensation for ex officio services * * * where the compensation and excess fees which the officers are allowed to retain shall not reach the maximum provided for in this chapter * * * when, in their judgment, such compensation is necessary, provided such compensation for ex officio services allowed shall not increase the compensation of the official beyond the maximum amount of compensation and excess fees allowed to be retained by him under this chapter."

This article, as amended, has received the following construction by this Department:

"From certain inquiries received by this Department, we find that confusion exists in the minds of some as to the amount of ex officio compensation that may be paid by the commissioners court under the provisions of Article 3893. There should be no serious difficulty in arriving at the meaning of this article. It plainly means that in those counties where officers do not receive from fees of all kinds the maximum allowed, the commissioners court may, if it deems it necessary, pay an ex officio compensation, but in no event would the commissioners court be authorized to allow an ex officio compensation so that the officer's fees plus the ex officio would make an amount larger than the maximum named in the law for that particular county.

"The language from which confusion arises is shown in the following quotation:

"'Article 3893. The commissioners court is hereby debarred from allowing compensation for ex officio services to county officials when the compensation *and excess fees* which they are allowed to retain shall reach the maximum provided for in this chapter, etc.'

"The use of the language 'and excess fees' in connection with the word 'compensation,' so as to read 'compensation and excess fees,' is confusing, unintelligible, and its use in this connection was evidently a legislative mistake. There cannot, in the nature of the case, exist *excess fees* until the fees collected by the officer after deducting the salaries of deputies and assistants, and expenses such as may be allowed by law, amount to more than the maximum fees provided for officers of the particular county, and there is no way to determine in advance the amount of excess fees.

"In our opinion, therefore, Article 3893 should be read as though this language did not appear and when stricken out we get at the intent of the Legislature, which is that such compensation for ex officio services allowed shall not increase the compensation of the official beyond the maximum amount of compensation allowed to be retained by him. In other words, whenever excess fees exist, no ex officio compensation can be allowed." (41 Op. Atty. Gen., 20.)

You also ask the following question:

(2) "May the county commissioners court pay a county attorney a salary for legal service—as legal adviser to the court?"

In reply to this question we also call attention to the foregoing construction given Article 3893 by the Department. We likewise call your attention to the case of Groomes vs. Atascosa County, 32 S. W., 188, where it was held that the commissioners court had no power to

contract for the services of an attorney as special advisor and to defend all suits against the county for a fixed period at a given salary, although it might contract for the services of an attorney in a special matter where the interests of the county required such services. The theory upon which this case was decided is, that under an agreement to pay a given salary for a fixed period of time the county would be rendered liable for such salary, although no services whatever might be rendered by the attorney.

You are, therefore, advised that the ex officio compensation which a commissioners court can allow a county attorney under Article 3893 is compensation for particular ex officio services rendered "when, in their judgment, such compensation is necessary; provided, such compensation for ex officio services allowed shall not increase the compensation of the official beyond the maximum amount of compensation allowed to be retained by him under" Chapter 121 of the Acts of the Thirty-third Legislature.

For further information on this subject, we refer you to the enclosed opinion rendered to Hon. John B. Guinn of Rusk, Texas.

You also ask the following question:

(3) "May and should the county furnish the county attorney a library, stationery and office fixtures?"

Answering this question, we beg to state that Article 3897 provides that the county may pay "actual and necessary expenses incurred (by the county attorney for) * * * stationery." The commissioners court is no where permitted to furish the county attorney a library and office fixtures.

Very truly yours,
JNO. C. WALL,
Assistant Attorney General.

FEES OF OFFICERS—COMMISSIONERS COURTS—POWERS OF, OVER COUNTY BUSINESS.

1. Has not general powers either by the Constitution or laws.
2. Has not, by Constitution or statutes, power to fix fees of officers.
3. Has not power to fix compensation for the services of officers, except as declared by statutes for certain ex officio services.
4. Has not power to reimburse officers for expenses incurred in looking for persons who are accused of crime or have escaped from custody.
5. Power to fix fees is vested by Constitution in the Legislature. If Legislature has failed to fix fees or the amount of a fee for any services rendered by officers, the courts of the State have no right to fix or determine the same.
6. Officer is not entitled to reward beyond his legal fees for the performance of an act which it is his official duty to perform.

October 29, 1914.

Hon. C. W. Lewis, County Attorney, Sweetwater, Texas.

DEAR SIR: In a letter of recent date you ask this Department to

render an opinion as to whether the commissioners court of your county can legally authorize the payment of some two or three hundred dollars out of county funds, to reimburse the sheriff of your county for money expended by him "in looking for prisoners who escaped the jail without any fault on his part whatever."

In our opinion, the commissioners court is without power and authority to permit the funds of the county to be so expended, for the following reasons, towit:

1. Because such authority is not vested in the commissioners court, either by the Constitution or by any act of the Legislature.

Article 5, Section 18, of the Constitution, which relates to the organization of the commissioners court and to its powers and jurisdiction over county business, provides that the commissioners court "shall exercise such powers and jurisdiction over all county business as is conferred by this Constitution and the laws of this State, or as may be hereafter prescribed."

Construing this provision, the Supreme Court in the case of Bland vs. Orr, 90 Texas, 495, held:

"The Constitution does not immediately confer jurisdiction upon these (meaning commissioners) courts over the county business and subject that jurisdiction to 'such regulations as the Legislature may prescribe,' nor authority generally over such business. The provision from Section 18 of that instrument (already quoted) prescribes: first, that the commissioners courts shall exercise such powers and jurisdiction over all county business as is conferred by the Constitution. * * * It also gives them such powers as are conferred 'by the laws of the State.' * * *

"There are some broad expressions in the opinions in Colorado vs. Beethe, 44 Texas, 447, and in Looscan vs. Harris County, 58 Texas, 511, in reference to the powers of the commissioners courts over county affairs; which are well enough when applied to the facts of those cases. If these utterances be construed as holding that such courts have general control over the finances of a county, such as is ordinarily conferred upon the directors of a private corporation, they cannot, in our opinion, be maintained."

Again, in the case of Mills County vs. Lampasas County, 90 Texas, 606, the Supreme Court, construing this provision, held:

"In our opinion, it is not true, as counsel for the appellant county insists in his elaborate written argument, that the Constitution confers upon the commissioners court any general authority over the county business, but 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. (Art. 5, Sec. 18.) We had occasion to consider this question in the case of Bland vs. Orr, ante, p. 492 (39 S. W., 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."

Taking the same view in Baldwin vs. Travis County, 88 S. W., 484, the court held that the commissioners court had no power to constract for payment by the county of costs for publication of notices to non-resident taxpayers.

So also in the case of Grooms vs. Atascosa County, 32 S. W., 188, it was held that the commissioners court had no power to contract

for services of an attorney as special advisor and to defend all suits against the county for a fixed period at a given salary, although it might contract for the services of an attorney in a special matter, where the interest of the county required such services.

And in Clark vs. Finley, 93 Texas, 171, 54 S. W., 343, it was held that this provision did not inhibit the Legislature from committing a matter of county business to some other agency.

The legislative construction of this provision of the Constitution is the same as that of the courts; that is, that commissioners courts have not general powers over all county business, but only such as are given them by the Constitution and the statutes. This is evident from the fact that the Legislature has passed many laws directly affecting county business and plainly putting the management of the same in other hands than the commissioners courts.

Of such a nature is the County Auditors Act. This act makes the power of the commissioners court over claims against the county dependent upon the approval of such claims by the auditor. In Anderson vs. Ashe, 99 Texas, 447, 90 S. W., 873, this act was held constitutional and the court also held that the commissioners court had no power to allow a claim against the county after it had been examined and disapproved by the auditor.

Of such a nature is the Act of 1897 limiting the fees and compensation of certain officers in counties of less than three thousand voters. This act was held not to be violative of the foregoing provision in Clark vs. Finley, supra, and Fears vs. Nacogdoches County, 71 Texas, 337, 9 S. W., 265.

Of such a nature is the Act of the Twenty-sixth Legislature establishing a corporation court in each municipality and conferring upon it the same criminal jurisdiction as is possessed by justices of the peace. This act was held constitutional in Ex parte Wilbarger, 55 S. W., 968.

Of such a nature are many of the School Laws, especially those relating to the establishment of independent school districts.

It then is the well settled law of this State that commissioners courts have not general control over county business, but only such control as is conferred by the Constitution itself and the laws of the State.

Let us then first look to the entire Constitution and see what powers by it are conferred on commissioners courts. An examination will show, as was stated in Bland vs. Orr, supra, that the powers therein conferred merely relate "to the filling of certain vacancies in offices and some other minor functions."

Nowhere is any power conferred which would enable the commissioners courts to fix the fees or compensation of officers. In fact, Section 23 of Article 5, of the Constitution, which relates to the creation of the office of sheriff, provides that the sheriff's "duties and perquisites, and fees of office shall be prescribed by the Legislature."

Again, Section 44 of Article 3, provides "the Legislature shall provide by law for the compensation of all officers, servants, agents and public contractors, not provided for in this Constitution, but shall not grant extra compensation to any officer, agent, servant, or public contractors, after such public service shall have been per-

formed or contract entered into, for the performance of the same."

The Supreme Court of Texas, construing this last provision, in the case of the State vs. Moore, 57 Texas, 320, holds:

> "A failure of the Legislature to exercise the power thus conferred cannot clothe the courts with it. * * *
>
> "It is not believed that any well-considered case can be found in which a public officer has been permitted to collect fees, unless the same are provided for and the amount thereof declared by law."

Looking next to the laws of this State, we find that the Legislature has no where conferred upon commissioners courts general powers over county business. On the contrary, as is stated in the case of Collingsworth County vs. Myers, 35 S. W., 416.

> "Title 32, Rev. St., 1895, especially Chapter 2, shows that their powers and duties are almost entirely political—such as dividing the county into districts and precincts; fixing the times and places for holding elections; laying out, establishing, building and controlling highways, bridges, ferries, etc.; auditing and settling accounts against the county, and directing their payment; providing for the support and burial of paupers; building courthouses, jails and other public buildings; and levying taxes."

Title 32, above referred to, is now Title 40 of the Revised Statutes of 1911. Chapter 2 of this title prescribes the powers and duties of commissioners courts, but it nowhere confers upon such courts the power to fix the fees or compensation of sheriffs.

Article 3866, Revised Statutes, which relates to the compensation of sheriffs for ex officio services is the only article of the statute which confers any right whatever upon the commissioners court to fix compensation for any services to be rendered by sheriffs. An examination of this article, however, will disclose that it has no reference to the fixing of compensation for such services as rendered in this instance. The compensation there provided for must "be fixed by the commissioners court at the same time other ex officio salaries are fixed."

The Constitution and laws of Texas failing in any way to authorize the payment of county funds to reimburse sheriffs for money expended by them in looking for criminals or for escaped prisoners, the commissioners court does not have such power. Nor does any other court have such power.

This is plainly decided in the case of the State vs. Moore, 57 Texas, 320, where the Supreme Court held:

> "In actions between man and man for services rendered by the one at the request of another, in the absence of a contract fixing the compensation, the courts have the power to inquire what will be a reasonable compensation for the services performed, and to render judgment for such sum; but no such power is believed to exist in regard to the fees of public officers, in the absence of an express grant of such power.
>
> "The Constitution provides that 'the Legislature shall provide by law for the compensation of all officers, servants, agents and public contractors not provided for in this Constitution,' and this power can be exercised by the Legislature alone.

"A failure of the Legislature to exercise the power thus conferred cannot clothe the courts with it. * * *

"In pursuance of the constitutional requirement, the Legislature has enacted laws fixing the compensation of public officers in cases civil and criminal; and if there be nothing in the laws evidencing a contrary intention, it would probably have to be held that an officer was not entitled to any compensation for such services as it is made his duty to perform, but for which no compensation is provided by law; but as we have already said, Article 257, R. S., does recognize the right of a county attorney to commissions on money collected by him for the State; it, however, fails to fix the rate of such commission, and until the Legislature does so, neither the courts nor the interested party, nor any officer of the government, can fix it."

To the same effect, see Wharton County vs. Ahldag, 84 Texas, 15, 19 S. W., 291.

See also Jefferson Co. vs. Young (Ky.), 86 S. W., 985, and cases cited; State vs. True (Tenn.), 95 S. W., 1028.

2. The funds of a county can not be legally used to reimburse a sheriff for money expended by him in looking for persons accused of crime or criminals who have escaped from his custody, because such would be equivalent to paying him a reward for the performance of acts which it is his official duty to perform.

It is a well settled doctrine of this State that an officer is not entitled to reward beyond his legal fees for the performance of an act which it is his official duty to perform.

Kasling vs. Morris, 71 Texas, 584, 9 S. W., 739.
S. W. Tel. & Tel. Co. vs. Priest, 72 S. W., 242.

A person who accepts office for a fixed salary (or for fixed fees) can not legally charge additional compensation for the performance of his official duty.

City of Decatur vs. Vermillion, 77 Ill., 315.

A sheriff is a peace officer. It is one of his most important duties to arrest persons legally accused of crime and criminals who have escaped from his custody. This duty is plainly imposed by statute.

Article 5109 of the Revised Statutes and Article 49 of the Code of Criminal Procedure make the sheriff responsible for the safekeeping of prisoners.

If he should wilfully permit a prisoner charged with a felony to escape, he may be punished by imprisonment in the penitentiary. (Articles 320 and 321, Penal Code.)

If he should wilfully permit a prisoner charged with a misdemeanor to escape or even negligently permit a person charged with crime to escape, he may be punished by fine. (Articles 323, 324 and 325, Penal Code.)

Nor can a sheriff wilfully refuse or fail from neglect to execute any lawful process requiring arrest of a person accused of a felony or misdemeanor or refuse to receive such person into the jail without becoming guilty of an offense punishable by a fine. (Articles 326, 327 and 388, Penal Code.)

Should a prisoner escape he may be retaken without any other warrant and any means may be used in retaking him which may be used in making the arrest in the first instance. (Article 291, Code Criminal Procedure.)

To enable the sheriff to perform the imposed duty of safekeeping prisoners, he is authorized by statute, upon the approval of the commissioners court, or, in cases of emergency, upon the approval of the county judge, to employ any number of guards that 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."

For the foregoing reasons it is the opinion of this Department that the commissioners courts would have no right whatever to reimburse the sheriff out of county funds.

Very truly yours,

JNO. C. WALL,
Assistant Attorney General.

COUNTY TREASURERS—FEE OF OFFICE—COMMISSION—SCHOOL FUNDS.

County treasurers are not entitled to commissions for receiving and disbursing school funds.

Article 2767, Rev. Stats.

October 10, 1914.

Hon. O. M. Wroe, County Attorney, Fairfield, Texas.

DEAR SIR: We are in receipt of a letter from I. B. Bonner, treasurer of Freestone county, requesting the opinion of this Department as to whether he, as treasurer of Freestone county, is entitled to commissions for receiving and disbursing the proceeds of a sale of $9,000 Kirven Independent School District bonds. In his letter he further states:

"These bonds were sold and the proceeds placed in the bank, which is used as a depository for the county funds, and pays interest upon the monthly balances. I collect my regular commissions upon all other moneys. As I understand the law, I am entitled to one per cent upon this money."

County treasurers are not included among those officers to whom this Department is permitted to render opinions. The matter inquired about, however, being of public interest and needing immediate attention, we are taking the liberty of advising you, in advance of a request from you, the opinion of this Department.

Article 2767 of the Revised Statutes is as follows:

"The terms 'county treasurer' and 'county treasury,' as used in all provisions of law relating to school funds, shall be construed to mean the county depository; and the State Department of Education shall be notified of the treasurer of the school funds in a given county by the commissioners court filing in said department a copy of the bond of said depository to cover school funds; provided, that no commission shall be paid for receiving and disbursing school funds."

In the case of Charlton vs. Cousins, 103 Texas, 117; 124 S. W., 422, the county treasurer of Harris county sought by mandamus proceedings to compel R. B. Cousins, State Superintendent of Public Instruction, to issue to relator a certificate showing the amount of money apportioned by the Board of Education to Harris county as its share of available school fund. Respondent denied the right of the relator to such certificate, insisting that because of the provision of the foregoing statute that "the terms 'county treasurer' and 'county treasury,' as used in all provisions of law relating to school funds shall be construed to mean the county depository," the certificate should be issued to the county depository and not to the county treasurer. Relator attacked the constitutionality and validity of this provision of the statute. The Supreme Court held this provision of the statute valid and not in conflict with any provision of the Constitution and mandamus was refused.

In the case of Horton vs. Rockwall county, 149 S. W., 297, the county treasurer of Rockwall county sought to recover commissions for receiving and disbursing the proceeds of the sale of twenty-five thousand dollars of common school district bonds. The trial court sustained the general demurrer to plaintiff's petition. On appeal the validity of all the provisions of the foregoing article of the statute was attacked. The Court of Civil Appeals affirmed the judgment of the trial court, holding the statute constitutional and all its provisions valid.

It is the opinion of this Department, therefore, that it is well settled law of this State that county treasurers are not entitled to commissions for receiving and disbursing school funds, whether they are available school funds or funds derived from the sale of bonds.

You will please so advise Mr. Bonner.

Yours very truly,

JNO. C. WALL,
Assistant Attorney General.

FEES OF OFFICE.

Chapter 4, Title 58, of the Revised Statutes does not attempt to fix any fees of office. It merely fixes the maximum amount of fees the officers mentioned therein may retain.

While various statutes fix the fees and the amount of fees which may be charged by different officers for their services, yet the maximum amount of fees any officer may retain is determined alone by Chapter 4, Title 58, R. S.

No officer mentioned in said chapter is entitled to any fees or compensation beyond the amount fixed therein, unless it be fees which are excepted by some provision of that act itself or of the act fixing the fee.

November 6, 1914.

Hon. J. K. Russell, County Attorney, Cleburne, Texas.

DEAR SIR: In a letter to this Department you ask "whether or not a county tax collector is entitled to his commission of one-half of

one per cent for assessing a common school district tax, exclusive of the maximum salary allowed him by law."

Since you use the words "tax collector," but inquire as to fees for assessing a common school district tax, we will answer the question as to both the tax collector and the tax assessor.

Article 2836, R. S., provides:

"The tax assessor shall assess, and the tax collector shall collect, said district taxes (special taxes voted and levied for school purposes) as other taxes are assessed and collected. The tax assessor shall receive a commission of one-half of one per cent for assessing such tax and the tax collector a commission of one-half of one per cent for collecting the same."

Article 3871 provides other fees allowed to tax assessors and Article 3872 other fees allowed to tax collectors.

While fees which accrue to the offices of tax assessor and tax collector are designated and the amounts thereof are fixed by the foregoing and perhaps other articles of the statute, yet the *maximum amount* of fees which said officers *may retain* is determined alone by Chapter 4, Title 58 of the Revised Statutes.

Article 3881 of said chapter and title provides:

"Hereafter the maximum amount of *fees of all kinds* that may be retained by any officer mentioned in this section (article) as compensation for services shall be as follows:"

Then follow the amounts allowed certain county officers, including tax assessors and tax collectors.

Construing this provision of Article 3881 the Supreme Court in the case of Ellis County vs. Thompson, 95 Texas, 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 fees involved in that case had accrued to the office of the county clerk. The construction there given the phrase, however is the same that would have to be applied in determining the amount of fees which assessors and collectors or any other officers named in Chapter 4 of Title 58 might retain.

This phrase received the same construction by the Court of Civil Appeals in Navarro County vs. Howard, 129 S. W., 859, the following language being used:

"In the case of Ellis County vs. Thompson, 95 Texas, 22; 64 S. W., 927; 66 S. W., 48, our Supreme Court held that the phrase 'fees of all kinds' mentioned in the foregoing section of the act of 1897 embraces every kind of compensation allowed by law to the clerk of the county court, unless excepted by some provision of said act."

It may then be safely said that no officer mentioned in Articles 3881, 3882 and 3883, R. S., is entitled to receive any fees or compensation of any kind beyond the amount allowed by Chapter 4, Title 58, R. S., unless it may be some fees of his office which are "excepted by a provision of said act" itself.

The fees or commissions inquired about are not so excepted to assessors and collectors in said act. They therefore can not be retained by said officers "exclusive of the maximum amount" of fees allowed by Chapter 4 of Title 58.

Your attention is called to the fact that several articles of said Chapter were amended by an act of the Thirty-third Legislature, which goes into effect December 1, 1914. The foregoing rules and construction, however, apply alike to the act as so amended.*

Yours very truly,

JNO. C. WALL,
Assistant Attorney General.

COUNTY CLERK—RECORDING FEES.

The county clerk of the county is required to record the annual report filed in his office by corporations operating street railways, electric light and power plants, etc., and as same is a public duty required of him in his official capacity and no provision is made for the payment of recording fees, the clerk is not entitled to a fee for same, but same falls within the ex officio duties required of him.

Articles 1182, 1185, 3862, R. S., 1911.

April 15, 1915.

Hon Luke Mankin, County Attorney, Georgetown, Texas.

DEAR SIR: The Attorney General is in receipt of your letter of April 10, reading as follows:

"Kindly give me a ruling on whether or not the county clerk is entitled to charge for recording the annual reports of corporations. The question has arisen, as shown by the enclosed correspondence, whether or not the clerk shall make such charge or whether it comes under his ex officio duties, which as you know at this time fees for such has discontinued."

Under the provision of Chapter 5, Title 25, R. S., 1911, every corporation within this State owning, leasing or operating in this State in cities or towns of over 2500 population, according to the last official census of the United States, a street railway, electric light or power plant furnishing light or power to the public, gas plant furnishing gas to the public, water plant furnishing water to the public, and sewerage company furnishing sewerage to the public shall file a copy of the annual report required under said chapter with the clerk of the county court of the county in which such corporation has its principal place of business. The copy of the report so filed with the county clerk shall be by such clerk delivered to the commissioners court, and it is further provided that such report shall be recorded in a properly indexed book to be kept for that purpose and opened to the inspection of the public at all times. It will be noted that the corporation making such report has complied with all the provisions of the law in so far as it is concerned when it has filed with the clerk a copy of the report made by it to the Secretary of State, the law placing no obligation upon such corporation to have the copy of its report recorded. It

*See opinion to Comptroller on page 227.

becomes the duty of the county clerk when such copy is filed with him to transmit same to the commissioners court, and if it becomes the duty of anyone to see to it that such report is recorded, then that duty falls upon the commissioners court and not upon the corporation filing such report.

It is a well established rule that an officer is not entitled to fees without specific statutory authority therefor.

Helena School District vs. Kitchens, 156 S. W., 441.
Honea vs. Green County, 143 S. W., 592.

It is also a general rule that statutes describing fees of officers must be strictly construed and unless it plainly appears that an officer is entitled to a fee, then the right thereto must be denied.

Holeman vs. Macon, 137 S. W., 16.
State vs. Patterson, 132 S. W., 1183.

The Supreme Court of the State of Missouri in the Holeman case above cited, uses this language:

"A recognized rule of statutory construction is that a public officer cannot demand any compensation for his services not specifically allowed by statute and that statutes fixing such compensation must be strictly construed."

It is true that Article 3862 of the Revised Statutes of 1911 provides in part as follows:

"No county clerk shall be compelled to file or record any instrument of writing permitted or required by law to be recorded until after payment or tender of payment of all legal fees for such filing or recording has been made."

In the preceding portion of the article of the statute above quoted from we find that the Legislature after enumerating certain ex officio services required of the county clerk uses this language: "and all other public services not otherwise provided for." The enumeration of the ex officio services is made in connection with the direction to the commissioners court to allow out of the treasury certain ex officio fees to the county clerk, and while the ex officio of the county clerk has been by subsequent acts of the Legislature practically abolished, yet it has not taken from the county clerk the obligation to perform the ex officio services of an officer or those obligations resting upon him to perform certain duties on behalf of the public and for the public good, and not for the advantage of any particular individual or citizen. Among those duties are those enumerated in Article 3862, and in addition thereto we might mention the obligation resting upon the county clerk to record the official bonds of the various officers of the county. The record of these bonds is not in the interest of any particular individual nor in the interest of the county in its corporate capacity, but is a public service in which all of the people have an interest.

The item contained in Article 3860, R. S., 1911, reading as follows:

"Recording all papers required or permitted by law to be recorded, not otherwise provided for, including certificate and seal, for each 100 words, 10 cents."

has reference to those papers and instruments which under some provision of law are required or permitted to be filed for record by some interested party and has no application to such instruments as the law requires to be recorded as a matter of public interest and places no obligation upon any particular interested party to have recorded.

Of course where the clerk performs any services for the county or for the State where the county or State engages in any business or litigation in which a citizen might engage, then such county or the State would be responsible to the clerk for his costs or filing fees or recording fees.

The purpose of the Legislature in requiring the record of this annual report was evidently that the public generally might be at all times informed of the operation and condition of such quasi public corporation. The record of such report in no way fixes a personal right and no question of the validity of any such right is in any way involved, but such record was for the purpose only of giving the public access to the true condition of such corporation.

We therefore advise you that the recording of the annual reports of the corporation mentioned is a general public service to be performed by the county clerk and as no provision is made for the payment of such recording fees either by the corporation or the commissioners court then the clerk would not be entitled to a fee therefor, and he must perform same as an obligation imposed upon him in the interest of the public.

Yours truly,

C. W. TAYLOR,
Assistant Attorney General.

DOCKET ENTRIES—FEES.

It is the duty of the district clerk to keep a court docket and to enter therein among other things the rulings of the court.

While it is the practice of many of the district judges to enter upon the court docket the date a cause is set for trial, yet such duty should be performed by the clerk. Ordinarily no record of the setting of a case is required to be made in the minutes of the court and where no record of such setting is made in the minutes no fees should be charged therefor by the clerk.

The judge, in his discretion, would have authority to make and have entered of record an order setting a case for a certain date, in which event the clerk would be entitled to charge and collect as costs in the case a fee of seventy-five cents prescribed in the fee bill. Articles 1694, 1695, 1935, 1943, 1944, 1945, 3855, 3858, R. S., 1911. Rules 79 to 82. Rules of the district and county courts.

March 10, 1915.

Hon. B. F. Gafford, County Attorney, Sherman, Texas.

DEAR SIR: From your favor of March 8, it appears that when in your district court a case is set for trial on a certain date, the

judge makes a memorandum on his docket; for illustration, as follows: "3-8-15, set for 3-22-15." You state that it frequently occurs that a case will be reset two or three times and that on the date of each resetting the court makes a similar memorandum. You further state that the clerk of the district court has adopted a practice of writing up an order on each memorandum made by the judge, for which he charges seventy-five cents, which amount is taxed up to costs. You desire an opinion from us as to the legality of such practice and charge.

We note you are of the opinion that the memorandum made by the judge of the setting and resetting of cases is simply one for his convenience and not such an act of the court as is required to be written up by the clerk in the minutes of the court. In this conclusion this Department concurs for the reasons hereinafter set forth.

Article 1694, R. S., 1911, provides that the clerks of the district courts shall keep a fair record of all the acts done and proceedings had, etc., while Article 1695 provides: "They shall also keep such other dockets and books as are or may be required by law."

Rules 79, 80 and 81 prescribed by the Supreme Court for district and county courts provides as follows:

"The clerks of the district and county courts shall keep a court docket, in a well-bound book, ruled into columns, in which they shall enter, in the first column, number of case and name of attorney; second, names of the parties; third, nature of the action; fourth, the pleas; fifth, rulings of former terms; sixth; the motions and rulings of the present term.

"The cases shall be placed on the docket as they are filed.

"The clerk shall, at each term, make out two copies of this docket, one for the use of the court, and one for the use of the bar."

From a reading of the above articles of the statutes and rules of the courts, it appears to us that it is made the duty of the district clerk to make all entries necessary or required to be made in the dockets of the courts and that it is not incumbent upon the district judge to make such entries. It is a general practice, however, for the district judges to make such entries upon the dockets as the setting of the cases, but this is a mere matter of convenience. Some judges adopt the rule of noting the setting of the cases upon a separate sheet of paper or in a separate book kept by them for that purpose, but as said above, there is no obligation resting upon the district judge to make the entries in the docket, while on the other hand the statutes and the rules of the court devolve such duty upon the clerk of the court.

In our opinion the ordinary setting of cases on a call of the docket as is provided for in Articles 1935, 1943 and 1944 does not require an order of the court to be entered upon the minutes, but merely requires a docket entry for the information of the court and the attorneys. It is contemplated by the articles of the statute above enumerated that all causes should be tried in their order upon the docket but by agreement of counsel or by order of the court such cases may be tried upon dates agreed upon or fixed by the court.

Kirkland vs. Sullivan, 43 Texas, 233.
Bostwict vs. Bostwict, 73 Texas, 182.
Gardell vs. Gardell, 94 S. W., 458.
Allyn vs. Willis, 65 Texas, 65.

We do not mean to hold, however, that the district judge would not have authority to set down a cause for hearing upon a particular date and to have entered an order upon the minutes of the court to that effect.

Allyn vs. Willis, 65 Texas, 65.
Railway Company vs. Shuford, 72 Texas, 165.
Ransom vs. Leggett, 90 S. W., 669.
Bartlett vs. Jones & Co., 103 S. W., 707.

Under the circumstances last mentioned, that is, where the court directs the clerk to enter an order, setting a case for trial upon a certain date, we are of the opinion that the clerk would be entitled to a fee of seventy-five cents to be charged as costs for the entry of such order.

Article 3855 enumerating the fees to be charged by the district clerks for their services, among other items, contained the following: "Every other order, judgment or decree not otherwise provided for, 75 cents," which provision would fix the fee to be allowed the clerk for the entry of the order of the court setting the case for trial.

We think the compensation of district clerks for the keeping of the dockets, as indicated above, is comprehended in Article 3858, R. S., wherein the commissioners court of the county is given the authority to allow clerks of the district courts compensation for ex officio services and that the keeping of the dockets are ex officio services to be compensated for in the discretion of the commissioners court.

You are therefore advised that where the district judge does not require the clerk to enter an order in the minutes of the court setting a case for trial the clerk could not legally enter such an order and charge a fee therefor to be collected as costs.

2. The district judge would have the authority to require the clerk to enter an order setting the case, in which event the clerk would be entitled to a fee.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

FEES OF OFFICE—COUNTY CLERK—TRANSCRIBED DEED RECORDS.

A county clerk is entitled to a fee of ten cents per hundred words for transcribing the deed records of the county when required to do so by the commissioners court, and the amount received by him for such services constitutes a part of his fees of office; consequently they are to be considered in making up his maximum fees and must be accounted for by him in his reports. Articles 3860 and 3881 and 3889 as amended in 1913, and Articles 6767 to 6771, both inclusive, R. S., 1911.

March 8, 1915.

Hon. J. K. Russell, County Attorney, Cleburne, Texas.

DEAR SIR: The Attorney General is in receipt of your letter of March 6, reading as follows:

"If the county clerk transcribes a deed record under contract with the

commissioners court for 10c per hundred words, should the amount received by the clerk from the county for such services be considered and reported as fees of office like recording fees or cost in civil and criminal cases, or would it be considered as ex officio, and not included in annual report of fees earned and collected."

By the act of August 7, 1876, which act is now Articles 6767 to 6771, both inclusive, of the Revised Statutes of 1911, it is made the duty of the commissioners court of any county when the records or indexes of such county have become or may become defaced, worn or in any condition endangering their preservation in a safe or legible form, to require the county clerk to transcribe or have transcribed such records into new books. This act does not provide the compensation to be paid the clerk for such services, so in order to determine the compensation to which the clerk is entitled therefor. resort must be had to Article 3860 of the Revised Statutes of 1911 prescribing the fees of clerks of the county court. One item appearing therein is as follows:

"Transcribing, comparing and verifying record books of his office payable out of the county treasury upon warrant issued under the order of the commissioners court, for each one hundred words, 10 cents."

Articles 3881 to 3883, Revised Statutes, as amended by Chapter 121, Acts of the Thirty-third Legislature, stipulate the amount of fees of all kinds that may be retained by the officers therein enumerated. while Article 3886 provides that such officer may retain one-fourth of the excess fees produced, such excess being such an amount of fees received in excess of the maximum to be retaind by the officer and his assistants or deputies.

In our opinion the fees received by the county clerk for the services performed under order of the commissioners court in transcribing the deed records from old, mutilated or defaced books constitute a portion of his fees of office and should be included in making up the maximum amount to be retained by him and should be included by him in his reports.

Navarro County vs. Howard, 129 S. W., 857.
Tarrant County vs. Butler, 80 S. W., 659.
Russell et al. vs. Cordwent et al., 152 S. W., 239.

In the case of Navarro County vs. Howard, supra, the court held that Article 3881 fixes the maximum amount of fees of all kinds that may be retained by any officer as compensation for his services. The phrase "fees of all kinds" as applied to the clerk of the county court embraces every kind of compensation allowed by law to him unless excepted by some provision of the act, relying upon the case of Ellis County vs. Thompson by the Supreme Court. 95 Texas, 22.

The case of Tarrant County vs. Butler, supra. was one instituted against Butler, county clerk, and sureties upon his official bond for certain excess fees retained by him, among which was the sum of eight thousand dollars paid by the commissioners court to Butler for the making of new sets of indexes to deed records and other public records of the county to take the place of old, worn out indexes to

said records. The court held this eight thousand dollars so paid constituted fees of office within the meaning of the fee bill and that it should be considered in determining the amount of excess due the county.

In the case of Russell vs. Cordwent, cited above, the Court of Civil Appeals went even further and held that as the statute prescribes the rate of compensation to which the clerk is entitled for the transcribing of records, the commissioners court is without authority to enter into a contract with the county clerk at a different rate than that prescribed by Article 3860 of the Revised Statutes of 1911, and that though the commissioners court had contracted with the county clerk for a smaller compensation for such services the clerk would be entitled to ten cents per hundred words and such contract would be void, and in effect held that the clerk of the county court should be held amenable to Article 113 of the Penal Code, making it a misdemeanor for said county officials to fail to charge up the fees of their office.

You are therefore advised that the amount received by your county clerk for transcribing the deed records constitute fees of office and should be accounted for by him in determining his maximum and excess fees, if any.

Very truly yours,

C. W. TAYLOR,
Assistant Attorney General.

FEES—MAXIMUM AMOUNT RETAINED—COUNTY AND DISTRICT CLERK.

In counties having a population of less than eight thousand, a single clerk performs the duties of district and county clerks and would, therefore, be entitled to a single maximum of fees amounting to $2250, and not to a maximum of $2250 for each district and county clerkship.
Art. 5, Sec. 9; Art. 5, Sec. 20, Constitution.
Revised Statutes, Arts. 1703, 1704, 1762, 3881.

February 15, 1915.

Hon. J. R. Hill, County Attorney, Fort Davis, Texas.

DEAR SIR: This Department is in receipt of your favor of recent date, reading as follows:

"Under Article 3681, Vernon's Sayles' Texas Statutes, 1914, Act of 1913, page 246, Sec. 1; in counties where the office of county clerk and district clerk are filled by one person, kindly advise whether or not the person filling said offices would be entitled to receive $2250 for each office, a total of $4500, or a total of $2250, the same as if he only held one office."

The Constitution of this State provides for the election of county clerks and also for the election of district clerks. Section 9, of Article 5, provides that there shall be a clerk for the district court of each county, who shall be elected by the qualified voters, and Section 20 of the same article provides that there shall be elected for each

county by the qualified voters a county clerk. However, we find a proviso to Section 20 of Article 5, which reads as follows:

"Provided, that in counties having a population of less than eight thousand persons, there may be an election of a single clerk who shall perform the duties of district and county clerks."

In accordance with the permission granted in this section of the Constitution last quoted, the Legislature of this State has enacted what is now Article 1703, Revised Statutes of 1911, which is as follows:

"In counties having a population of less than eight thousand persons only one clerk shall be elected, who shall perform the duties of district and county clerks. He shall take the oath and give the bond required of clerks of both the district and county courts, and shall have all the powers and perform the duties of such clerks, respectively. In determining the number of persons in the county under this article, the estimate shall be made on the basis of five inhabitants for every vote cast for governor in such county at the last preceding general election."

And, therefore, in all counties in this State having a population of less than eight thousand persons only one clerk is elected to serve both district and county courts.

While it is true, as said in the cases of Imlay vs. Brewster, 3 Tex. Civ. Apps., 103, and Hardy Oil Company vs. Bank, 131 S. W., 440, following the express provision of Articles 1704 and 1762, Revised Statutes, 1911, that in performing the duties of the respective clerkships he acts in a different capacity and must, while acting as clerk of the county court attach the seal of the county court and authenticate his official acts as clerk of such court, and must, while acting as clerk of the district court attach the seal of the district court and authenticate his official acts as clerk of such court, yet such acts do not constitute him two officers and change his status under the Constitution as a single officer who is entitled to fees for services performed by him in the line of the duties conferred upon him by law.

The limitation upon the maximum amount of fees allowed certain officers is found in Article 3881, Revised Civil Statutes, 1911, as amended by the Acts of the Thirty-third Legislature. This statute provides:

"Hereafter the maximum amount of fees of all kinds that may be retained by any officer mentioned in this section (article) as compensation for services shall be as follows:"

Then follows an enumeration of the various officers limited in their fees, and among which is the following:

"Clerk of the county court, an amount not exceeding twenty-two hundred and fifty dollars per annum.

"Clerk of the district court, an amount not exceeding twenty-two hundred and fifty dollars per annum."

The question presented by you now is, would the single clerk

provided for in the Constitution and statute be entitled to a maximum of twenty-two hundred and fifty dollars for performing services rendered in the capacity of clerk of the county court and also to a maximum of twenty-two hundred and fifty dollars for performing the services of clerk of the district court and thereby be permitted to retain a maximum of forty-five hundred dollars for the services performed?

From what has been said above in expressing our views as to the nature of the office held by the incumbent, we are of the opinion that such officer would be entitled to retain only one maximum, that is twenty-two hundred and fifty dollars. We are led to this conclusion by a consideration of Article 3881 above mentioned and the purpose of the enactment of legislation of this character. As we see it, the Legislature had in mind and it was its purpose, as plainly appears from the act, to limit the compensation received by certain officers. As was said in the case of Clark vs. Finley, 93 Texas, 171, "When the intent of the Legislature is clear, the policy of the law is a matter which does not concern the court. The Legislature may reach the conclusion that the compensation of certain officers and in certain counties of the State is excessive, while in others it is not more than enough. By the reduction of the fees of office throughout the State they may correct the evil in those in which the compensation is too great, but they would probably inflict a greater evil by making the compensation too small in all the others. In such a case it becomes necessary to make the law applicable to some and not to all." It thus appears that the Legislature was of the opinion that in some counties of the State certain officers were receiving compensation out of proportion to the services performed, and the intention of Article 3881 et seq. was to equalize as near as possible the compensation of officers and in proportion to the services required of them.

It also seems perfectly clear to us that when the Constitution in Section 20 of Article 5 gave permission to the Legislature to confer the duties of district and county clerk upon a single person, that it was for the reason that in sparsely populated counties the duties of the two clerkships would not require the time of two officials nor would the compensation attached to such officer be sufficient for two individuals. Taking this view of the Constitution in connection with the evident purpose of the Legislature in enacting Article 3881 et seq. of the Revised Statutes, we are able to arrive at no other conclusion than that the Legislature intended to limit the amount of compensation any one particular officer might receive.

We are further borne out in this conclusion by the long established and well known rule of construction that the Legislature is presumed to proceed with a knowledge of existing laws. (Lewis' Sutherland on Statutory Construction, Sections 355, 447.) We quote from the above authority as follows:

"The legislature is presumed to know existing statutes and the state of the law relating to the subjects with which they deal." (Sec. 447.)

Also: "As all legislatures are presumed to proceed with the knowledge of existing laws, they may properly be deemed to legislate with general provisions of such a nature in view." (355.)

Therefore, when the Legislature in 1897 enacted what is now known as the Fee Bill, it is presumed to have taken into consideration Article 1703, which was enacted in 1879, and provided for only one clerk to perform the duties of district and county clerks and thereby placed a limitation upon the fees of that officer of $2250 per annum with the excess provided for in Article 3889.

It will be noted that the maximum amount allowed to the district clerk and the maximum allowed to the county clerk is the same, towit: $2250. This being the case, no question could arise as to which maximum the clerk could retain. In the event the maximum allowed to one of the clerks was greater than that allowed to the other, then the question would arise as to which maximum the district and county clerk would be entitled to retain. As it is not necessary to decide this question in the present case, we will not enter into a discussion of it, but merely refer to the general rule that where a maximum is provided by statute with authority conferred to fix compensation within the maximum and such authority is not exercised, then the maximum compensation is allowed. (Bastrop Co. vs. Hearne, 70 Tex., 563.)

We, therefore, advise you that the maximum amount allowed under the Fee Bill to your district and county clerk is $2250 with one-fourth of the excess as provided by Article 3889, Revised Statutes, 1911.

Yours very truly,
C. W. TAYLOR,
Assistant Attorney General.

COUNTY TREASURER—SALARY—COMMISSIONERS COURT.

The commissioners court would not have authority in fixing the treasurer's compensation to allow one rate of commission on certain funds of the county and a different rate on other funds, but such compensation must be by one rate upon all the funds of the county.

The commissioners court may, at any time, change the rate of compensation allowed to the county treasurer provided it does not exceed two and one-half per cent upon county funds exclusive of the school fund and does not aggregate more than two thousand dollars per annum. Article 3873, R. S., 1911.

February 11, 1915.

Hon. Joseph B. Dart, County Attorney, Boerne, Texas.

DEAR SIR: The Department is in receipt of your letter of February 10th, reading as follows:

"Will you very kindly advise me whether it is lawful for the commissioners court of any county to place the county treasurer on a salary, yearly or otherwise, and whether it would make any difference in the commissioners' authority to place him on a salary if he were elected or appointed?

"Also, whether, after fixing the percentage on money collected and paid out as his compensation, could they, after the election on a bond issue, fix his percentage on money received and paid out, out of the sale of the bonds at a different percentage than that allowed him on other money handled?

"Also, whether they could at one and the same meeting fix his percentage for handling county money and for handling bond money at a different percentage?"

Replying thereto I beg to say that this Department has heretofore rendered an opinion on the right of the commissioners court to at any time fix or change the rate of commission allowed to the county treasurer, provided that such commission does not exceed two and one-half per cent on receipts and disbursements and in no event to exceed an annual compensation of two thousand dollars, and it gives me pleasure to hand you herewith copy of this opinion.

As to the fixing of a different rate on moneys received on bond issues from the rate fixed on other county funds, we beg to say in our opinion Article 3873 contemplates one rate upon all funds belonging to the county and that the commissioners court would not have authority to allow the treasurer a different commission upon the different funds, and that it would be the duty of the commissioners court to fix one commission upon all funds of the county other than the school funds upon which latter funds the commissioners court has no authority to pay a commission to the treasurer. (Section 154a, Chapter 12, Acts Thirty-first Legislature; 124 S. W., 422, 149 S. W., 297.)

From the enclosed opinion you will see that the commissioners court has the authority to at any time change the rate of compensation allowed the county treasurer, and we therefore suggest that if the commissioners court sees fit before the receipt of funds on bond issue it may reduce the rate allowed the treasurer to such a percentage as will compensate the treasurer for the services performed bearing in mind at all times that they have no authority to reduce the rate so low as to practically abolish the office. By keeping in touch with the receipts of the county the commissioners court by orders fixing different rates of commission allowed the county treasurer can maintain the equipoise of the compensation which would otherwise be destroyed by the acquisition of large sums converted into the treasury as the result of bond issues. We offer this merely as a suggestion to be followed by the commissioners court in the event it meets their approval in the due discharge of their official duties.

Very truly yours,

C. W. TAYLOR,
Assistant Attorney General.

PRACTICE—FEES OF OFFICE—COUNTY JUDGE.

Where a plaintiff discontinues his suit in vacation before defendant has answered, the county judge is not entitled to three dollars trial fee.

Where a plaintiff discontinues a cause in vacation there is no necessity for a judgment of the court dismissing the cause.

Arts. 1898, 1899, 1900 and 3851, R. S., 1911.

February 3, 1915.

Hon. C. P. Shepherd, County Attorney, Ballinger, Texas.

DEAR SIR: The Department is in receipt of your letter of January 22nd, reading as follows:

"Article 3851, Rev. St., 1911, contains the following provision: 'For each civil cause finally disposed of by the county judge, by trial or otherwise, he shall receive a fee of three dollars, to be taxed against the party cast in the suit.'

"Article 1898, of the same Statutes, provides: 'The plaintiff may enter a discontinuance on the docket in vacation, in any suit wherein the defendant has not answered, on payment of all costs that have accrued thereon.'

"What is your construction of the above articles applicable to the following facts? A. sued B. on account. At the same time A. garnisheed C. The papers were filed and docketed in each suit on the clerk's file docket. Only writ issued was writ of garnishment. Few hours after writ of garnishment was served on C., plaintiff's attorney told the clerk to dismiss the cases, no answer having been filed in either case, tendering the clerk check in payment of costs in both suits, but the attorneys failed to include the judge's fees in the garnishment suit. Said cases do not appear on the bar docket or judge's trial docket.

"Query: Is the county judge entitled to his three dollars in each suit? When does the county judge's fee attach under the article first cited? In view of the facts hereinabove stated, does the judge's fee attach under Article 1898 supra? Or, does the judge's fee attach at time suit is filed?"

The question presented in your communication has not been passed upon directly by any of the courts of this State. We are of the opinion, however, that a proper construction of the articles referred to would be that a discontinuance noted on the docket in vacation by the plaintiff or under his direction is a final termination of the suit, and the county judge, having taken no action whatever in the cause, would not be entitled to a trial fee.

Williams vs. Williams, 38 S. W., 261.
Werner vs. Kasten, 26 S. W., 322.
Seeligson vs. Gifford, 46 Texas Civ. App., 566.

Article 1898, providing for a discontinuance in vacation, reads as follows:

"The plaintiff may enter a discontinuance on the docket in vacation in any suit wherein the defendant has not answered on the payment of all costs that have accrued thereon."

This article of the statute seems to lodge with the plaintiff the authority to discontinue the case and to stop the machinery of the

court that he by the filing of his petition has set in motion. This statute, standing alone, would indicate that there is no necessity whatever for the court to pass any order or have any entry made upon the minutes of the court in connection with such case. That this is a proper construction of Article 1898 is borne out by Articles 1899 and 1900, Revised Statutes of 1911, which are as follows:

"Art. 1899. The court may permit the plaintiff to discontinue his suit as to one or more of several defendants who may have been served with process, or who may have answered when such discontinuance would not operate to the prejudice of the other defendants; but no such discontinuance shall, in any case, be allowed as to a principal obligor, except in the cases provided for in article 1897.

"Art. 1900. Where the defendant has filed a counter claim seeking affirmative relief, the plaintiff shall not be permitted, by a discontinuance of his suit, to prejudice the right of the defendant to be heard on such counter claim."

We note from your communication that service was had of the writ of garnishment, and we take it from the tenor of your letter that some doubt has arisen in your mind, but that Article 1899 would require that before a case could be dismissed wherein the defendant had been served the county judge must grant permission and that same be dismissed by order of court. Any doubt arising upon this score, however, is set at rest when we take into consideration the purpose of Articles 1897, 1898 and 1899. These articles are in effect an abrogation of the common law rule that a judgment against one of several joint contractors merges the contract and thereby defeats an action thereon against the other parties thereto. Not only do these articles abrogate this rule, but they provide protection against several joint obligors in that the court may not dismiss a cause to their disadvantage. This is made clear in the opinion of the court in the case of Wooters vs. Smith, 56 Texas, 198, wherein, quoting from the case of Forbes vs. Davis, 18 Texas, 274, the court says:

"This section recognizes the right of a plaintiff to enter a nolle prosequi as to defendants not served in all suits, no matter whether they be in tort or contract, or whether the obligation be joint and on which all the obligees must, at common law, be sued jointly, and there must be a joint judgment, or joint and several, and in which the suit, though joint, might have been several. All distinctions of this character, and the laws arising upon them, are disregarded and swept away by the statute; and the only test of the right of the plaintiff to discontinue as to some of the defendants is whether they have or have not been cited in conformity with law."

After quoting from the Forbes case, the court uses this language: "Such being the rule in cases in which defendants have been joined in the suit and not cited, the same must be applied in a case in which some parties who might have been made parties were not joined. The object of the statute was to abolish the common law rule, and such parties as are only liable as indorsers, guarantors, sureties, or drawers of accepted bills, are protected from the operation of the rule thus established by Aticles 1257, 1258, 1259, R. S."

The procedure, therefore, provided for in Article 1899 is merely for the dismissal of the cause as to one or more of several defendants, leaving the case pending as to other defendants, and does not apply

to a case being discontinued as to all of the defendants; as above said, it is merely for the protection of those defendants as to whom the case is not dismissed, lodging with the court the power to protect obligors upon an instrument sued upon.

In cases of this character any attempted discontinuance by the plaintiff must be subjected to the scrutiny of the court, and he could not by a notation on the docket in vacation discontinue as to some of the defendants where such discontinuance would be to the prejudice of other defendants. Such discontinuance must be by permission of the court.

As stated above, the question of whether or not the discontinuance by plaintiff as contemplated by Article 1898 of the statutes is a final disposition of the case without an order of the court has not been definitely determined by the courts of this State. The cases cited above leave the matter somewhat in doubt, but we gather from the decisions referred to that the courts when called upon to pass directly upon this question will take the view here announced.

The case of Werner vs. Kasten, supra, was one in which plaintiff filed his petition on May 28, 1891. On October 19, 1891, in vacation and before any answer had been filed, the plaintiff filed a motion to dismiss with the clerk and tendered the costs. On October 26, thereafter, the court having been convened, and before any answer was filed, formally dismissed the cause. On the next day after such dismissal the defendant filed a motion to reinstate, which motion was granted and an answer filed therein setting up a cross action. Thereafter on April 26, 1892, plaintiff filed his first amended original petition. A general demurrer was sustained to the petition. The plaintiff refused to amend and the case was tried on the cross action of the defendant and judgment rendered for him. The plaintiff assigned as error the action of the court in reinstating the cause. The Court of Civil Appeals, in passing upon this point, said:

"Article 1258, Revised Statutes, provides that 'the plaintiff may enter a discontinuance on the docket in vacation, in any suit wherein the defendant has not answered, on the payment of all costs that have accrued thereon.' There is no question as to the demands of this statute having been met by plaintiff in error, although it was contended in the motion that the case continued on the docket until October 26th, when it was formally dismissed by the court, no answer being filed. Take either view of the case, and the cause was legally and properly dismissed from the docket; and we see nothing in the motion for reinstatement that would entitle defendant in error to have the case reinstated. He was, after the dismissal, in the same position that he was before, and had filed no pleas for affirmative relief that entitled him to have the case held for trial. No case involving the same issue has ever been decided by our supreme court, or any of the courts of civil appeals, and we can only be guided by those cases in which the cause has been dismissed as to one of several defendants. In none of those has it ever been held, where a case was so dismissed, that the defendant so dismissed could reinstate the cause. There can be, and there is, no just reason assigned in this case for the reinstatement of the cause, and we are of the opinion that the court erred in its action."

This case is not any great assistance to us in the solution of the question we have before us, although the court does use this language:

"Take either view of the case and the cause was legally and properly dismissed from the docket."

In the case of Williams vs. Williams, above cited, plaintiff's petition was filed on October 14, 1895. On October 29, 1895, the defendant filed his original answer, and on March 27, 1896, the plaintiff went before the clerk of the court in vacation, paid all costs accrued in the case, and ordered the clerk to discontinue the same. On April 4; 1896, the defendant filed an amended original answer and cross bill. The clerk failed to discontinue the case as requested by the plaintiff, but brought it forward on the docket, and on April 7th, the court having convened on the sixth, the court called the case for trial, whereupon the plaintiff suggested to the court that the case was dismissed on March 27th and was improperly on the docket. The defendant objected to the dismissal of the case, contending that the attempted discontinuance by the plaintiff on March 27th after answer was filed was illegal. The court held the discontinuance of the case on March 27th regular and legal and dismissed or struck the case from the docket. The Court of Civil Appeals, in passing upon this state of facts, said:

"The only question in the case is raised under appellant's first assignment of error, and calls in question the ruling of the court in dismissing the case. Under Article 1258, Revised Statutes, 1895, it is provided that 'the plaintiff may enter a discontinuance on the docket in vacation in any suit wherein the defendant has not answered, and the payment of all costs that have accrued thereon.' It is provided under Article 1260: 'Where the defendant has filed a counter-claim seeking affirmative relief, the plaintiff shall not be permitted, by a discontinuance of his suit, to prejudice the right of the defendant to be heard on such counter-claim.' Under this statute the plaintiff may discontinue his cause at any time before answer filed by the defendant, upon the payment of all costs accrued. After answer filed, the right of the plaintiff to discontinue his cause in vacation merely upon payment of the costs does not exist. He must then wait until the cause shall be dismissed under order of the court."

The court reversed and remanded the case for a trial upon a cross bill.

In the case of Seeligson vs. Gifford the following entry was made in vacation:

"On the 20th day of September, 1905, in vacation, the defendants, Wharton Oil & Cotton Company, George Seeligson and R. A. Rich, not having answered herein. the plaintiffs, G. C. Gifford & Company, a firm composed of G. C. Gifford and P. A. Murray, G. M. D. Sorrell, H. J. Belton, H. C. Fergason, G. C. Gifford and P. A. Murray, enters this, their discontinuance and dismissal of this suit, all costs that have accrued having been paid by plaintiffs. Brooks & Cline, Attorneys for Plaintiffs."

The contention was raised that the discontinuance was of no effect for the reason that it was entered by plaintiffs' attorney instead of by plaintiffs themselves. The court held that the entry by attorneys of the plaintiffs was as much the act of plaintiffs as if they had made it in person, and in passing upon the question the court said, in part:

"The discontinuance ended the suit for all purposes."

It is in cases of this character that the general rule, that officers are not entitled to fees prescribed by statute unless they actually perform the services entitling them thereto, finds its application. Fees of office are intended as a compensation for services performed. They are not given as a matter of right, and an officer is not entitled to same by reason of his office. It is only upon rendering the services prescribed by the statute that he is entitled to a compensation.

We therefore advise you that under the facts stated in your communication the county judge would not be entitled to a trial fee of three dollars, and that the only costs chargeable against the plaintiff upon a discontinuance of the two causes mentioned would be those that had actually accrued at the time of such discontinuance. And you are also advised that in the opinion of this Department where a plaintiff discontinues a cause in vacation there is no necessity for a judgment of the court dismissing the cause.

Yours very truly,

C. W. TAYLOR,

Assistant Attorney General.

FEE BILL—JUSTICE OF THE PEACE.

A justice of the peace should report and account for under the fee bill all fees received by him for services performed as ex-officio notary public.

A justice of the peace is not required to keep an account and report under the fee bill such fees as may be paid him for performing marriage ceremony.

January 30, 1915.

Hon. Roger L. Burgess, Assistant County Attorney, Beaumont, Texas.

DEAR SIR: The department is in receipt of your favor of recent date, reading as follows:

"The legislature of 1913 passed a law amending the law in reference to fees of county officials. This law is found on page 247, General Laws of 1913.

"There is considerable dispute in this county in reference to the report that the justice of the peace shall make under this law. It provides that justices of the peace shall receive an amount out of fees collected by them not to exceed $2000 per annum; providing, that this act shall not apply to justices of the peace or constables, except those holding office in cities of more than 20,000 inhabitants; of course, the justices of the peace in this city come under this provision, as Beaumont is a city of more than 20,000 inhabitants.

"The county judge of this county has held that the justices of the peace do not have to include in their reports fees received by them for performing marriage ceremonies and notary work; in which opinion I am inclined to concur. The county clerk holds that they must include such fees in the report.

'Will you kindly advise me, as soon as possible, whether or not the justices of the peace of this city, must include in their reports such fees."

We will discuss the questions propounded in your communication and give you our opinion thereon in their order.

EX OFFICIO NOTARY PUBLIC.

Section 19 of Article 5 of the Constitution of this State contains the following provision in reference to justices of the peace: "and the justices of the peace shall be ex officio notaries public." In persuance of this provision of the Constitution the Legislature of this State by the act of August 18, 1876, provided for the commission to be issued to the justice of the peace in the following language, which is now Article 2287, Revised Statutes of 1911:

"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."

It will thus be seen from the plain language of the Constitution and Statutes that the person holding the office of justice of the peace and ex officio notary public is not holding two offices, but that in so far as he is concerned he is one officer upon whom is conferred the additional duties pertaining to another officer; that is to say, he is elected justice of the peace, but the Constitution of this State, as well as the statute, has conferred upon him the duties pertaining to the office of notary public.

In a former opinion rendered by this Department in discussing the constitutional provision and the various statutory exactments relative to the justice of the peace it was held that it is not necessary for a justice of the peace to subscribe to the oath and execute the bond required of a notary public. This opinion is based upon the reason that a justice of the peace may exercise all the powers of a notary public under the statute by reason of his qualification as such justice of the peace, and that the powers of a notary public are conferred upon him by reason of his office.

We will not attempt to discover the reasons prompting the people of this State by the Constitution to confer upon the justice of the peace the powers of a notary public, but it appears to us that a plausible reason therefor would be that there had been conferred upon the clerks of the various courts of record of this State and the county judges and notaries public the authority to take acknowledgments to instruments of writing for record and had further provided that no instrument should be placed of record without the certificate of the officer taking such, sealed with the seal of his office, and there being no provision for a seal of office for a justice of the peace, and desiring to confer upon a justice of the peace authority to take acknowledgments, it became necessary to bestow upon such officer the authority possessed by some officer having a seal.

The title of the particular office under discussion is not "justice of the peace and ex officio notary public" but is simply "justice of the peace." It is not essential that in the certificate of acknowledgment or in the designation of the officer signing such certificate that he be designated as "justice of the peace and ex officio notary public."

Daugherty vs. Yates, 35 S. W., 937.
Wilson vs. Simpson, 68 Texas, 306.
Butler vs. Dunagan, 19 Texas, 559.

In the acknowledgment of the deed under discussion in the case of Daugherty vs. Yates, supra, the officer taking such acknowledgment executed the certificate and placed after his name the following: "J. P. Precinct No. 2, in and for Kaufman county." In that case the court said:

"The acknowledgement of the deed from Bailey Daugherty to J. S. Gilkey is herein copied. It shows it to have been made before J. B. Newberry, 'J. P. precinct No. 2, in and for Kaufman County', on the 3d day of June, 1876. The letters 'J. P.', used in the connection they are, both in the body of the certificate of acknowledgment, and after Newberry's signature, evidently mean that he was the justice of the peace of precinct No. 2 of Kaufman County when the acknowledgment was made; for it is by these letters, used in this way, that such officers indicate their official character in their signatures to documents requiring them. When the acknowledgment certified to was made, justices of the peace were ex officio notaries public, and, as such, authorized to take acknowledgments of deeds; but in taking them, like all other officers, they were required to affix their official seal to their certificates of authentication, which was the seal of a notary public, and which a justice of the peace was authorized to use ex officio, and the only one, he having none as justice of the peace, independent of his being ex officio a notary public."

More in point is the case of Wilson vs. Simpson, above cited, wherein the court used the following language:

"The acknowledgment was taken in 1878. The law then in force (Pas. Dig., Art. 7418), as now, conferred authority upon notaries public in other States of the Union to authenticate conveyances for the purpose of registration, and it seems to us that the authority of a notary, who is lawfully such by virtue of his holding some other office, is quite as ample as if he were notary by direct appointment. Such is virtually the decision in Butler vs. Dunagan, 19 Texas, 559, where it was held that an acknowledgment taken before a primary judge was good, by reason of his being ex officio a notary public, although the statute did not in terms authorize primary judges to take such acknowlědgments, and the officer did not sign as a notary public. We think, therefore, that the court erred in excluding the deed in question".

The citation of the above authorities and the quotations therefrom establish our contention that it is unnecessary for a justice of the peace in making his certificate of acknowledgment to designate himself as a notary public. The Constitution has conferred that authority upon him and the statute has further confirmed it. All officers and persons of this State are charged with a notice that a justice of the peace in this State has all the powers of a notary public, and it is not necessary for a clerk of the county court to be advised in the certificate of the justice of the peace that he is clothed with the powers of a notary public, for as above stated, he is charged with such notice by the plain terms of the Constitution. It seems perfectly apparent, therefore, that in exercising the ministerial functions of a notary public that the justice of the peace is not acting as a notary public, but is merely exercising the powers conferred upon a justice of the peace, and that any compensation received by him for such acts is compensation accruing to him by reason of his election and qualification as a justice of the peace.

Article 3881, Revised Statutes of 1911, as amended by the act of

April 3, 1913, referred to in your letter, provides in part that the maximum amount of fees of all kinds that may be retained by any officer mentioned in this Article as compensation for services shall be as follows:

"* * * * Justice of the peace an amount not exceeding $2000 per annum * * * * provided that this act shall not apply to justice of the peace or constables except those holding offices in cities of more than twenty thousand inhabitants to be determined by the last United States census".

As stated in your letter, Beaumont is a city of more than twenty thousand inhabitants, and therefore the statute above referred to is applicable to the justice of the peace in your city. The expression "fees of all kinds" has been subject to definition by the courts of this State in Ellis County vs. Thompson, 95 Texas, 22; Navarro County vs. Howell, 129 S. W., 857.

In Ellis County vs. Thompson it is said:

"The phrase 'fees of all kinds' embraces every kind of compensation to a clerk of the county court, unless excepted by some provision of the statute. Article 2495k, 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 included within the requirements of the act".

The case of Navarro County vs. Howard, above cited, approves the Ellis County case in the following language:

"In the case of Ellis County vs. Thompson, 95 Texas, 22, our supreme court held that the phrase 'fees of all kinds' mentioned in the foregoing section of the Act of 1897 embraces every kind of compensation allowed by law to the clerk of the county court, unless excepted by some provision of said act."

A definition of the word "fees" is found in the case of the city of Austin vs. Johns, 62 Texas, 179, in the following language:

"The word 'fees' as defined by Burrill, is said to be the reward or compensation or wages allowed by law to an officer for services performed by him in the discharge of his official duties. The latter author cites cases showing the difference between fees of an attorney, counselor and physician and the costs of a suit.

'Webster, in his Unabridged Dictionary, p. 444, word 'fee,' following the elementary law writers, also gives, in substance and quite fully, the same definition of this word."

Then follows the expression in the opinion that the above definition is a well known and a correct legal definition of the word "fee." We suppose there would be no contention that fees received for notary work by justices of the peace are excepted by the statute, and do not come under the operations of what is known as the fee bill.

The case of State of Nebraska ex rel, Lancaster County Commissioners vs. Paul Holm, 64 L. R. A., 131, seems to be a well considered case in which is collated decisions not only of the Nebraska courts, but of other courts of the Union bearing upon a similar question, and as the opinion in this case gives the facts and holdings of the various

courts in a brief and concise manner with citation of authorities, we copy from that case rather extensively, as follows:

"It may be stated at the outset that, if the services for which respondent received the money in question were any part of the duties of his office, he would be required to account for and pay the same over to the relator; and it would make no difference whether the statute prescribing such duties fixed the amount of compensation therefor, or whether the amount was fixed by the agreement of the respondent and the person for whom he performed the service. Counsel for the relator contends that the money was received because of respondent's official position, and the judgment should be reversed because of the rule announced in State ex rel Miller vs. Sovereign, 17 Neb., 175, 22 N. W. Rep., 353. In that case the acts performed by Sovereign were a part of his official duties, and it was held that he could not, by making his certificate as a notary public instead of county clerk, avoid accounting for the fees which were fixed by law for the performance of those duties. We are also cited to the well known case of State ex rel Atty. Gen. vs. Leidtke, 12 Neb., 171, 10 N. W. Rep., 703. In that case Leidtke, who was the auditor of public accounts, performed certain duties in administering the law relating to insurance companies. Those duties were required of him by virtue of his office, and the fees therefor were fixed by law. The statute further provided that such fees should be paid to him as auditor. It was contended that for that reason he was entitled to retain those fees in addition to the amount of his salary as fixed by law and the Constitution. It was held that the Constitution requires these fees to be paid to the state treasurer, and Leidtke was for that reason ordered to account for and pay the same over to the State. Counsel also calls our attention to the case of State ex rel Chesney vs. Wallichs, 16 Neb., 110, 20 N. W. Rep., 27. The only question involved in that case was whether or not a county presenting its refunding bonds to the auditor for registration must pay one-fourth of 1 per cent on the dollar for each bond registered as provided by law. Our attention is also called to State ex rel Frontier County vs. Kelly, 30 Neb., 574, 46 N. W. Rep., 714. In that case it was held that where a county clerk, who was also a notary public, took acknowledgments of deeds, mortgages, affidavits, and depositions, as a notary public, it was his duty to enter upon his fee book, as county clerk, and report to the county board, every item received by him for such services, under the rule laid down in State ex rel Miller vs. Sovereign, 17 Neb., 175, 22 N. W. Rep., 353. It was further held that he could not retain the fees received by him for making and certifying abstracts of title, which was a part of the duties of his office, although he was at that time a bonded abstractor. The relator relies, also, on the case of State ex rel Holt County vs. Hazelet, 41 Neb., 257, 59 N. W. Rep., 891. In that case the county clerk insisted that he was entitled to receive, retain, and not account for and pay over to the county, the fee of $2 for furnishing the sheriff with a certificate of liens and encumbrances in cases of appraisal and sale under decrees of foreclosure and on execution. It was held that it was a part of the official duties of the clerk to furnish such certificates when requested to do so by the sheriff; that he was entitled to collect therefor the sum of $2 in each case, which he must enter upon his fee book, and account for, notwithstanding the duty was performed by his deputies outside of regular office hours. State ex rel Lancaster County vs. Silver, 9 Neb., 85, 2 N. W. Rep., 215, is also relied on by the relator. Silver was the county clerk of Lancaster County, and claimed that extra compensation should be allowed him by the board of commissioners for making the tax list and duplicates. His claim was disallowed, and it was held that a public officer must discharge all of the duties pertaining to his office for the compensation allowed by law, and that he cannot be allowed compensation for extra work unless it is authorized by the statute. We are further cited to Bayha vs. Webster County, 18 Neb., 131, 24 N. W. Rep., 457. The only question presented in that case was whether or not the clerk was entitled to extra compensation for making out the tax list, and it was again held that a public officer must discharge all the duties pertaining to his office for the compensation allowed by law; that he can

receive no compensation for extra work unless it is authorized by statute. Lastly, our attention is called to the case of Heald vs. Polk County, 46 Neb., 28, 64 N. W. Rep., 376, where the same question was involved and was decided in the same way as in the case last above mentioned.

"It is further contended that, even if it was not the official duty of the respondent to perform these services, yet he was the county's officer, and the custodian of its books and seal, and that he cannot be heard to say that he performed them as an individual. To sustain this view, the relator cites Blaco vs. State, 58 Neb., 566; 78 N. W. Rep., 1056. An examination of that case discloses that the decision is based, as in all of the foregoing cases, on the fact that the fees were received on account of official services provided for by law; and the particular point decided was that the respondent must account for such fees, whether he performed the services regularly or irregularly, and that his bondsmen could not escape liability on the claim that the services were irregularly performed.

"So it would seem that our decision must be based upon the sole question as to whether or not the services rendered for the applicants, as above stated, were a part of the official duties of the respondent. If they were, then he must account for and pay over the money received therefor to the relator. If, however, they were no part of his official duties, then the question falls within the rule announced in the case of State vs. Obert, 53 Kan., 107; 36 Pac., 64, where it was held that a county treasurer, who, for compensation, made searches and answered letters of inquiry, and charged therefor, without a statute authorizing a charge, did not have to report such fees except for his certificate alone. The law of Kansas on this question is the same as the law of this State. It was provided by the Kansas statutes that in counties having a population of more than 5000 and not over 10,000, the treasurer should receive $1500 per annum and that he should account for and pay over to the county all of the money collected by him as fees in excess of that amount. It was stated in the body of the opinion that, under the general statutes relating to fees and salaries, county officers are entitled to no more compensation than the salaries fixed by law, and that all fees received by them for official services should be accounted for and deducted from each quarterly allowance of salary. The court further said: 'We do not think that the fees Obert collected for making and certifying abstracts of title, and in writing letters, and giving information therein as to taxes, etc., should be reported or accounted for. Such services are no part of the official duty of a county treasurer, as that duty is defined by the statute,' citing Mallory vs. Ferguson, 50 Kan., 685; 22 L. R. A., 99; 32 Pac., 410. The same rule was announced in the case of San Bernardina County vs. Davidson 112 Cal., 503; 44 Pac., 659. In that case it was shown that it was the custom of miners to have the county recorder record notice of mining claims. There was no statute requiring such work, but the clerk kept a record, and charged for it. It was held that 'it was no duty imposed by law, and no fees fixed by law for it, and hence he need not account for such fees.' The case of Cornell vs. Irvine, 56 Neb., 657; 77 N. W. Rep., 114, seems to throw some light on this question. There it was said that where a State officer has rendered services outside of, and not incompatible with, his duties as such officer, it is not proper for the auditor of public accounts to refuse to issue a warrant in payment of such extra services merely because the salary of such officer was already paid for the period during which said extra services were rendered."

It seems from a reading of the authorities in the above case that the overwhelming weight of authority is to the effect that where the services rendered are a part of the official duties of the officers and the fees of such officer are to be remitted to the county, then all fees collected by him must be turned over to the county.

It will be noted that in the case of State vs. Sovereign, 17 Neb., 175, the court held that where a county clerk who was also a notary public

took acknowldgments as such notary, that it would be his duty as county clerk to enter upon his fee books all fees collected as a notary public and account for same to the county. So, under the authority of that case, we might abandon our contention that the duties and powers devolving upon the justice of the peace as notary public do not constitute him a dual officer and concede that the fees collected for notarial work are collected as a notary public and not as a justice of the peace, yet even under this state of facts the fees collected by the justice of the peace as a notary public must be incorporated in his record and accounted for in a statement with the county. However, we do not base our opinion upon this reason, but upon the proposition that a justice of the peace is not a dual officer; that he is not exercising at one and the same time the powers and functions of two officers, but that he is one officer upon whom has been conferred the powers, rights and privileges pertaining to another officer.

The act of 1907, which is now Article 3880, et seq., as amended by the act of the Thirty-third Legislature and being what is commonly known as the fee bill, is dealing in its limitations with those provisions of Title 58 of the Revised Statutes of 1911, which in detail set out the fees allowed to certain officers for certain duties therein enumerated. We do not mean to say that Title 58 of the Revised Statutes contain all the fees of office coming within the limitation prescribed by Chapter 4 of Title 58, which chapter fixes the maximum of fees that may be retained, but it is sufficient for an illustration of this contention to cite Article 3867 which is a schedule of fees that may be received by justice of the peace, and Article 3878, which is a schedule of fees that may be received by notaries public. Article 3881 prescribing the maximum amount of *fees of all kind* that may be retained by any officer. mentions among other officers so limited in their fees that of justice of the peace. If this act, then, is a limitation upon the preceding chapters of the title, we see no escape from the conclusion that the Legislature, charged with the knowledge that a justice of the peace exercises the functions of a notary public and with the further knowledge that the fees of justices of the peace as such and of notaries public as such had been expressly provided for by prior acts, then that such legislation as is set out in Article 3881 was directed at all the fees to be retained by a justice of the peace in whatever capacity he may act.

The Legislature is always presumed to be acquainted with the law and especially those laws bearing upon the subject upon which it attempts to legislate. The rule is thus laid down in Lewis' Sutherland Statutory Construction:

"It is presumed that the Legislature is acquainted with the law; that it has a knowledge of the State of it upon the subjects upon which it legislates; that it is informed of previous legislation and the construction it has received. The Legislature is always presumed to know the principles of statutory construction." (Sec. 499, 2nd ed.)

The author here cites numerous authorities in support of the proposition there announced. The same author in section 355 uses the following language:

"As all legislatures are presumed to proceed with a knowledge of existing laws, they may properly be deemed to legislate with the general provisions of such a nature in view."

Also in Section 447 of the same work the author used this expression:

"The Legislatures are presumed to knew existing statutes and the law of the State relating to the subjects with which they deal."

Therefore, when the Legislature in Article 3881, R. S., 1911, limited the maximum fees that may be retained by a justice of the peace it is presumed that the Legislature enacted such statute with the knowledge that legislation prior thereto had conferred upon a justice of the peace all of the duties, powers and emoluments of the office of notary public; that prior legislation had fixed the schedule of fees not only of a justice of the peace while acting as such, but of notaries public as well, and we are therefore bound to conclude that it was the intention of the Legislature that all fees accruing to a justice of the peace by reason of his office in any capacity he may act should be accounted for by such justice of the peace in making up his maximum. We are not at liberty to say that a justice of the peace shall not account for his notary public fees, but must account for his inquest or examining trial fees. All of the compensation received by a justice of the peace comes by way of fees of office either in one capacity or another, and if he must account for one he must account for all under the plain language of the statute, Article 3881.

Under our law a justice of the peace is required to discharge certain duties and in the discharge of such duties he acts in four separate and distinct capacities. He may sit as a court of inquiry under the provisions of Article 976, C. C. P., to detect and ferret crimes. He may sit as a magistrate in examining trials; he sits as a court in the trial of cases before him, civil or criminal; he acts as a notary public in the taking of acknowledgments, etc. Brown vs. State, 55 Texas Crim. Rep., 572. In our opinion such officer could no more escape the duty of accounting for the fees obtained while acting in any other capacity than he could those obtained while discharging his duty as notary public.

The Legislature in placing the justice of the peace under the provision of what is known as the fee bill and limiting the amount that he may retain, that is those in cities of more than twenty thousand, has, as it had the perfect right to do, classified those officers and placed the limitation of fees upon a class. Not only has the Legislature classified justices of the peace as such, but it has carved out a class of officers exercising the rights of notaries public which under the decisions of the courts it had ample authority to do.

Clark vs. Findley, 93 Texas, 178.
Logan vs. State, 54 Crim., 74.
G. C. & S. F. Ry. Co. vs. Ellis, 165 U. S., 150.

The case of Clark vs. Findley, supra, was a general onslaught upon what is known as the fee bill alleging among other things that it was

violative of Article 3, Section 56 of the Constitution prohibiting the passage of special or local laws as general laws may be made applicable in that it applied to some counties of the State and not to others and to certain officers of the State in certain counties, and did not apply to the same officers in other counties. The court in passing upon this question said:

"But we do not find it necessary to repose upon the former ruling of the court. A law is not special because it does not apply to all persons or things alike. Indeed, most of our laws apply to some one or more classes of persons or of things and exclude all others. Such are laws as to the rights of infants, married women, corporations, carriers, etc. Indeed, it is perhaps the exception when a statute is found which applies to every person or thing alike. Hence it cannot be that the statute under consideration is special merely because it is made to operate in some counties of the State and not in others. The definition of a general law as distinguished from a special law given by the Supreme Court of Pennsylvania in the case of Wheeler vs. Philadelphia, 77 Pennsylvania State, 338, and approved by the Supreme Court of Missouri, is perhaps as accurate as any that has been given. State vs. Tolle, 71 Mo., 645. The court in the former case say: 'Without entering at large upon the discussion of what is here meant by a local or special law, it is sufficient to say that a statute which relates to persons or things as a class is a general law, while a statute which relates to particular persons or things of a class is special, and comes within the constitutional prohibition. The law in question is applicable to every county of the designated class. Now, we do not propose to be led off into any extended discussion as to what is a proper class for the application of a general law. The tendency of recent decisions upon the subject, as it seems to us, is to drift into refinements that are rather more specious than profitable. It is said in some of the cases that the classification must be reasonable, in others that it must not be unreasonable or arbitrary, etc. If it is meant by this that the Legislature cannot evade the prohibition of the Constitution as to special laws by making a law applicable to a pretended class which is, in fact, no class, we concur in the proposition. Such was the law passed upon in the case of Commonwealth vs. Patton, 88 Pennsylvania, 258. That statute was made applicable to all counties in which there was a population of more than 60,000 and an incorporated city with a population exceeding 8000 'situate at a distance from the county seat of more than twenty-seven miles by the usually traveled public road.' There was but one city in the State which came within the pretended class. The court held this a covert attempt at special legislation, and that the Supreme Court of that State has found it necessary to repress it with a strong hand. In so far as the courts which undertake to define the basis upon which the classification must rest hold that the Legislature cannot, by a pretended classification, evade a constitutional restriction, we fully concur with them. But if they hold that a classification which does not manifest a purpose to evade the Constitution is not sufficient to support a statute as a general law, merely because in the court's opinion the classification is unreasonable, we are not prepared to concur. To what class or classes of persons or things a statute should apply is, as a general rule, a legislative question. When the intent of the Legislature is clear, the policy of the law is a matter which does not concern the courts. A Legislature may reach the conclusion that the compensation of certain officers in certain counties of the State is excessive, while in others it is not more than enough. By the reduction of the fees of office throughout the State, they may correct the evil in those in which the compensation is too great; but they would probably inflict a greater evil by making the compensation too small in all the others. In such a case, it becomes necessary to make the law applicable to some and not to all. There must be a classification. That classification may be either by population or by taxable values. One Legislature might do as the Legislature of Texas did—make the classification by population; another, as was done by the Legislature of Arizona,

might make the taxable values of the respective counties the basis of classification. Shall the courts inquire which is correct? Can they say that the work of an officer is not in some degree proportionate to the population of his county? On the other hand, can they say that the more the property of a county, the more the crime? To ask these questions is to make it apparent that they are questions of policy, determinable by the political department of the government, and not questions the determination of which by the Legislature is subject to review by the courts. Therefore, should we adopt the rule that in order to make an act a general law the classification adopted should be reasonable, we should still be constrained to hold the statute in question a general law and valid under our Constitution, for we cannot say that the classification is unreasonable. It may be, as urged in the argument, that there are counties in the class to which the law is made applicable, the population of which very slightly exceeds that of other counties which are without it; and that it seems unreasonable to make a discrimination upon so slight a difference. To this the answer is, the line must be drawn somewhere and that a similar difficulty would probably result if the classification were made upon any other basis. Exact equality in such matters, however desirable, is practically unattainable.

Nor do we think the act in question can be considered a local law within the meaning of the term as used in the provision of the Constitution under consideration. We have found no very satisfactory definition of a local law. But it seems to us that it is one the operation of which is confined to a fixed part of the territory of the State. While by the determination of an extrinsic fact, its operation in the main may be restricted to a minority of the counties in the State, still it applies generally to the whole State. Besides, the territory is not fixed, but is subject to change according to the increase or decrease of the population of the respective counties as may appear by the vote. And again, it is held that a statute, although its enforcement be restricted to a fixed locality, is not local in its character if persons or things throughout the State be affected by it. Williams vs. People, 24 N. Y., 405; Healey vs. Dudley, 5 Lans., 115."

In the case of Logan vs. State, above cited, the Court of Criminal Appeals, in discussing the question of the special laws, said:

"In the case of State vs. Corson, 50 Atlantic Reporter, 780, it was held that 'a statute is not special or local within the meaning of the Constitution merely because it prohibits the doing of a thing in a particular locality, but is general if it applies equally to all citizens and deals with a matter of general concern.' See also Doughtrey vs. Conover, 42 N. J. Law (13 Vroom), 193. In an opinion delivered by Associate Justice Bookhout in the case of Smith vs. Grayson County, 18 Texas Civ. App., 133, in discussing Section 56, Article 3, of the Constitution, held 'that where this prohibition applies—i. e., no local law shall be passed where a general law can be made applicable—that it is the sole province of the Legislature to determine whether or not a general law can be made applicable,' citing various authorities."

In the case of G. C. & S. F. Ry. vs. Ellis, above cited, the Supreme Court of the United States, in discussing the question of the classification and its validity under the fourteenth amendment to the Constitution of the United States, said:

"It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification and is not a mere arbitrary selection."

As we view the statute under discussion, the Constitution of the State, as well as the statutes passed thereon, has created two classes of notaries public in this State; first, those who are nominated by the Governor and confirmed by the Senate; second, those persons who by virtue of their election as justice of the peace are endowed with all the rights, powers and privileges, as well as perquisites of a notary public. We can not bring ourselves to the conclusion that this is an improper or unconstitutional classification, but on the other hand that there is an abundance of reasonable ground for such classification.

We therefore advise you that in the opinion of this Department the justice of the peace in his reports under the fee bill should include therein all fees collected by him for notary work performed.

FEES FOR PERFORMING MARRIAGE CEREMONY.

Replying to that division of your inquiry relating to the fees received by the justice of the peace for performing marriage ceremony, we beg to advise that in the opinion of this Department there is no duty resting upon the justice of the peace to keep any account of fees received by him for such services, nor to make any report thereof, nor to account therefor in his statement under the fee bill.

There is no statute in this State prescribing the fees that may be charged for any officer who may perform such ceremony: It seems that the compensation to the officers for their services in performing so delightful a ceremony is left entirely in the discretion of the bridegroom and the amount of his donation we take it is measured only by his liberality upon that occasion. The only case we have been able to discover upon this point is that of the City of St. Louis vs. Sommers, Justice of the Peace, 50 S. W., 102. The court in that case said:

"A justice of the peace, by the laws of Missouri, is authorized to solemnize marriages. Rev. St., 1889, 6843. He is allowed a fee of two dollars for solemnizing each marriage. Rev. St., 1889, 5005. Does the act of 1891 (Laws Mo., 1891, p. 175) require him to pay all such fees into the city treasury? Section 12 of said act provides that each justice of the peace elected under the provisions of said act, which is applicable to the city of St. Louis alone, shall receive a salary of $2500 per annum, payable monthly out of the treasury of said city. Such justice is required to appoint a clerk of his court to hold office during the pleasure of such justice, who shall give bond. By Section 16 it is provided: 'All fees and costs collected in said courts not paid to or collected by the constables or their deputies shall be paid to and received by said clerks, and in no instance paid to or received by said justices; said clerk shall pay over all said fees collected for any services of the justice to the treasurer of said city every thirty days, accompanied by a sworn statement,' etc. Section 17 requires said clerks to keep accurate books, in which shall be entered full, complete, itemized accounts of all fees and costs taxed or collected in said courts. A careful reading of the act in question and all of its parts discloses a purpose on the part of the Legislature to define his jurisdiction as an inferior judicial tribunal, and fix his compensation therefor. For such judicial services, and for these alone, he is to receive $2500. It is of these services his clerk is required to keep an accurate book, and the fees and costs fixed by the general statutes of the State for such services are required to be taxed and collected by the clerk and constable, and the justice is forbidden to collect such. The act, by its terms, only requires the clerks to tax and collect 'the fees and costs collected in said courts'; and no refer-

ence is to be found in the act to fees which the justice may receive for fees for services wholly disconnected from his judicial character. The right to collect the latter is not repealed expressly or by implication, and the statute nowhere directs him to pay these into the city treasury. The solemnization of a marriage is in no sense a judicial act. Were a justice to perform it in his court, no record or note could be made of it. It may be performed anywhere within his jurisdiction, at any and all hours of the night, or on Sunday; and there is nothing which requires the clerk to attend the justice in his perambulations, or to take ex officio notice when parties will call upon the justice at his home to perform the marriage ceremony, nor does it require the justice to report such ceremony to his absent clerk."

There is no provision in the statutes of this State for the justice of the peace making any record whatsoever for marriage ceremonies performed by him other than the certificate upon the license.

We therefore advise you that in our opinion the justice of the peace would not be required to keep an account of the fees paid him for performing marriage ceremonies, nor would he be required to report same and account therefor under the fee bill.

Very truly yours,

C. W. TAYLOR,
Assistant Attorney General.

FEES OF OFFICE—COMMISSIONS—JUSTICE OF THE PEACE.

A justice of the peace is not a clerk of his own court, and therefore is not entitled to a commission of five per cent on fines collected.

A justice of the peace is entitled to five per cent commission on fines collected by virtue of the statute authorizing such commission to be deducted by sheriffs and other officers collecting moneys for the State or county, except jury fees.

Articles 1193 and 1194, Code of Criminal Procedure of 1911.

January 15, 1915.

Hon. O. B. Wigley, County Attorney, Newton, Texas.

DEAR SIR: The Department is in receipt of your favor of January the 11th, reading as follows:

"Some confusion has arisen in this county lately as to the construction of Article 1143, C. C. P. (McIlwaine's Digest), which provides for the payment of a commission to district and county attorneys and clerks of the court upon all fines recovered and collected by them. What we desire to know from you is whether or not a justice of the peace is entitled, under this statute, to any commission on fines collected on judgments rendered in his court.

"As we have frequently recurring cases involving this article of the Code, I would thank you for an opinion stating whether or not he is entitled to same."

The question presented by you is one not easy of solution for the reason that it involves the construction of not only Article 1193 (1143 of the old code referred to by you) but also of Article 1194 (1144 old code), relating to commissions allowable to officers for the collection of moneys due the State and county. For convenience, we here copy these two articles:

"Article 1193 (1143). The district or county attorney shall be entitled to ten per cent on all fines, forfeitures or moneys collected for the State or county upon judgments recovered by him; and the clerk of the court in which such judgments are rendered shall be entitled to five per cent of the amount of said judgments, to be paid out of the amount when collected.

"Article 1194 (1144). The sheriff or other officer who collects money for the State or county under any of the provisions of this Code, except jury fees, shall be entitled to retain five per cent thereof when collected."

The only case we find bearing directly upon this point is that of McLennan County vs. Boggess et al., 137 S. W., 346, wherein the Supreme Court, upon a certified question from the Court of Civil Appeals of the Third Supreme Judicial District, held that under Article 1143, Code of Criminal Procedure, the justice of the peace is not the clerk of his own court and is therefore not entitled to retain a commission of five per cent upon fines collected by him. A reading of this case will disclose that the opinion is based entirely upon Article 1143 and that Article 1144 of the old code, which is now Article 1194 of the Code of Criminal Procedure of 1911, was not considered by the court, and no contention was made by the defendant in error that he was entitled to a commission under the last named article.

It appears that in the interim between the decision of the Supreme Court and the decision by the Court of Civil Appeals based upon the answer of the Supreme Court that the Attorney General's Department, through Mr. Walter C. Woodward, Assistant Attorney General, rendered an opinion holding that while a justice of the peace was not the clerk of his own court and was therefore not entitled to a five per cent commission on fines collected by reason of Article 1143, yet by reason of Article 1144, being an officer authorized to collect fines due the State under other provisions of the statute, he is entitled to a five per cent commission on fines collected, such fines being moneys due the county.

We are impressed with the correctness of this view, and in order that you may have the benefit of this opinion we copy it as follows:

ATTORNEY GENERAL'S DEPARTMENT, STATE OF TEXAS.

AUSTIN, June 27, 1911.

Hon. Lamar Bethea, County Attorney, Bryan, Texas:

Dear Sir: We are in receipt of your letter of the 26th instant, relating to the commission allowed a justice of the peace on fines collected by him for the use of the State or county.

In the case of McLennan County vs. Boggess, 137 S. W., 346, the Court of Civil Appeals certified the question of the right of a justice of the peace to retain five per cent commission on fines collected by him under Article 1143 of the Code of Criminal Procedure. The Supreme Court held in answer to the certified question that the justice of the peace was not a clerk of his court, and that under Article 1143 he was not entitled to the five per cent commission. There is another article, however, towit, Article 1144 of the Code of Criminal Procedure, which provides as follows:

"The sheriff or other officer who collects money for the State or county under any of the provisions of this Code, except jury fees, shall be entitled to retain five per cent thereof when collected."

In my opinion, under this article of the statute, the justice of the peace would be entitled, when the fine was collected by him, to retain five per cent thereof as commission. His right, of course, in this instance, even though collected by him, would depend upon whether he has the right to collect the fine in the first instance. I am led to believe that he is permitted to collect moneys for the use of the State and county, such as fines, etc., by reason of the fact that under Article 1013, Code of Criminal Procedure, a justice of the peace is one of the officers named therein whose duty it is to make a report of all moneys collected for the county, as provided for in Article 1012, Code of Criminal Procedure.

It is further provided by Article 1011, Code of Criminal Procedure, that the report shall show the amount collected, when and from whom collected and the disposition that has been made of the money.

It is provided by Article 1015, Code of Criminal Procedure, that the money when collected shall be paid over by the officer collecting same to the county treasurer of the proper county after first deducting therefrom the legal fees and commissions for collecting the same.

Therefore, you are advised in answer to your letter that it is my opinion a justice of the peace is entitled under Article 1144, Code of Criminal Procedure, to retain five per cent of the fines collected by him. This article of the statute was not discussed in the opinion in the case above cited, and it seemed not to be directly before the court in that case. Therefore this opinion is not in conflict with the opinion in the case above cited.

Yours very truly,
WALTER C. WOODWARD,
Assistant Attorney General.

The opinion of the Court of Civil Appeals in the case of McLennan County vs. Boggess et al., based upon the answer of the Supreme Court to the certified question, is found in 139 Southwestern Reporter, page 1154.

In a motion for rehearing in this court the right of a justice of the peace to a commission under Article 1144 of the Code of Criminal Procedure was set up for the first time, and the court makes mention of the fact that the Attorney General had rendered the above opinion, saying:

"It is stated in the motion for new trial that the Attorney General's Department has recently held that when a justice of the peace collects a fine from the party against whom it has been adjudged by a judgment of his court, he is entitled to five per cent thereof under Article 1144. That ruling may be entirely correct. * * *"

While this language of the court is not an approval of the opinion of the Attorney General's Department, yet it is persuasive that the court was at least favorably impressed with that ruling. The motion for rehearing in this case was overruled for the reason that Boggess, the justice of the peace, had deducted from the fines collected ten per cent for the county attorney, five per cent for the constable, and also five per cent for himself as justice of the peace, and the court held that, under the law, he was authorized to deduct only fifteen per cent; that is, ten per cent for the county attorney and five per cent for the constable or justice of the peace for making the collection, and that eighty-five per cent should have been remitted to the county; that in so far as that case was concerned, it was immaterial as to who was entitled to the five per cent for collecting,

and that Boggess, having retained twenty per cent, was due the county five per cent and judgment was rendered accordingly.

Taking all of the above matters into consideration, we are of the opinion that where a justice of the peace actually makes the collection of a fine due the county that he would be entitled to a commission of five per cent, under Article 1194 of the Code of Criminal Procedure of 1911; that is to say, we are of the opinion that the officer making the collection is entitled to the commission,—if the constable makes the collection he is entitled to the five per cent commission, or if the justice of the peace makes the collection he would be entitled to the commission. The justice of the peace would not be entitled to this commission by reason of being the clerk of his court, under Article 1193, but as the collecting agent for the county, under Article 1194 Code of Criminal Procedure.

To be more specific and confine this opinion to the direct question propounded by you, we answer your inquiry and say:

(1) The county attorney is entitled to ten per cent commission on fines collected in the justice court on judgments procured by him.

(2) If such fine is collected by a constable or sheriff, such officer is entitled to a commission of five per cent for making such collection.

(3) If such fine is collected by the justice of the peace, without the aid of the *capias pro fine* executed by the sheriff or constable, then the justice of the peace would be entitled to a commission of five per cent for making such collection.

(4) In no event would the constable or sheriff and the justice of the peace *both* be entitled to the commission, for this commission is allowed as a compensation to the officer making the collection and is not allowed to the justice of the peace as the clerk of his court for clerical services performed, for, as held in the case of McLennan County vs. Boggess, above cited, a justice of the peace is not the clerk of his court, and is not entitled to a commission on fines collected under the provisions of Article 1193, Code Criminal Procedure. This opinion holds that the justice of the peace is only entitled to a commission of five per cent on fines actually collected by him without the aid of the sheriff or constable in prosecutions arising under the Criminal Code.

State vs. Hart, Dist. Clk., 96 Texas, 102.

Trusting this opinion will be of service to you, I am, with respect,

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

FEES OF OFFICE—COUNTY CLERK.

The county clerk is entitled to fifty cents for issuance of citation, including requisite number of copies thereof.

The county clerk is entitled to ten cents per hundred words for recording abstract of judgment.

The county clerk is not entitled to a fee for assessing damages in a case not tried by a jury.

The county clerk is entitled to charge for entering an appearance only

where defendant appears in person or by attorney and enters his appearance without the service of citation.
Revised Statutes, Articles 1850, 1514, 6832, 3865, 3860 and 1881.

October 6, 1914.

Hon. T. P. Hart, County Attorney, Falfurrias, Texas.

DEAR SIR: Owing to a great press of business in this Department your communication has been unanswered until now. You propound four interrogatories, and we will answer them in their order.

1. We advise that a county clerk would be entitled to only fifty cents for issuing a writ of citation and all necessary copies thereof to defendants in the county. It is the duty of the county clerk to issue copy of citation to all defendants. The only fee provided therefor is fifty cents for the citation including the copy, and he would only be entitled to fifty cents regardless of the number of copies necessary in the suit.

Moore vs. McClure, 64 S. W., 810.
E. Hallman vs. R. F. Campbell, 57 Texas, 54.
Scott vs. Ray, 141 S. W., 1002.

2. Beg to say that the amount allowed for the recording of abstracts of judgments when properly authenticated and entitled to registration under Articles 5614 and 6832 is the fee allowed by the fee bill under Article 3860, or ten cents for each one hundred words, including the certificate and seal.

3. While Article 3860 prescribing the fees of the county clerk contains an item "assessing the damages in each case not tried by a jury, fifty cents." Yet Article 3863 provides that "no county or district clerk shall receive any compensation for assessing damages in any case." This being a subsequent statute we advise that the clerk would not be entitled to any fee for such service.

4. You are advised that the only instance in which the clerk would be entitled to charge a fee for entering an appearance would be under the provisions of Article 1881, Revised Civil Statutes, which reads as follows:

"The defendant may, in person, or by attorney, or by his duly authorized agent, enter an appearance in open court, and such appearance shall be noted by the judge upon his docket and entered in the minutes, and shall have the same force and effect as if citation had been duly issued and served as provided by law."

The items allowed by the fee bill are intended as compensation to the officers for services performed. Technically appearances are made in court by both plaintiff and defendant in various manners, but the instance referred to in the article above quoted is the only one where the entering of an appearance necessitates some act on the part of the clerk. The filing of the petition in a suit is technically an appearance by the plaintiff and likewise the filing of an answer by the defendant is technically an appearance by the defendant, but in such cases the clerk receives his compensation by way of a filing fee. It could not be contended that the law intended that he should

receive an additional compensation for entering an appearance where he performed no duty. You are therefore advised that the only instance that a clerk would be authorized to charge for entering an appearance would be that set out in Article 1881 above quoted.

With respect, I am,

Yours very truly,
C. W. TAYLOR,
Assistant Attorney General.

FEES OF OFFICE—COUNTY JUDGE—INDEPENDENT EXECUTORS.

Upon the appointment of an independent executor, the county judge is entitled to the fees for the specific work performed under Article 3849, R. S., 1911, and he is not entitled to a commission of one-half of one per cent upon the cash shown by the inventory as under Article 3850.

December 20, 1915.

Hon. Sewall Myer, County Attorney, Houston, Texas.

DEAR SIR: The Attorney General is in receipt of your letter of December 15th, reading as follows:

As the county attorney for Harris county, I have had a matter put up to me for decision which will affect every county in the State, and the matter will come before the courts of this State for determination, since the parties adversely interested have already filed, in the probate court, a motion to retax the costs in this particular estate.

The facts in the matter are that O. L. Cochran, a very wealthy man of our city, died some time back, and by his will appointed his wife as independent executrix, without bond.

The inventory and appraisement shows that he left on hand in cash $89,006 and a certificate of deposit issued by the Houston Land and Trust Company for $126,270.

Acting under Article 3850, and as has long been the custom in this county, there was taxed up as part of the costs to the county judge a commission of one-half of one per cent on the sum of $89,006 and also upon the amount of the certificate of deposit, towit, $126,270.

In this county the fees of the county judge are always in excess of the maximum allowed him by law. The county is, therefore, interested in this particular matter, for the reason that the excess, of course, is now going to the county.

The attorneys for the Cochran estate have taken the position that this estate is to be administered under a will appointing Mrs. Cochran independent executrix, and that the will providing that the only action which will be taken by the probate court is the probating of the will and the filing of an inventory, appraisement and list of claims, and that since the law provides (Article 3849) fees for the county judges for performing the duties required of him, he would not be entitled to retain the commission of one-half of one per cent taxed against the estate as costs.

I have made some investigation into the matter, and am not at all satisfied that the county judge is entitled, under the above circumstances, to make this charge of one-half of one per cent commission. It, however, being a matter of so much importance, I desired to have the benefit of your opinion, and any authorities which you could furnish me on the matter.

I will appreciate your letting me hear from you at your earliest convenience.

We are of the opinion that the county judge would not be entitled to a commission upon the cash on hand in this estate, as shown by the inventory and appraisement.

Article 3849 of the Revised Statutes of 1911 prescribed the fees allowed by the Legislature to the county judge for performing certain services in probate matters. It is provided that for probating a will he shall be entitled to $2.00, for granting letters testamentary, fifty cents, etc., covering all of the duties performed by the county judge in such matters for which a fee in a stipulated sum is fixed by statute.

By Article 3850 it is provided that the county judge shall receive a commission of one-half of one per cent on the actual cash receipts of each executor, administrator or guardian, upon the approval of the exhibits and the final settlement of the account of such executor, administrator or guardian, such article being in the following language:

"There shall be allowed the county judge a commission of one-half of one per cent upon the actual cash receipts of each executor, administrator or guardian, upon the approval of the exhibits and the final settlement of the account of such executor, administrator or guardian, but no more than one such commission shall be charged on any amount received by any such executor, administrator or guardian."

A testator may provide that no action be had in the courts except to probate the will and return an inventory, appraisement and list of claims of his estate.

Article 3362 upon this subject reads as follows:

"Any person capable of making a will may so provide in his will that no other action shall be had in the county court in relation to the settlement of his estate than the probating and recording of his will, and the return of an inventory, appraisement and list of claims of his estate."

In our opinion the purpose of this statute was to permit the testator to dispose of his property not only without the delay necessary in an administration through the courts, but also to avoid the cost incident thereto, save and except such costs as are allowed to the officers of the court for the proceedings in the probate of the will and filing the inventory. We are of the opinion that the county judge would not be entitled to this commission for another reason:

Article 3241 of the statute requires executors to make annual exhibits under oath fully showing the condition of the estate and to make final settlement of the estate within three years from the grant of letter, etc. In connection with this article we call your attention specifically to the language of Article 3850, which says that the county judge shall be entitled to the commission of one-half of one per cent upon the approval of the exhibits in the final settlement of the account of such executor, etc. It could not be said that the inventory and appraisement filed by the executors with the assistance of the appraisers is the exhibit called for in Article 3241, above referred to.

An inventory and appraisement is nothing more than a list of the property belonging to the estate and the value placed thereon by the

appraisers, attached to which is a list of all claims due or owing to the estate, which, together with the inventory is sworn to by the executors and is in no sense an exhibit of the condition of the estate, such as is contemplated by Article 3241. It is upon the filing of the exhibit that the county judge is entitled to his commission of one-half of one per cent and not upon the filing of the inventory.

In a very recent case, Grice vs. Cooley, County Judge, reported in 179 S. W., 1098, Advance Sheet No. 7, the court in passing upon the right of a county judge to a commission of one per cent upon the cash receipts of a guardian, held that the same was payable only upon the filing of the annual account of the guardian. In that case the Court of Civil Appeals said:

"Proceeding on the theory that the Legislature, when it enacted that such fees should be paid 'upon the approval of the exhibits and the final settlement of the account' of the guardian, intended that full force and effect should be given to both provisions, we conclude that such commissions may be payable upon approval of the annual account or upon approval of the final account, depending upon when the guardian received the money upon which the commission is sought to be collected. For illustration, if, upon presentation of an annual account, it discloses that cash has been received by the guardian prior to such presentation and subsequent to any last annual account, such guardian would be entitled to the specified commissions upon the approval of the account so presented. On the other hand, if it appears from the guardian's final account that since his last annual account further cash has been received, he would be entitled to his commission thereon upon the approval of such final account. The reference to the approval of the guardian's exhibits and the approval of his final account we regard as merely fixing the period or time when the county judge may tax his commissions. By Article 4186, R. S., 1911, guardians are required to present an annual account, under oath, showing, among other things, 'a complete account of receipts and disbursements since the last annual account.' Upon presentation of such annual account, it is by subsequent provisions of the statutes made the duty of the then presiding county judge to conduct a hearing thereon, and if he is satisfied that the account is correct, it is his duty to approve same. Having made it the duty of the county judge to approve such accounts, and having allowed a fee of one-half of one per cent upon the 'actual cash receipts' shown thereby, it surely follows, it seems to us, that the commissions are payable upon such approval, for the reason that they were clearly intended for the benefit of the officer performing the duty, and having been so intended, it was never contemplated that he should forego his compensation until final settlement of the estate, particularly when final settlement might not come until after the lapse of many years and the possible death of the officer. We do not, as indicated, think the reference to final settlement at all meaningless. It is very probable that in many guardianship proceedings cash would be received by the guardian in the period intervening between his last annual account and the final account. If such cash was received, the county judge who heard and approved such final account would be entitled to the commission thereon, and the sole purpose, in our opinion, for any reference to final settlement was to secure the officer in the payment of the fees accruing at that time and which could not be done under the provision covering annual accounts."

Again we are of the opinion that the one-half of one per cent commission allowed to county judges is the compensation allowed for the work of administering the estate, and the testator in this case having expressly provided that the estate should be administered without the assistance of a court it seems that it would be in effect to defeat

the purpose of the statute and the testator as well to save the expense of administration if it should be held that the county judge would be entitled to his commission upon the filing of the inventory showing the cash on hand.

For the reasons above set out we are of the opinion and so advise you that the county judge would not be entitled to a commission upon the cash on hand, as shown by the inventory and appraisement and list of claims.

Yours very truly,

C. W. TAYLOR,

Assistant Attorney General.

COUNTY TREASURER—SALARY.

After the commissioners court had fixed the treasurer's commission at two and one-half per cent, but upon the prospective sale of a large issue of road bonds, had reduced such commission to one-half of one per cent, but such bonds were not sold, resulting in a reduction of $1000 in the annual compensation of the treasurer, if such reduction was in effect an abolition of the office, then such order would be void, and the former order fixing the compensation at two and one-half per cent would be in full force and effect and the commissioners court would have authority, even after the treasurer had gone out of office, to enter an order directing the payment of the difference between one-half of one per cent and two and one-half per cent.

Whether or not the reduction of the compensation allowed is in effect an abolition of the office is a question of fact, which this Department cannot determine.

Article 3873, Revised Statutes, 1911.

February 5, 1915.

Hon. J. A. Drane, County Attorney, Pecos, Texas.

DEAR SIR: The Department is in receipt of your letter, reading as follows:

"During the year 1914 J. B. Hudson was county treasurer of Reeves county and received as his salary two and one-half per cent of moneys received and the same amount for moneys paid out by him, as is provided in Article 3873 of Vernon's Sayles' Revised Civil Statutes. In April of said year Road District No. 1 of said county voted a $100,000 road bond issue, and assuming that said bonds would be sold and the money received thereon during the said treasurer's incumbency, said commissioners court, by an order duly made by them, reduced the said treasurer's salary from two and one-half per cent to one-half of one per cent. The road bonds were never sold by the court, and subsequently the said J. B. Hudson, treasurer, went out of office, and if the bonds are ever sold, his successor, and not himself, will receive the remuneration. As a result of the reduction of the treasurer's salary, from the date of the order of the court to the time he went out of office he received approximately the sum of $300, whereas under his previous allowance from the court he would have received approximately the sum of $1300.

"Query: Is there now authority for the commissioners court to pay the treasurer, by proper order, a sum of money equal to the amount he lost by reason of said reduction of his salary on account of the supposed sale of said road bonds as above set out?"

Article 3873 of the Revised Statutes, fixing the compensation of county treasurers, reads as follows:

"County treasurers' commissions.—The county treasurer shall receive commissions on the moneys received and paid out by him, said commissions to be fixed by order of the commissioners court as follows: For receiving all moneys, other than school funds, for the county, not exceeding two and one-half per cent, and not exceeding two and one-half per cent, for paying out the same; provided, however, he shall receive no commissions for receiving money from his predecessor nor for paying over money to his successor in office."

This article, however, is subject to the limitation placed thereon by Article 3875, which reads as follows:

"Commissions shall not exceed $2000 annually.—The commissions allowed to any county treasurer shall not exceed two thousand dollars annually."

It is thus apparent that the salary of a county treasurer is in an amount within the discretion of the commissioners court, not to exceed, however, the sum of $2,000 annually. This rule, however, is subject to the qualification that the commissioners court would not have it within their power to so reduce the commissions allowed to the county treasurer, as the salary produced thereby would be of so small an amount as to practically abolish the office, in that for so small an amount no one would undertake to discharge the duties of the office.

Hill County vs. Sauls, 134 S. W., 267.
Bastrop County vs. Hearn, 70 Texas, 563.
Throop on Public Officers, Sec. 458.

As to whether or not the fixing of the treasurer's commissions at one-half of one per cent amounts in effect to abolishing the office it is not our province to determine, for, as we see it, this question has already been determined by the commissioners court, as will be more fully hereinafter discussed. Later on in this opinion we will discuss the validity of the order reducing the commission to one-half of one per cent and will cite other authorities to the effect that a reduction of the salary of a constitutional officer to such an extent as to practically abolish the office, for the reason that no one could ordinarily be secured to take the office for so small a salary would be void.

The rule that the commissioners court has it in its power to at any time fix the compensation allowed to the county treasurer is well established. In the case of Bastrop County vs. Hearn, supra, the court said:

"The law prescribes no time when the court shall fix the compensation of the county treasurer for receiving and disbursing the public moneys; nor is there any inhibition to the changing of the rate of percentage after it has been once fixed; the intention doubtless being to leave the compensation to be allowed largely in the discretion of the commissioners court, within the rate named by the Legislature, and not to exceed two thousand dollars in any one year, trusting that tribunal to do justice between the county and its treasurer." (70 Texas, 566.)

So the commissioners court of Reeves County has abundant authority in its discretion, it becoming apparent that upon the issue of road bonds contemplated and the sale thereof, that two and one-half per cent on receipts and disbursements by the treasurer would exceed $2000 in amount, to fix a fair compensation for the services performed by your county treasurer.

It appears from your letter that the road bonds in question were never sold and consequently the prospective sum to be derived from their sale never went into the treasurer's hands, thereby reducing the compensation received by the treasurer $1,000. As a result of the subsequent failure to sell the bonds he received for his services from the date of the order until the time he went out of office only the sum of $300; whereas otherwise he would have received $1,300.

It seems perfectly apparent to us that it was the intention of the commissioners court, under the facts stated in your letter, to fix a percentage to be allowed to the treasurer that would net him for the term of his office subsequent to the date of the order the sum of $1,300. That the commissioners court did not intend to reduce the amount the treasurer was to receive, but that the sole purpose in passing the order reducing his compensation from a commission of two and one-half per cent to a commission of one-half of one per cent was to prevent an excess in compensation to the county treasurer, arising by reason of placing in the treasury the proceeds of the bond issue. The unforseen failure to dispose of the bonds defeated the will of the commissioners and resulted in the loss to the treasurer of $1,000 compensation.

We recognize the well established rule that the compensation paid to a public officer is not by reason of any contract between him and the county.

Throop on Public Officers. Section 443.

The above authority says:

"It has been often held, that an officer's right to his compensation does not grow out of a contract between him and the State, or the municipality by which it is payable. The compensation belongs to the officer as an incident of his office, and he is entitled to it, not by force of any contract, but because the law attached it to the office; and although, during the time for which he claims it, he has earned money in other employment. The prospective salary or other emoluments of a public office are not the property of the officer nor the property of the State. They are not property at all. They are like daily wages unearned, and which may never be earned. The incumbent may die or resign, and his place be filled, and the wages earned, by another. The right to the compensation grows out of the rendition of the services, and not out of any contract between the government and the officer, that the services shall be rendered by him."

We are also not unmindful of that provision of our Constitution which provides that no extra compensation shall be paid.

Constitution, Art. 3, Sec. 53.

The above section of the Constitution reads as follows:

"Extra compensation by municipal corporations.—The Legislature shall have no power to grant, or to authorize any county or municipal authority to grant, any extra compensation, fee or allowance to a public officer, agent, servant or contractor, after service has been rendered, or a contract has been entered into and performed in whole or in part; nor pay, nor authorize the payment of, any claims created against any county or municipality of the State, under any agreement or contract, made without authority of law."

The rule is announced in Mechem on Public Offices and Officers, Section 374, as follows:

"It is the presumption of the law that the salary, fees or other compensation which it has fixed as the reward for the performance of official duty are adequate, and the officer, by accepting the office, impliedly agrees to perform its duties for the reward as prescribed. To permit him to exact more as a condition to the performance of his duty would be to countenance and encourage official exaction and oppression. To enforce a voluntary promise to pay him more would be to countenance and encourage bribery and corruption in respect to public officials."

So, were it proposed in the present case to pass an order of the commissioners court allowing additional compensation for services performed, under ordinary circumstances the right would not exist.

In the very recent case of Dallas County vs. Lively, 167 S. W., 219, appears an interesting discussion of the right of the commissioners court to allow extra compensation. In that case the commissioners court of Dallas county entered an order allowing an ex officio salary to County Judge H. F. Lively for a period of nine months preceding the date of the order. Dallas County entered suit to recover the amount so paid, alleging that the commissioners court was without constitutional warrant to allow an amount for ex officio services for a period that had already expired, under that provision of Article 3, Section 53 of the Constitution which prohibits the granting of any compensation, fee or allowance to a public official after service has been rendered. The question was certified by the Court of Civil Appeals for the Fifth District to the Supreme Court, which latter court answered that the commissioners court had authority to make the order, on the ground that the law does not specify the time when allowance for ex officio services shall be made, that is, whether made before or after the service was rendered. The Supreme Court said:

"As before stated, no allowance for this service has been made, nor sum paid, before the performance of the duties. The construction of the constitutional provision depends upon the meaning of "*extra compensation*," as used in Article 3, Section 53, of our Constitution, which has been construed to mean any sum given in addition to the contract price or salary. We quote:

"'Extra compensation is such not merely for being greater or less than the contract, but properly because it is outside the contract.' Carpenter vs. State, 39 Wis., 271." Words and Phrases, Vol. 3, p. 2624.

"The writer finds it difficult to argue that *extra compensation* means compensation in *addition to that allowed by law or contract*. The import of the language is so plain as to preclude argument. If the law had specified the salary to be allowed, or the commissioners court had fixed the amount, then any additional compensation procured after services were rendered would be *extra* and forbidden.

"It is manifest that the allowance in this instance was not in addition

to a previous allowance. Nothing having been paid, or sum fixed, it could not be extra allowance or compensation. Something cannot be added to nothing. If the court had allowed the same sum before the services were rendered, it would have been valid. No time being specified for making it, why should it be held invalid because made after service rendered? The county judge was not upon salary, and no allowance made for other service included this; therefore the sum fixed by the commissioners court could not be extra. It was not in addition to anything paid for other services, but was for services distinct from all other official acts.

"If there were a doubt on this question, a reading of Chapter 3, Title, "Fees of Office—County Judge," must clear the mind of such doubt, for the Legislature declares with great particularity what sum that officer shall receive for each official act, except "ex officio services," which are enumerated, and are of such character that the compensation must vary in different counties; therefore it was wisely left to the commissioners court of each county. The Constitution does not forbid the fixing of compensation after service rendered, but forbids increasing the agreed or prescribed sum after service rendered or work performed. Had the salary been specified before the ex officio duties were performed, any additional sum would be extra compensation, which the Constitution forbids." (167 S. W., 220.)

As applicable in the case in question we call attention to the expression of the court in the decision above mentioned wherein they say:

"The Constitution does not forbid the fixing of compensation after services rendered, but forbids increasing the agreed or prescribed sum after service rendered or work performed. Had the salary been specified before the ex officio duties were performed, any additional sum would be extra compensation, which the Constitution forbids."

It clearly appears from your letter that the result contemplated by the commissioners court in the fixing of the treasurer's commissions at one-half of one per cent was to allow the treasurer a salary for the remainder of his term, amounting to substantially $1,300. Of course it would have been beyond the province of the commissioners court to have entered an order specifying that for the remainder of his term of office the county treasurer should receive $1,300, for by the statute such compensation must be fixed by a stipulated rate of commission on amounts received and disbursed, but the practical effect of so fixing a percentage is to designate the annual salary for such officer. This is clearly contemplated by the statute limiting the amount a treasurer may receive to $2,000 annually. The statute prescribing that treasurers' compensation shall be arrived at by allowing a fixed percentage on receipts and disbursements is but another manner of fixing an annual salary. The commissioners court in the present case, when they make an order fixing the compensation of the county treasurer at one-half of one per cent for the remainder of his term, intended to fix a salary, when arrived at by computation under the statute, that would be in effect the same amount, were it not for the issuance of the bonds, that would be produced by a commission of two and one-half per cent on the ordinary receipts and disbursements of the county. So that if in any manner the commissioners court should at this time pass an order, the effect of which would be to allow the county treasurer the sum of $1,300 for the period between the date of the passage of the order aforesaid and the expiration of his term of office, it would

not in fact be an increase of his salary nor would it be an extra compensation, for in the minds of the commissioners of the county, when the order allowing one-half of one per cent was fixed, they were fixing the compensation of the county treasurer at $1,300 and not $300, which he received. An allowance now of $1,000 to the treasurer would be in effect the carrying out of the intention of the commissioners court when they entered the order referred to. While, as above stated, the county official does not receive his compensation by reason of any contract, yet at the same time we believe that the method of fixing the compensation of the county treasurer under the peculiar provisions of our statute partakes so much of the nature of a contract that the general rules applicable to contracts would, under the peculiar equities of the case in hand, be applicable thereto. It is well settled that mutual mistake as to a material fact will avoid a contract.

Wilson vs. Queen Insurance Co.. 5 Fed., 674.

Mutual mistake as to a material fact will avoid a contract. Wilson vs. Queen Ins. Co. of Liverpool & London.

A mutual mistake between the parties to a verbal contract of sale, as to the terms on which a note of a third person was to be received as the consideration, makes the contract not binding on either party. Baldwin vs. Mildeberger, 2 N. Y. Super. Ct. (2 Hall), 176.

A misconception which will avoid a contract must be a mutual one, and of a fact which entered into the contemplation of both parties as a condition of their assent. Gibson vs. Union Rolling Mill Co., 3 Watts, 32.

A contract made in contemplation of the passage of legislative acts, which were essential to the object of the contract, and the passage of which was confidently expected by both parties, ought not to be enforced when the Legislature refused to pass these acts, and adopted other measures, entirely defeating the object of the parties in making the contract. The equity of such a case is essentially the same as if the contract had been made under a mutual mistake of a material fact, 'the efficient cause of its concoction.' Miles vs. Stevens, 3 Clarke, 434, 5 Pa. Law J., 513.

Where parties to a contract have presupposed some facts or rights to exist, or that they will thereafter exist, as the basis of their proceedings, which in truth do not exist, or are prevented from happening by unforseen causes ending in mutual error, under circumstances material to their character and consequences, such contract, on general principles, is inoperative and invalid. Miles vs. Stevens, 3 Pa. St. (3 Barr), 21; 45 Am. Dec., 621.

Defendant bought a horse at a sheriff's sale of the property of H., and, as an act of kindness, left it with her. Thereafter the husband of H. sold it to plaintiff. Plaintiff returned it to defendant on the promise of the latter to restore it to him if the husband was acquitted on a pending indictment for larceny of the horse. *Held*, that the contract was void, being founded on a mutual mistake of fact, both parties erroneously assuming that the husband's title would necessarily be determined by his acquittal or conviction. Fink vs. Smith, 179 Pa. St., 124; 32 Atl. 556 37 Wkly. Notes Cas., 46.

Contracts made in mutual error, under circumstances material to their character and consequence are invalid. Harrell vs. De Normandie, 26 Tex., 120.

A contract, which is made while the parties are under a mutual mistake as to material facts, affecting its subject-matter, is invalid. Ketchum vs. Catlin, 21 Vt., 191.

"Where both parties to an agreement act under a mutual mistake, neither can take advantage of it. French vs Townes, 10 Grat, 513."

"When an alleged agreement was entered into by an honest misunderstanding of the parties, there is no legal contract, and the remedy is to set it aside. Boehm vs. Yanquell, 15 Ohio Cir. Ct. R., 454; 8 C. C. D., 184."

"If a mutual innocent mistake is made in reference to the substance of a contract, a court of equity may rescind the contract on the ground that the minds of the parties in fact never act, so that there was really no mutual assent to the contract. Crisliy vs. Cain, 19 W. Va., 438."

The moving cause, and in fact the only consideration prompting the commissioners court to reduce the rate of commission was the anticipation of the receipt of one hundred thousand dollars on the bond issue. Had it not been that this large sum was in contemplation we must assume that the commissioners court would have allowed the rate to have remained at two and one-half per cent. The treasurer himself relied upon what he deemed an assured fact and therefore took no steps whatever to controvert the order of the court. It was in the minds of both parties affected by the order that same was based upon and relied for the effect thereof upon the assumption that the revenues of the county would be swelled by the proceeds of this bond issue. When this amount failed to materialize then the will of the commissioners court was defeated and the county treasurer was deprived of the real amount it was intended he should receive, and we are firmly convinced that the order so made would be held void, by reason of a mistake of the material fact upon which such order was based.

In the scheme of government of this State all power is divided into three separate and distinct departments, that is to say, the executive, the legislative and the judicial. Under one of these heads county commissioners, being officers of the government, must fall. They are not legislative, for they exercise none of the functions of a legislative body; they are not judicial, for they do not decide controversies between individuals, nor do they pass upon accusations made in the name of the public against persons charged with violations of the law.

People vs. Ransom, 58 Cal., 558.
People vs. Oakland, 58 Cal., 572.
People vs. Ridgley, 21 Ill., 65.
M., K. & T. Ry. Co. of Texas vs. Shannon, 100 Texas, 379.

In the last case above cited it was held that the commissioners court did not form a part of the judiciary; therefore, any order made by the commissioners court is not in the nature of a judgment, but is the act of an executive under authority vested in him by statute. However, if such order could be considered in the nature of a judgment of a court then we are of the opinion that such court would at this date, by reason of the mistake entering into such judgment, have authority to set same aside and make such order as the facts of the case warrant.

"Where an unauthorized order has been made by the surrogate in the decree of settlement of an executor's account, he has the power, inherent in courts generally, to vacate the decree in that respect. In re Underhill, 53 Hun., 632; 6 N. Y. Supp., 133, affirming 1 Con. Sur, 313; 9 N. Y., Supp., 457, and affirmed 117 N. Y., 471; 22 N. E., 1120.

"Where the parties consented to submit the application for judgment in a county other than that in which the venue is laid, but the judgment was granted on a misapprehension that the consent extended to the granting of a judgment, such judgment will be set aside on motion. Spiehler vs. Asiel, 83 Hun., 223; 31 N. Y. Supp., 584."

Should the commissioners court, when this matter is presented to it enter an order rescinding the order entered in April, 1914, whereby the treasurer's commission was reduced to one-half of one per cent, the effect of this would be to leave in operation the order theretofore entered allowing a commission of two and one-half per cent, and upon that order the treasurer having received only one-half of one per cent would be authorized to receive and the proper officials authorized to pay an additional two per cent; provided, always, of course, that the total for the year did not exceed $2,000.

In support of the proposition that the order of the commissioners court allowing a commission of two and one-half per cent would remain in force after the passage of an invalid order we cite the case of Hill County vs. Sauls, above referred to in this opinion. In that case the commissioners court of Hill county entered an order to the effect that beginning December 1, 1908, the commissions received by the county treasurer should be limited to that he is entitled to receive by law for receiving and disbursing the school fund and that he receive no commission on other county funds received and disbursed. This order was made on January 16, 1908. Prior thereto, on February 16, 1906, an order had been entered allowing the treasurer one per cent on all amounts received and disbursed. Thereafter on the 13th day of March, 1909, the commissioners court reconsidered its order of January 16, 1908, fixing the compensation of the county treasurer at one and one-half mills on receipts and disbursements. The court in discussing the order made on December 1, 1908, which limited the commission of the treasurer to the school fund, called attention to the acts of the Thirty-first Legislature, page 22, Section 154a. which provides: "that no commission shall hereafter be paid for receiving and disbursing the school fund." The court held that as the commissioners court had no authority to destroy the office of county treasurer by abolishing the salary and that as the law did not allow a commission upon school funds and that being the only commission allowed by the commissioners court that the court had transcended its power and that the order of the court limiting the compensation of the county treasurer to a commission on the school fund was void and that the order theretofore entered allowing one per cent was in full force and effect. The court said:

"We therefore are of the opinion that said action of the commissioners court in failing to allow compensation was void and of no effect and that the order theretofore existing allowing commissions of one per cent on all moneys received and on all moneys paid out remained in full force until March 13, 1909, when said court fixed the compensation at one and one-half mills on the dollar."

We think this case is sufficient authority in support of the proposition announced, that is to say, if the order of the commissioners court of your county reducing the commissions of your county treasurer to one-half of one per cent was for any reason illegal or void, then the prior order fixing the commission at two and one-half per cent is in full force and effect.

We desire to revert to the question of the right of the commissioners

court to determine the reasonableness of the salary fixed by the commissioners court. It can not be controverted that no authority authorized to fix compensation for constitutional officers can practically destroy that office by fixing the compensation at such a low figure that no person would perform the duties of the office for the amount allowed.

Hill County vs. Sauls, supra.
McDaniel vs. Yuba County. 14 Cal., 444.
Marquis vs. City of Santa Anna, 103 Cal., 561.
Board of Supervisors of De Soto County vs. Westbrook, 64 Miss., 312.
People vs. Howland, 17 N. Y. App. Div., 165.
State of N. C. vs. Gales, 77 N. C., 285.
White vs. Ayer, 126 N. C., 570.
Reid vs. Smoulter, 128 Pa. St., 312.

Section 44 of Article 16 of the Constitution of this State provides for the election of and compensation of the county treasurer in the following language:

"County treasurer and surveyor.—The Legislature shall prescribe the duties and provide for the election by the qualified voters of each county in this State, of a county treasurer and a county surveyor, who shall have an office at the county seat and hold their office for two years, and until their successors are qualified; and shall have such compensation as may be provided by law."

The county treasurer, therefore, being a constitutional officer it is beyond the power of the Legislature, either directly or through the agency of the commissioners court, by way of conferring the power upon the commissioners court, as has been done in Article 3875, R. S., 1911, to so reduce the salary of the county treasurer as to substantially and for all practical purposes abolish the office. To our minds it is not a question as to whether your ex-county treasurer would have retained his office with the knowledge that he would not receive but $300, but as to whether or not it would be always possible under all the circumstances to obtain a county treasurer for the salary fixed.

The principle that an office cannot be abolished by reducing the salary is clearly set forth in the opinion of the court in the case of Board of Supervisors vs. Westbrook, supra, wherein the board of supervisors reduced the salary of the chief health officer of the county to $1 per month, and we quote from that case as follows:

"By Section 790 of the code, it was the duty of appellant to fix the salary of the chief health officer of their county. What the salary should be was a matter within their discreation, 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 cannot 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 cannot

be repealed or abrogated, directly or indirectly, by a board of supervisors.

"The jury accepted as true the testimony that one dollar per month was not adequate compensation for the services rendered, and there was no effort to show neglect of duty or want of qualification on the part of appellee, or that the services of a competent physician could have been secured for the reduced salary.

"It appears that the action of appellants in reducing the salary of the chief health officer of their county from fifteen dollars to one dollar per month was intended to dispense with the office 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.

"On the facts of record the result reached in the court below was right, and the judgment is affirmed."

Of similar import is the holding of the case of McDaniel vs. Yuba County, supra, wherein the court said:

"The contract having been made by the board of supervisors, it was not in their power to abrogate it by rescinding the order under which the plaintiff was appointed, or abolishing the office. This has been often decided. The distinction is very apparent between an office constituted by legislative act, and a contract made with a party to render for a stated period certain services, though these services are to be rendered in a capacity in the nature of a public office or appointment."

In the case of Reid vs. Smoulter, supra, the court said:

"The Constitution creates the office of assistant clerk, and the Legislature fixes the sálary; but the latter cannot deprive him of his office by refusing him his salary. In Commonwealth vs. Gamble. 62 Pa., 343, there was an effort to remove a judge from his office by doing away with his district; and, although the apportionment of the districts was clearly within the power and discreation of the Legislature. yet it was held that as the judge held his office under the Constitution the General Assembly could not, by a mere legislative act, remove him from the exercise of the duties and jurisdictions attaching to his office. So in this case, the adjustment of the salary is given to the Legislature. yet as the clerk derived his office directly from the Constitution, the Legislature cannot expel him from it by repealing the act fixing the amount of his salary."

In the case of State vs. Rowland, supra, the Legislature relieved the sheriffs and constables of the duty of serving process for justices of the peace. The court held that this deprived the justice of the peace of his fees of office and in effect abolished the office. In this connection the court said:

"Section 20 of Article 6 of the Constitution provided that 'No judicial officer except justices of the peace shall receive to his own use any fees or perquisites of office.' This it seems to me is not only a constitutional recognition that the compensation of justices of the peace was by fees, which under the principles above set forth the Legislature is bound to recognize, but is also an express permission to receive fees for their services, and that which the Constitution expressly permits, the Legislature cannot directly or indirectly prohibit."

We consider this a sufficient citation of authority upon this question.

When at the April term, 1914, the commissioners court fixed the compensation at one-half of one per cent, induced by the prospective

increase in revenues whereby the actual amount of compensation produced by a commission of one-half of one per cent would be identical with an amount produced by a commission of two and one-half per cent on ordinary receipts and disbursements they reaffirmed their decision that a reasonable compensation for the services performed was an amount equivalent to that sum produced by two and one-half per cent upon the ordinary receipts and disbursements. The effect of this new order was the same as if no bond issue had been contemplated and the commissioners had passed another order allowing two and one-half per cent and confirming the order theretofore entered. Therefore, if by reason of the failure of the material fact contemplated by the commissioners court on the date of their order the amount realized by the treasurer is less than the amount theretofore determined by the commissioners court was reasonable compensation for the services rendered, such order so reducing the compensation below a reasonable amount would be void and of no effect.

As has been said before, the power is lodged in the discretion of the commissioners court to fix the compensation of the county treasurer. This must be done by taking into consideration all of the facts and circumstances surrounding the office, having due regard for the duties to be performed and bearing in mind at all times that the compensation can not be fixed low enough to practically abolish the office. Our view of the question submitted by you is that your commissioners court at the date of passing the order allowing the commission of two and one-half per cent determined what was a reasonable allowance for the county treasurer, that thereafter in April, 1914, by entering the order of one-half of one per cent they again determined what was a reasonable compensation for the county treasurer and such order, taken in connection with the fact of a contemplated bond issue, proves conclusively that the commissioners court were still of the same opinion as to what was a reasonable amount of compensation for the officer. Your commissioners court has determined that a reasonable allowance for such officer is such an amount as will be produced by a commission of two and one-half per cent upon the ordinary receipts and disbursements of your county. It has also been determined that a reasonable compensation for the treasurer is a sum that will be produced by a commission of one-half of one per cent on the ordinary receipts and disbursements, plus the sum of one hundred thousand dollars. The effect of the orders of your commissioners court is that one-half of one per cent of the ordinary receipts and disbursements of the county is not a reasonable compensation, under the circumstances.

It would appear from all the facts stated in your communication that the commissioners court by the orders entered have determined that a commission of one-half of one per cent on the ordinary receipts and disbursements of the county is not a reasonable compensation for the county treasurer. If the amount produced by one-half of one per cent on the ordinary receipts and disbursements of the county is not a reasonable compensation and the result of such an order is a substantial abolition of the office by reducing the salary attached thereto to so low a figure as to preclude the probability of securing an incumbent, then such order would be void.

If such order is void the prior order allowing two and one-half per cent commission remains in full force and effect and the county is indebted to your ex-treasurer in the difference between the amount he received and the amount that would be produced by calculating two and one-half per cent of the receipts and disbursements of the county from the time such order was entered, which, we believe, was in April, 1914, until your ex-treasurer went out of office, we assume sometime in December, 1914, provided, of course, such an amount did not exceed $2000 per annum.

The question of whether or not the order of the commissioners court reducing the compensation of the county treasurer to one-half of one per cent is an abolition of the office is one of fact, to be determined by taking into consideration all of the facts and circumstances and the amount of work incumbent upon the office. This being the case this Department could not pass upon that question, but must leave it as a question of fact to be proven.

If the commissioners court are of the opinion that one-half of one per cent on the receipts and disbursements of your county for the period between the date of the entry of the order of one-half of one per cent and the expiration of the treasurer's term of office is a sufficient compensation for the service performed, and all the facts go to show that such exercise of the discretion lodged in the commissioners court is not an abuse thereof then the courts would not interfere with such order and the county treasurer could not recover. On the other hand if the commissioners are of the opinion that a commission of one-half of one per cent on such receipts and disbursements for the period named is not a sufficient compensation and would result in the abolition of the office, then it would be their duty to enter an order rescinding the order of one-half of one per cent and directing payment to the treasurer on the basis of the former order of two and one-half per cent. If such an order should be entered and the same should be contested by a taxpayer then the question would revert to whether or not an order of one-half of one per cent was an abolition of the office, and would be a matter of proof as above said.

It does not appear from your communication that the present commissioners court is composed of the same gentlemen who composed the court during the last two years. We take it, however, from your letter, that the present court, whether composed of the same gentlemen or not, desires to compensate the ex-treasurer, as was contemplated by the former court, and if the court should now enter an order rescinding that of April, 1914, provided they are of the same opinion as the court was at that time, as to the just and reasonable compensation for the county treasurer, that they would have ample authority to do so and that such an order, re-affirming the opinion of the commissioners court, would be further proof of the right of the ex-treasurer to the amount in controversy.

With respect, I am,

Yours very truly,

C. W. TAYLOR,

Assistant Attorney General.

FEES—COUNTY ATTORNEY—LUNACY CASES.

The county attorney, who has not been notified of and who does not attend a trial in a lunacy case, is not entitled to a fee therefor.
Articles 155-163, Vernon's Sayles' Civil Statutes.

January 26, 1915.

Hon. Lex Smith, County Attorney, Fairfield, Texas.

DEAR SIR: The Department is in receipt of your favor of January the 7th, reading as follows:

"The ex-county attorney of Freestone county has filed his claim with the commissioners court for fees in lunacy cases, in which he never appeared, nor was he notified by the commission of said trials. Is he entitled to a fee in such cases?"

Replying to the above, we beg to advise you that the fees of the county attorney for representing the affiant in lunacy proceedings before a commission are such as shall be allowed by the commissioners court, not to be less than $5.00 nor more than $10. (Article 163, Vernon's Sayles' Civil Statutes.)

By Article 155 (Vernon's Sayles' Civil Statutes) it is provided:

"The county attorney shall appear and represent the affiant of said affidavit, and shall be notified by the commission of all times and places fixed by the commission for hearing of testimony."

There is nothing in the law relating to such proceedings that could be construed to mean that the county attorney would be entitled to this fee as a matter of right, or by reason of his office, whether he attended the trial or not. On the other hand, reading the two statutes above referred to together, it seems perfectly apparent to us that the commissioners court have in their discretion the allowance of the fee, and that such court would have the right only to allow a fee for services actually rendered.

It is a correct statement that fees allowed to officers by statute are allowed as compensation for services actually rendered and to say that the commissioners court would be justified in allowing the county attorney a fee in a lunacy case where he was not present and took no steps whatsoever in the trial, it seems to us would be making a gift of county funds to an officer where he had performed no service whatever, and would be unwarranted by any provision of the statute.

We therefore advise you that in our opinion the commissioners court would be wholly without authority to allow fees in the case presented by you.

Yours very truly,

C. W. TAYLOR,

Assistant Attorney General.

OPINIONS CONSTRUING GAME, FISH AND OYSTER LAWS

FISH AND OYSTER LAWS—DISTRIBUTION OF FINES—STATUTORY CONSTRUCTION.

Of all fines collected for the infraction of the fish and oyster laws the county attorney is entitled to ten per cent, and the remainder placed to the credit of the fish and oyster fund of the State.

In the Acts of the Thirty-third Legislature, appearing as Chapter 146 of the printed acts thereof, the article numbered 4012 should be numbered 4013, as the subject matter of this article is the same as Article 4013, which is amended by that act. The numbering of this amended Article as 4012 held to be a clerical error.

April 11, 1915.

Hon. Will W. Wood, Game, Fish and Oyster Commissioner, Austin, Texas.

DEAR SIR: The Department is just in receipt of your letter of even date herewith, reading as follows:

"Will you kindly render me your opinion on the following question:

"When a fine is collected for violation of the fish law, should the county in which fine is collected retain same, or should they remit this department ninety per cent? We refer you to Article 4012 of the 1913 statutes."

Replying thereto we beg to advise that in our opinion the distribution of fines collected for infraction of the fish and oyster laws of this State should be as under the Article numbered 4012, on page 305 of the General Laws of the Thirty-third Legislature, that is to say prosecuting attorneys would be entitled to ten per cent thereof, and the remaining ninety per cent should be placed to the credit of the fish and oyster fund of the State. Some little confusion has arisen as to the correct disposition of these fines, on account of the fact that Chapter 146 of the Acts of the Thirty-third Legislature, above referred to, covers substantially the whole subject of Chapter 2, Title 63, of the Revised Statutes of 1911.

In the caption of this act Article 4012 of the Revised Statutes is not mentioned, nor is such article mentioned in Section 1 of the act, as being one of those articles amended by the act.

In order to make our position clear it will be necessary to copy herein the articles of the Statutes of 1911 under discussion, as well as the amended article numbered in the amendatory act as Article 4012.

Articles 4012 and 4013 of the Revised Statutes of 1911 are as follows:

"Art. 4012. Fines, etc., to go to general fund of county.—All moneys derived by counties from fines for infraction of the fish and oyster laws, fees, taxes, etc., shall go to the general fund of the county."

"Art. 4013. Fines distributed, how.—Of all fines collected for infraction of the fish and oyster laws, ten per cent shall go to the prosecuting attorney, and one-fourth shall go to the informer, and one-half of the

residue shall go to the fish and oyster fund of the State, and the other half of the residue shall go to the county in which the case was tried."

It will be noted that these two articles taken together cover the disposition of fines arising from the infraction of the fish and oyster laws, in so far as the county is concerned; Article 4012 providing that the moneys derived by the counties therefor shall go to the general fund of the county, while Article 4013 determines the percentage of such fine to which the county is entitled.

What is numbered as Article 4012 in the amendment of 1913 reads as follows:

"Art. 4012. Fines distributed, how.—Of all fiines collected for infraction of the fish and oyster laws, ten per cent shall go to the prosecuting attorney and the residue shall go to the fish and oyster fund of the State."

It will be seen from the language used in the above by the Legislature that it covers both Articles 4012 and 4013 of the Statutes of 1911, in that it eliminates the county in the distribution of such fines. We think the only reasonable construction of this act of the Legislature is that it was the intention to repeal Article 4012 of the Statutes of 1911 and to amend Article 4013, by substituting for the language in the old Article 4013 that language to be found in the amended article numbered 4012, and that the numbering of the new article as Article 4012 was a mistake on the part of the Legislature, and that such amended article should be construed to be numbered Article 4013, for the reason that the subject matter of Article 4012, as amended, is the same as that of Article 4013 of the old statute.

Any other construction of this act would result in holding inoperative the amended Article 4012, for the reason that the same is not mentioned in the caption, and under the Constitution of this State, not being mentioned in the caption, could not be contained in the body of the act.

Looking again to the caption we find that one of the purposes of this amended act is to provide for the distribution of fines collected and the disposition of funds. This shows clearly the purpose of the Legislature to provide for a different distribution of these fines from that prescribed by the old law, and in so doing it amended Article 4013 of the old law, by the terms of which amendment it necessarily destroyed and rendered ineffective the provisions of Article 4012. Not only has this been done, but by the express terms of the new act all laws and parts of laws in conflict are repealed. We think it clear, therefore, that the Legislature, in numbering the amended Article as Article 4012 simply made a clerical error and that such article should be numbered Article 4013. Mr. Sutherland, in his work on Statutory Construction, says:

"To enable the court to insert in the statute omitted words or read into it different words from those found in it the intent thus to have it read must be plainly deducible from other parts of the statute." (Sec. 4011.)

From an analysis of the Statutes of 1911 and the Act of 1913, above, we think we are clearly within the rule, for the reason that it so

plainly appears from the caption of the amendatory act, as well as the body thereof, the Legislature intended to amend Article 4013 and not 4012. The above author cites as illustrations numerous similar mistakes made by Legislatures, for instance:

"The New York liquor tax law of 1896 repealed numerous acts, including Chapter 744 of the laws of 1895. This related to a sewer in Rochester. Chapter 774 of the laws of 1895 was a liquor law. The designation of 744 was held to be a clerical mistake and the chapter was held not to be repealed. The act purported to amend Section 2 of Chapter 112, the amendment had no relevancy to Section 2, but did to Section 11 of the chapter. It was held to be a clerical mistake and the act was construed as amending Section 11."

We think the act of the Legislature in the present case, in numbering the amended Article 4012, is on all fours with the illustration last cited by Mr. Sutherland. Article 4012 of the old law simply designated the county fund to which the county's portion of the fines should be credited, and does not undertake to determine the distribution of the fund, or the percentage thereof to which the county was entitled, but Article 4013 of the old law sets out the percentage to which its officers and funds shall be entitled. Clearly the purpose of the Legislature was to amend Article 4013. It will be noted that the amended article disposes of all of the fine in that ten per cent is set apart to the prosecuting attorney for his services and all of the remainder must go to the credit of the fish and oyster fund of the State. This makes no provision for the sheriff or constable to receive any part of the fine, and therefore is in conflict with Article 1194 of Code Criminal Procedure, which provides, "The sheriff or other officer who collects money for the State or county under any of the provisions of this code, except jury fees, shall be entitled to retain five per cent thereof when collected."

Under the article last quoted the general rule is that where a sheriff or other officer collects a fine he is entitled to five per cent thereof for making such collection. This article is applicable generally to the collection of fines, while Article 4013, as amended, is dealing with a particular subject, the general rule being, in the cases of this character, that where two statutory provisions in apparent conflict, one general and applying to general subjects and the other particular and applying to only one subject, the particular provision must prevail.

McDonough vs. Thomas, 64 Ill. App., 408.
Camp vs. Wabash R. R. Co., 78 S. W., 1133.

The statute relating to the distribution of fines arising under the fish and oyster law, dealing specially and particularly with fines, we are of the opinion controls and supersedes the general rule under Article 1194, Code Criminal Procedure, and therefore the sheriff or other officer who collects this fine would not be entitled to any portion thereof. We therefore advise you that out of the fines collected for the infraction of the fish and oyster laws the prosecuting attorney

is entitled to receive ten per cent and the remainder thereof, or ninety per cent, shall be deposited by you to the credit of the fish and oyster fund in the treasury of this State.

Yours very truly,
C. W. TAYLOR,
Assistant Attorney General.

GAME LAWS.

The right to reduce wild animals to possession is subject to the control of the Legislature.

"Wild game within a State belongs to the people in their collective, sovereign capacity; it is not the subject of private ownership, except in so far as the people may elect to make it so; and they may, if they see fit, absolutely prohibit the taking of it, or any traffic or commerce in it, if deemed necessary for its protection or preservation, or the public good."

Transportation companies cannot lawfully receive for transportation and transport hides and heads of wild deer from taxidermists who have had same in their possession for the purpose of treating and mounting.

Articles 878, 882, 890 and 891 of the Penal Code.

Article 4022 of the Revised Civil Statutes of 1911.

March 25, 1915.

Hon. Will W. Wood, Game, Fish and Oyster Commissioner, Capitol.

DEAR SIR: The Attorney General is in receipt of your letter of March the 19th, reading as follows:

"Under your ruling of March 15, in regard to shipping the hides and horns to taxidermists for mounting is prohibited by law. Now I would ask if the hide and horns were left with the taxidermist for mounting and having passed from a raw into a manufactured product (mounted) would it be unlawful to ship same after making proper affidavit? You stated in your opinion that the having in possession by the taxidermist was not unlawful, as his possession was only temporary. May I ask what disposition may be made of these articles if not allowed to ship to owner, and was prohibited from holding permanently?"

In a former opinion to you of the 15th instant we held that a taxidermist may lawfully have in his possession the hides and horns of deer for the purpose of treating and mounting, for the reason there is no inhibition in our statute against the possession of the articles named for such purpose: Article 882 of the Penal Code prohibiting such possession for the purpose of sale or after purchase. In other words, it is unlawful to have such articles in possession for the purpose of sale, or to sell or to offer to sell same, or to have in possession after purchase such articles.

In that opinion we also held it to be unlawful, as is provided by Article 890 of the Penal Code, for express companies, railroad companies, or other common carrier, or the officers, agents, servants or employes, to receive for transportation or to transport such articles, except as and in the manner provided in Article 891, Penal Code, to the home of the person killing same, and we therefore advised that it would be unlawful for the carriers named to receive such

articles for transportation or to transport same to taxidermists for the purpose of being mounted.

The question you now propound is: May such carriers receive the articles named from the taxidermist after mounting for the purpose of transportation and transport same to the owner by making the affidavit required by Article 891 of the Penal Code of 1911?

In the outset, we will say there is no provision in the statute authorizing transportation companies to receive and transport such articles on the affidavit of any person other than the one killing same, which would preclude basing such right upon the affidavit of a taxidermist, and then again the exemption statute requires the person who killed such game to accompany same on the same train.

For convenience, we will copy below the articles of the Penal Code pertinent to this inquiry, being Articles 878, 882, 890 and a portion of 891, leaving out the form of affidavit prescribed in this latter article:

"Article 878. All the wild deer, wild antelope, wild Rocky Mountain sheep, wild turkey, wild geese, wild grouse, wild prairie chickens (pinnated grouse), wild Mongolian or English pheasants, wild quail or partridges, wild doves, wild pigeons, wild plover, wild snipe, wild jacksnipe, wild curlews, wild robins, wild Mexican pheasants, or chacalaca, and all other wild animals, wild birds and wild fowls found within the borders of this State, shall be, and the same are hereby declared to be, the property of the public.

"Article 882. Whoever shall sell or offer for sale, have in his or her possession, for the purpose of sale, or whoever shall purchase or have in his possession after purchase, any wild deer, wild antelope, or wild Rocky Mountain sheep, killed in this State, or the carcasses thereof, or the hide thereof, or the antlers thereof; or whoever shall sell or offer for sale, or have in his possession for the purpose of sale, or whoever shall purchase or have in his possession after purchase, any of the game or game birds mentioned in Article 879, killed or taken within this State, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum not less than ten nor more than one hundred dollars.

"Article 890. It shall be unlawful for any express company, railroad company or other common carrier, or the officers, agents, servants or employes of the same, to receive for the purpose of transportation, or to transport, carry or take beyond the limits of the State, or within this State, except as hereinafter provided, any wild animal, bird or water fowl mentioned in Article 878 of this act, or the carcass thereof or the hide thereof. Any persons violating the provisions of this article shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than ten nor more than one hundred dollars. Provided, that each shipment shall constitute separate offense, and that such express company, or other common carrier, or its agents, servants or employes, shall have the privilege of examining any suspected package for the purpose of determining whether such package contains any of the articles mentioned herein.

"Article 891. Nothing in this chapter shall be construed to prohibit the transportation or shipment of any of the game, birds or wild fowls mentioned in Article 878, when lawfully taken or killed, from the place of shipment to the home of the person who killed the same; provided, the person who killed said game, birds or fowls shall accompany said game, birds or fowls on the same train or common carrier from the point of shipment to the said point of destination; and provided, further, that the person desiring to ship or transport said game, birds or fowls shall first make the following affidavit in writing before some officer authorized by law to administer oaths, and deliver same to said railroad or common carrier, or to the agent of said railroad or common carrier at the point

of shipment; and, upon filing the affidavit, such party shall be permitted to transport to his home in accordance herewith not exceeding twenty-five of any wild game bird, when such number is permitted to be killed, or the kind offered for shipment, except wild duck; provided, that such party may be permitted to transport seventy-five wild ducks upon filing the affidavit containing the provisions as stipulated in the affidavit prescribed. * * * And, thereupon, said game, birds or fowls shall be transported or shipped, by railroad or other common carrier, in the name of the person making said affidavit, to the home of said person, and shall mark on the card attached to said game, birds, or fowls the words "affidavit made." Any person violating the provisions of this section shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum not less than ten nor more than one hundred dollars."

Deer being one of the animals named in Article 878, then it becomes unlawful for the transportation company, its agents, etc., named in the latter article, to receive for transportation or transport "the carcass thereof or the hide thereof," except as provided in the exemption contained in Article 891, which was evidently inserted in the law to enable hunters to ship game lawfully killed on hunting trips to their distant homes, and was not intended to permit an indiscriminate shipment of such to any point and for any purpose.

It will be noted also that the inhibition in Article 890 is not against transporting game, the carcasses or hides thereof in any particular season, but is a broad and positive prohibition against the transportation thereof whether in season or out of season, and it is equally apparent, from the language of Article 891, containing the exception, that the shipments therein permitted can only be made during the open season.

Under the common law, animals *ferae naturae* were the property of the State, without any legislation upon the subject; but apparently in order to make assurance doubly sure, the Legislature of this State enacted what is now Article 4022 of the Revised Statutes, 1911, as follows:

"All the wild deer, wild antelope, wild Rocky Mountain sheep, wild turkey, wild ducks, wild geese, wild grouse, wild prairie chickens (pinnated grouse), wild Mongolian or English pheasants, wild quail or partridges, wild doves, wild pigeons, wild plover, wild snipe, wild jacksnipe, wild curlews, wild robins, wild Mexican pheasants or chacalaca, and all other wild animals, wild birds, and wild fowls found within the borders of this State, shall be, and the same are hereby declared to be, the property of the public."

Those animals and fowls named above are "declared to be the property of the public," consequently no person can acquire any individual right thereto, except in the manner and upon the condition provided by law and no person may acquire any property right therein, except in the number, at the time and for the purpose permitted by the statute. Game, when declared to be the property of the public, simply can not become the property of the individual citizen, except upon the terms granted by law.

Statutes of this character have been enacted by practically all of the States of the Union, and with great uniformity the courts, not only of the States, but the Supreme Court of the United States as

well, have upheld same as being a proper exercise of the police power.

Sterett vs. Gibson, 168 S. W., 19.
Baker vs. State, 153 S. W., 631.
Ex parte Blardone, 55 Crim. App., 889.
Phoenix Hotel Co. vs. Commonwealth, 166 S. W., 117.
Eager vs. Express Co., 147 S. W., 60.
State vs. Ashman, 135 S. W., 325.
Acklen vs. Thompson, 126 S. W., 730.
State vs. Hager, 93 S. W., 252.
State vs. Snowman, 50 L. R. A., 545.
Roth vs. State, 51 Ohio State, 209.
Magner vs. People, 97 Ill., 320.
Stevens vs. State, 89 Md., 669.
Hornbeke vs. White, 76 Pac., 926.
Greer vs. Conn., 161 U. S., 519.
Plumley vs. Mass., 155 U. S., 461.
Schollenberger vs. Pa., 171 U. S., 1.
Silz vs. Hesterberg, 211 U. S., 31.
Ex parte Maier, 103 Cal., 476.

We could multiply authorities without end upholding the various statutes, limiting and prohibiting the taking and possession of game in the various States of the Union, but, suffice it to say, that with one accord such statutes have been upheld as a proper exercise of the police power. This has been concisely stated in Grear vs. Connecticut, supra, in the following language:

"Kent, in his Commentaries, states the ownership of animals *ferae naturae* to be only that of a qualified property. 2 Kent Com., 347. In most of the States laws have been passed for the protection and preservation of game. We have been referred to no case where the power to so legislate has been questioned, although the books contain cases involving controversies as to the meaning of some of the statutes."

In this same case, Judge White quoted from Ex parte Maier as follows:

"The wild game within a State belongs to the people in their collective, sovereign capacity. It is not the subject of private ownership except in so far as the people may elect to make it so; and they may, if they see fit, absolutely prohibit the taking of it, or traffic and commerce in it, if it is deemed necessary for the protection or preservation of the public good."

In this opinion Judge White further quoted from the case of the State vs. Rodman, 58 Minn., 393, as follows:

"We take it to be the correct doctrine in this country that the ownership of wild animals, so far as they are capable of ownership, is in the State, not as a proprietor, but in its sovereign capacity as the representative, and for the benefit, of all its people in common."

Judge White adopts the further quotation from the Rodman case:
"The preservation of such animals as are adapted to consumption as food or to any other useful purpose, is a matter of public interest; and it is within the police power of the State, as the representative of the people in their united sovereignty, to make such laws as will best preserve such game, and secure its beneficial use in the future to citizens, and to that end it may adopt any reasonable regulations, not only as to time and

manner in which such game may be taken and killed, but also imposing limitations upon the right of property in such game after it has been reduced to possession. Such limitations deprive no person of his property, because he who takes or kills game had no previous right of property in it, and when he acquires such right by reducing it to possession he does so subject to such conditions and limitations as the Legislature has seen fit to impose."

This case (Greer vs. Connecticut) is replete with authorities upon every proposition announced, citing cases from courts of the various States of the Union.

We also call particular attention to the case of New York ex rel. Silz vs. Hesterberg, Sheriff of Kings County, 211 U. S., 31. The laws of the State of New York prohibited the possession of certain game birds during the closed season, except under certain conditions. Silz was a dealer in imported game. He was arrested for unlawfully having in his possession in the closed season the dead body of an imported Golden Plover lawfully taken, killed and captured in England during the open season for such game birds there; he likewise had in his possession the body of one imported Blackcock, a member of the grouse family, which was lawfully taken, killed and captured in Russia during the open season for such game there. He was convicted in the State courts of New York, and such case on writ of error to the Supreme Court of the United States was affirmed.

We cite this case in order to show the extent the courts will go in upholding the game laws of the States. In this case, the court said:

"It has been provided that the possession of certain kinds of game during the closed season shall be prohibited, owing to the possibility that dealers in game may sell birds of the domestic kind under the claim that they were taken in another State or country. The object of such laws is not to affect the legality of the taking of game in other States, but to protect the local game in the interest of the food supply of the people of the State. We cannot say that such purpose, frequently recognized and acted upon, is an abuse of the police power of the State, and as such to be declared void because contrary to the Fourteenth Amendment to the Constitution."

The court, speaking through Mr. Justice Day, then takes up a discussion of the case of Greer vs. Connecticutt, supra, and quotes from that case as follows:

"Aside from the authority of the State, derived from the common ownership of game and the trust for the benefit of its people which the State exercises in relation thereto, there is another view of the power of the State in regard to the property in game, which is equally conclusive. The right to preserve game flows from the undoubted existence in the State of a police power to that end, which may be none the less efficiently called into play, because by doing so interstate commerce may be remotely and indirectly affected. Kidd vs. Pearson, 122 U. S., 1; Hall vs. De Cuir, 95 U. S., 485; Sherlock vs. Alling, 93 U. S., 99; Gibbons vs. Ogden, 9 Wheat., 1. Indeed, the source of the police power as to game birds (like those covered by the statute here called in question) flows from the duty of the State to preserve for its people a valuable food supply. Phelps vs. Racey, 60 N. Y., 10; ex parte Maier, 103 Cal., 476; Magner vs. the People, 97 Ill., 320, and the cases there cited. The exercise by the State of such power therefore comes directly within the principle of Plumley vs. Massachusetts, 155 U. S., 461, 473. The power of a State to protect by adequate police

regulation its people against the adulteration of articles of food (which was in that case maintained), although in doing so commerce might be remotely affected, necessarily carries with it the existence of a like power to preserve a food supply which belongs in common to all the people of the State, which can only become the subject of ownership in a qualified way, and which can never be the object of commerce except with the consent of the State and subject to the conditions which it may deem best to impose for the public good."

In the case of State vs. Snowman, supra, the court used the following language:

"The fish in the waters of the State and the game in its forests belong to the people of the State in their sovereign capacity, who, through their representatives, the Legislature, have sole control thereof and may permit or prohibit their taking."

The Federal Congress has recognized the necessity for such legislation by the legislatures of the States, and has, in aid thereof, enacted what is known as the Lact Act, Section 5 of which we quote as follows:

"Sec. 5. That all dead bodies, or parts thereof, of any foreign game animals, or game or song birds, the importation of which is prohibited, or the dead bodies or parts thereof, of any wild game animals, or game or song birds, transported into any State or territory, or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or territory, be subject to the operation and effect of the laws of such State or territory, enacted in the exercise of its police powers, to the same extent and in the same manner as though such animals or birds had been produced in such State or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise. This act shall not prevent the importation, transportation or sale of birds or bird plumage manufactured from the feathers of barnyard fowl."

In the case of Ex parte Blardone, supra, Judge Ramsey, speaking for the Court of Criminal Appeals of Texas, quoted with approval from the case of State vs. Heger, 93 S. W., 252, as follows:

"The authorities are uniform in holding that the absolute ownership of wild game is vested in the people of the State, and that such is not the subject of private ownership. As no person has in such game any property rights to be affected, it follows that the Legislature, as the representative of the people of the State, and clothed by them with authority to make laws, may grant to individuals the right to hunt and kill game at such times, and upon such terms, and under such restrictions, as it may see proper, or prohibit it altogether, as the Legislature may deem best."

In the Blardone case, the relator had been arrested upon a complaint charging him with the sale of two wild ducks lawfully in his possession in the open season. The court remanded him to the custody of the sheriff and in the opinion overruled the case of Hall vs. State (52 Texas Crim. Rep., 195), wherein it was held that a party reducing fish to his possession, acquired ownership therein and could lawfully dispose of such property. In discussing that case, Judge Ramsey said:

"We think the vice of this view rests in the fact that fish and game, being by legislative enactment and declaration the common property of the whole people and part of the food supply of the State, the Legislature has not

only the authority to regulate the slaughter of such game, but to make such laws as may be necessary to accomplish this purpose and as may and will defeat evasions and prevent violations of this law. 'Lead us not into temptation, but deliver us from evil' is not only a suggestion of the Holy Writ as a form of supplication, but not infrequently forms a part of legislation. The limit to which game may be killed is already very large. If no profit results to the sportsman he may well be trusted to limit the spoil of his gun to the number allowed by law. If he may make merchandise of game, there is a constant temptation to kill indiscriminately, and in view of the difficulty of ascertaining what is being killed, it would doubtless lead in practice to frequent, continuous and shameless violations of the law. The same power that has the right to send out the decree that the citizen shall not slaughter game at all, or that he shall kill so many and no more, has the right to make these enactments effective, to enact the further provision that no sale of such game shall be made at all. If the Legislature can, for nine months in the year, prevent either the sale or slaughter of game, can it not, for the better protection of game, limit the sale for the entire year? We think there can be no escape in logic or reason from this view."

So that game shipped from other States wherein it may lawfully be taken, when it reaches the borders of Texas immediately becomes subject to the laws of this State. Eager vs. Express Company, 147 S. W.. 60. We do not mean to hold, however, that there is any legislation in this State which would prohibit the transportation into the State, possession or sale of deer killed beyond the boundaries of this State. It will be noted that Article 878, Penal Code, declares that all of the wild animals and birds and fowls therein enumerated, found within the borders of this State, shall be, and the same are hereby declared to be, the property of the State. Following this, Article 882 prohibits the possession by purchase and the sale, or offer of sale, of the wild animals therein enumerated "killed in this State,"—while the inhibition in Article 890, relating to the transportation of such game, is against the carrying or taking beyond the limits of the State or within the State, and does not prohibit the bringing into the State game from other States or countries. This was the holding of this Department in an opinion rendered December 10, 1909, and we see no reason to dissent from that opinion.

The process such articles may go through in the hands of the taxidermist, in our opinion, does not change their status and take them from under the restrictions laid thereon by law. The treatment given these articles by the taxidermists is not for the purpose of changing their form and converting them into other and different articles of commerce or trade. The highest evidence of the skill of the taxidermists is that he is enabled not to change the form of such articles, but to render them as natural and lifelike as possible. Doubtless the courts would hold that the person taking or killing such game might himself convert the hides thereof into articles of commerce and be permitted to sell same. It might be that if the person lawfully taking or killing such animals should himself prepare the hides thereof and make them into gloves, or other useful articles, and thereby so change their form as to bear no resemblance to those articles upon which the law has laid its hand, that he would be exempt from the operation of this law, but the mere treatment of the hides, heads and

horns of a deer by the taxidermist has no resemblance whatever to such a process, and the articles, when they leave the hands of the taxidermist, are more life-like than when he received them. Such articles when so treated and mounted, in our opinion, do not become a manufactured article, but the skill and art exercised thereon is merely for the preservation and the making of same substantial and life-like.

The term, "manufactured article," includes something which is changed by process of manufacturing from its natural form. Thus the term includes iron, manufactured from iron ore; lumber, manufactured from logs; bone dust, produced by the grinding of bone; staves, from logs; ice, formed by natural process and changed by manual labor or machinery to a form adapted for sale and use. Attorney General vs. Lorman, 60 Am. Reps., 287.

Numerous exeamples might be given of the process necessary to constitute an article a manufactured one, but all of these authorities but lead to the general rule that the article must be changed from its natural state and converted into some article of commerce or usefulness, and we find no authorities holding that the preserving of an article in its natural state or the preserving of the carcass or hide of an animal in its life-like and natural state constitutes a process of manufacture.

With the wisdom, propriety or justness of legislation against the sale and transportation of the game, the carcass or hide thereof, this Department, as such, is not concerned. It may be that some of the inhibitions in their ramifications run counter to the ideas of natural rights, but when considered in the light of the fact that the Legislature has it within its power to absolutely prohibit the killing or taking of game at any time and that such legislation would be upheld as a proper exercise of the police power and would ultimately redound to the benefit of all by preventing the extermination of all game, we see the equity and wisdom of the present law.

In giving you this opinion, we have endeavored to construe the law as it is written with the aid of the decisions of the highest courts of the States and of the Supreme Court of the United States, and we can reach no other conclusion than that the law, as it is written, is entirely within the constitutional rights of the Legislature to enact such legislation.

You are therefore advised:

First: It would be unlawful for a transportation company to receive from a taxidermist mounted hides of deer for the purpose of transportation or transport same beyond the limits of this State or within this State.

Second: A taxidermist may not lawfully sell or offer for sale, or have in his possession for the purpose of sale, or purchase, or have in his possession after purchase, where such purchase was made in violation of law, the mounted hide or antlers of a deer killed in this State.

Third: Where a taxidermist has in his possession the articles named above which he had treated and mounted for the owners

thereof, the same must be returned to the owners by other means than the transportation companies or common carrier named in Article 890 of the Penal Code.

With respect, I am

Yours very truly,
C. W. TAYLOR,
Assistant Attorney General.

GAME, FISH AND OYSTER LAW—REGISTRATION OF BOATS.

Article 3984, R. S., as amended by the act of the Thirty-third Legislature, provides for the registration of all boats used in the fishing trade. The Penal Code of 1911 contains no penalty for failure to register such boats. By the Act of April 23, 1901. a penalty of not less than ten dollars nor more than two hundred and fifty dollars was prescribed for a failure to register boats. While this penal provision was not brought forward in the revision of the statute, it has not been repealed and is applicable in such cases.

The statutes provide that no captain or master of a boat shall engage in such business without obtaining a license therefor, and in order to obtain such license he must make application, stating, among other things, the register number of his boat, and until he has complied with the law governing the registration of boats he cannot meet the requirements of the statutes relating to his application for a license.

Article 908, C. C. P., Articles 3984 to 3986, R. S., 1911, as amended by the act of the Thirty-third Legislature; Acts of Twenty-seventh Legislature, p. 304.

May 17, 1915.

Hon. Will W. Wood, Game, Fish and Oyster Commissioner, Capitol.

DEAR SIR: The Department is in receipt of your letter of May 10th, in which you state that some of the fishermen along the coast have refused to register their boats and pay a fee of $1.50 provided therefor, claiming that there is no penalty for such failure, and you desire an opinion from this Department covering the matter.

By the act approved April 23, 1901, the Twenty-seventh Legislature added to the Penal Code of this State Article 529v in the following language:

"Any person who is a citizen of the United States wishing to engage in the catching of fish, green turtle or terrapin or gather any oysters for market in any of the coast waters in this State in accordance with the provisions of the fish and oyster law of this State, shall apply to the Fish and Oyster Commissioner or his deputy for registration. He shall furnish said officer, on oath, his name, place of residence, the name and kind of boat, vessel or craft to be used or employed by him, and the number of men to be employed; thereupon the said officer shall register him and his boat and prescribe for his boat a number corresponding with applicant's registered number, which number the applicant shall cause to be plainly marked or placed on each side of the prow of his vessel, boat or craft for which he shall pay the said officer a fee of fifty cents for each vessel, boat or craft registered, and the said officer shall furnish him with a certificate of such registration; and any person failing to comply with the provisions of this article shall be deemed guilty of a misdemeanor and upon conviction shall be fined not less than ten dollars ($10.00) nor more than two hundred and fifty dollars ($250.00), and each day any person shall

fish for green turtle, fish or terrapin or gather any oysters for market in any of the coast waters of this State without having complied with the provisions of this article shall constitute a separate offense."

In the revision of 1911 the civil portion of the above article found its place in the civil statutes as Article 3984 but for some reason the penal provision of this act was omitted from the revision of the Penal Code. The failure of codifiers to incorporate any valid existing laws into the revision does not work a repeal thereof. This question was expressly decided in the case of Berry vs. State, 156 S. W., 626, in which case it became necessary for the Court of Criminal Appeals to determine whether a criminal statute relating to hunting on enclosed lands, which statute had been omitted from the codification, was repealed, and in holding such statute still in force the court said:

"There being in the Code of 1911 no express repeal of the act of the Legislature of 1899, and no provision of the Code of 1911 dealing with the subject of the act of the Legislature of 1899, we are of the opinion that the act of the Legislature adopting the codification of the laws as prepared by the Commission did not repeal the act of 1899, and it is still in full force and effect. Had the act of the Legislature in adopting the codification contained an express repealing clause, or had the Code as thus adopted dealt with the subject of hunting in inclosures containing 2000 acres or more, a more difficult question might have been presented. But as the Code prepared by the codifiers does not deal with this subject, and there is no express repealing clause contained in the act adopting this Code, we are of the opinion that the act of 1899 punishing persons for hunting in the inclosed posted lands of another containing 2000 acres or more has not been repealed, and the act of 1899 is in full force and effect, and being of this opinion, the judgment is affirmed."

We therefore advise you that while the penal provision of Article 529v as added by the Twenty-seventh Legislature is not to be found in the Revised Penal Code it is nevertheless in full force and effect and parties failing to register their boat may be punished thereunder.

In addition to what is said above, we call your attention to Article 3986, Revised Statutes, 1911, as amended by said Chapter 146, Acts of the Thirty-third Legislature, which requires any captain or master of a boat wishing to engage in the business of catching or taking any fish, turtle, terrapin, shrimp or oysters from the waters of this State to make application for a license and in such application he must state among other things the name, class and registry number of his boat. The registration contemplated by this provision is that provided for in Article 3984 and consequently no captain or master of a boat could make application under the statute for a license until he had complied with the article last named. You would be authorized to refuse a license unless the application did contain the registry number of the boat. These two statutes should be read together and when so read it is apparent that the registration of the boat is a condition precedent which must be performed before the applicant is entitled to a license.

Article 908 of the Penal Code as amended by Chapter 135, Acts of the Thirty-third Legislature, fixes a penalty for any person engaging in the business of fishing or catching green turtle or terrapin or shrimp for market without having procured a license therefor.

This article of the Penal Code is applicable and fixes the penalty for engaging in the occupation without a license as defined by Article 3986.

From what has been said above you will see that an additional remedy exists in order to force a registration of boats under Article 3984, as it will be necessary for you to refuse a license under Article 3986 until the applicant can comply with the provisions requiring certain statements in his application with reference to the registration number of his boat which will necessitate a compliance with Article 3984.

Yours truly,
C. W. TAYLOR,
Assistant Attorney General.

GAME, FISH AND OYSTER LAW.

1. It is only those captains or masters of boats engaged in the fishing trade that are required to obtain a license to fish.

2. The law levies a tax of one-fifth of one per cent per pound upon all fish, turtle, terrapin, shrimp or oysters taken for market from the public waters of this State, and requires payment of the tax and the securing of a permit before the person taking the same would be authorized to sell or offer for sale such product. The penal provision, however, applicable to this statute is to the effect that any person selling or offering for sale such products in quantities of fifty pounds or more for shipment or storage shall be guilty of a misdemeanor, and therefore prosecutions could not be maintained for a failure to pay the tax and obtain the permit unless such products were offered in quantities of fifty pounds or more, and for the purpose of shipment, or storage.

Article 3983 et seq., R. S., 1911; Articles 908 and 923, P. C., 1911, both as amended by the act of the Thirty-third Legislature.

May 13, 1915.

Hon. Will W. Wood, Game, Fish and Oyster Commissioner, Capitol.

DEAR SIR: Your letter of May 1st, addressed to the Attorney General, was duly received, but on account of the intricate question therein propounded, as well as an unusual conjestion of business in this Department, it has been unanswered until now.

Your communication reads as follows:

"Under the Fish and Oyster Laws of this State, are fishermen required to take out a license to fish for the market, and further, are they required to obtain a permit before they sell or offer for sale any fish, turtle, terrapin, etc., caught in either fresh or salt water.

"This Department asks this question from the fact that we are not clear on the meaning of Article 923 of the criminal statutes of this State pertaining to fish and oysters."

We understand your questions to be:

1. Is it necessary in order to have the right to take fish from the waters of this State that the person desiring to do so shall obtain a license to pursue such occupation, from the Game, Fish and Oyster Commissioner.

2. Must the fisherman pay a tax to the Game, Fish and Oyster Commissioner and obtain a permit from him before they sell or offer for sale any fish, turtle, terrapin, etc., caught in either the fresh or salt waters of this State?

To arrive at a correct solution of the questions propounded by you it will be necessary to review the various acts of the Legislature creating your department and conferring upon it certain duties and powers beginning with the original act creating it, of 1895, and pursue it through the various Legislatures that have dealt with it until the final acts on the subject which was passed by the Thirty-third Legislature which are to be found in the printed Acts of the Regular Session thereof as Chapter 135, which amends the Penal Code of this State, and Chapter 146 which amends the civil statutes of the State relating to the fish and oyster laws.

We will discuss the questions propounded by you under two heads. First, license, and second, tax and permit.

LICENSE.

The original act creating your Commission is to be found as Chapter 112 enacted by the Twenty-fourth Legislature in 1895. Section 24 of this act provides for the issuance of a license by the Game, Fish and Oyster Commission to persons wishing to engage in the business of fishing or catching green turtle or terrapin, in the following language:

"Any person wishing to engage in the business of fishing or catching green turtle or terrapin must make application in writing to the Fish and Oyster Commissioner or his deputy for a license, stating under oath that he is a citizen of the United States and a resident and taxpayer of the State of Texas, and stating also the name and class of his boat, the number and length and class of nets to be used, and he shall receive a license authorizing such person to engage in such business. Such license must be signed by the Fish and Oyster Commissioner or his deputy, and must be stamped with the seal of his office, and it shall state:

1. The name of applicant, and his place of residence.
2. The name, class and place of registry of his boat.
3. The number, length and class of nets to be used.
4. The date of issuance of such license.

"Such license shall be good for all the purposes of this act for six months from the day of issuance of same, and for such license the applicant shall pay to the Fish and Oyster Commissioner or his deputy the sum of five cents per fathom for every fathom of drag seine, and two and one-half cents per fathom for every fathom of set nets, and the float line shall be deemed the length of such drag seine or set net; and it shall be the duty of the Fish and Oyster Commissioner or his deputy to measure such seine or nets, and attach securely to each one a metal tag with the letters 'F. & O. C.' stamped thereon."

Section 25 of this act being the penalty section, reads as follows:

"Any person shall be entitled to hold a license to catch fish, green turtle or terrapin, for sale or market, who is a citizen of the United States and a resident and taxpayer of the State. Any one offending against this section shall, upon conviction. be fined in any sum not less than ten dollars nor more than two hundred and fifty dollars."

Section 34 of the act referred to provides for the issuance of a license to gather oysters, and provides a penalty therefor, in the following language:

"It shall be unlawful for any person to gather oysters with tongs or otherwise from the public beds and reefs of the State for sale without a license from the Fish and Oyster Commissioner or his deputy for each and every pair of tongs that shall be used on his boat, and for such license he must pay to the Fish and Oyster Commissioner or his deputy the sum of five dollars for each pair of tongs, and any person shall be entitled to hold such license who is a citizen of the United States and a resident and taxpayer of the State of Texas. Such license shall be good from day of issuance until April 30 next; such license shall be signed by the Fish and Oyster Commissioner or his deputy, and stamped with the seal of his office, and shall state the name of applicant and date of issuance; provided, that any person holding such license in his own name may take or catch oysters from any boat. Any one offending against this section shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than ten dollars nor more than two hundred and fifty dollars, and each day shall constitute a separate offense."

Section 25 above quoted was placed in White's Annotated Texas Penal Code as Article 529D, while Section 24 above referred to found its place in Revised Statutes of 1895 as Article 2518K.

By Chapter 98 of the General Laws of the Twenty-fifth Legislature, Article 529 D, was amended so as to read as follows:

"Any person who shall engage in the business of fishing or catching green turtle or terrapin without first having procured a license therefor, as prescribed in Article 2518k of the Revised Civil Statutes, shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than ten dollars nor more than two hundred and fifty dollars, and any person who shall sell fish, green turtle, or terrapin, caught by drag seine or set net shall be considered as engaged in the business above named."

Article 2518K was amended by Chapter 122 of the Acts of the Twenty-eighth Legislature; also by Chapter 90 of the Twenty-ninth Legislature of 1905; by Chapter 126 of the Thirtieth Legislature in 1907 and became Article 3986 of the Revised Statutes of 1911, and was again amended by Chapter 146 of the Thirty-third Legislature, which amendment is the present law.

Going back to Article 529D of White's Penal Code, we find that this article became Article 908 of the Penal Code of 1911, which was amended by Chapter 135 of the Acts of the Thirty-third Legislature.

From the above analysis it is patent that the license referred to in Article 908 of the Penal Code is that license required to be obtained by Article 3986 of the Revised Statutes; that is to say, that before any captain or master of any boat wishing to engage in the business of catching or taking any fish, turtle, terrapin, shrimp or oysters from the waters of this State for market, before engaging in any such business shall secure the license therein provided for from the Game, Fish and Oyster Commissioner or one of his deputies. We will quote from Article 3986 as follows:

"For the purpose of obtaining this license the person desiring same must make written application to the Game, Fish and Oyster Commissioner or

of one of his deputies in which he, the applicant, shall set forth, under oath, that he is a citizen of the United States, the name, class and register number of his boat."

Such article further provides that the license issued by the Game, Fish and Oyster Commissioner, or his deputy, shall be signed by him, stamped with the seal of office and also "state the name of the licensee, name and class of his boat and the date of issuance." This article further provided that the applicant shall pay for said license the sum of $1.00, and further, "the license so issued shall be kept on the boat subject to the inspection of the Fish and Oyster Commissioner or any of his deputies, and it shall not be good for any other person nor on any other boat than the original named therein without the consent of the Game, Fish and Oyster Commissioner, or one of his deputies, having first been had, which consent or assignment shall be written across the face of the license; provided that if at any time such licensed captain or master of a boat shall violate any of the fish and oyster laws of this State or shall at any time refuse to comply with any provisions made in his application for license, the Game, Fish and Oyster Commissioner is authorized to cancel said license and the boat registration certificate * * *."

We are strengthened in the conclusion we have reached that it is only those masters or captains of boats or people in their employ, against whom the penalty of the law is directed for fishing without license by going back again to the original act of 1895, which, read in its entirity, was intended to apply only to the coast waters of this State, for note the provisions of Section 28, which reads as follows:

"It shall be unlawful for any person, during the breeding season, consisting of the months intervening between April first and October first, to catch any fish, green turtle, or terrapin by drag seine or set net in these waters, which are hereby declared to be breeding grounds for fish, green turtle and terrapin, towit:

"1. All that portion of water in Cameron and Nueces counties lying west of a line starting from Griffin's Point and running in a northerly direction to the northeast bank of Laguna Madre, and marked on the United States coast survey chart as Baffin's Bay and Aqua Dulce.

"2. All that portion of water in Nueces county lying north of the San Antonio & Aransas Pass Railroad bridge, and marked on the United States coast survey chart as Nueces Bay.

"3. All that portion of water in Aransas county north of a line starting from the town of Lamar and running south to the north end of Goose Island; thence in a southwesterly direction to the extreme southeast point of Live Oak Peninsula, and marked on the United States coast survey chart as Copano Bay, Puerto and Mission Bay.

"4. All that portion of water in Aransas county marked on the United States coast survey chart as St. Charles Bay.

"5. All that portion of water in Refugio and Calhoun counties marked on the United States coast survey chart as Hynes Bay.

"6. All that portion of water in Calhoun county north of a line starting from Marsh Point and running due east to the east bank of San Antonio Bay, and marked on the United States coast survey chart as Mission Bay and San Antonio Bay.

"7. All that portion of Lavaca Bay in Calhoun county north and west of a line starting from Gallinipper Point on the south bank of said bay, running in a northerly direction along Gallinipper Bar to Point Comfort, or sometimes called Mitchell's Point.

"8. All that portion of water in Calhoun county marked on the United States coast survey chart as Carankaway Bay.

"9. All that portion of water in Matagorda county north of a line starting from Wells Point and running east to Palacious Bayou, and marked on the United States coast survey chart as Turtle Bay and Trespalacious Bay.

"10. All that portion of water in Brazoria county north and east of Mud Island Pass, and marked on the United States coast survey chart as Bastrop Bay and Oyster Bay.

"11. All that portion of water in Galveston county north of a line starting from Red Bluff on the west bank of Galveston Bay and running in an easterly direction to the first beacon south of Morgan's Point; thence in a northeasterly direction to Mesquite Point.

"12. All that portion of water in Chambers county marked on the United States coast survey chart as Turtle Bay.

"Any person offending against this section shall, upon conviction, be fined not less than twenty-five dollars nor more than two hundred and fifty dollars, and each day shall constitute a separate offense; and in all prosecutions under this section the identification of the boat from which such violation occurs shall be prima facie evidence against the owner, lessee, person in charge or master of such boat."

None of the various amendments referred to above contain any language susceptible of any other construction. On the other hand, from the language used it is clear to our mind that it was the intention of the Legislature to demand a license only of those fishermen along the coast who of necessity must make use of boats in their operation.

As a further evidence of the correctness of our view we copy Article 529V, added to the Penal Code of this State by Chapter 130 of the Acts of the Twenty-seventh Legislature in 1901, which is as follows:

"Any person who is a citizen of the United States wishing to engage in the catching of fish, green turtle or terrapin or gather any oysters for market in any of the coast waters in this State in accordance with the provisions of the Fish and Oyster Law of this State, shall apply to the Fish and Oyster Commissioner or his deputy for registration. He shall furnish said officer, on oath, his name, place of residence, the name and kind of boat, vessel or craft to be used or employed by him, and the number of men to be employed; thereupon, the said officer shall register him and his boat and prescribe for his boat a number corresponding with applicant's registered number, which number the applicant shall cause to be plainly marked or placed on each side of the prow of his vessel, boat or craft, for which he shall pay the said officer a fee of fifty cents for each vessel, boat or craft registered and the said officer shall furnish him with a certificate of such registration; and any person failing to comply with the provisions of this article shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined not less than ten dollars ($10.00) nor more than two hundred and fifty dollars ($250.00), and each day any person shall fish for green turtle, fish or terrapin or gather any oysters for market in any of the coast waters of this State without having complied with the provisions of this article, shall constitute a separate offense."

This article with the exception of the criminal provision thereof took its place in the Revised Statutes of 1911 as Article 3984 which was amended by Chapter 146 of the acts of the Thirty-third Legislature, to read as follows:

"Registration of fish boats, etc., in public waters, application, certificate,

fees, marking boats, and providing who shall fish.—Any person who is a citizen of the United States wishing to use a boat in catching or taking fish, green turtle, terrapin or shrimp or gathering oysters for market in the public waters of this State, in accordance with the provisions of the Fish and Oyster Laws of this State, shall apply to the Game, Fish and Oyster Commissioner or his deputies for permission to do so. Such applicant will furnish said officer under oath his name, place of residence, the name and kind of boat to be used by him, together with the number of men to be employed by him, thereupon the officer shall register such boat, which register number shall be distinctly painted on each side of the bow of such boat, for which registration he shall pay the said officer one dollar and fifty cents, and the said officer shall furnish the applicant with a certificate of such registration."

It will be noted that substantially the only change made by this amendment is the making of such article applicable to the public waters of this State and not merely to the coast waters as originally enacted.

We cite the above legislation in aid of the construction of Article 3986 relating to the license of fishermen and as showing clearly that the Legislature had in mind to require the captain and masters of boats to obtain a license and not require the fishermen pursuing such occupation in any other manner.

We therefore advise you that the only persons in this State who are required to obtain a license from your department to pursue the business of catching or taking fish, turtle, terrapin, shrimp or oysters are captains or masters of boats engaged in such occupation which boats are required to be registered under Article 3984 above quoted.

TAX AND PERMIT.

Article 923 of the Penal Code referred to by you fixes a penalty for marketing or offering to market any fish, etc., taken from the salt waters or from the fresh waters of this State without paying the tax and obtaining the permit as prescribed by law. This article was amended by Chapter 135 of the Acts of the Regular Session of the Thirty-third Legislature which amendment is in the following language:

"Any person who shall market or offer to market any fish, turtle, terrapin, shrimp or oysters taken from salt waters of this State, or any fish taken from any fresh water lakes or streams, in any quantity greater than fifty pounds, shall pay the tax and obtain the permit, as prescribed by law, before disposing of any part of said product, and if he or any other person shall sell or shall dispose of any part of said product for shipment or storage before obtaining said permit, the person so selling or disposing of said product, or any part thereof, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined not less than ten nor more than two hundred dollars. In prosecutions in this and other similar cases, the fact of the fish, turtle, terrapin, shrimp and oysters being of the varieties that are found in the waters of this State shall be prima facie evidence that said fish, turtle, terrapin, shrimp or oysters were taken from the waters of this State."

In order to arrive at a correct understanding of this article it will be necessary, as we did in the preceding section of this opinion,

to review the history of this legislation to determine the exact application of this penal provision. Prior to the amendment by the Thirty-third Legislature the language of Article 923, Penal Code was substantially as in the amendment with the exception that the old article limited it to those fish taken from coast waters while the amendment applies to those fish taken from salt waters and also fresh water lakes or streams, and further the amendment carries the phrase "in any quantity greater than fifty pounds" that was not contained in the old Article 923. The article under discussion first found a place in the statutes of this State as a part of Chapter 90 of the General Laws of 1905 being inserted as Article 529x and added to Chapter 130 of the General Laws of 1901, and was in the following language:

"Any person who shall bring to market any fish, turtle, terrapin, shrimp or oysters taken from the coast waters of this State shall pay the tax and obtain the permit as prescribed in Article 2514 before disposing of any part of said product, and if he or any other person shall sell or shall dispose of any part of said product for shipment or storage before obtaining said permit the person so selling or disposing of said product or any part thereof shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined not less than ten dollars nor more than two hundred and fifty dollars. In prosecutions in this and other similar cases, the fact of the fish, turtle, terrapin, shrimp or oysters being of the varieties that are found on the Texas coast shall be prima facie evidence that said fish, turtle, terrapin, shrimp or oysters were taken from the coast waters of this State."

It will be noted that the tax and permit required to be paid and secured by the above article is that prescribed by Article 2514 of the Civil Statutes.

Article 2514 of the Statutes of 1895 was amended by Chapter 122 of the Acts of 1903 so as to provide for the inspection and weighing of all fish, etc., by the Fish and Oyster Commissioner or his deputy and the collection of a tax of one-tenth of one cent per pound on fish, etc. This article applied only to those fish taken from the public coast waters of the State. This article was further amended by Chapter 90 of the Acts of 1905, but in the particulars under discussion no change was made and such article took its place in the revision of 1911 as Article 3983 and was amended by Chapter 146 of the act of the Thirty-third Legislature which is now the law of the State upon this subject. It will be noted that in the amendment last referred to the term "public coast waters" was eliminated and the amount of tax changed from one-tenth to one-fifth of one cent per pound on fish so that the State now demands a tax of one-fifth of one cent per pound on all fish, turtle, etc., taken for market from the public waters within the jurisdiction of the State.

From the above analysis it appears therefore that the penalty provided by Article 923, Penal Code, as amended by Chapter 135, Acts of the Thirty-third Legislature is applicable to Article 3983, Revised Civil Statutes as amended by Chapter 146 of the Thirty-third Legislature.

Article 3985, Revised Statutes, as amended by Chapter 146 provides that when the tax is paid it is the duty of the Game, Fish and

Oyster Commissioner or his deputy to give a receipt for same together with a permit authorizing the holder thereof to dispose of the product on which the tax was paid, and this is the permit spoken of in Article 923, Penal Code.

While the State levies a tax of one-fifth of one cent per pound on fish taken from the public waters of this State as is contained in Article 3983, yet for a failure to pay this tax we must look to the provisions of Article 923, Penal Code, as set out above. While it is true that the first clause of Article 923 provides that any person who shall market or offer to market any fish, etc., in any quantity of fifty pounds shall pay the tax, yet by a careful reading of this article you will observe that the penalty is laid against the person who shall sell or dispose of any part of said product for shipment or storage before obtaining said permit, such person so selling or disposing for shipment or storage being guilty of a misdemeanor, and upon conviction shall be fined not less than ten nor more than two hundred dollars. The offense is not completed by the marketing or offering to market under the language of the first clause of this article, but such article goes further in defining this offense and says that such product must be sold or disposed of for shipment or storage, and we are therefore of the opinion that unless the proof was made that the fish or other products defined in this law were sold either for shipment or storage a prosecution could not be maintained.

The difficulty with these laws, as we see it, is that from the beginning they have been directed at the protection of the fish industry along the coast. There can be no question but originally they were intended only for such purpose, but in the various amendments and re-enactments of these laws by the Legislature there has crept into them certain clauses attempting to make them apply to the fresh waters of the State, as well as to the salt or coast waters, but it has not been a uniform system of broadening these laws to cover the fresh waters, and therefore there exists confusion and uncertainty as to their meaning.

We therefore advise you under this heading, tax and permit, that in our opinion you could not maintain a conviction for the sale or offer of sale of any fish unless they were sold or offered for sale for shipment or storage and in quantities of fifty pounds, or more.

Yours truly,

C. W. TAYLOR,
Assistant Attorney General.

GAME LAWS—CLOSED SEASON ON DOVES AND QUAIL—WILD TURKEYS—GAME LIMIT—STATUTORY CONSTRUCTION.

1. The caption of an amendatory act which states the object of the act to be to amend a certain chapter, title or article of the Penal Code or a chapter of the acts of the Legislature of a certain session is sufficient without stating the subject of the amendment.
2. Where an amendatory act states the purpose of the act to be to amend a certain chapter, title or article of the statute or a chapter of the printed acts of a certain session of the Legislature goes further and states the purpose of the amendment, then the body of the act must be limited to the purpose stated in the caption.
3. A general act dealing with a multitude of subjects will be controlled by a particular act applicable to one of those subjects only.
4. That portion of Chapter 123 of the Acts of the Regular Session of the Thirty-fourth Legislature fixing the number of birds or fowls that may be killed in any one day is void, as such purpose was not stated in the caption.
5. Senate Bill No. 35, which would be Chapter 22 of the printed acts of the first called session of the Thirty-fourth Legislature, is a valid act, and the provision thereof limiting the number of birds or fowls that may be killed or destroyed in any one day to fifteen supersedes and repeals that portion of Article 889 of the Penal Code fixing the limit of any birds or fowls that may be killed in any one day to twenty-five.
6. The open season for wild doves in this State is from September 1 to March 1.
7. The open season for bob-whites, quail or partridges in this State is from December 1 to February 1.
8. The number of birds that may be killed or destroyed in any one day is fifteen.
9. The number of wild turkeys that may be killed during the entire open season—that is, during the months of December, January, February and March—is three.

August 25, 1915.

Hon. Will W. Wood, Game, Fish and Oyster Commissioner, Capitol.

DEAR SIR: Attention Hon. H. T. Bailey, Chief Deputy.

Under date of August 21, you transmit to this Department for an opinion thereon a communication addressed to you by Hon. Chester H. Terrell of San Antonio wherein he calls attention to Chapter 123. Acts of the Thirty-fourth Legislature and raises certain questions as to the validity of that act in so far as it undertakes to prescribe the number of birds that may be killed in any one day.

Mr. Terrell raises other objections to this act but in conversation with the writer all other objections are waived, but he contends that as the subject of the limit of the number of birds that may be killed or destroyed in any one day is not contained in the title of the act that such a provision in the body thereof would be inoperative and void. As the act is short and in order that this opinion may be complete, within itself, we copy such act as follows, towit:

"An Act to amend Chapter 6, Title 13, of the Penal Code of 1911, by inserting after Article 889 two new articles, to be known as Article 889a and Article 889b, fixing the closed season for killing doves, bob-whites, quail or partridges in this State, and declaring an emergency.

Be it enacted by the Legislature of the State of Texas:

Section 1. Article 889a. From and after the passage of this act it shall

be lawful to kill doves in this State at any time except between the first of March and the first of September of each year.

Article 889b. From and after the passage of this act it shall be lawful to kill bob-whites, quail or partridges in this State at any time except between the first day of February and the first day of December of each year; provided, it shall be unlawful except elsewhere provided for any person in any one day to kill or destroy more than fifteen of the birds or fowls mentioned in Article 878 that are permitted to be taken or killed in any one day, and repealing all laws in conflict herewith.

Sec. 2. The near approach of the end of the season and the crowded condition of the calendar creates an emergency and an imperative public necessity requiring the constitutional rule that all bills be read on three several days be, and the same is hereby, suspended, and this act shall take effect from and after its passage, and it is so enacted."

It will be noted from a reading of the caption of the above act that the express purpose of the Legislature in its enactment was to so amend Chapter 6, Title 13 of the Penal Code of 1911 by adding two new articles thereto to fix the closed season for killing doves, bob-whites, quail or partridges in this State. In Article 889b in the body of the act after fixing the closed season upon bob-whites, quail or partridges will be noted the following proviso which is that portion of the act against which Mr. Terrell lodges his objection:

"Provided, it shall be unlawful except elsewhere provided for any person in any one day to kill or destroy more than fifteen of the birds or fowls mentioned in Article 878 that are permitted to be taken or killed in any one day, and repealing all laws in conflict therewith."

In our opinion Mr. Terrell's contention is sound and that this portion of the act must be held void and inoperative under Section 35, Article 3 of the Constitution, which reads as follows:

"No bill (except general appropriation bills, which may embrace the various subjects and accounts for and on account of which moneys are appropriated) shall contain more than one subject, which shall be expressed in its title. But if any subject shall be embraced in an act, which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed."

If the title to the above act had contained only a statement that the purpose of the act was to amend Chapter 6, Title 13 of the Penal Code, then the objection to the proviso under discussion would not have been sound for the reason that it has been many times held in this State, as will appear later on in this opinion, that such a caption is sufficient, but when the framers of this act not being content with the statement that the purpose of the act was to amend Chapter 6, Title 13 by adding two new articles, went further and stated the subject of the amendment, then we are of the opinion that the caption cannot be enlarged beyond the subject stated so as to permit the embodying in the act of a subjeect beyond the caption, although it might be germane to the caption and title amended.

In the case of Adams & Wickes vs. San Antonio Waterworks Company, 86 Texas, 485, the court held that under an act to amend an act to regulate the condemnation of property in cities and towns for the purpose of opening, widening or changing public streets or aven-

ues or alleys or for water mains or sewers that although the act contained the provision for the condemnation of ground for reservoirs or stand-pipes such condemnation proceedings could not be had for such latter purposes for the reason that reservoirs or stand-pipes are not mentioned in the title of the act. In that case the court said:

"But the maxim that the mention of one thing is the exclusion of another, it not only is a legal but a logical rule; and it applies with peculiar force to the question of notice. The expression of a purpose to confer authority by an act of the Legislature to give the power to condemn property for water mains, not only fails to give notice of the purpose to confer such power in reference to reservoirs, but is calculated, on the contrary, to lead to the belief that the latter purpose is not intended."

It is therefore the opinion of the Department that the proviso limiting the number of birds that may be killed or destroyed in any one day is of no effect, but that the act of the Legislature in question is void only as to this proviso and as to other matters towit: the fixing of closed season on doves and quail is a valid law.

However, at the First Called Session of the Thirty-fourth Legislature there was enacted Senate Bill No. 35, which we are informed will be Chapter 22 of the printed acts of such called session, the caption of which bill is as follows:

"An act to amend Chapter 6, Title 13, of the Penal Code of Texas, as amended by Chapter 123 of the Acts of the Regular Session of the Thirty-fourth Legislature."

While the verbiage of this act differs somewhat from that in Chapter 123, yet the effect of those portions fixing the closed season on doves and quail is the same; that is, the closed season on wild doves is from the first day of March to the first day of September, and the closed season on bob-whites, quail and partridges is from the first day of February until the first day of December. .

There is also contained in amended Article 889b the following proviso:

"Provided, it shall be unlawful for any person at any time to kill or destroy in one day more than fifteen of the birds or fowls mentioned in this act or Article 378 of this chapter."

This act also contains a section fixing a penalty for violation of the act. If the above mentioned act of the First Called Session of the Thirty-fourth Legislature is valid then the effect thereof in addition to Chapter 123 of the acts of the Regular Session of the Thirty-fourth Legislature is to reduce the number of birds or fowls that may be killed or destroyed in any one day from twenty-five as fixed in Article 889 to fifteen as fixed by the proviso copied above. The question of the validity of this act depends upon whether or not the caption is sufficient, that is, is a caption of an amendatory act sufficient if it merely designates the chapter, title or article of the Penal Code of this State to be amended or the chapter of the printed acts of the particular session to be amended. The decision of the courts of this State have been uniform to the effect that such a caption

is sufficient and that matters germane to the subject of the chapter, title or article so amended may be incorporated in the body of the act.

Nichols vs. State, 23 S. W., 680.
Ratigan vs. State, 26 S. W., 407.
Ex parte Segars, 25 S. W., 26.
Taber vs. State, 31 S. W., 662.
Fehr vs. State, 35 S. W., 382.
Hasselmeyer vs. State, First Crim. App., 690.

From the case of Nichols vs. State, supra, which is on all fours with the questions here presented in that the caption to the act stated it to be an act to amend Article 523, Chapter 7, Title 15 of the Penal Code of the State of Texas as amended by the Act of the Twentieth Legislature approved February 25, 1887, we quote as follows:

"Appellant insists that this case should be reversed and remanded upon the ground that the act April 13, 1891, changing the age of consent from 10 to 12 years, is unconstitutional and void, in that the title to the act does not, in compliance with Const. Art. 3, Sec. 35, express the subject of the act. The Twentieth Legislature passed an act, approved February 25, 1887, more fully defining rape, under the following title: 'An act to amend Article 528, Chapter 7, Title 15, of the Penal Code.' The change made was extending the protection of the law to females so mentally diseased as to have no will. The Twenty-second Legislature amended this act by an amendatory act, approved April 13, 1891, with the following title: 'An Act to amend Article 528, Chapter 7, Title 15, of the Penal Code of the State of Texas, as amended by the act of the Twentieth Legislature, approved February 25, 1887.' Const. Art. 3, Sec. 35, declares: 'No bill (except appropriation bills) shall contain more than one subject which shall be expressed in its title', and Section 36 of same article provides that no law shall be revived or amended by reference to its title, but in such case the act revived or section amended shall be re-enacted and published at length. The objection of appellant is that the title of the amendatory act of April 13, 1891, is fatally defective in not stating the subject of the amendment, to wit, 'the definition of rape,' and it is not sufficient to merely state the article, chapter, and title of the Penal Code of Texas which the act purports to amend. If there was ever any force in this objection, as applied to amendments of the Criminal Codes of Texas, it is now no longer an open question. Ever since the enactment of the Penal Code and Code of Criminal Procedure, successive Legislatures, with this provision, or a similar one, before them. have amended these Codes by acts the titles of which only gave the article, chapter, title, and name of the Code sought to be amended. They have recognized 'the Penal Code' as a single act, designed to embrace all offenses against the laws, complete within itself, arranged and classified into titles, chapters, and articles, and have always deemed an amendment made as above stated was a sufficient compliance with the constitutional requirement, and sufficiently specified the subject sought to be amended by the act. If, therefore, uniform legislative construction, supported by judicial decision and recognition, can settle anything, we must hold the title of the act in question to be sufficient."

In the case of Ex parte Segars, supra, the court held an act to be valid, the caption of which was in the following language:

"An act to amend Title 63, Revised Statutes, as amended by the Act of April 1, 1887."

In the case of Taber vs. State, supra, it was contended that by reason of the fact that the caption of an act referred only to Article 747 of the then Penal Code as being amended, that the word "hog" could not be inserted in such article, thereby making the theft of a hog a felony. The court refused to accede to this contention, and said:

"It has been held by the Supreme Court and by this court that our Penal Code can be amended by reference to the articles thereof."

Cited in addition to the Nichols case, supra, is the case of State vs. McCracken, 42 Texas, 383.

We are therefore of the opinion that Senate Bill No. 35 enacted at the First Called Session of the Thirty-fourth Legislature is a valid act and that the proviso with reference to the number of birds that may be killed or destroyed in any one day will become and be the law of the State upon the taking effect of this act ninety days after adjournment of such called session and that such proviso will supersede and repeal that provision of Article 889 of the Penal Code fixing a limit of twenty-five birds that may be killed in any one day.

We have also been asked the question if the effect of the proviso contained in these two acts with reference to the number of birds that may be killed in any one day by reason of the fact that the proviso contains the language, that it will be unlawful to kill and destroy in any one day more than fifteen of the birds or fowls mentioned in this act or Article 878 of this chapter, that it would be lawful to kill in any one day fifteen wild turkeys.

There is contained in Article 889, Penal Code, both provisions, that is, the provision relating to the number of turkeys that may be killed in any one season and also the general provision that twenty-five of the birds named in that article, as well as those named in Article 878 may be killed in one day which is now superseded by the new limit of fifteen per day, thereby creating an apparent inconsistency between the two provisions.

In Lewis' Sutherland Statutory Construction, Section 346, we find the following:

'Where there is an act or provision which is general, and applicable actually or potentially to a multitude of subjects, and there is also another act or provision which is particular and applicable to one of these subjects, and inconsistent with the general act, they are not necessarily so inconsistent that both cannot stand, though contained in the same act, or though the general law were an independent enactment. The general act would operate according to its terms on all the subjects embraced therein, except the particular one which is the subject of the special act."

We are therefore of the opinion that neither under the law as it existed prior to such amendment nor under the amendment could more than three wild turkeys be killed in any one opened season.

The holding of this opinion is as follows:

1. The opened season for wild doves in this State is from the first day of September to the first day of March.

2. The opened season for bob-whites, quail or partridge in this State is from the first day of December to the first day of February.

3. The number of birds that may be killed or destroyed in any one day is fifteen.

4. The number of wild turkeys that may be killed during the entire opened season, that is, during the months of December, January, February and March is three, but see Article 889, Penal Code for open season after June 13, 1916.

Very truly yours,

C. W. TAYLOR,
Assistant Attorney General.

GAME LAWS—SHIPPING LIMIT.

The number of wild game birds that are permitted to be shipped is twenty-five, except wild duck, of which forty-five may be transported upon filing the affidavit required by law.
Article 891, Penal Code.

September 18, 1915.

Hon. Will W. Wood, Game, Fish and Oyster Commissioner, Capitol.

DEAR SIR: In your favor of September 17th, you enclose a telegram addressed to you by C. L. and Theo. Bering, Jr., Inc., which telegram reads as follows:

"Is the legal three days kill of ducks this year forty-five and does the same form with this exception of last year affidavit cover it?"

You desire an opinion from this Department on the question submitted in the telegram copied above.

Replying thereto we beg to advise that Article 891 of the Penal Code of this State, dealing with the transportation of wild game and wild game birds killed or taken within this State, among other provisions contains the following:

"* * * and, upon filing the affidavit, such party shall be permitted to transport to his home in accordance herewith not exceeding twenty-five of any wild game birds, when such number is permitted to be killed, of the kind offered for shipment, except wild duck; provided that such party may be permitted to transport seventy-five wild ducks upon filing the affidavit containing the provisions as stipulated in the affidavit prescribed."

Then follows the form of affidavit to be made by the shipper. Of this affidavit the latter part thereof deals with the shipment of wild duck and contains the following provision:

"* * * (and if such game to be shipped be wild duck, then such party shall further make affidavit) that the shipment I offer is wild duck only, that the number does not exceed seventy-five, that I killed the said ducks in three days consecutively; and that I did not kill more than twenty-five of same in any one day."

Under Article 889, Penal Code, the number of birds or fowls mentioned in Article 878, Penal Code, that might be killed or destroyed in any one day was limited to twenty-five. Wild ducks being among the birds enumerated in Article 878 the number thereof that might be killed or destroyed in any one day is limited to twenty-five. From

the language of the affidavit above quoted it appears that the Legislature in prescribing the form thereof has limited the number of ducks that may be transported to such a number as may be lawfully killed in three consecutive days, which number under the law as it then existed, as appears from the above reference, was twenty-five per day or seventy-five for any three days. The making of this affidavit is a condition precedent to the right to ship, as well as the right of the carrier to accept same for transportation and any carrier accepting game for transportation, not accompanied by said affidavit is subject to the penalty prescribed of not less than $10.00 nor more than $100.00.

In Chapter 22 of the Act of the First Called Session of the Thirty-fourth Legislature the number of birds or fowls mentioned in Article 878, Penal Code, that might be killed or destroyed in any one day was limited to fifteen, in lieu of twenty-five, as under the prior law. Construing this latter statute, together with Article 891 and the affidavit prescribed therein, and having in mind the purpose of the Legislature in the enactment of Article 891 to limit the number of birds that might be lawfully transported to such a number as might be lawfully killed or destroyed in three consecutive days it becomes apparent that the proper construction of the two statutes is that the number of ducks that may now be lawfully transported is such a number as may be lawfully taken in three consecutive days; fifteen being the number that may be taken in one day it follows that forty-five is the number that may be lawfully transported, and that the affidavit prescribed by Article 891, Penal Code, must therefore be amended as to the number and in lieu of twenty-five should read forty-five.

What is said above as to wild ducks does not obtain as to other wild game birds lawfully killed or destroyed. The wording of the affidavit as to other birds is entirely different. The number that may be lawfully transported is limited to twenty-five, but the affidavit prescribed by the Legislature does not undertake to say that the number shipped or transported is the number lawfully killed or destroved in any one day, although twenty-five may be shipped, and twenty-five, under the former law, was the one day limit. Therefore as to such other birds as a party may desire to ship the number remains at twenty-five, although the one day limit has been reduced to fifteen.

With respect, I am,

Yours very truly,

C. W. TAYLOR,

Assistant Attorney General.

FISH—WHOLESALE DEALERS.

The license issued by the Game, Fish and Oyster Commissioner authorizes the party named therein to engage in the business at one or more places within this State.

A licensed dealer having a place of business at more than one point in this State is liable for the tax of $1.00 on the one thousand pounds at only one point, and in event he ships fish upon which the tax has been

paid from one house to the other, no tax is due thereon at the latter place.
The law defines a wholesale dealer as one who sells in lots of fifty pounds, or more. A dealer bringing himself within this definition by selling in lots of fifty pounds or more is subject to the tax on all fish he delivers, although some of his sales may be in lots of less than fifty pounds. Articles 3987, 3989, R. S., 1911; Article 917, Penal Code, as amended by Chapter 135, Acts Thirty-third Legislature.

June 28, 1916.

Hon. Will W. Wood, Game, Fish and Oyster Commissioner, Capitol.

DEAR SIR: The Attorney General is in receipt of your letter reading as follows:

"A dealer, holding a wholesale dealer's license to do business in Corpus Christi, Texas, and paying the tax at Corpus Christi, has also a fish business in San Antonio, Texas, to which he ships goods from his Corpus Christi house, and which he sells at wholesale and retail. He also purchases some fish other than those shipped from his house at Corpus Christi. On neither of his purchases from outside houses or his shipments from Corpus Christi is he paying any tax.

"In your opinion, does his wholesale dealer's license which he holds, give him the right to sell his Corpus Christi goods in San Antonio without further tax, and is a wholesale dealer liable only to the tax on fish sold in wholesale quantities, or liable for all fish sold, either retail or wholesale.

"If you find said party liable to this tax, is he liable for the entire time that he has been doing business in San Antonio, or liable for just the few hundred pounds of fish this department has been able to locate as his having sold at wholesale quantities, and did he violate Article 917 in selling fish in wholesale quantities, portions of said fish being from his Corpus Christi home, and portions of said fish being purchased from outside."

Replying thereto in the order in which your questions are propounded, you are advised:

First: Article 3987 et seq., Revised Statutes of 1911, relating to the issuance of license to wholesale dealers in fish, provide for the issuance of such license upon the application duly made and filed with you as provided in such articles. Nowhere in these articles is it provided that the applicant shall state the place at which the business is to be conducted, nor is there any expression therein to the effect that such business shall be conducted only at one point within the State. The tax paid by dealers under a license issued to them is an occupation tax upon the business and the license issued is a permit granted by the State to conduct such occupation. In many of the occupation tax statutes of this State it is provided that such tax shall be paid in each county in the State in which such occupation may be carried on, and of course under those statutes a license must be procured in each county. A great majority of the occupation taxes however, that are levied in this State have no such limitation placed upon them by law, and in such cases this Department has ruled that a State license issued in one county by the authority authorized by law to issue the same, is valid in all counties in this State. This of course relates to the State tax only, and not the county tax.

The tax levied upon wholesale dealers in fish is essentially a State tax, the counties having no authority to levy the same, nor any

portion thereof. This being true, we are of the opinion, and so advise you, that a license issued to a wholesale dealer in fish is valid throughout the State, and that he may conduct his business at one or any number of points within the State.

Of course the dealer would be compelled to pay the tax of $1.00 for each one thousand pounds of fish handled by him, as levied in Article 3989, based upon the entire amount of fish handled at all points where such business is so conducted.

Answering your first questions specifically, you are advised that in our opinion a dealer doing business in two or more points in the State should be compelled to pay the wholesale dealers' tax but one time upon the fish so handled, and in case such dealer should ship from one of his houses to another, in event the tax is computed and paid at the house first receiving the same, then such dealer would have the privilege of shipping portions of the fish so handled to his branch house and no further tax would be due thereon, or in event the tax was not paid at the original receiving point, then it should be paid at the house to which it is shipped. In other words, it is one business and the owner thereof is taxable only upon the total amount handled without regard to the point to which the same is handled.

Second: As to whether or not a wholesale dealer is liable for the tax on fish sold both at wholesale and retail within the meaning of the act, or only upon fish sold at wholesale, you are advised that in our opinion such dealer is subject to the tax upon a total amount of fish handled by him without regard to whether same is sold at wholesale or retail within the meaning of the law.

Article 3987, Revised Statutes, 1911, provides that a wholesale dealer within the meaning of this act, is one who is engaged in the fish or oyster business as a dealer supplying the wholesale or retail trade by sale of quantities of fifty pounds or more, of fish. This is the definition of a wholesale dealer; that is to say, any dealer engaged in the fish business who makes sales in quantities of fifty pounds, or more, is regarded by the law as a wholesale dealer.

Article 3989 providing for the issuance of a license upon the application made therefor, provides among other things that "for such license the applicant shall pay a tax of $1.00 for each one thousand pounds of fish *handled* by him * * *."

The tax therefore is levied upon the amount of fish handled, and not upon the amount sold in lots of fifty pounds, or more. By selling in lots of fifty pounds or more the dealer brings himself in the definition set forth in Article 3987, and if he desires to sell a portion of the commodity handled by him in lots of less than fifty pounds that is his privilege, but by selling in lots of fifty pounds or more he has brought himself in the definition of a wholesale dealer, and must therefore pay the tax of $1.00 upon each one thousand pounds of fish handled by him in the business.

The articles of the Civil Statutes above referred to are substantially the same as Article 917 of the Penal Code, which was amended by Chapter 135 of the Acts of the Thirty-third Legislature, which article contains the following with reference to a wholesale dealer:

"He shall also agree to keep a correct record of all fish and oysters handled by him under this Chapter * * *. For such license the applicant shall pay $1.00 for each one thousand pounds of fish handled by him."

This article of the Penal Code concludes with a definition of a wholesale dealer in substantially the same language as that used in Article 3987 of the Civil Statutes above referred to, and is subject to the same construction placed upon the latter article.

Third: In addition to what has been said above, you are further advised that in event a party owning a business at Corpus Christi and also at San Antonio, and paying the tax on the business as hereinabove indicated, should purchase at one or both of such houses fish from outside parties upon which he has not paid the tax, then of course he would be subject to the tax upon such fish so purchased. In other words, the fish so purchased or being handled by him are within the meaning of the law and he would be subject to a tax thereon.

Trusting that the above is a satisfactory reply to your inquiries, I am, with respect,

Very truly yours,
C. W. TAYLOR,
Assistant Attorney General.

GAME AND FISH LAWS—LICENSE TO FISH—PAYMENT OF POLL TAX.

The payment of the poll tax is not a necessary incident to citizenship. A person who has not paid his poll tax is a citizen of the United States within the meaning of Article 3986 and a person complying with the provisions of such article is entitled to a license from the Game, Fish and Oyster Commissioner whether or not he has paid his poll tax.
Article 3986, Revised Statutes, 1911.

January 26, 1916.

Hon. Will W. Wood, Game, Fish and Oyster Commissioner, Capitol.

DEAR SIR: The Attorney General is in receipt of your letter of the 21st, reading as follows:

Will you kindly render me your opinion as to whether it is lawful for this Department to issue a fisherman's license to a citizen of the United States who has not paid his poll tax?"

We take it your question submitted arises out of the application of Article 3986 wherein it is provided in substance that any captain or master of a boat wishing to engage in the business of catching or taking fish, etc., shall make application to your Department for a license authorizing him to pursue such occupation, and among other things it is provided that in his application therefor he shall set forth under oath that he is a citizen of the United States, and that you desire to know whether or not a party who has not paid his poll tax within the time prescribed by law is a citizen of the United States within the meaning of the above mentioned article.

We advise you that in our opinion it is not necessary that an applicant for license under the above article should be a holder of a poll tax receipt issued to him within the time prescribed by law, and that if the other requirements of the article are met by the applicant he would be entitled to a license irrespective of whether or not he had procured a poll tax receipt and thereby qualified himself as an elector in this State.

By the amendment to Section 2, Article 6 of the Constitution, adopted December 26, 1902, wherein it is provided for the first time in the organic law of this State that a voter subject to the payment of poll tax shall have paid the same before he offers to vote and hold a receipt showing his poll tax paid before the first day of February next preceding such election, there is a recognition of the principle that a person may be a citizen of the United States who is not a qualified voter under the laws of the State, for it is provided in the first portion of said section that every male person subject to none of the foregoing disqualifications who shall have attained the age of twenty-one years and who shall be a citizen of the United States, etc. It is beyond the power of a State to determine the qualification for citizenship. That power is vested alone in the Federal Congress and by no method could the people of any one State prescribe or limit the qualifications necessary to constitute one a citizen of the federal union. A man may be a citizen of the United States and yet not a citizen of Texas.

In Butchers Benefit Association vs. Crescent Livestock Landing and Slaughter House Company, 83 U. S., 36, it is held: "A man may be a citizen of the United States without being a citizen of the State, but an important element is necessary to convert the former into the latter. He must reside within the State to be a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the union."

In the Town of New Hartford vs. the Town of Canaan, 5 Atl., 360, it is held that the right of citizenship as distinguished from alienage is a natural right, character or condition and does not pertain to the individual States separately considered. The question is of national and not of individual sovereignty and is governed by the principles of common law which prevail in the United States and become under the Constitution to a limited extent a system of national jurisprudence.

The right to vote is not an incident of citizenship. A man may be a citizen of Texas and yet not be entitled to exercise the right of suffrage. The only effect of the payment of a poll tax by a person subject thereto in this State is to qualify such person as an elector and confer upon him the right to vote. It is immaterial as affecting citizenship whether or not such poll tax is paid.

In the case of Solon vs. State, 114 S. W., 349, the Court of Civil Appeals, in an opinion by Judge Ramsey, said:

"The true rule is that the right to vote is not a necessary or fixed incident of citizenship or inherent in each and every individual, but that voting is the exercise of political power and no one is entitled to vote unless the people in their sovereign capacity have conferred upon him the

right to do so. It may be laid down as a general proposition that the right of suffrage may be regulated and modified or withdrawn by the authority which conferred it."

Quoting from A. & E. Enc., Vol. 10, p. 568, Judge Ramsey continues:

"The right is not a natural right of which a person cannot be deprived but is a privilege which may be granted or denied by the people or the department of government to which they have delegated power in the matter as general policy may require."

The opinion furtner quoting from Cyc., Vol. 15, p. 2802, says:

"None of the elementary writers include the right of suffrage among the rights of property or person. It is not an absolute unqualified personal right, but is altogether conventional. It is not a natural right of the citizen but a franchise dependent upon law by which it must be conferred to permit its exercise."

The opinion quotes also from State vs. Dillon, 228 L. R. A., 124, as follows:

"The right to vote is not an inherent or absolute right found among those generally reserved in bills of rights, but its possession is dependent upon constitutional or statutory grant."

The constitutional provision referred to in the first part of this opinion confers upon certain classes of citizens of this State the elective franchise, subject, however, to the provision that those citizens who by the laws of this State are subject to a poll tax must have paid the same and hold a receipt therefor, bearing date prior to the first day of February next before the election at which they offer to vote. The liability for and the payment of the poll tax therefore has no bearing upon the citizenship. A person who has not paid his poll tax may be as much a citizen of the United States or for that matter of the State of Texas as a person who has paid his poll tax. The payment of the poll tax goes only to the right of suffrage and does not in any manner affect citizenship.

You are therefore advised that a party complying with the other provisions of Article 3986 would be entitled to a license irrespective of whether or not he was a holder of a poll tax receipt.

Very truly yours,

C. W. TAYLOR,
Assistant Attorney General.

GAME—WILD DEER—DOMESTICATED DEER.

The statutes of this State enacted for the protection of game, relate only to wild animals and birds, and have no application to domesticated animals or birds, therefore domesticated deer raised in captivity are not protected by such laws and may be killed and transported in either the open or closed season. Articles 882-878-889-890-891, P. C.

November 23, 1915.

Hon. Will W. Wood, Game, Fish and Oyster Commissioner, Capitol.

DEAR SIR: You have transmitted to this Department a letter addressed to your Chief Deputy, Mr. H. T. Bailey, by Mr. Jim Jones of Hubbard, Texas, wherein he states that he has a herd of domesticated deer that have been raised by him in captivity and he desires to know if he would be permitted to kill a number of them and ship the carcasses thereof to dealers in other towns to be sold. You desire an opinion from this Department upon whether or not Mr. Jones could be permitted under the law to dispose of the deer, as indicated.

Replying thereto we beg to say, that under the decisions of the courts of various States of the Union where the question has been presented, the weight of authority is to the effect that animals *ferae naturae*, wild by nature, may be domesticated and a property right acquired therein. Some of the decisions will be discussed later on in this opinion.

We will first call your attention, however, to the statutes of this State dealing with game animals. In quoting these statutes, we are capitalizing the adjective "WILD" as it appears in defining deer in the statutes:

Article 878. "All the WILD deer, wild antelope, wild Rocky Mountain sheep, wild turkey, wild ducks, wild geese, wild grouse, wild prairie chickens (pinnated grouse), wild Mongolian or English pheasants, wild quail or partridges, wild doves, wild pigeons, wild plover, wild snipe, wild jacksnipe, wild curlews, wild robins, wild Mexican pheasants, or chacalaca, and all other wild animals, wild birds and wild fowls found within the borders of this State, shall be, and the same are hereby declared to be the property of the public."

Article 882. "Whoever shall sell or offer for sale, have in his or her possession, for the purpose of sale, or whoever shall purchase or have in his possession after purchae, any WILD deer, wild antelope, or wild Rocky Mountain sheep, killed in this State, or the carcass thereof, or the hide thereof, or the antlers thereof; or whoever shall sell or offer for sale, or have in his possession for the purpose of sale, or whoever shall purchase or have in his possesion after purchase, any of the game or game birds mentioned in Article 879, killed or taken within this State, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum not less than ten nor more than one hundred dollars."

Article 889. "It shall be unlawful for any person to kill, ensnare, or entrap, or in any way destroy any WILD deer in the period of time embraced between the first day of January and the first day of November in each year; provided, it shall be unlawful for any person at any season of the year to take, kill, trap, or ensnare any WILD female deer or spotted fawn within this State; and provided, further, that it shall be unlawful for any person to take, kill, trap or ensnare more than three wild buck during the months of November and December of any one year."

Article 890. "It shall be unlawful for any express company, railroad company or other common carrier, or the officers, agents, servants or

employes of the same, to receive for the purpose of transportation, or to transport, carry or take beyond the limits of the State, or within this State, except as hereinafter provided, any wild animal, bird or water fowl mentioned in Article 878 of this Act, or the carcass thereof, or the hide thereof. Any persons violating the provisions of this article shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not less than ten nor more than one hundred dollars. Provided, that each shipment shall constitute a separate offense, and that such express company, or other common carrier, or its agents, servants or employes shall have the privilege of examining any suspected package for the purpose of determining whether such package contains any of the articles mentioned herein."

It will thus be noted from the reading of the above statutes, that the Legislature has protected wild deer, and as we see it, the Legislature has drawn a distinction between wild deer and domesticated deer, and has made the distinction recognized by the courts of this State, between the two.

The right of the State to enact legislation regulating the taking of wild game, or even to go to the extent of prohibiting the killing or taking thereof, is fully discussed and upheld in the case of Ex Parte Blardone, 50 Texas Criminal Reports, 189. In this case will be found a review of the authorities from the various States of the Union, and it would be useless for us to do more than cite this case.

The Statutes of the State of Missouri, enacted for the protection of game of that State, declared the ownership of, and title to, all game not held by private ownership legally acquired to be in the State, and it was made unlawful to have in possession a carcass of any deer, under certain conditions. In the case of State vs. Weber, 10th L. R. A. (N. S.), 1155, the defendant was convicted upon a charge of having in possession the carcasses of three deer in violation of the conditions of this statute. It appeared that such deer had been raised in captivity upon a small farm in Henry County, Missouri owned by Mrs. George M. Casey, and were killed there and their carcasses sold and shipped to the defendant in Kansas City. The deer had belonged to a herd raised upon the Casey farm and were descended from a pair of tame deer raised as pets, some twenty-five years before on the lawn of the Casey home. A number of the deer were killed every year for food purposes and for several years it had been the custom of the defendant, during the holiday season, to purchase a small number of deer from Mr. or Mrs. Casey, for sale at his meat market at Kansas City. The Supreme Court of Missouri, in affirming the conviction of this case, does so upon the ground, that while the ownership of game in the State not held by private ownership, was declared to be in the State, yet the prohibitions contained in the act with reference to the dealing with such game, applied to all game, whether the same be wild or domesticated.

In the case Dieterich vs. Fargo, 22nd, L. R. A. (N. S.), 696, the plaintiff sought by injunction to force the express company to accept for shipment, in the closed season, the carcasses of domesticated deer raised in captivity. The Court of Appeals, New York, in upholding the contention of the plaintiff, said:

"In my opinion, the Forest, Fish and Game Commissioner was right in deciding, as he did in 1904, that the statute does not apply to the transportation during the open season of venison obtained from domesticated deer bred in confinement. From early times the law of England has made a distinction between wild deer and tamed deer. 'Deer, though, strictly speaking, ferae naturae, if reclaimed and kept in inclosed ground, are the subject of property, pass to the executors, and are liable to be taken in distress.' I Halsbury's Laws of England, 799. In the case of Morgan vs. Abergavenny, 8 C. B. 768, there were upwards of 600 deer kept in a park of 900 acres. They were attended by keepers, who fed them regularly with hay, beans and other food. The does were watched at falling time, and the fawns taken as soon as dropped, and marked. Some of the animals were selected from the herd from time to time and stalled and fattened for venison. It was held that, upon these facts, a jury was warranted in finding that the deer had been tamed and reclaimed. They had, therefore, ceased to be wild animals and, as such, a part of the inheritance, but constituted personal property which passed to the executor. The same doctrine was asserted by Sir W. Page Wood when vice chancellor, in the case of Ford vs. Tynte, 2 Johns. & H., 150, where it appeared that the deer were also kept in a park, in which they were caught with the assistance of muzzled dogs, and then turned into an inclosure or into pens to fatten, after which they were shot for the market and the venison sold for profit like mutton and beef. In the present case there is no doubt that the deer of the plaintiff were as fully reclaimed as the animals mentioned in these English decisions; for the allegation of the plaintiff is that they are domestic animals, and that the herd consists almost entirely of deer bred in confinement. This allegation is admitted by the demurrer and must, of course, be taken as true for the purposes of our decision.

"The title of the forest, fish and game law indicates that its purpose, so far as animals are concerned, was to protect the wild animals of the State. It is 'an act for the protection of the forests, fish and game of the State.' The word 'game' in its ordinary signification does not include domesticated animals. When, therefore, in the forest, fish and game law we find prohibitions against the killing at certain seasons of geese, ducks and swans, no one would suppose for an instant that reference was made to domestic geese, ducks or swans; and throughout the whole statute, so far as it relates to game, it is obvious that wild animals only are meant unless the context plainly indicates a contrary intention. The sections of the statute relating to deer which we are called upon to construe in this case deal with two subjects—the killing of deer and the transportation of venison. Section 76 thus prescribes the open season for deer, and provides that deer shall not be taken at any other time. I think that this prohibition may fairly be held to comprehend all deer, whether wild or domesticated. While the purpose of the Legislature by this enactment doubtless was to prevent the killing of wild deer except in the open season, it possessed the constitutional power to prohibit the killing of any deer during the closed season in order to prevent an evasion of the principal prohibition. That the power of the Legislature goes to this extent cannot be questioned, since the decision of the Supreme Court of the United States, affirming the judgment of this court in People ex rel. Silz vs. Hesterberg, 184 N. Y., 126; 3 L. R. A. (N. S.), 163; 76 N. E., 1032; 6 A. & E. Ann. Cas., 353; Id., 211 U. S., 31; 53 L. ed., 75; 29 Sup. Ct. Rep., 10. When we come, however, to the provision that no person shall take more than two deer in the open season and to the provisions relating to the transportation of venison, it seems to me that a different intention is disclosed, and that those parts of the statute apply only to wild deer. The statute is highly penal in its character, making every violation thereof a misdemeanor, and therefore it should not be construed so as to embrace cases which do not clearly fall within its terms. Where, as in the case at bar, the venison is plainly marked and readily identifiable as having been obtained from domesticated deer, it is difficult to perceive any good reason for prohibiting its sale during the open season, and I do not think that we ought to read such a prohibition into the forest, fish and game law by judicial construction. If the Legislature

shall consider further safeguards necessary in order to prevent an evasion of the provisions relating to wild deer, it may readily provide for a system of inspection and certification by the game wardens or otherwise before the venison of domesticated deer is allowed to be received for transportation. The keepers of domesticated deer might be required to register as such with the Forest, Fish and Game Commission before their venison was thus receivable. It must not be inferred from anything which has been said that the owner of lands frequented by wild deer can render them domesticated simply by inclosing their domain with a fence, and denominating it a deer park. The domestic character of the plaintiff's deer is unquestioned; and it is only deer which are strictly of that nature that are to be deemed outside the statutory provisions relating to the transportation of game in the open season. As the law now stands, however, I think that domesticated deer may lawfully be killed and the venison thereof may lawfully be accepted for transportation by an express company in this State without restriction as to number, provided this is done only in the open season. As I have already intimated, I think that the Forest, Fish and Game Commissioner originally construed the law correctly in this respect, and that it is the duty of that officer to adhere to the construction then adopted, unless the Legislature shall see fit to impose some further restrictions such as have been suggested, applicable to domesticated deer only."

Upon the distinction made in the cases above cited between wild deer and domesticated deer and upon the statutes of this State relating to the protection of game which protect only the wild deer in this State, we are of the opinion, and so advise you, that domesticated deer raised in captivity may be killed and transported, held in possession for the purpose of, and sold, and that such acts will not constitute a violation of the game laws of this State.

The letter addressed to you by Mr. Jones seems to establish the fact that the deer he has in his possession are in fact domesticated. However, this is wholly a question of fact and this Department cannot undertake to pass upon questions of that character. The holding of the Department being in this opinion, that where in truth and in fact, the deer killed, shipped or sold, are domesticated, the statutes of this State prohibiting such acts have no application.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

OPINIONS CONSTRUING INSURANCE LAWS

INSURANCE—SURETY COMPANY—STATE TREASURER—SECURITIES OF, WITHDRAWAL OF.

Revised Statutes, Article 4932.

1. In order for a surety company to withdraw securities deposited by it with the State Treasurer, it must first file with the Commissioner of Insurance and Banking a statement in writing, under oath, giving the date, name and amount of all of its present existing obligations as suretyship, stating briefly the facts of each case.

2. After an examination of the facts are disclosed, then the Commissioner must require the company to file with the Treasurer a bond payable to the State in a sum equal to the whole amount of its liability under its contracts, conditioned for the faithful performance of the fulfillment of all its outstanding obligations. Included within its liabilities is the company's reinsurance reserve.

3. In lieu of the bond, however, the company may at its option reinsure its risks in some surety company authorized to do business in this State, or it may cancel all bonds on which it is liable and return the pro rata of the premiums received thereon when such acts can be done without impairing its obligations to third parties.

4. In the case of the present company, it has already ceased to engage in business, and the first provision above named should be complied with, and at the same time it should present to the Commissioner and through the Commissioner its reinsurance contract to be filed in the Treasurer's office, so that same may be available for the use of its contract holders. The statement and affidavit referred to, taken in connection with the reinsurance contract, should show that all obligations in the company arising out of surety bond contracts have been taken care of either by expiration, cancellation or reinsurance.

5. The present reinsurance contract of the company should provide, or there should be attached to it a supplemental agreement on the part of the surety company making the reinsurance to the effect that the reinsurance contract is made for the use and benefit of those holding the bond contracts of the reinsurance company, so framed that those holding the contracts could recover against the company reinsuring the Houston company.

6. The officers of the company must be authorized by the directors, and the directors in turn by the shareholders, before this character of reinsurance contract can be effectuated and before the securities may be withdrawn from the treasury. In the present case, those acts already done should be approved by the shareholders, and then the directors and officers should be authorized to withdraw the securities from the State treasury.

February 18, 1916.

Hon. John S. Patterson, Commissioner of Insurance and Banking, Capitol.

DEAR SIR: Inquiry has been made of the Attorney General by you and by the Treasurer for advice as to how the American Surety and Casualty Company of Houston may be permitted to withdraw the securities owned by it now on deposit in the State Treasury. I have not seen the charter of the company but I assume that it is a surety company or rather that its obligations are all surety obligations.

Revised Statutes, Article 4932, reads as follows:

"Any such company, domestic or foreign, may at any time surrender to the Commissioner of Insurance and Banking its said certificate of qualification, and shall thereupon cease to engage in said business of suretyship; and such company shall thereupon be entitled to the release and return of its said deposit as aforesaid, in manner following: Said company shall file with said Commissioner of Insurance and Banking a statement in writing, under oath, giving the date, name and amount of all its then existing obligations of suretyship in this State, briefly stating the facts of each case to said Commissioner, who, after examination of the facts, shall require said company to file with the treasurer of this State a bond, payable to the State, in a sum equal to the whole amount of its liability in this State, under its contracts, conditioned for the faithful performance and fulfillment of all its outstanding obligations, or it may, at its option, reinsure its risks in some surety company authorized to do business in this State, or cancel all bonds on which it is liable, and return a pro rata of the premium received thereon, whenever such cancellation and return can be done without impairing its obligation to third parties."

This statute sets forth in detail what must be done by a surety company in order that it may withdraw the securities deposited by it with the State Treasurer. The American Surety and Casualty Company has not been engaged actively in business for some two years or more, and has no certificate of authority from the Commissioner, and therefore its purpose is not to surrender the certificate, for the simple reason that it has none. However, its purpose is to be enabled to withdraw its securities as provided for in this statute. In order to do this it is necessary first, for the company to file with the Commissioner of Insurance and Banking a statement in writing under oath giving the date named, and the amount of all its present existing obligations of suretyship in this State, stating briefly the facts of each case in this document.

In preparing this statement all claims should be included whether they are admitted obligations on the part of the company or not. This, of course, refers to any claim against the company arising on a surety bond, whether direct or indirect. Second, after an examination of the facts as disclosed by the foregoing, then it is made the duty of the Commissioner of Insurance and Banking to require the company to file with the Treasurer of the State a bond payable to the State in a sum equal to the whole amount of its liability in this State under those contracts, conditioned for the faithful performance and fulfillment of all its outstanding obligations.

In an opinion dated November 16, 1911, rendered by Hon. James D. Walthall, found in Vol. 24, page 105, Opinions of the Attorney General, it was held that this provision was included in the company's reinsurance reserve; that is, the bond should include all debts and claims plus the company's reinsurance reserve. In lieu of the bond, however, a company is permitted at its option to reinsure its risks in some surety company authorized to do business in this State; or further, it may cancel all bonds in which it is liable and return the pro rata of the premiums received thereon whenever such cancellation and return can be done without impairing its obligations to third parties.

My information, however, is that the present company has reinsured all its business. I therefore suggest that the provision first named

above should be complied with by this company and at the same time the company should present to the Commissioner and through the Commissioner its reinsurance contract filed in the Treasurer's office so that the same may be available for the use of its contract holders. A certified copy of the bond can be made by the Treasurer and returned to the company for its own files. The purpose of the reinsurance contract is to take the place of the securities which of course are a trust fund, but the statute has provided this method of reinsurance as a condition precedent to the release of the securities by the trustee. It is the view of the writer that the reinsurance contract must be deposited with the State Treasurer. The statement and affidavit referred to above taken in connection with the reinsurance contract should show that all obligations of the company arising out of surety bond contracts have been taken care of either by expiration, cancellation or reinsurance. Of course if any claims are in court or if there are any outstanding claims upon which suit has not been filed they probably cannot be taken care of by reinsurance contract, but could only be cared for by retention of sufficient securities to cover any recoveries which might be had. However, I assume there are no claims of the character last named.

The present reinsurance contract appears to be a very good one and in an excellent company, but it should provide or there should yet be attached to it a supplemental agreement on the part of the American Surety Company of New York, the reinsuring company, to the effect that the reinsurance contract is made for the use and benefit of those holding the bond contracts of the American Surety and Casualty Company of Houston, so framed that those holding the contracts could recover against the American Surety Company on this reinsurance contract. It may be that the American Surety Company has substituted contracts of its own for all those reinsured by it, but if so this fact should be shown.

Since the cessaction of business and reinsurance of all its contracts by the Houston Company was not an act in furtherance of the general business of the company, but amounted to a fundamental change in its affairs, it is necessary that the board of directors be authorized by the stockholders to cease business and to cause such a reinsurance contract to be executed and that the board in turn authorize the officers to execute the contract. The present contract as shown has already been executed and it may be that those requirements have been complied with. However, if they have not been complied with, then it will be necessary for the shareholders of the company in ceasing business and entering into the present reinsurance contract, and also to authorize the directors to have the officers of the company withdraw the securities from the Treasurer as is contemplated. The reason it is necessary for action on the part of the shareholders and directors in the respects suggested is that the contemplated acts, as well as those done, make fundamental changes in the status of the company which is beyond the authority of the officers and of the directors unless authorized by the shareholders.

In Thompson on Corporations, Vol. 5, Sec. 6632 the rule is stated as follows:

"We have already seen that the directors of a business corporation are merely its business managers, and that they have no power, unless such power has been conferred by statute, or unless it is delegated by a vote of the stockholders in general meeting, to do what may be termed constituent acts; that is, to do any acts changing the constituent character of the corporation—as, for instance, to increase or diminish its capital stock. On the same principle, in the absence of any enabling statute, or of the authorization of the constituent body, the directors of a business corporation have no power to surrender its franchise or to declare it dissolved."

In the present case the act of reinsurance is a part of the act of ceasing to engage in business and is beyond the powers of the officers and of the directors unless they are authorized by the shareholders. As suggested, it may be that action was taken by the shareholders in this instance, but if such action has not been taken it will be necessary for the shareholders to take action and approve such action as the directors or officers have already done looking toward the end sought here and further authorizing the directors and officers to comply with Article 3932, Revised Statutes, in obtaining the securities on deposit with the Treasurer.

Very truly yours,

C. M. CURETON,

First Assistant Attorney General.

SURETY BONDS—RECEIVERSHIP.

Where bonding company is placed in hands of receiver, necessary for parties to give new bonds or obtain other sureties on bonds theretofore given.

October 14, 1915.

Hon. John S. Patterson, Commissioner Insurance and Banking, Capitol.

DEAR SIR: In response to your communication relative to the affairs of the Commonwealth Bonding and Casualty Insurance Company as related to surety bonds given in certain causes pending and on appeal in the district court of Dallas county, we beg to advise you that, in our opinion, the district court having adjudged this company insolvent and that "it is impracticable and impossible to carry on the business of said defendant corporation as an insurance company," and having appointed a receiver of the corporation and said receiver not having elected to perform these bond contracts, if in fact he could, under the insolvent condition of the company, make such election, that it is necessary for the parties in these various cases to give new bonds or obtain other sureties on the bonds which have been given.

Our view of the matter is that it would be proper for you to notify the district clerks in whose courts these several cases are pending of the action which has been taken with reference to the Commonwealth Bonding and Casualty Company in the Sixty-seventh District Court of Tarrant County, and then let these courts take such action

as may be necessary for them to do in order to protect parties in pending cases.

We notice that three of the cases, towit: No. 8547C, No. 10,631 and No. 18,336C are pending on appeal. We assume that these cases are pending in the Court of Civil Appeals at Dallas. If so, it would be proper for you to notify the clerks of these courts, as well as the trial courts, of the condition of this company.

It is true that a receivership proceeding does not impair a valid and subsisting contract entered into by the receiver's principals with a third person, yet the law is that a receiver has the right, subject to the order of the court, to elect whether he will perform the executory contracts entered into by the individual or corporation whose estate he represents made prior to the receivership and that no preexisting contracts are binding on the receiver unless adopted by him. (High on "Receivers," 4 Ed., Section 273d; 23 Amer. and Eng. Ency. of Law, page 1099.) But it appears to us that a discussion of the question as to whether or not these bonds are contracts which the receivership did not annul or are contracts which are executory and which the receiver would have the right to adopt or reject is of no value to any one.

The court has declared, as suggested, that this company is hopelessly insolvent and unable to continue its business. This being the status of its affairs, a continuation of its bond contracts would, of course, furnish no protection, and it would be to the interest of the court and all litigants to have new bonds given, which, we think, they would have the right to require.

Yours very truly,

C. M. CURETON,

First Assistant Attorney General.

INSURANCE—SURETY, FIDELITY AND GUARANTY INSURANCE—CASUALTY INSURANCE—STATE TREASURER, DUTIES OF—DEPOSITS BY INSURANCE COMPANIES—WORDS AND PHRASES.

Revised Statutes, Articles 4930 and 4935.

Acts Thirty-third Legislature, Chapter 117, Section 5.

1. Securities deposited in the State Treasury under Revised Statutes, Article 4930, are placed in trust to answer the default of the company on its policy or contract obligations, and are not subject to claims of general creditors.

2. The holder of a judgment against a surety or casualty company as garnishee is a general creditor and has no claim on such company's securities on deposit with the State Treasurer.

3. The word "loss" as used in Revised Statutes, Article 4935, means a loss under a policy or contract of the company, and not a judgment obtained against the company as garnishee.

4. An execution issued against a surety company on a judgment against it as garnishee cannot be levied on securities deposited in the State Treasury under Revised Statutes, Article 4930.

December 11, 1915.

Hon. J. M. Edwards, State Treasurer, Capitol.

DEAR SIR: Your communication of December 8, 1915, in substance is as follows:

"Under date of May 8, 1911, the General Bonding and Casualty Insurance Company of Dallas, Texas, deposited with this Department securities approved by the Banking and Insurance Department to the amount of $69,000.

"In the Insurance Commissioner's letter of transmittal of that date authorizing this deposit, he gives as authority Section 2, Chapter 165, General Laws of the Twenty-fifth Legislature.

"Under date of May 15, 1912, additional securities were deposited, authority given as Section 5, Chapter 117, Acts of the Thirty-second Legislature.

"On January 6, 1915, I was instructed by the Commissioner of Banking and Insurance, under provision of Section 5, Chapter 117, Acts of the Thirty-second Legislature, to surrender to this company all securities in excess of $50,000, as this company had ceased to do business in other States and had no liabilities in any State other than Texas. These instructions were complied with, and at this time this company has on deposit with this Department $50,300 in securities.

"I am attaching hereto a demand from C. T. Lawson from Hamilton, Texas, for the sum of $5000, either in money or securities to settle judgment of that amount in favor of C. T. Lawson against the General Bonding and Casualty Insurance Company.

"Kindly advise me if I am authorized by law to comply with this request by delivering to Mr. Lawson, or his attorney, $5000 of these securities, or have I the authority to convert said securities into cash and pay the sum demanded."

The demand referred to in your letter is as follows:

"To the State Treasurer of Texas, J. M. Edwards:

"C. T. Lawson hereby makes demand for five thousand dollars ($5000), either in money or securities accepted by the State as a deposit, on account of judgment for said amount in favor of C. T. Lawson against the General Bonding and Casualty Company, more than sixty days having elapsed since the rendition of said final judgment.

"LANGFORD & CHESLEY.
"For C. T. LAWSON."

"December 8, 1915.

We will first examine into the nature of Mr. Lawson's claim. We are in possession of a certified copy of the judgment, which is the basis of this claim, in which it is shown that the claim of Mr. Lawson against the General Bonding and Casualty Insurance Company is against that company as garnishee and not a direct judgment against it on a contract or policy issued by the company in favor of Mr. Lawson. We have before us the original court papers in the case, it being Cause No. 2126, in the District Court of Hamilton County, and the findings of fact and conclusions of law filed by the trial judge sufficiently show the origin of this claim and in order to make a record of the matter we copy the same in this opinion as follows:

"No. 2126—C. T. Lawson vs. the General Bonding and Casualty Insurance Company, Garnishee; Hamilton Compress Company, Defendant—In the District Court of Hamilton County, Texas, August Term, 1915.

I herewith file the following findings of fact and conclusions of law:

1st. I find that in cause No. 2023, pending in this court, that C. T.

Lawson, on the 23rd day of March, 1914, recovered judgment against the Hamilton Compress Company for $5325, which judgment was affirmed by the Court of Civil Appeals and motion for rehearing overruled prior to the issuance and service of the writ of garnishment herein.

2nd. I find that the garnishee herein had issued its policy No. ......, insuring the defendant, the Hamilton Compress Company, against liability on account of injuries or death to its operatives, and that said policy was in full force and effect when the minor son of plaintiff, an operative of said defendant, was injured by said defendant and for which injury a recovery of $5000 was obtained against said compress company in the judgment before mentioned.

3rd. I find that the garnishee herein answered the writ of garnishment that it was not indebted to said Hamilton Compress Company, and otherwise fully excusing itself. I find that plaintiff contested said answer.

4th. I find that garnishee is indebted to the Hamilton Compress Company in the sum of $5000 on account of the legal liability established by said judgment, and that the answer of garnishee in denying that it owes said company anything is not true.

5th. I find that one of the provisions of the policy of insurance before mentioned is that said garnishee in the event the policy holder is sued for personal injuries by an operative might take charge of the defense of said action and thereby become liable to the plaintiff in such action. And I find that said garnishee did take charge of the defense in the suit of C. T. Lawson for himself and as next friend of Walter Lawson, his minor son, against the Hamilton Compress Company.

6th. I further find that after the filing of a contest herein the garnishee appeared in open court on the first day of the August term, 1915, and agreed with plaintiff's counsel that said contest should be set down for trial and hearing on the 8th day of September, 1915.

7th. I further find that the garnishee committed a fraud in Hamilton county in and about the subject matter of this proceeding by colluding and conspiring with the defendant, the Hamilton Compress Company, to send to said garnishee the policy of liability insurance, so that said garnishee could mark the same canceled and destroy or keep from the plaintiff and the court said policy, and I find that said policy has been destroyed or is now in the hands of the garnishee, and its acts therein in so procuring the same, after a subpoena duces tecum had been issued out of this court and served on the defendant, the Hamilton Compress Company, commanding it to produce in court said policy, was and is a fraud.

8th. I further find that said policy of liability insurance was in a sum not to exceed $5000.

CONCLUSIONS OF LAW.

I conclude as a matter of law, based on the foregoing facts, that plaintiff is entitled to recover against the garnishee, the General Bonding and Casualty Insurance Company, the sum of $5000.

J. M. ARNOLD,
Judge Presiding."

We will next inquire into the legal status of the securities on deposit with you. In the first place the General Bonding and Casualty Insurance Company was incorporated under the general insurance laws of this State on the 29th day of November, A. D. 1910. It was formed for the purpose of "transacting all kinds of surety business and all kinds of casualty insurance business and all kinds of liability insurance business." The company was not incorporated under Chapter 13 of Title 71 of Revised Civil Statutes, providing for the incorporation, government and regulation of fidelity, guaranty and surety companies, but was, as suggested, incorporated under the general insurance laws of the State, with authority to engage in the

several lines of insurance business named above. The company, however, in order to qualify itself for the transaction of fidelity, guaranty and surety business complied with the foregoing title and chapter of the statutes by depositing $50,000 in appropriate securities with the Treasurer of this State. The statute provided that these securities should be "held for the benefit of the holders of the obligations of such company; said security so deposited with said Treasurer to remain with him in trust to answer any default of said company as surety upon any such bond, undertaking, recognizance or other obligation established by final judgment upon which execution may lawfully be issued against said company." Revised Statutes, Article 4930.

This statute evidently means that the securities were placed with the Treasurer to remain with him in trust to answer the default of the company upon its contracts and obligations, and we take it that the phrase "or obligation" contained in the quotation above under the rule of *ejusdem generis* must be held to mean "other obligations similar to those enumerated" and does not mean an ordinary general contract obligation of the company or one which might arise from tort or in a manner other than by an action of the company in creating an insurance contract of some character. That this construction is a correct one will appear from the same article of the statute, in which it is provided with reference to foreign companies of this character that such foreign company must have on deposit with a State officer of one of the States of the United States not less than $100,000 in good securities "deposited with and held by such officer for the benefit of the holders of its obligations." This construction is one also consistent with the general purpose of laws of this character, for it is usual for the State to specifically provide for the protection of policy holders of insurance companies. 22 Cyc., 1399.

Our view of the statute, therefore, is that the deposit made by this company with the State Treasurer was for the benefit of its policy holders, that it constitutes a trust fund for the payment of claims of the company's policy holders. 22 Cyc., 1389.

Rolfo vs. Columbia Insurance Co., 10 Mo. App., 150.
Boston & Albany Ry. Co. vs. Mercantile Trust Co., 38 L. R. A., 97.

It is the rule in such cases that securities deposited by an insurance company for the benefit of its policy holders are subject to the claims of such policy holders alone, and not to those of general creditors. Authorities supra.

Falkenback vs. Patterson, 43 Ohio St., 359; 1st N. E., 757.
Kelsey vs. Cogswell, 113 Federal, 693 (606).
Lancashire Insurance Co. vs. Maxwell, 30 N. E., 192.
Attorney General vs. North American Life Insurance Co., 82 N. Y., 172.
Re Equitable Reserve Fund Life Association, 131 N. Y., 354.
People vs. Life Union, 145 N. Y., 606.

There cases in effect held that a deposit with the State Treasurer under the circumstances now before us creates a trust for the benefit

of the policy holders of the insurance company and in case of insolvency the policy holders have a claim against such securities to the exclusion of other creditors. In other words, the trust is not created for the benefit of the creditors other than those who are credited by reason of holding or having held policy contracts. The facts before us clearly show that Mr. Lawson did not hold a policy of the General Bonding and Casualty Insurance Company, but that his judgment arose out of garnishment proceedings; therefore Mr. Lawson is not of the class of creditors for whom these securities were deposited in trust and he therefore has no claim whatever on these securities, other than as a general creditor of the corporation. Of course, in the final winding up of the business of this company if the securities now with you should not be exhausted by debts due policy holders of the company then Mr. Lawson, like any other general creditor, would have a right to participate in the residue, but you are under no statutory obligation to him whatever, so far as paying him this judgment or permitting him to make a levy on any securities placed with you. Thus far we have only considered the deposit of securities made by the company for the purpose of enabling it to do a fidelity and surety business, and we may note before leaving this part of the discussion that Mr. Lawson's claim did not arise even remotely out of any fidelity, guaranty or surety obligation of the company, for the bond by which it was claimed the General Bonding and Casualty Insurance Company became indebted to the Hamilton Compress Company was a liability bond and not a fidelity, guaranty or surety bond.

Your letter also shows that this company made a deposit under Chapter 117, Acts of the Thirty-third Legislature, in order that it might be permitted to engage in casualty insurance business. Section 5 of Chapter 117, Acts of the Thirty-third Legislature, shows that this character of deposit was required to be made exclusively for the protection of the policy holders, for a portion of this section reads:

"The State Treasurer is hereby authorized and directed to receive such deposit and to hold it exclusively for the protection of all policy holders of the company."

So it would appear that the deposit made by the bonding company in order to engage in a casualty business was made for substantially the same purpose as that made to enable it to do a fidelity and surety business, that is for the benefit of the company's policy holders. What we have said, therefore, with reference to the deposit made by the company to enable it to do a fidelity and surety business applies with equal force to the deposit made by it in order to qualify for engaging in casualty business. In other words, both deposits were made for the benefit of its policy holders and not for the benefit of its general creditors. As suggested above, Mr. Lawson is merely a general creditor of the company, the bonds in your possession are not in trust for his benefit, he has no interest or claim in them, and no rights under the statute relative thereto. Of course Mr. Lawson has the right to have his debt paid by the com-

pany and if necessary the bonds in your possession may be subjected to payment of his debt, but not until all policy obligations have been paid can he reach the funds in your possession and then only upon liquidation of the company or through a court of equity.

You are advised, therefore, to decline to comply with the request made by Mr. Lawson through his attorneys, Messrs. Langford and Chesley. Mr. Lawson's attorneys have with much earnestness directed our attention to Revised Statutes, Article 4935. As suggested above, our opinion is that this statute has no application, because Mr. Lawson is not within the class there referred to, for it will be noted by reading this statute that it is only upon the failure of a surety company "to pay any loss by it incurred" that the liability may be satisfied by you by paying out funds in your possession.

Mr. Lawson's claim does not arise from any loss and is, as suggested, the claim merely of a general creditor. The word "loss" as used in this statute must be construed to mean a loss under a policy issued by a company, for, as shown above, only this class of obligations are secured by the trust fund in your possession. Besides, the word "loss," as used in relation to insurance, means the damages accruing to the assured which must be paid by the company under a contract or policy issued by it.

Stephenson vs. Insurance Company, 93 N. W., 19.

We have been asked to construe Revised Statutes, Article 4935, which authorizes you to pay losses upon certain proof, out of the deposit placed with you. We find it, however, unnecessary to determine the meaning of this statute, for whatever its meaning may be Mr. Lawson does not come within the class referred to, and again you could not pay thereunder, for you have nothing to pay with, as you have no money belonging to this company, but only securities impressed with a trust in favor of all the company's policy holders and not in favor of holders of claims of the character of this one held by Mr. Lawson. In addition to what we have said above we will suggest again that Mr. Lawson's claim did not arise out of a contract of fidelity, guaranty or suretyship.

Again it has been insisted by counsel for Mr. Lawson that under Revised Statutes, Article 4936, it would be proper for you to permit the sheriff to levy an execution on these securities deposited with you, for the reason that this article of the statute, among other things provides:

"Such securities and substitutes therefor shall be at all times exempt from and not subject to levy under writ or process of attachment; and further shall not be sold under any process against said company until after thirty days' notice to said company, specifying the time, etc."

As suggested above, this statute has no application to Mr. Lawson's claim, and therefore you should not permit the levy of an execution, even though we are of the opinion that this statute authorizes such a levy. As to whether or not the statute does authorize such a levy we find it unnecessary to determine at this time. If

it be insisted that Mr. Lawson's claim did arise indirectly on a liability or casualty policy and that for this reason the funds deposited under Chapter 117, Acts of the Thirty-second Legislature, are pledged in trust with the Treasurer for his benefit then we beg to say that such funds can only be administered by a court of equity and that you have no authority under the casualty insurance statute to pay out the same or to permit a levy thereon. However, as heretofore suggested, we are of the opinion that Mr. Lawson's claim does not belong to the class for which these securities were placed in trust, as Mr. Lawson was not a policy holder of this company.

Perhaps other reasons might be given by us for declining to comply with Mr. Lawson's request, but the above are sufficient, we think, for your present purpose. We advise you, therefore, to decline to comply with the request and enclose you an extra copy of this opinion, which you may append to your letter declining the same, if you so desire.

Yours very truly,
C. M. CURETON,
First Assistant Attorney General.

INSURANCE—INSOLVENT INSURANCE COMPANIES—INSOLVENCY—RECEIVERS.

1. The insolvency of an insurance company is a breach of its contract to each existing policy holder, upon the occurrence of which the policy holder is entitled to recover a portion of the premium paid which is unearned at the time of the insolvency.

2. Upon such a company going into the hands of a receiver, the proper course for the claimant of a premium is to file his claim in the receivership proceedings, and have the same allowed in due course and ordered paid by the court.

March 22, 1916.

Hon. John S. Patterson, Commissioner of Insurance and Banking, Capitol.

DEAR SIR: The Attorney General is in receipt of a letter from Hon. Earl Conner of Eastland, Texas, the substance of which is as follows:

"About one year ago the City National Bank of Eastland, having been selected as a State depository for the Sixteenth Congressional District, made application to and obtained a bond from the Commonwealth Insurance or Bonding Company, doing business in Texas, with a Mr. Hilligoss as State agent. Mr. Hilligoss resided then at Dallas. The amount of the bond required by the City National Bank was $50,000, and the premium was $250.

"It developed that soon after this bond was written for the bank the bonding company failed. Therefore it will be noticed that the bank is out the paid premium, and I am writing to you now to know just what course the bank will have to pursue in order to obtain a recovery of the unearned premium paid the commonwealth, if it can be recovered at all."

Since the questions involved in Mr. Conner's letter are recurring ones we have decided to write an opinion on the question addressed to you, for your information and for the purpose of preserving the ruling for the future use of this Department.

The effect of the insolvency of an insurance company on its contracts is very succinctly stated by Cyc. as follows:

"Effect of Insolvency in General.—The insolvency of an insurance company constitutes a breach of contract on its part, and on dissolution of the company claims of policy holders are debts due *in pracsenti*. On a decree dissolving the company and appointing a receiver to wind up its affairs, the policies of the company are canceled and losses hereafter accruing are not recoverable; but it has been held that the cancellation of policies does not result from an assignment by the company for the benefit of credtiors, nor from the institution of proceedings against the company by the superintendent of insurance. As to any losses accruing under the policy before insolvency the company is liable, although the amount of the loss has not been ascertained or paid. A company cannot recover premiums for the portion of the term of insurance after insolvency has taken place. Nor can it maintain an action against an agent for the recovery of premiums received by him, the consideration for which has thus failed. The insolvency of the company being a breach of its contract as to an existing policy holder, the latter is entitled to recover the portion of the premium paid which is unearned at the time of the insolvency, and this is so even though there is no provision for refunding premiums paid. The interest of policy holders in the assets of an insurance company cannot be enlarged by any event occurring after the institution of proceedings to have it declared insolvent; or the date of the order of dissolution; or the date on which the insolvency occurred as determined by the decree of dissolution."

22 Cyc., 1404-1045.

It appears to us that the rules stated in this quotation are the general ones which obtain in this State, and therefrom you will observe that the insolvency of an insurance company is a breach of its contract as to each exisiting policyholder, upon the occurrence of which the policyholder is entitled to recover a portion of the premium paid which is unearned at the time of the insolvency and this even though there is no provision in the policy for refunding premiums paid.

Boston & Albany Ry. Co. vs. Mercantile Trust and Deposit Co., 38 L. R. A., 97.

Smith vs. National Credit Insurance Co., 33 L. R. A., 511.

The case of Boston and Albany Railway Co. vs. Mercantile Trust and Deposit Co., usually known as the American Casualty Insurance Company's case, is a very comprehensive one, well annotated in the L. R. A., and has been cited and followed by this Department upon various insurance questions.

We regard it as authoritative.

With regard to the course to be pursued by a policyholder where an insurance company has become insolvent and goes into the hands of a receiver we think the proper course is to file his claim in the receivership proceeding, have the same allowed in due course and ordered paid by the court.

Yours very truly,

C. M. CURETON,
First Assistant Attorney General.

FIRE INSURANCE—TAXATION—WAR REVENUE ACT, 1914

Revised Statutes (Vernon's Sayles'), Articles 4876, 4876a, 4877, 4879, 4886, 4890, 4897, 4899 and 4896.

(a) Fire insurance companies as between themselves and their policy holders must pay for, attach and cancel the revenue stamps placed upon each insurance policy issued.

(b) Insurance companies cannot charge the amount or cost of the revenue stamps attached to a policy to the policy holder or assured, nor can it add the same to the premium and collect the same from the policy holder.

(c) The imposition of the federal tax is a proper matter for consideration by the State Fire Insurance Commission in making insurance rates. The whole duty of the commission in this respect is to make reasonable rates, as is expressly declared in the law itself. The revenue tax is only an element to be considered in rate making, like any other tax or operating expense, and is entitled to neither more nor less consideration. If the present insurance rates are reasonable, notwithstanding the addition of this tax, then that ends the matter. If the addition of this tax will make the present rate unreasonable, then manifestly the State Fire Insurance Commission should amend its rates so as to make them reasonable after the addition of such tax. The federal law does not prohibit the shifting of the burden of this tax on the policy holder, but such an act as prohibited by the State law, which requires the insurance companies to write insurance at the rates prescribed by the State Fire Insurance Commission.

(d) Policies of fire insurance written after the enactment of the federal revenue measure and prior to December 1, 1914, should be stamped with the proper federal revenue stamps, provided they will not become effective until on or after December 1, 1914; if such policies were to become effective before December 1, 1914, then of course it is not necessary to have the revenue stamps attached thereto.

(e) The question as to whether the companies may shift the burden of paying for the revenue stamps on each policy on to their local agents is not one within the jurisdiction of this Department or of the State of Texas, under our present laws, but one wholly within the jurisdiction of the federal government.

November 28, 1914.

The State Fire Insurance Commission, Capitol.

GENTLEMEN: In answer to your several inquiries concerning the effect of the recent stamp tax enacted by the Federal Congress on fire insurance companies and your duties relative thereto, we beg to advise you as follows:

I.

The Federal Act referred to in Section 5 in part reads as follows:

"That on and after the first day of December, nineteen hundred and fourteen, there shall be levied, collected and paid, for and in respect of the several bonds, debentures or certificates of stock and of indebtedness and other documents, instruments, matters and things mentioned and described in Schedule A of this act, or for or in respect of the vellum, parchment or paper upon which such instruments, matters or things, or any of them, shall be written or printed by any person or persons or party who shall make, sign or issue the same, or for whose use or benefit the same shall be made, signed or issued, the several taxes or sums of money set down in figures against the same, respectively, or otherwise specified or set forth in the said schedule."

That portion of Schedule A mentioned in the foregoing quotation

relating to insurance policies, in so far as necessary to notice the same, reads:

"Insurance.—Each policy of insurance or other instrument, by whatever name the same shall be called, by which insurance shall be made or renewed upon property of any description (including rents or profits), whether against peril by sea or on inland waters, or by fire or lightning, or other peril, made by any person, association or corporation, upon the amount of premium charged, one-half of one per cent on each dollar or fractional part thereof; provided, that purely co-operative or mutual fire insurance companies or associations carried on by the members thereof solely for the protection of their own property and not for profit shall be exempted from the tax herein provided; and provided further, that policies of reinsurance shall be exempt from the tax herein imposed by this paragraph."

Construing these two sections of the act together they clearly mean, with reference to the questions before us, that each fire insurance policy issued by a company after midnight on the 30th day of November, 1914, must have placed thereon a revenue stamp, or stamps, equal in amount to one-half of one per cent on each dollar or fractional part thereof of the premium paid or to be paid for such policy. We think it equally clear that this tax must be paid and the stamp be attached and canceled by the company issuing the same, before it can lawfully deliver the policy to the policy holder. A portion of Section 5 quoted above reads:

"Paid * * * by the person or persons or party who shall make, sign or issue the same or for whose use or benefit the same shall be signed or issued. * * *"

In the case of fire insurance companies the policy is both signed and issued by the company, acting by its agents, they, of course, acting for the benefit of the company, and to the policy therefore must be attached stamps paid for by the company itself. The language does not require the party to whom the policy is issued to stamp the same or to pay for the stamps, as has been suggested.

Section 6 is one of the penal provisions of this revenue act and reads:

"That if any person or persons shall make, sign or issue, or cause to be made, signed or issued, any instrument, document or paper of any kind or description whatsoever, without the same being duly stamped for denoting the tax hereby imposed thereon, or without having thereupon an adhesive stamp to denote said tax, such person or persons shall be deemed guilty of a misdemeanor, and upon conviction shall pay a fine of not more than $100, at the discretion of the court."

It seems clear from this that the penal provision is intended to apply only to the person who issues the instrument or causes it to be done, and not to the person who receives the same, as, for example, in the case of an insurance company it does not apply to the policyholder.

Section 11 contains a penal provision peculiarly applicable to Schedule A, in which schedule is found the tax levied against insurance policies. Section 11 in part provides:

"That any person or persons who shall register, issue, sell or transfer, or who shall cause to be issued, registered, sold or transferred, any instrument, document or paper of any kind or description whatsoever mentioned in Schedule A of this act, without the same being duly stamped, or having thereupon an adhesive stamp for denoting the tax chargeable thereon, and canceled in the manner required by law, with intent to evade the provisions of this act, shall be deemed guilty, etc. * * * "

You will note that the language used in this quotation levels the punishment against and makes guilty the person, or persons, who issues or sells the instrument, which in the case of insurance would be the person who issues or sells a fire insurance policy, and not the person who receives or purchases the policy. The proviso contained in this same section likewise is in accord with the construction we have given it, for it reads, in part:

"Provided, that hereafter, in all cases where the party has not affixed to any instrument the stamp required by law thereon at the time of issuing, selling or transferring the said bonds, debentures or certificates of stock or of indebtedness, and he or they, or any party having an interest therein, shall be subsequently desirous of affixing such stamp, * * * or they shall appear before the collector of internal revenue for the proper district, who shall, upon the payment of the price and the proper stamp required by law and the penalty of $10, etc., affix the proper stamp, etc."

It would seem to be plain from this that the law contemplates that the party issuing the instrument shall place the stamp thereon. The construction given above, to the effect that the stamp must be paid for and attached by the insurance company issuing the policy is one in entire harmony with the general rule laid down by the courts in interpreting previous revenue laws of this character. The general rule is thus stated by a leading authority:

"As a general rule, the person executing a document which requires a stamp is the one to affix it."
24 Am. & Eng. Ency. of Law, p. 925.
Kirk vs. Western Union Telegraph Co., 90 Fed., 809.
Gray vs. Western Union Telegraph Co., 85 Mo. App., 123.
Myers vs. Smith, 48 Barb. (N. Y.), 614.

In the case of Kirk vs. Western Union Telegraph Company, 90 Federal, 809, a controversy arose in the following manner:

An action was brought to recover damages for the alleged neglect of the telegraph company to transmit a certain message presented to it by the plaintiff, on the 11th day of August, 1898. The telegraph company interposed a demurrer to the complaint, on the ground that it did not appear therefrom that the telegram alleged to have been offered to the company for transmission had upon its face or elsewhere the internal revenue stamp required by Section 7 of the Act of Congress approved June 15, 1898. The court in construing Section 18 of that act, which provided that "the telegraph company or its agent or employe shall not transmit to any person any dispatch or message without an adhesive stamp denoting the tax imposed" discussed at some length Sections 6 and 7 of that act, of which Sections 5 and 6 of the present act are exact copies. The court held that it was

the duty of the person making, signing or issuing the telegram to place the stamp upon the same, saying:

"It is contended in support of the demurrer that it was the duty of the plaintiff to affix and cancel the internal revenue stamp provided in the last section, before tendering the dispatch to the defendant for transmission, and that negligence cannot be charged against the defendant for its refusal to transmit a message which was not stamped by the plaintiff as required by law. The real question submitted to the court for decision is this: Upon whom does the law impose the burden of paying the stamp tax—the sender of the message or the telegraph company? The document being subject to tax under Schedule A, the fine or penalty imposed for the omission to affix and cancel the proper stamp is, under Section 7, imposed upon the person who makes, signs or issues the document. The statute is in the disjunctive, and reaches not only the omission of the person who issues a document subject to the tax, but the maker and signer of the instrument. The law for this purpose takes notice, therefore, of the person who writes out and signs a dispatch, and makes him liable for the omission to stamp the instrument he creates. By the terms of the stamp schedule, the tax of one cent is placed upon this instrument as prepared by the sender, without reference to any act of the telegraph company in transmitting the message to its destination. The instrument described is a "Dispatch, telegraphic: Any dispatch or message." Had it been intended to impose this tax upon the telegraph company, Congress could certainly have identified the subject of taxation as the document transmitted by the telegraph company; and it may be said that the penalty of $10 provided in Section 18 for the default of the telegraph company in transmitting a dispatch or message without the stamp denoting the tax imposed by law is such an identification of the subject intended to be taxed. But the difficulty with this interpretation of the statute is that it does not relieve the sender from the fine of not more than $100 for his omission to affix the proper stamp to the dispatch or message as made and signed by him, and delivered to the telegraph company for transmission. Two penalties are clearly imposed upon parties engaged in making and transmitting an unstamped dispatch or message—a fine of not more than $100 upon the party who makes, signs or issues the document; and a penalty of $10 upon the telegraph company for transmitting it to its destination—the first being intended to secure the payment of the tax, and the latter the attention and service of the telegraph company in the enforcement of the law.

It follows, therefore, that the instrument set forth in the complaint was subject to a stamp tax, and that it was the duty of the plaintiff, as the maker and signer of the instrument, to affix to it and cancel the stamp required by law, before he can charge the defendant with neglect in failing to transmit the message to its destination."

90 Fed. Rep., p. 811.

Insurance policies are governed by Section 5 of the present act, as well as by Section 7 thereof, which were, as suggested, Sections 6 and 7 of the old law, construed in the opinion above referred to and from which an excerpt has been quoted. Construing the language of those sections as they then existed, which embody the language of the sections now under examination, the court held that the party who made, signed or issued the instrument must affix to it and cancel the stamp required by law. Therefore our holding that in the present instance it is the duty of insurance companies to affix and cancel the stamps required by law to be placed on insurance policies before they deliver the policies is one in entire accord with the holding of the Federal Court, as well as with the general rule laid down in the Encyclopedia of Law and the opinions of the State courts cited by us.

The real question, as suggested in that portion of the opinion quoted,

was: "Upon whom does the law impose the burden of paying the stamp tax?" The court answered and held that the burden was imposed upon the party signing, making or issuing the instrument, in that particular instance upon the sender of the telegram, because he made and issued the telegram. The same rule applies here, for the same identical language is under construction, and the duty of paying the tax levied by the present law is upon the insurance company issuing the policy and not upon the policyholder or upon any one else.

II.

The next question which naturally arises is whether or not the insurance companies, although bound themselves to pay the revenue tax and cancel the stamps on policies issued by them, have the right to shift the burden of the stamp tax imposed upon insurance policies to the policyholder.

We will first discuss the question as to whether or not there is anything in the federal law which would prohibit them from shifting this burden, as suggested, by charging against each policy the amount of stamps affixed thereto. Our opinion is that there is nothing in the Federal Act prohibiting this and that, so far as the Federal law is concerned, it might be done.

American Express Co. vs. Michigan, 177 U. S., 404.
The People vs. Wells Fargo & Co., 135 Cal., 503.

In the first case cited the Supreme Court of the United States had before it for construction the act of June 30, 1898, levying a stamp tax upon, among other things, one cent for each package of express matter. The court held that the act did not forbid an express company upon which was imposed the duty of paying the tax upon express matter from requiring the shipper to furnish the stamp or the means for paying for it. The stamp act referred to was similar in its provisions to that now before us, and the construction given that measure is applicable to the present act and the instant case. The court held that the express company had the right to shift the burden of the tax by increasing the rate by the exact amount distinctly and separately imposed by the act on each shipper. In this case, however, it was not contended that the imposition of the additional amount of tax on the express company's rate made the rate unreasonable. The only matter in issue was whether or not the company had a right to shift the burden of the tax, as suggested. In holding that the express company had a right to shift the burden and collect the tax from the shipper of the exact amount imposed, in addition to its fixed rate, the Supreme Court discussed at some length the provisions of law there applicable and in the discussion laid down the principles which determine the present issue. We, therefore, quote from it liberally as follows:

"The argument is that as it is made the duty of the express company to make and issue 'a bill of lading, manifest or other evidence of receipt and forwarding for each shipment, * * * and there shall be duly attached

and canceled, as in this act provided, to each of said bills of lading, manifests or other memorandum, and to each duplicate thereof a stamp of the value of one cent'; therefore the obligation is imposed absolutely on the express company, not only to make and furnish the receipt, but to issue it with the stamp duly canceled. But, as we have said, though the correctness of the claim be arguendo taken for granted, such concession does not suffice to dispose of the essential issues. They are that by the statute the express company is forbidden from shifting the burden by an increase of rates, although such increased rates be in themselves reasonable. As no express provisions sustaining the propositions are found in the law, they must rest solely upon the general assumption that because it is concluded that the law has cast upon the express company the duty of paying the one cent stamp tax, there is hence to be implied a prohibition restraining the express company from shifting the burden by means of an increase of rates within the limits of what is reasonable. In other words, the contention comes to this, that the act in question is not alone a law levying taxes and providing the means for collecting them, but is moreover a statute determining that the burden must irrevocably continue to be upon the one on which it is primarily placed. The result follows that all contracts or acts shifting the burden, and which would be otherwise valid, become void. To add by implication such a provision to a tax law would be contrary to its intent, and be in conflict with the general object which a law levying taxes is naturally presumed to effectuate. Indeed, it seems almost impossible to suppose that a purpose of such a character could have been contemplated, as the widest conjecture would not be adequate to foreshadow the far-reaching consequences which would ensue from it. To declare upon what person or property all taxes must primarily fall is a usual purpose of a law levying taxes. To say when and how the ultimate burden of a tax shall be distributed among all the members of society would necessitate taking into view every possible contract which can be made, and would compel the weighing of the final influence of every conceivable dealing between man and man. A tax rests upon real estate. Can it be said that by the law imposing such a tax it was intended to prevent the owner of real property from taking into consideration the amount of a tax thereon, in determining the rent which is to be exacted by him? A tax is imposed upon stock in trade. Must it be held that the purpose of such a law is to regulate the price at which the goods shall be sold, and restrain the merchant therefore from distributing the sum of the tax in the price charged for his merchandise? As the means by which the burdens of taxes may be shifted are as multiform and as various as is the power to contract itself, it follows that the argument relied on, if adopted, would control almost every conceivable form of contract and render them void if they had the result stated. Thus, the price of all property, the result of all production, the sum of all wages, would be controlled irrevocably by a law levying taxes, if such a law forbade a shifting of the burden of the tax and avoided all acts which brought about that result. It cannot be doubted that to adopt, by implication, the view pressed upon us, would be to virtually destroy all freedom of contract, and in its final analyses would be to virtually deny the existence of all rights of property. And this becomes more especially demonstrable when the nature of a stamp tax is taken into consideration. A stamp duty is embraced within the purview of those taxes which are denominated indirect, and one of the natural characteristics of which is, although it may not be essential, that they are susceptible of being shifted from the person upon whom in the first instance the duty of payment is laid. We are thus invoked by construction to add to the statute a provision forbidding all attempts to shift the burden of the stamp tax when the nature of the indirect taxation which the statute creates suggests a contrary inference."

In that case the express company had the right, under the law, to make its own rates and since the question of the reasonableness of the rate with the tax added was not at issue the only question decided

by the Supreme Court was that the company had the right, in the absence of the question of unreasonableness of rates, to shift the burden of the tax on to the shipper by raising its rate on each package in the amount specified in the tax law, and that the levy of the tax by the Federal act not having specified that the burden could not be shifted it was the privilege of the express company to shift the burden. We may say, therefore, that so far as the Federal act is concerned an insurance company would have the right to add to the policy premium a sum equal to the stamp tax paid by it. But there yet remains to be considered the effect of the State laws upon this question, and that we will now discuss.

III.

Article 4876, Vernon's Sayles' Civil Statutes of Texas, provides that all fire insurance companies transacting business in this State shall as to fire insurance policies be governed by the provisions of those articles which follow, and being Chapter 9 of Title 71, Vernon's Sayles' Statutes.

Article 4876a reads as follows:

"After this act shall take effect, a maximum rate or premiums to be charged or collected by all companies transacting in this State the business of fire insurance, as herein defined, shall be exclusively fixed and determined and promulgated by the State Fire Insurance Commission created by this act, and no such fire insurance company shall, after this act takes effect, charge or collect any premium or other compensation for or on account of any policy or contract of fire insurance as herein defined in excess of the maximum rate as herein provided for, but may write insurance at a less rate than the maximum rate as herein provided for; provided, that when insurance is written for less than the maximum rate, such lesser rate shall be applicable to all risks of the same character situated in the same community."

Article 4877 creates the State Fire Insurance Commission for the purpose as there set forth "that there may be reasonable and just insurance rates in Texas."

Article 4879 provides that the State Fire Insurance Commission shall have the sole and exclusive power and authority and it shall be its duty to prescribe, fix, determine and promulgate the rate of premiums to be charged and collected by fire insurance companies transacting business in this State.

Article 4886 declares that the rates of premiums fixed by the State Fire Insurance Commission shall be at all times reasonable and that the schedules promulgated by the Commission shall be in such form as will in the judgment of the Commission most clearly and definitely in detail disclose the rates as fixed, etc. The same article of the statute gives the Commission full power and authority to alter or amend, modify or change any rate fixed and determined by it.

Article 4890 likewise gives the Commission full authority to alter, amend or reduce the rates of premiums.

Article 4896 prohibits any company issuing fire insurance policies in this State, except in accordance with the provisions of this Act, and prohibits any company or its officers, directors, general agents,

local agents, etc., to grant or contract for any special favor or advantage. etc., in order to procure a contract of insurance.

Article 4897 prohibits any person from receiving from the agents of any insurance company or any of its sub-agents, brokers, solicitors, employes, intermediaries or representatives or from any other person any rebate premium payable on the policy or any special favor or advantage or any valuable consideration or inducement not specified in the policy of insurance.

Article 4899 authorizes the Insurance Commissioner to revoke the certificate of authority of any company, officer, agent or representative violating the provisions of the law.

This brief statement of the salient provisions of the State Fire Insurance Commission Law makes it clear, we think, that the making of maximum fire insurance rates in this State is a matter wholly within the jurisdiction of the State Fire Insurance Commission, and that it alone has the right to specify the premium charge or any item thereof. It is true that insurance companies may write insurance at a rate less than the maximum fixed by the State Fire Insurance Commission, but to do so it must comply with the terms of Article 4896. To this extent and to this extent only have fire insurance companies operating in this State authority to change the maximum rates promulgated by the State Fire Insurance Commission. For any other change sought or desired in the rates of fire insurance in this State an insurance company must bring the matter before the State Fire Insurance Commission, in accordance with the provisions of Articles 4894 and 4895, which in effect provide for hearings as to the adequacy or inadequacy of rates to be held by the State Fire Insurance Commission and its decision thereon and in the event of dissatisfaction on the part of any company action may be brought in the District Court of Travis County for an adjudication with reference to the rates promulgated by the State Fire Insurance Commission or any modification sought therein by any company or interested party.

IV.

The next question which naturally arises in connection with this matter is whether or not the tax levied by the Federal law is properly a subject for consideration by the State Fire Insurance Commission in making the rates promulgated by it. In our opinion that tax, like any other, is a matter to be considered by the State Fire Insurance Commission in promulgating and making its rates. In other words, the collection of the amount of the tax by the company is a part of the price for which it sells its insurance and as such is subject to regulation and control by the State Fire Insurance Commission of this State. The Commission, of course, has nothing to do with the payment of the tax, but it has all to do with providing a rate adequate to enable the company to meet its tax obligations, as well as its other legal liabilities, whether these liabilities arise under the laws of this State or the laws of the United States. It is elementary, we think, that taxes are to be considered as part of the operating expense of an insurance company. A tax when it is paid becomes either an invest-

ment or an operating expense. If an investment it necessarily becomes a part of the capital stock of the company, in which event it would become a subject for consideration for all future rate making, because a rate to be reasonable must be sufficient to pay for the service rendered and produce a return on the instrument of that service, to wit, the capital involved. But it is hardly tenable to suppose that the taxes when paid become a part of the capital of any enterprise. On the contrary, the universal theory is that the taxes are to be considered a part of the operating expenses of any enterprise, and as such must be paid out of the annual revenues received, for otherwise the capital of any enterprise would necessarily be impaired for the purpose of paying taxes. It is true that some enterprises would have a surplus on hand, but the payment of a tax out of an undivided or accumulated surplus would be merely, after all, the payment out of an accumulated income, from which source, that is the income, all operating expense must be paid if an enterprise is to continue solvent and a going concern. That taxes for the purpose of making rates are to be treated as a part of the operating expense of an enterprise is a proposition quite elementary and will not, we think, be found controverted by any reputable authority.

Whitten's Valuation of Public Service Corporations, Sec. 7, p. 8; Sec. 240; Sec. 302, p. 266; Sec. 740, p. 657.
Willcox vs. Consolidated Gas Co., 212 U. S., p. 19.
Costra Costa Water Co. vs. City of Oakland, 165 Fed., 518.
Foster's Engineering Valuation of Public Utilities, p. 21.
Zartman's Yale Readings in Insurance, pp. 212-213.

The last authority cited, in the analysis of the disposition made of insurance premium assigns fifty-five per cent of the premium for the payment of losses and then makes a detailed statement of the expense charges, applying three per cent of the premium for tax purposes; showing, however, that the element of taxes is figured in all insurance premiums. This, of course, is elementary, and well known to all who have anything to do with the making of insurance rates.

Mr. Whitten, in his work on Valuation of Public Service Corporations, in Section 240, lists as one of the overhead charges of concerns of this character the element of taxes. In the case of Willcox vs. Gas Company, cited above, the Supreme Court of the United States expressly stated that taxes are properly treated as a part of the operating expenses of a gas company.

From a consideration of the authorities and cases cited by us it will be found that there is no reason for the proposition that taxes are not a part of the operating expense or overhead charges of any character of business enterprise, and that where the question of rates is left wholly to the company that the company will, of necessity, include the taxes paid by it in the rate, so that a revenue sufficient will be produced to make a reasonable return on its investment and pay all of its overhead or operating expenses, including the tax. On the other hand where the rates are made by the State, or through an instrumentality of the State, the authorities all hold that these rates, in order to be reasonable, must be sufficient to produce a revenue large enough in amount to pay all overhead charges and expenses, in-

cluding taxes, and to compensate the enterprise for the service performed and produce return on the capital involved. It is not necessary here, at this point in the discussion, to enter upon any consideration as to what is or what is not a reasonable rate. The only point directly involved is that when a question of rate making is up for discussion the element of taxes is one necessarily considered by the board making the rate, or the rate making body. This being true, the tax levied by the Federal Government is a subject for consideration by the State Fire Insurance Commission when it essays to make rates governing fire policies in this State; though its jurisdiction in this respect is made exclusive by the statute, because these taxes being a part of the operating expenses of the companies must be provided for by the premium income, which may only be prescribed by the State Fire Insurance Commission. Being necessarily a part of the premium or charge for insurance the insurance companies are not authorized to include the amount of this tax in the premium charged by them or to collect the same from the policyholder by adding the same to the premium, because such action would be collecting a maximum premium over and above that prescribed by the general basis schedule of this State, promulgated by the State Fire Insurance Commission.

If the present schedules do not produce an insurance rate which is reasonable for the payment of Federal taxes then the insurance companies have their remedy of an application to the board for increase of the rate, because under the statute an insurance company is entitled to a reasonable rate, just as much as is the public generally, but the companies have no authority to add the amount of this tax to the premium produced by the rate promulgated by the board.

The Federal act neither authorizes nor prohibits an increase of insurance rates to cover the cost of the stamps required, and any action taken by the Texas Fire Insurance Commission, so long as it permits a reasonable maximum rate, is within the jurisdiction and power of the Commision and can only be set aside by the courts on the ground that the rates are unreasonable and therefore unauthorized by law.

Dinsmore vs. Southern Express Co.; Trammell et al. vs. Dinsmore et al., 102 Fed. Rep., 794.

The case just cited arose out of the following state of facts:

The complainants were citizens of the State of New York and shareholders in the Southern Express Company, a Georgia corporation which had its principal office in the State of Georgia and conducted the business of an express carrier in that State and in ten of the neighoring States. The action was brought by original bill charging that the Constitution of the State of Georgia, adopted in 1877, expressly charged the Legislature of that State with the duty of passing laws from time to time to regulate freight and passenger tariffs, to prevent unjust discrimination on the various railroads of the State and prohibiting the same from charging other than just and reasonable rates and to enforce the same by adequate penalties. That, acting under this provision of the Constitution, the Legislature of the State of

Georgia passed an act in 1879 to carry into effect the constitutional provision referred to, which act was from time to time amended and enlarged, and by an act of 1891 the powers of the Railroad Commission were extended so as to give them authority to regulate charges for express for transportation from one point to another in the State of Georgia. Pursuant to this authority the Railroad Commission fixed and prescribed rules, tariffs and classifications governing express companies plying between points within the State of Georgia, and published and distributed their report of same, to which the bill in equity referred. From the date of the adoption of these measures the Southern Express Company conformed to the rules, regulations and tariffs so adopted by the Railroad Commission of Georgia and were continuing to do so up until June 13, 1898, when the Congress of the United States passed the act commonly designated as "The War Revenue Act," in which it was made the duty of express companies on receiving a package for carriage to issue a receipt for such package and providing that the receipt thus issued should bear a one cent stamp. Upon the taking effect of the War Revenue Act, July 1, 1898, the Southern Express Company asked and demanded the production by its customers of the stamp required to be attached under the provisions of the Act at the issuing of the receipts or bills of lading, insisting that it should not carry any package or issue its receipt therefor until the sender or shipper furnished the necessary governmental stamp therefor. Certain citizens of the State of Georgia refused to furnish these stamps or to pay for the same if furnished by the express company and thereupon complained to the Railroad Commission of the State, that is to the Respondents Trammell and others, who, as such commission on July 11, 1898, issued an order as follows:

"It being represented to the Railroad Commission of Georgia that the Southern Express Company, a corporation engaged as an express company in this State in the business of common carrier of goods and merchandise for hire, since the passage by the Federal Congress of an act approved June 13, 1898, entitled 'An act to provide ways and means to meet war expenditures, and for other purposes, has exacted, and continues to exact, from shippers, as a condition precedent to forwarding any goods tendered to it for transportation between points within this State, the payment of a special tax upon such shipments imposed by said act, thus indirectly increasing the cost of transportation beyond the rate fixed therefor by this commission, it is ordered that the Southern Express Company do appear before this commission on the 18th day of July, 1898, then and there to show cause, if any it can, why it should not be held to have violated the rules and regulations of this commission by the exactions or overcharges, as aforesaid, and why suit should not be instituted against it in every case of such overcharges for the recovery of the penalty provided by law for such illegal act."

This sufficiently states the basis of the action and as is perceived the question at issue was whether or not, in view of the fact that the charges which the Southern Express Company might exact for express business were fixed by the Railroad Commission, the company had the right to require its customers to pay the additional amount equal to the Federal tax. The case was heard on appeal before the Circuit Court of Appeals for the Fifth District of the United States by Pardee, McCormick and Shelby, Circuit Judges.

The court in an opinion by Judge McCormick, concurred in by Judge Pardee, held that the provisions of the War Revenue Act of 1898 imposing a stamp tax on express companies neither authorized nor prohibited an increase of rates by the express company to cover the cost of the stamp required; and that the action of the State Railroad Commission authorized by statute to prescribe rates for carriage between points within the State in prohibiting an express company from adding the cost of the revenue stamp to the maximum rates prescribed was within the jurisdiction and powers of the Commission and could only be set aside by the court when the rates thus fixed were so low as to be violative of constitutional rights. That is to say, as long as the rates were reasonable the courts had no jurisdiction over the affairs of the Railroad Commission in its rate-making capacity. The opinion of the court seems to be precisely in point on the question here at issue and for your information we quote it as follows:

"Subject to the limitation that the carriage cannot be required without reward, or upon conditions amounting to the taking of property for public use without just compensation, a State has power to prescribe the charges of public carriers for the carriage of persons and merchandise within its limits. The acts of the Legislature of Georgia constituting the Railroad Commission, and prescribing its powers and duties, do not violate the provisions of the Georgia constitution. And the provisions of that constitution, and of the statutes passed in pursuance thereof, administered subject to the limitation that the carriage cannot be required without reward, do not violate the constitution of the United States, and have full force as public law. Railroad Commission vs. Smih, 70 Ga., 694, affirmed by the Supreme Court of the United States, 128 U. S., 174; 9 Sup. Ct., 47; 32 L. Ed., 377; Railroad Commission Cases, 116 U. S., 307-331; 6 Sup. Ct., 334, 348, 349, 388, 391, 1191; 29 L. Ed., 636; Reagan vs. Trust Co., 154 U. S., 362; 14 Sup. Ct., 1047; 38 L. Ed., 1014; Road Co. vs. Sandford, 164 U. S., 578-598; 17 Sup. Ct., 198; 41 L. Ed., 560; Smyth vs. Ames, 169 U. S., 466-550, 18 Sup. Ct., 418; 42 L. Ed., 819; Houston & T. C. R. Co. vs. Metropolitan Trust Co. of City of New York (C. C.), 90 Fed., 683.

"The Southern Express Company, as to its business conducted between points within the State of Georgia, is bound to receive for carriage, and to carry, express matter properly tendered to it by any person for transportation, provided the person so tendering such goods offers to pay its charges, not to exceed the maximum rates fixed by the Railroad Commission, so long as the body of the rates, or the system of maximum charges, prescribed by the commission are not unjust and unreasonable, and such as to work a practical destruction to the right of property of the shareholders in the corporation thus acting as a common carrier. The formation of a tariff of charges for the transportation by a common carrier of persons or property is a legislative or administrative, rather than a judicial, function. The courts are not authorized to revise or change the body of rates imposed by the commission. They do not determine whether one rate is preferable to another, or what, under all the circumstances, would be fair and reasonable as between the carriers and the shippers. They do not engage in any mere administrative work. There can be no doubt of their power and duty to inquire whether a body of rates prescribed is unjust and unreasonable, and such as to work a practical destruction to rights of property, and if found so to be, to restrain its operation. Reagan vs. Trust Co., 154 U. S., 397; 14 Sup. Ct., 1047; 38 L. Ed., 1014. "While rates for the transportation of persons and property within the limits of a State are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the constitution secures, and therefore without due process of law, cannot be

so conclusively determined by the Legislature of the State, or by regulations adopted under its authority, that the matter cannot be the subject of judicial inquiry." Smyth vs. Ames, 169 U. S., 526; 18 Sup. Ct., 426; 42 L. Ed., 842.

"It seems clear to us, from the statement of the case which we have digested from the record, that the issue between the Railroad Commission of Georgia and the Southern Express Company was, had that company the right to add to the maximum charges prescribed by the commission the cost of the one cent revenue stamp required by the act of Congress to be attached to a receipt issued in each case of shipment? As the act of Congress in question does not purport to fix or affect the rates which carriers may charge for transportation, its construction is not necessarily involved in the solution of this issue. In the circuit court counsel for the complainants submitted that the construction of the revenue act is not involved in this case, and the judge of that court who passed the decree from which this appeal is taken so held, and in the opinion which he delivered said: The issues presented by the pleadings do not render necessary a construction by the court of the act of Congress imposing the war stamp tax, nor any clause of it. The shippers who refused to furnish the stamp or pay the cost of it did so on the ground that the demand thereof was an unlawful increase of the maximum rates prescribed by the commission. On this ground the complaint was made to the commission, and in its notice to the carrier the express company's action is referred to as "thus indirectly increasing the cost of transportation beyond the rate fixed therefor by the commission." When the carrier appeared before the commission in obedience to the notice, it showed cause, etc., respectfully, as the bill avers, by "denying all jurisdiction in the premises on the part of the said commissioners"; from which it is evident that the carrier relied on the act of Congress to support its action. Thus challenged, the commission proceeded to discuss and construe the act, and, in effect, held that it did not affect their power and duty to enforce the observance of the rates which they had prescribed. And later, when the carrier, still protesting, applied for leave to increase its rates, the commission refused to leave, and adhered to its judgment that the maximum rates which it had prescribed were just and reasonable, and should be enforced. It is true, but wholly immaterial, that the commissioners held and expressed the view that the war revenue act imposes the tax in question exclusively upon the carrier, and precludes it from relieving itself of the expense of affixing and canceling the stamp required to be attached to each bill of lading, manifest or other evidence of receipt, by passing that expense on to the shipper, and requiring him to submit to an increased rate to that extent. This construction is unsound, but, as we have just said, it is wholly immaterial; for the act of Congress neither prohibits nor authorizes such an increase in rates. Neither expressly nor by implication does it contain any provision on that subject. Crawford vs. Hubbell (April 16, 1900), 20 Sup. Ct., 701; Adv. S. U. S., 701; 44 L. Ed., ——; Express Co. vs. Maynard (April 16, 1900), 20 Sup. Ct., 695; Adv. S. U. S., 695; 44 L. Ed., ——. But the laws of Georgia, and the requirements of the Railroad Commission in pursuance thereof and in accord therewith, while the limitations of the fourteenth amendment of the constitution of the United States are observed, not only affect, but control, this carrier as to its Georgia business, and prohibit it from increasing its charges beyond the maximum rates prescribed by the commission.

"There is nothing in the bill in this case that tends to show that the tariffs of rates and classification, and the rules prescribed by the commission, and now sought to be enforced by it, do not observe the limitations of the Constitution of the United States. The one substantive fact which the bill with reasonable accuracy states is that the payment of the tax imposed by the war revenue law, as required by the order of the Railroad Commission, will aggregate to the Southern Express Company in the State of Georgia annually the sum of $42,000, which is repeated further on in this language: "That the payments for said stamps thus required to be made as a part of the rates imposed on the express company, and under

which it must do business, by the order of said commission, will result in irreparable damage and injury, and will cause a diminution of income, as nearly as can be ascertained, of forty thousand dollars per annum, and a loss to complainants, in a decreased value of their shares, of ten thousand dollars." And further on still the complainants again repeat, and "show that the said Southern Express Company, and its directors, having declared their intention to do so, will now pay the said revenue tax out of the income and profits of the company, and will thereby diminish the assets of the company, and lessen the dividends thereof, and the value of its shares." There is no statement whatever of the amount of income of the company from its Georgia business (intrastate business), nor from its other business (interstate business), nor from both together, either gross income or net income, or profits of the company. It is stated simply that the tax will aggregate in the State of Georgia annually the sum of $42,000, and that this will cause a diminuation of the income—an obvious result as to the net income. But neither the substantive fact averred nor the obvious conclusion tends to show that the commission has hitherto trenched upon, or is about to trench upon, the limitations of the constitution, and thus present a case within the remedial jurisdiction of a court of equity. The aggregate amount in the State of Georgia annually of the war revenue tax, as stated, namely, $42,000, shows the number of shipments by that carrier in that State (whether intrastate alone does not appear) of 4,200,000 annually. The argument of the pleader proceeds and shows that the express company has to make its own arrangements with the railroads for the carrying of its freight on passenger trains; that the contracts of the express company with the railroad companies are matters of negotiation, and the average charge of the railroads is 50 per cent of the express company's gross receipts; that it costs the express company 43 per cent of its receipts to do its business, and this, added to the average of 50 per cent which must be paid to the railroads, makes the total cost to the express company 93 per cent of its receipts; that considerable express business is done at a charge of 10 cents per package, and a very large proportion of its intrastate business is done at a charge of 25 cents per package. "Taking ninety-three per cent from these charges, and there is left a margin of seven-tenths of a cent on the 10 cent packages, and one and three-quarters of a cent on the 25 cent packages. If the express company is compelled to pay one cent each on the receipts, it loses three-tenths of a cent on every 10 cent package, and makes only three-quarters of a cent on the 25 cent packages. This would materially reduce the very moderate profit of the business, and will so reduce the income of the company as to lessen any dividends payable to its shareholders, like the complainants." The argument proceeds, further, that in Section 9 of the act of the General Assembly of the State of Georgia approved December 24. 1896 (Pub. Laws, p. 28), to levy and collect a tax for the support of the State government for the years 1897 and 1898, all persons and companies doing an express business, and charging the public therefor, in the State of Georgia, were required to pay 2½ per cent on their gross receipts, and all persons, or the superintendent or general agent of each express company, were required to make a quarterly return, under oath, in the form therein prescribed, under the penalty of indictment, conviction and punishment, pursuant to Section 1039 of Volume 3 of the Code of 1895, and a failure to pay the tax will subject such corporation to a forfeiture of its charter. We notice this argument only to say that the "considerable express business done at a charge of 10 cents per package" is not affected by the action of the commission, because a reference to the tariffs prescribed by it, referred to in the bill and made a part of the record, shows that the lowest maximum rate prescribed therein is 25 cents, and the adding of one cent to the 10 cent rate would not make a rate in excess of that allowed by the commission's tariff. We suggest, further, that the argument shows no reason why the tax imposed by the government of the United States should be added to the commission's rates that does not apply with at least equal force to the tax of 2½ per cent on their gross receipts which the State government is shown to have levied. We say with

at least equal force; we think with greater force, because this last tax would adjust itself to the shipments uniformly, and one who shipped a small package, or a package for a short distance, for the rate of 10 cents, would not be required to pay as much as one who shipped a larger package for a longer distance at the maximum rate shown in the commission's tariffs of $1.40 per hundred pounds. The increase made on this basis would be uniform, and not unjustly discriminative between shippers; while the increase which the carrier proposes to make by adding the tax imposed by the war revenue act does manifestly discriminate, largely and unjustly, between the shipper of a small package for a short distance at a low rate and the shipper of a larger package the longer distance at the larger rate. Though each shipper is charged one cent, the relation of this charge to the service is unequal. Further, it does not appear but that the 50 per cent of the express company's gross receipts which the railroads impose upon it by negotiation, and which charge more largely diminishes the revenues of the express carrier, should not, with equal justice and reason, be added to the maximum rates prescribed by the commission. This is absurd and is suggested only to illustrate the utter want of force in the argumentative pleading which the bill attempts to put in the place of a showing of substantive facts.

"It seems clear to us that the bill makes no case for the interference of a court of equity to restrain the action of the Railroad Commission of Georgia, and that the demurrer, though some of its special grounds which we have not recited may have been not well taken, should have been sustained. This disposes of the appeal and of the cross appeal.

It is therefore ordered that the decree of the circuit court be, and the same is hereby, reversed, and that the suit be, and it is hereby, dismissed, at the cost of the complainants."

102 Federal Reporter, pp. 799-803.

The opinion we have just quoted was dissented from by Judge Shelby of the Circuit Court of Appeals, but since Judges Pardee and McCormick are still on the Circuit Court of Appeals for this district it is very certain that the principles laid down in this opinion are still the law, so far as this Circuit Court is concerned. The case was appealed to the Supreme Court of the United States, but the questions at issue were not decided by that court, for the reason that the law made the basis of complaint by the express company was modified or repealed during the pendency of the case and the Supreme Court did not deem it necessary to pass upon the subject matter of the litigation, as that subject matter had ceased to exist. (183 U. S., p. 115.)

Therefore, the opinion of the Circuit Court, above quoted, remains at this time as the last and highest expression on the subject there at issue, and is applicable to the facts of the matter at issue in this opinion. The State Fire Insurance Commission is a ratemaking body and as such has fixed insurance rates in this State and having fixed these rates the insurance companies will not be authorized to make an additional charge against policy holders in the issuance of policies, even though such additional charge should be only in the express amount of the tax paid on each policy to the federal government. The tax manifestly is a subject for consideration by the Commission, for as a part of the over-head charges or operating expenses of each insurance company it enters into the making of reasonable rates. In other words, this tax must be not out of the proceeds received for the service rendered.

Pond on Public Utilities, Secs. 455, 459.

We do not mean to state that the tax should not be considered by the State Fire Insurance Commission, on the contrary we mean to say that that body is the only body or person authorized to consider the amount and effect of this tax in making insurance rates, and the matter is wholly without and beyond the jurisdiction of the companies themselves. We do not undertake to say whether or not the amount of this tax should be added by the State Fire Insurance Commission to the present rates promulgated by it, for we personally do not know whether the present insurance rates under the imposition of this tax are reasonable or unreasonable, nor do we express any opinion on that question, for that is a matter peculiarly within your jurisdiction and in no sense of the word within the jurisdiction of this Department. We are quite certain that the law is that the State Fire Insurance Commission has the right to fix maximum rates, as prescribed in the statute, but that in the exercise of this power it must not violate the constitutional rights of the insurance companies. In other words, that the rates fixed by it must be reasonable and fair and not confiscatory. It is rather difficult to define what are reasonable and fair rates to be charged for any character of public service, but the following from Messrs. Beale & Wyman's work on Railroad Rate Regulation probably presents the elementary principles as well as it will be found expressed by any authority:

"Sec. 312. The reasonableness of the schedule as a whole depends, as has been seen, upon whether it yields a fair return to the carrier. This is largely a mathematical question. The carrier is entitled, first, to pay all expenses, which would include both the actual expenses of operation and also certain annual charges that must be paid before any real profit can be realized. He is entitled, furthermore, to gain a fair profit on his capital invested. The determination of the actual amount of the capital invested may be a matter of some difficulty; once determined, the rate of profit upon that amount of capital is a question which will be determined, generally speaking, by the ordinary business profit of the time and place. A schedule of rates will be reasonable from the point of view of the carrier if it yields him a net profit equal to that which would be realized, as a business question, from any other business where the capital and the risk were the same." (183 U. S., p. 876.)

V.

You are therefore advised:

(a) That the fire insurance companies as between themselves and their policy holders must pay for, attach and cancel the revenue stamps placed upon each insurance policy issued.

(b) The insurance companies can not charge the amount of cost of the revenue stamps attached to a policy to the policy holder or assured, nor can it add the same to the premium and collect the same from the policyholder.

(c) The imposition of the Federal tax is a proper matter for consideration by the State Fire Insurance Commission in making insurance rates. The whole duty of the Commission in this respect is to make reasonable rates, as is expressly declared in the law itself. The revenue tax is only an element to be considered in rate making, like any other tax or operating expense and is entitled to neither

more nor less consideration. If the present insurance rates are reasonable, notwithstanding the addition of this tax, then that ends the matter. If the addition of this tax will make the present rate unreasonable, then manifestly the State Fire Insurance Commission should amend its rates so as to make them reasonable after the addition of such tax. The Federal law does not prohibit the shifting of the burden of this tax on the policy holder, but such an act is prohibited by the State law, which requires the insurance companies to write insurance at the rates prescribed by the State Fire Insurance Commission.

(d) Policies of fire insurance written after the enactment of the Federal revenue clause and prior to December 1, 1914, should be stamped with the proper Federal revenue stamps, provided they will not become effective until on or after December 1, 1914; if such policies were to become effective before Decmbr 1, 1914, then of course it is not necessary to have the revenue stamps attached thereto.

(e) The question as to whether the companies may shift the burden of paying for the revenue stamps on each policy on to their local agents is not one within the jurisdiction of this Department or of the State of Texas, under our present laws, but one wholly within the jurisdiction of the Federal Government. A ruling from us on the question would settle nothing, as the revenue measure in this respect is subject only to the construction of the Internal Revenue Department. On this question the ruling of the Internal Revenue Department should be obtained by any party interested, and should thereafter be followed. We refrain therefore from expressing an opinion outside of our jurisdiction and make no ruling on the question as to whether or not the insurance companies may require their local agents to pay for the stamps placed on policies issued by them.

Very respectfully,

C. M. CURETON,
First Assistant Attorney General.

INSURANCE—FOREIGN CORPORATIONS.

Acts of the Thirty-third Legislature, Chapter 106, Sections 2, 3, 21, 22, 25, 26.

Collier's Insurance Laws, Sections 192, 214, 215, 218 and 219.

1. A foreign insurance company having a permit to transact business in the State must write all policies issued on property within this State in accordance with the laws of the State, regardless of the fact that the policy may have been ordered from and may be written at the home office of the company located beyond the boundaries of the State.

2. Where such a company writes a policy at less than the maximum rate prescribed by the commission, it must file an analysis of such reduced rate with the State Fire Insurance Commission, as provided by law.

3. The failure of any such company to thus obey the law will subject it to a forfeiture of its permit, and its officers and agents to prosecution.

August 28, 1915.

To the State Fire Insurance Commission, Capitol.

GENTLEMEN: You have transmitted to us for consideration a policy of insurance issued by the X Company, a foreign corporation, engaged in the fire insurance business, but having a permit to transact business in the State of Texas.

This policy of insurance was written by the company at its home office beyond the boundaries of the State. It was sent to local agents, and they were offered a commission of five per cent. The policy was written at a twenty-five cent rate, whereas the maximum schedule rate on the property as made by the State Fire Insurance Commission would be fifty-nine cents.

The policy was not accompanied by an analysis of the rate made by it in this instance, nor has the company complied with the law, by the terms of which it is authorized to write policies of insurance at less than the maximum schedule rate. The policy has not been delivered to the policy holder, and we do not know whether the insurance was effectuated or not, but assume that it probably was by means of a binder, or some other method of consummating the contract prior to the delivery of the policy, but whether it was or not is immaterial for the present consideration.

We will treat the policy as though the insurance had been consummated, in order that we may present to you the principles of law which govern instruments of this sort. It is believed by your department, with reason, that the method of business sought to be carried on in this instance is one which, if it was indulged in by foreign insurance companies of this State who at the same time hold permits to transact business in this State, is illegal. With this statement of facts, we will now pass to a consideration of the law governing in such cases.

All fire insurance companies transacting business in this State must do so in conformity with the terms and provisions of the Fire Insurance Commission law, which is Chapter 106, General Laws passed by the Regular Session of the Thirty-third Legislature. Section 2 of the Act of the Legislature named, which is Section 192 of Collier's Digest, Texas Insurance Laws of 1913, reads as follows:

> "After this act shall take effect, a maximum rate of premiums to be charged or collected by all companies transacting in this State the business of fire insurance, as herein defined, shall be exclusively fixed and determined and promulgated by the State Fire Insurance Commission created by this act, and no such fire insurance company shall, after this act takes effect, charge or collect any premium or other compensation for or on account of any policy or contract of fire insurance as herein defined in excess of the maximum rate as herein provided for, but may write insurance at a less rate than the maximum rate as herein provided for; provided, that when insurance is written for less than the maximum rate, such lesser rate shall be applicable to all risks of the same character situated in the same community."

It is plain from this provision of the law that it was not intended that fire insurance could be written on property in this State at a rate less than the maximum rate fixed by the Fire Insurance Commission, but when a less rate is used on any particular risk then

all risks of the same character situated in the same community take the lesser rate.

Section 22 of the same act likewise provides, in part, as follows:

> "No company shall engage or participate in the insuring or reinsuring of any property in this State against loss or damage by fire except in compliance with the terms and provisions of this act; nor shall any such company, knowingly write insurance at any lesser rate than the rates herein provided for, *and it shall be unlawful for any company so to do, unless it shall thereafter file an analysis of same with the Commission.* * * *"

These provisions referred to above make it plain that, in order for an insurance company to write a policy at a rate less than that fixed by the Fire Insurance Commission, that an analysis of such rate must be filed with the Commission. The writing of insurance at a rate less than that fixed by the Commission, accompanied by a failure to file an analysis of the same with the Commission,—in other words, a purposeful writing of insurance at a rate less than that fixed by the Commission without complying with the law is made a crime, under the law, and Section 25 of the act referred to declares that the Commissioner of Insurance and Banking, upon ascertaining that any insurance company or officer, agent or representative thereof, has violated any of the provisions of this act, may at his discretion, and with the consent and approval of the Attorney General revoke the certificate of authority of such company.

Section 21 of the act also declares that if any insurance company, affected by the provisions of this act shall violate any of the provisions of the act, the Commissioner of Insurance and Banking shall, by and with the consent of the Attorney General, cancel its certificate of authority to transact business in this State.

Section 26 provides:

> "Any insurance company affected by this act, or any officer or director thereof, or any agent or person acting for or employed by any insurance company, who, shall wilfully do or cause to be done, or shall wilfully suffer or permit to be done any act, matter or thing prohibited or declared to be unlawful by this act, or who shall wilfully omit or fail to do any act, matter or thing required to be done by this act or shall cause or wilfully suffer or permit any act, matter or thing directed not to be done, or who shall be guilty of any wilful infraction of this act, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than three hundred dollars ($300) nor more than one thousand dollars ($1,000) for each offense."

These provisions make it plain that penal prosecutions and revocations may be leveled against any company, officers or agents violating any provisions of the law, and that the certificate of authority of the company may be revoked, a guilty agent's authority revoked, and the company, or any of its agents, guilty of crime may be punished. It has been suggested that perhaps the X Company and those of its agents connected with the issuance of this policy would not be guilty, under the law, for the reason that this policy was written, in part, out of the State. As a matter of fact, the policy was to have been executed by the local agents within the State, and it would have

therefore been executed within the State and clearly within the terms of the statute.

But regardless of that issue, and assuming that the entire contract was consummated beyond the boundaries of the State, still the law is applicable to the X Company and may be enforced against it for all violations thereof of the character named.

Section 3 of the act declares:

"Every fire insurance company, every marine insurance company, every fire and marine insurance company, every fire and tornado insurance company, and each and every insurance company of every kind and name issuing a contract or policy of insurance, or contracts or policies of insurance against loss by fire *on property within this State,* * * * shall be deemed to have accepted such certificate and to transact business thereunder, upon condition that it consents to the terms and provisions of this act and that it agrees to transact business in this State, subject thereto. * * *"

Section 22 likewise declares:

"No company shall engage or participate in the insuring or reinsuring of *any property in this State against loss or damage by fire except in compliance with the terms and provisions of this act.* * * *"

These portions of the sections referred to clearly show that it is the purpose of the law to require that insurance policies issued on property in this State shall be issued in accordance with this law. It is true that the law could not be enforced against a company having no permit to transact business in this State and having no agent or representative in this State amenable to the law, nevertheless the law applies and is leveled against every company which insures property within this State. The only reason for not enforcing the law is the absence of the defendant, and not the fact that he has not violated the law.

The views here expressed are emphasized by the provisions of Revised Statutes, Article 4962, which make it unlawful for a non-resident insurance company to issue or cause to be issued, to sign or countersign, or to deliver or cause to be delivered any policy of insurance on property located in the State of Texas, except through a regularly commissioned or licensed agent of such company in the State of Texas. This article of the statute reads as follows:

"Whenever any person shall do or perform within this State any of the acts mentioned in Article 4961 for or on behalf of any insurance company therein referred to, such company shall be held to be doing business in this 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.

"Penalty, etc.—Any person who shall do any of the acts mentioned in Article 4961 for or on behalf of any insurance company without such company has first complied with the requirements of the laws of this State, shall be personally liable to the holder of any policy of insurance in respect of which such act was done for any loss covered by the same."

You are, therefore, advised that foreign fire insurance companies having a permit to do business within the State of Texas must, in issuing policies of insurance on property located within this State, conform these policies, both in form and rate, to the lawful actions and promulgations of the State Fire Insurance Commission; and this regardless of the fact that the policy may be issued at the home office upon request made through the mails or otherwise by the policy holder himself. That such companies in undertaking to write a policy at a rate less than the maximum rate prescribed by the Commission must comply with the law by filing an analysis with the Commission, as provided in Section 22, Chapter 106, General Laws, Thirty-third Legislature, and which is Section 215, Collier's Digest of Texas Insurance Laws, 1913.

You are further advised that a failure on the part of any company, of the status suggested, to comply with the laws of this State, will subject such company to the penalties prescribed in Section 21 of said Chapter 106, also Sections 25 and 26 of the same chapter, which said three sections are Sections 214, 218 and 219 of Collier's Digest of Texas Insurance Laws, edition of 1913.

Whether or not these several forfeitures, penalties and punishments may be awarded against the X Company, in the present instance, depends altogether on how far said company has gone with the present contract, on whether it has or has not violated the law in the particulars suggested on this or other occasions. Those are questions of fact, of course, concerning which we have not sufficient data before us. This opinion, however, we hope, will make plain to you the law which must govern, and that hereafter you will be able to promptly cancel out the permits of all companies which violate the law and properly punish any of their agents who are in the jurisdiction of any of the courts of this State.

Yours very truly.

C. M. CURETON,

Acting Attorney General.

AGENTS AND AGENCIES—FIRE INSURANCE AGENTS—INSURANCE—COMMISSIONER OF INSURANCE AND BANKING, POWER OF—ATTORNEY GENERAL, DUTIES OF.

Acts of the Thirty-third Legislature, Chapter 106.
Revised Statutes, Article 4966.
Insurance Redbook, Sections 192, 193, 196, 215, 218, 219, 435.

1. An insurance agent and his company which knowingly and wilfully issue an insurance policy for a lesser rate than that specified in the general basis schedules and produced by a proper application of these schedules, are both guilty of violating the law; may be punished by fine; the certificate of authority of the company may be revoked or suspended and the agent's license suspended or annulled.

2. Upon complaint being made in the form of an affidavit showing a violation of the law by the agent and the company, the matter should be set down for a hearing before the Insurance Commissioner in the presence of the Attorney General. and the parties should be given notice of this hearing a reasonable time before the date of hearing, not to

be less than ten full days excluding the day of the notice is mailed and the day of its receipt by the interested parties; if in the judgment of the Commissioner of Insurance and Banking, the license of the agent or the certificate of authority of the company, or both should be revoked or suspended, the same may be done by him, upon approval of the Attorney General.

August 18, 1916.

State Fire Insurance Commission, Captitol.

GENTLEMEN: We have examined the enclosed file of papers and the facts shown may be briefly stated for the purpose of this opinion, as follows: The agent of the X Insurance Company, residing in the city of Blank, wrote an insurance policy on a special hazard, for five years, charging therefor, a less premium than that specified in the general basis schedules, and without this company, having complied with the law permitting the writing of insurance at premium rates less than those set forth in the general basis schedules. The statements presented, also show a willful and purposeful violation of the law, at least so far as the agent is concerned. In fact, the file of papers contain the statement that this agent, when his attention was called to the fact that this policy was issued in violation of the law, replied that he "did not give a damn what the schedules said, that all the Commission could do would be to make him cancel and rewrite his policy for one year."

You desire to be advised what may be done. Chapter 106, Section 6, Acts of the Thirty-third Legislature (Insurance Redbook, Section 196) prescribes:

"The State Fire Insurance Commission shall have the sole and exclusive power and authority, and it shall be its duty to prescribe, fix, determine and promulgate the rates of premiums to be charged and collected by fire insurance companies transacting business in this State. As soon as practicable after this act shall take effect the State Fire Insurance Commission shall begin the work of fixing and determining and promulgating the rates of premiums to be charged and collected by fire insurance companies, throughout the State, and the making and adoption of its schedules of such rates, and then until such time as this work shall have been fully completed, said Commission shall have full power and authority to adopt and continue in force the rates of premium which may be lawfully charged and collected when this act shall take effect, for such time as it may prescribe or until the work of making such schedules for the entire State shall be completed. Said Commission shall also have authority to alter and amend any and all such rates of premiums so fixed and determined and adopted by it, and to raise or lower the same, or any part thereof, as herein provided. Said Commission shall also have authority to employ clerical help, inspectors, expert and other assistants, and to incur such other expenses as may be necessary in carrying out the provisions of this act; provided, that such expenses, including the salaries of the members of the Commission, shall not exceed in the aggregate the sum of one hundred thousand dollars ($100,000) per annum."

Sections 2 and 3, Chapter 106, Acts of the Thirty-third Legislature (Insurance Redbook, Sections 192 and 193) read:

(192.) "After this act shall take effect, a maximum rate of premiums to be charged or collected by all companies transacting in this State the business of fire insurance, as herein defined, shall be exclusively

fixed and determined and promulgated by the State Fire Insurance Commission created by this act, and no such fire insurance company shall, after this act takes effect, charge or collect any premium or other compensation for or on account of any policy or contract of fire insurance as herein defined in excess of the maximum rate as herein provided for, but may write insurance at a less rate than the maximum rate as herein provided for; provided, that when insurance is written for less than the maximum rate, such lesser rate shall be applicable to all risks of the same character situated in the same community."

(193) "Every fire insurance company, every marine insurance company, every fire and marine insurance company, every fire and tornado insurance company, and each and every insurance company of every kind and name issuing a contract or policy of insurance, or contracts or policies of insurance, against loss by fire on property within this State, whether such property be fixed or movable, stationary or in transit, or whether such property is consigned or billed for shipment within or beyond the boundary of this State, or to some foreign country, whether such company is organized under the laws of this State, or under the laws of any other State, territory or possession of the United States or foreign country, or by authority of the federal government, now holding a certificate of authority to transact business in this State, shall be deemed to have accepted such certificate and to transact business thereunder, upon condition that it consents to the terms and provisions of this act and that it agrees to transact business in this State, subject thereto, it being intended that every contract or policy of insurance against the hazard of fire shall be issued in accordance with the terms and provisions of this act, and the company issuing the same governed thereby, regardless of the kind and character of such property and whether the same is fixed or movable, stationary or in transit, including the shore end of all marine risks insured against loss by fire."

Section 22, Chapter 106, Acts of the Thirty-third Legislature (Insurance Redbook, Section 215), declares that no company shall engage or participate in the insuring or reinsuring of any property in this State against loss or damage by fire, except in compliance with the terms and provisions of the State Fire Insurance Commission act; that no company shall knowingly write insurance at a lesser rate than that provided for in the act, and it is made unlawful for any company so to do, etc. This section further declares that any company or any of its officers, directors or agents, general or local, doing any of the acts prohibited shall be guilty of unjust discrimination, which is made punishable as a misdemeanor. Section 25, Chapter 106, Acts of the Thirty-third Legislature (Insurance Redbook, Section 218) declares:

"The Commissioner of Insurance and Banking, upon ascertaining that any insurance company or officer, agent or representative thereof, has violated any of the provisions of this act, may, at his discretion, and with the consent and approval of the Attorney General, revoke the certificate of authority of such company, officer, agent or representative; but such revocation of any certificate shall in no manner affect the liability of such company, officer, agent or representative to the infliction of any other penalty provided by this act, and provided, that any action, decision or determination of the Commissioner of Insurance and Banking and the Attorney General in such cases shall be subject to the review of the courts of this State as herein provided."

Section 26 of the same act (Insurance Redbook, Section 219), reads as follows:

"Any insurance company affected by this act, or any officer or director thereof, or any agent or person acting for or employed by any insurance company, who, alone or in conjunction with any corporation, company or persons, who shall willfully do or cause to be done, or shall willfully suffer or permit to be done any act, matter or thing prohibited or declared to be unlawful by this act, or who shall willfully omit or fail to do any act, matter or thing required to be done by this act, or shall cause or willfully suffer or permit any act, matter or thing directed not to be done, or who shall be guilty of any willful infraction of this act, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by fine of not less than three hundred dollars ($300) nor more than one thousand dollars ($1000) for each offense."

From these various provisions, it is very clear that the insurance agent and his company which knowingly and willfully issue an insurance policy for a lesser rate than that specified in the general basis schedules and produced by a proper application of these schedules, are both guilty of violoting the law; both punishable by fine, as shown in the statutes quoted; the company may have its certificate of authority revoked, and the agent his license canceled or annulled. Revised Statutes, Article 4966 (Insurance Redbook, Section 435) reads:

"That whenever the Commissioner of Insurance and Banking shall have or receive notice or information of any violation of any of the provisions of this law, he shall immediately investigate or cause to be investigated such violation, and if a fire, fire and marine, marine, tornado, rent, accident, casualty, liability, health, elevator, disability, plate glass, burglary, bonding, title, surety or fidelity insurance company has violated any of such provisions aforesaid, he shall immediately revoke his license for not less than three months, nor more than six months, for the first offense, and for each offense thereafter for not less than one year; and if any person, agent, firm or corporation licensed by the Commissioner of Insurance and Banking as a fire, fire and marine, marine, tornado, rent, accident, casualty, liability, health, elevator, disability, plate glass, burglary, bonding, title, surety or fidelity insurance agent shall violate or cause to be violated any of the provisions of this law, he shall for the first offense have his license revoked for all companies for which he has been licensed, for not less than three months, and for the second offense he shall have his license revoked for all companies for which he is licensed, and shall not thereafter be licensed for any company for one year from date of such revocation."

From a reading of the foregoing statute, it is entirely clear that an insurance company violating the law, may have its certificate of authority revoked or suspended, and that the same character of punishment may be meted out to an agent who has violated the provisions of the law. Under the facts stated in the enclosed file of papers, both the company and the agent have been guilty apparently, of violating the laws of this State, and the Insurance Commissioner, upon proper proceeding, may revoke or suspend the certificate of authority of such company as well as the license of such agent.

I am authorized by the Attorney General, to state that when proper complaint has been made and a hearing had on the facts,

in which hearing he has agreed and expects to personally participate, if the facts warrant it, and the Commissioner of Insurance and Banking desires to revoke the certificate of authority of the company, or of the guilty agent, or desires to suspend the certificate of authority or license of either one or both, that he (the Attorney General) will approve the action of the Commissioner, under the terms of Section 25, Chapter 106, Acts of the Thirty-third Legislature. My view of the matter is that you should have laid before you, complaint in the form of an affidavit, showing as fully as may be, violation of the law by the agent and the company, together with such other relevant proof as may be accessible; that this affidavit and proof should be filed with the Commissioner of Insurance and Banking, whereupon, the charges should be set down for a hearing before the Commissioner, and in the presence of the Attorney General; notice should be given the company and the agent of the charges made, and of the date set for the hearing, and on said date, the hearing should proceed with due formality, and the conclusion and judgment of the Commissioner of Insurance and Banking, with the approval of the Attorney General thereon, should be entered on the records of the office of the Commissioner of Insurance and Banking. The hearing should be set at a date sufficiently distant to give the parties charged ample time to prepare to make their defense, and should, I believe, be not less than ten full days excluding the day the notice is mailed and received by the interested parties. In other words, about fifteen days from the date of the issuance of the notice.

Yours very truly,

C. M. CURETON,
First Assistant Attorney General.

INSURANCE AGENTS AND AGENCIES—FIRE INSURANCE AGENTS—FIRE INSURANCE BROKERS.

Revised Statutes, Arts. 4960, 4961, 4963, 4965, 4966.
Penal Code, Art. 642.

1. An insurance broker is one who acts as a middleman between the insured and the insurer and who solicits insurance from the public under no employment from any special company, but places the orders secured, either with companies selected by the insured or, in the absence of such selection, with companies selected by himself.
2. It is plain from the statutes of this State that insurance brokers are, under the statutes, to be regarded as insurance agents, and are, by the statute, made agents of the company with which they may place any policy of insurance.
3. One conducting an insurance brokerage business in this State is prohibited by law from conducting such business without first having secured a license as an agent from the Commissioner of Insurance and Banking.
4. An insurance company having a permit to transact business in this State cannot issue a policy except through a regularly commissioned and licensed agent, nor can it pay any commission to a broker to handle its business in this State, unless such broker is a regularly licensed agent under the laws of this State.
5. It appears, however, from the verbiage of Revised Statutes, Article

4963, that an unlicensed out-of-State broker can write, or cause to be written, policies of insurance on property in this State without violating the law, provided he delivers or causes such policies to be delivered through a duly licensed agent in this State.

6. However, where a local agent delivers policies for an out-of-State broker and receives therefor only a part of his regular commission, and the out-of-State broker receives the remainder, although paid to him by the company, the transaction is a division of the commission by the local agent with an outside unlicensed agent, in violation of the laws of this State, and the local agent's license may be revoked.

7. Where a company which is permitted to transact business in this State makes an agreement with an outside unlicensed broker for an assured to allow him ten per cent or more commission on business situated in Texas, and then the company has its local agent in Texas to issue a policy, and pays him therefor only a part of his regular commission, such a transaction is a mere simulated transaction and is in reality a division of commission with an outside broker or agent, in violation of the laws of this State.

8. Even should it be determined, however, that the insurance broker who places insurance for his customers is not an agent within the purview of the Texas statutes, still, if such insurance broker receive his compensation from the insurance company for placing the insurance with it, the law is violated by the company; if the broker is acting for a customer in placing the insurance, the services which he performs are services for his customer. The company, of course, is compelled to charge the customer the uniform rate for insurance, and if, in addition, it pays the broker for services which were in reality rendered to his customer, then the company is guilty of rebating and discrimination, as defined by the statutes of this State.

August 2, 1916.

State Fire Insurance Commission, Capitol.

GENTLEMEN: This Department has had various communications from you, and among others, one enclosing a letter from a State agent of one of the insurance companies, discussing the subject of insurance brokers, or those who purport to represent the insuring public in obtaining policies from insurance companies. I will not quote the letter referred to, as I expect to re-enclose it to you. It is my purpose in this opinion to discuss the question and fix the status of an insurance broker and those admitted companies which issue policies of insurance upon applications made to such broker under the laws of this State.

An insurance broker is one who acts as a middleman between the insured and the insurer, and who solicits insurance from the public under no employment from any special company, but placing the orders secured either with companies selected by the insured, or in the absence of such selection, with companies selected by himself. 16 American and English Enclycopedia of Law, p. 970. East Texas Fire Insurance Co. vs. Blum, 76 Texas, 653. A distinction is made by the authorities between an insurance agent and an insurance broker, the latter being one who procures insurance and negotiates between insurers and insured; the broker is generally regarded as the agent of the insured, and is ordinarily the agent of the insurer only to the extent of collecting the premium. East Texas Fire Insurance Co. vs. Brown, 82 Texas, 636.

Having determined clearly the status of an insurance broker as being one who procures insurance for the insured, we will next determine

the status of such person as affected by the statutes of this State. We think it quite plain from the statutes of this State, that insurance brokers are under the statute, and regardless of constructions made by the courts, in reality insurance agents. Revised Statutes, Article 4961 reads:

"Any person who solicits insurance on behalf of any insurance company, whether incorporated under the laws of this or any other State or foreign government, or who takes or transmits other than for himself any applications for insurance or any policy of insurance to or from such company, or who advertises or otherwise gives notice that he will receive or transmit the same, or who shall receive or deliver a policy of insurance of any such company, or who shall examine or inspect any risk, or receive, or collect, or transmit any premium of insurance, or make or forward any diagram of any buildings, or do or perform any other act or thing in the making or consummating of any contract of insurance for or with any such insurance company other than for himself, or who shall examine into, or adjust, or aid in adjusting, any loss for or on behalf of any such insurance company, whether any of such acts shall be done at the instance or request, or by the employment of such insurance company, or of or by any broker or other person, shall be held to be the agent of the company for which the act is done, or the risk is taken, as far as relates to all the liabilities, duties, requirements and penalties set forth in this chapter; provided, that the provisions of this chapter shall not apply to citizens of this State who arbitrate in the adjustment of losses between insurers and insured, nor to the adjustment of particular or general average losses of vessels of cargoes by marine adjusters who have paid an occupation tax of two hundred dollars for the year in which the adjustment is made; provided, further, that the provisions of this chapter shall not apply to practicing attorneys at law in the State of Texas, acting in the regular transaction of their business as such attorneys at law, and who are not local agents, nor acting as adjusters for any insurance company."

From the foregoing statute it is quite plain that anyone "who takes or transmits other than for himself, any application for insurance or any policy of insurance to or from such company or who advertises or otherwise gives notice that he will receive or transmit the same, or who shall receive or deliver a policy of insurance of any such company, or who shall receive or collect or transmit any premium of insurance—or do or perform any other act or thing in the making or consummating of any contract of insurance for or with any such insurance company other than for himself—shall be held to be the agent of the company for which the act is done or the risk is taken, as far as relates to all the liabilities, duties, requirements and penalties set forth in this chapter." The reading of the statute, it seems to us, leaves no room for debate that an insurance broker comes within the purview of the statute, and is, so far as the statute is concerned, an agent of the company with which he may place any policy of insurance. Under this construction, it follows that one conducting an insurance brokerage business is prohibited by law from conducting the business without first having secured a license from the Commissioner of Insurance and Banking. Revised Statutes, Article 4960, reads as follows:

"It shall not be lawful for any person to act within this State, as agent or otherwise, in soliciting or receiving applications for insurance of any kind whatever, or in any manner to aid in the transaction of the business

of any insurance company incorporated in this State or out of it, without first procuring a certificate of authority from the Commissioner of Agriculture, Insurance, Statistics and History (Commissioner of Insurance and Banking)."

The Penal Code, Article 642, declares:

"If any person shall transact the business of life, fire or marine insurance in this State, either as agent, solicitor or broker without his, or the company or association he represents, first obtaining a certificate of authority therefor from the Commissioner of Insurance and Banking, he shall be punished by fine of not less than five hundred nor more than one thousand dollars, and by imprisonment in the county jail not less than three nor more than six months."

Revised Statutes, Article 4963, reads:

"Any fire, fire and marine, marine, tornado, rent, accident, casualty, liability, health, elevator, disability, plate glass, burglary, bonding, title, surety or fidelity insurance company legally authorized to do business in this State, is hereby prohibited from authorizing or allowing any person, agent, firm or corporation that is a non-resident of the State of Texas to issue, or cause to be issued, to sign or countersign, or to deliver or cause to be delivered, any policy or policies of insurance on property, person or persons located in the State of Texas, except through regularly commissioned and licensed agents of such companies in Texas; provided, however, that this law shall not apply to property owned by the railroad companies or other common carriers, and provided further, that upon oath made in writing by any person that he cannot procure insurance on property through such agents in Texas it shall be lawful for any insurance company not having an agent in Texas to insure property of any person upon application of said person, upon his filing said oath with the county clerk of the county in which such person resides."

From this statute it is quite plain that an insurance company having a permit to transact business in this State cannot issue a policy except through a regularly commissioned and licensed agent, and our view of the matter is that such a company cannot pay any commission to brokers to handle its business unless such brokers are regularly licensed agents under the laws of this State. Revised Statutes, Article 4965. From what we have stated, it follows that all insurance brokers in this State must be duly licensed as agents under the statutes of this State, and that if they undertake to transact business as insurance brokers without such license, they are subject to prosecution and punishment under the law. Moreover, any insurance company having a permit to transact business in this State, which accepts insurance through unlicensed brokers, is itself guilty of violating the law, and is subject to punishment. Revised Statutes, Article 4966.

The proposition is plainly this: an insurance company cannot transact business in Texas, except through a duly licensed agent, and if it issues policies on Texas property at the instance of an insurance broker, then such broker is, under the laws of this State, its agent, and must be licensed; otherwise, both the company and the broker are guilty of violating the law.

It seems to appear, however, from the verbiage of the statute, Article 4963, that an unlicensed out-of-State broker could write or cause to be written, a policy on property in Texas, without violation

of the law, provided he delivered it or caused it to be delivered through a duly licensed agent within the State. Having this situation in view, the letter referred to presents this question:

"Under one proposition, we will suppose that outside brokers control the insurance on a large establishment in Texas. They write all they can in unadmitted companies and then arrange with certain local agents to write the balance in their admitted companies at a commission of five per cent. These local agents, to avoid violation of the law forbidding them to divide commissions with unlicensed agents, advise the company that they will only charge five per cent commission in their account and request the company to pay the brokers ten per cent, which would be no violation under this ruling."

The facts suggested in this quotation from the letter, to our mind, present a clear evasion of Revised Statutes, Article 4965 (Insurance Redbook, Section 434) in that the local agent does indirectly divide his commission with the unlicensed agent or broker residing beyond the boundaries of the State. Of course, as to whether or not it is an actual division of the commission is always a question of fact, but where a local agent agrees to surrender two-thirds of his usual commission or any part of his usual commission on business obtained through brokers residing beyond the boundaries of the State with the understanding, express or implied, that the remaining portion of the commission thus surrendered is to be paid to such unlicensed agent or broker, then the transaction, though clothed in the garb of assumed innocence, is nothing more nor less than a division of the commission by a local agent in violation of law, and in such case, the local agent's license should be promptly revoked, under the provisions of Revised Statutes, Article 4966.

Another state of facts suggested in the letter referred to, is there stated as follows:

"Under another proposition, we will suppose that the home office of a company makes an agreement with the broker for an assured to allow him ten per cent or more commission on business situated in Texas. Then the company writes the agent to issue a policy on this property and charge only five per cent commission on it. Sometimes, possibly to avoid the need of the agent keeping an exact record, the company writes out the policy in full and merely sends it to the agent for his signature."

This state of facts also suggests a plain violation of law, for it is only another color or cloak, by which the local agent divides his commission with an outside broker. Such conduct on the part of the agent presents the same quality of wisdom as that which made the ostrich famous; to wit, he buries his head in the sand and imagines that he is concealed from the officers of the law who seek him. As a matter of fact, however, he has concealed nothing. He has simply made a clean-cut division of the commission with an outside broker or agent in violation of Revised Statutes, Article 4965, and his license should be revoked under the terms of Revised Statutes, Article 4966.

Even, however, should it be determined that an insurance broker who places insurance for his customers is not an agent within the purview of the Texas statutes, if such broker receives his compensa-

tion from the insurance company for placing the insurance with it, the law is violated by the company. If the broker is acting for a customer in placing insurance, the services which he performs are, of course, services for his customer. The company, of course, is compelled to charge the customer the uniform rate for insurance; that is, the rate fixed by the Insurance Commission, or by the company, acting under authority of the Fire Insurance Commission Law. Now, if in addition, the company turns in and pays the broker for services which were in reality rendered to his customer, then the company is guilty of discrimination and rebating, as defined in Sections 22 and 23, Chapter 106, Acts of the Thirty-third Legislature.

Yours very truly,

C. M. CURETON,
First Assistant Attorney General.

INSURANCE—MUTUAL FIRE INSURANCE COMPANIES—BY-LAWS.

Acts of the Thirty-third Legislature, Chapter 29.
Revised Statutes, Art. 4874.
Acts of the Thirty-third Legislature, Chapter 105.

1. By-laws of a mutual fire insurance company cannot provide that a member of the company will have a vote for each policy which he has on a separate risk, but a member can have only one vote, regardless of the number of policies he may have with the company.
2. The by-laws of a mutual fire insurance company which limit the collection of an additional premium on demand of the board of directors, are too restrictive. Such additional premium must be made assessable at the discretion of the Insurance Commissioner, as well as the board.
3. The surplus required of a mutual insurance company cannot be limited by the by-laws, but there must be added each year ten per cent of the saving made by the company.
4. Mutual fire insurance companies organized under the laws of this State are amenable and subject to all the laws governing stock fire insurance companies, in so far as applicable, and not in conflict with the provisions of the mutual fire insurance company act.
5. Mutual companies are subject to the valued policy law and the anti-technicality law, and a provision in the by-laws declaring that in the event of a loss by a member, such loss shall be payable contingent on the member having paid his premium is in violation of these statutes, and void.
6. The by-laws of a mutual fire insurance company are, under the statute and elementary authorities, a part of its policy contract.

August 7, 1916.

Hon. John S. Patterson, Commissioner, Insurance and Banking, Capitol.

DEAR SIR: We have examined the charter and by-laws of the South Texas Ginners Mutual Fire Insurance Company, and find the charter in proper form. We find certain objections to the by-laws, which will now be noted. Section 1 of Article 6 of the by-laws, in part, reads as follows:

"Each policy holder is a member of the company, and is entitled to a vote for each policy on separate plants that he holds."

This part of the by-laws is in conflict with Section 6, Chapter 29, General Laws of the Thirty-third Legislature, which reads:

"Every person to whom a policy of insurance has been issued by a mutual company incorporated in this State shall be a member of such company so long as his policy remains in force and shall be entitled to one vote at the meetings of the members of such companies, and shall further be entitled to his equitable share of all benefits derived from being a member of such company."

It will be noted from the statute just quoted that a person holding a policy is entitled to one vote in all meetings of the company; he is entitled to a vote by reason of being a member of the company, and not by reason of holding more than one policy. We would suggest that that portion of the by-laws quoted above be stricken out, and in lieu thereof the statutory language be used.

Section 6 of Article 6 of the by-laws provides: "Every member of this company, in addition to his premium shall be liable for a sum equal to another annual premium collectible on demand by the board of directors." This section is too restrictive; the additional premium should be collectible, not only on demand of the company's board of directors, but assessable at the discretion of the Insurance Commissioner. Section 7, Chapter 29, Acts of the Thirty-third Legislature, reads as follows:

"The by-laws of every company organized under this act shall provide that every member, in addition to his annual premium paid in cash, or in cash and premium notes, shall be liable for a sum equal to another annual premium; or it may provide a sum equal to three or five annual premiums. Such additional liability being assessable at the discretion of the Insurance Commissioner or the company's board of directors, for the member's proportionate share of losses and expenses should the company's fund become impaired."

We suggest as appropriate language in which to word this provision, the following: "Every member, in addition to his annual premium, shall be liable for a sum equal to another annual premium, which additional liability shall be assessable at the discretion of the Insurance Commisioner, or the company's board of directors, for the member's proportionate share of losses and expenses, should the company's fund become impaired."

Section 10 of Article 6 of the by-laws is likewise too restrictive in this: that it puts limitation upon the surplus which is to be created. This section reads as follows: "A surplus fund shall be created by setting aside, not less than ten per cent of the net earnings of the company, over and above the 40 per cent of the premium set aside, as required by law, until such surplus equals 100 per cent of the premiums collected the preceding year." Section 8, Chapter 29, Acts of the Thirty-third Legislature, which contains the provision requiring the creation of a surplus fund, in part, reads:

"* * * shall provide for the accumulation of a surplus fund to which shall be added not less than ten per cent of the annual saving, etc."

It will be noted from the law quoted that the 10 per cent addition

to the surplus fund is to continue annually for all time, and is not to end when the surplus reaches a certain amount, as is provided in Section 10 of the by-laws. We suggest as an appropriate provision in the by-laws, defining the surplus, the following: "A surplus fund shall be created, which shall consist of 10 per cent of the annual saving made by the company, to which shall be added the same amount each succeeding year; and in determining the profits or saving to be distributed among the members, 40 per cent of the actual cash premiums paid on policies in force for one year, and a pro rate reserve on risks that have more than one year to run, shall be deemed a sufficient reserve on such policies, out of which no dividends to members shall be paid."

We also direct your attention to Section 5 of Article 6 which is in terms as follows "It is mutually understood and agreed that the payment of a loss to any member is contingent on that member having paid his premium as required." In connection with this Section, we desire to direct your attention to Section 15, Chapter 29, Acts of the Thirty-third Legislature, which provides:

> "Any mutual company organized for any purpose mentioned in this act shall be amenable to and subject to the provisions of all laws of this State governing stock fire insurance companies, in so far as they are applicable to mutual companies, and not in conflict with the provisions of this act."

It is quite plain from the statute quoted, that those provisions of the fire insurance laws of the State, not in conflict with the provisions of the special law governing mutual companies apply to mutual companies as well as to companies having a capital stock. We will now quote two provisions of law which apply to stock fire insurance companies, and under the statute above quoted, of necessity apply with the same force to mutual companies such as the one which it is proposed to organize. The provisions we refer to are as follows:

> " * * * fire insurance policy, in case of a total loss by fire, of property insured shall be held and considered to be a liquidated demand against the company for the full amount of such policy; provided that the provisions of this article shall not apply to personal property." R. S., Art. 4874.
>
> "Be it enacted by the Legislature of the State of Texas, that no breach or violation by the insured of any of the warranties, conditions or provisions of any fire insurance policy, contract of insurance, or application therefor, upon personal property, shall render void the policy or contract, or constitute a defense to a suit for loss thereon, unless such breach or violation contributed to bring about the destruction of the property." (Sec. 1, Chap. 105, Acts 33d Legislature.)

The by-law, quoted above, seems to be in direct conflict with the valued policy law (Revised Statutes, Article 4874) in this, that unless the member has paid the premium, the policy would not be a liquidated demand; but there is no exception in the law, and in the event of a loss, the policy, under the statute is a liquidated demand. The by-laws cannot engraft onto the statute, any provision not contained in the statute itself. Westervelt vs. Mohrenstecher, 34 L. R. A., 477; Nicolet National Bank vs. City Bank, 8 Am. St. Rep., p. 643. The anti-technicality statute, quoted above, declares that a breach or

violation by the insured, of any of the warranties, conditions, or provisions of the policy or application shall not render void the policy contract, or constitute a defense. Section 5 of the by-laws, above quoted, is a condition which being contained in the by-laws, is a part of the policy contract issued by the mutual company. Under the plain language, therefore, of the statute, the failure to pay the premium would not constitute any defense, and this provision of the by-laws is necessarily void. That the by-laws of a mutual company constitute a part of the policy contract, is statutory and elementary. Acts of Thirty-third Legislature, Chapter 29, Section 8. 21 Am. and Eng. Encyc. of Law, pp. 267 and 268. Protection Life Insurance Co. vs. Foote, 79 Ill., p. 361; Mutual Fire Insurance Co. vs. Miller Lodge, 58 Md., 463; Donville vs. Farmers Mutual Fire Insurance Co., 113 Mich., 158; Miller vs. Hillsborough Mutual Fire Assurance Association, 42 New Jersey Equity, 459.

You are advised, therefore, that section 5 of these by-laws is in conflict with the valued policy law and the anti-technicality law, quoted above, and should be eliminated from the by-laws. When the by-laws have been corrected in the manner suggested in this opinion, we will be pleased to approve the charter, as provided by law, when the same is presented to us.

Yours very truly,

C. M. CURETON,

First Assistant Attorney General.

INSURANCE—MUTUAL ASSESSMENT—ACCIDENT INSURANCE—DIRECTORS —NUMBER OF.

Revised Statutes, Arts. 4714 and 4794.

1. Revised Statutes, Article 4714, providing that insurance companies must have not less than seven nor more than thirteen directors applies to mutual assessment accident insurance companies incorporated under Revised Statutes, Article 4794.

January 25, 1916.

Hon. John S. Patterson, Commissioner of Insurance and Banking, Capitol.

MY DEAR SIR: We hove examined the charter of the Bankers Health and Accident Association of Houston and find that the same can not be approved, for the reason that Section 2 of the charter provides that the number of its directors shall be five and gives the name and residence only of five directors.

Article 4794 of the statute provides that any number of persons, not less than five, may organize this character of corporation, but this, of course, refers to the number of incorporators and has no reference to the number of directors. The number of directors required is governed by Revised Statutes, 4714, which provides that the directors shall not be fewer than seven nor more than thirteen. There being no special statute governing the number of directors which a company of this character shall have the provisions of Article 4714 apply.

Article 4714 was Section 5 of the General Insurance Act of 1875, and in so far as it may apply applies to all insurance companies.

In the case of the State of Texas vs. Burgess, 101 Texas, 524, the court held that Article 4705 (old Article 3028), which was in reality an outgrowth of the Act of 1875, of which Article 4714 was a part, applies generally to all insurance companies, unless special provision be otherwise made. On the same line of reasoning as that used in the above case our construction of the law is that Article 4714 applied to companies such as the applicant in this case.

You are advised therefore that we will be unable to approve this proposed charter until the number of directors provided for has been increased to seven and the names and residences of seven have been given in the charter.

We are returning the charter to Mr. Price, the attorney for the company, with a copy of this opinion, but we are transmitting the original carbon to you for your information and guidance.

Yours very truly,
C. M. CURETON,
Acting Attorney General.

INSURANCE—COMMON AND MUTUAL HAIL—COMMISSIONER OF INSURANCE, AUTHORITY OF.

Vernon's Sayles' Civil Statutes, Art. 4918g.
General Laws Thirty-third Legislature, Chap. 22, Sec. 7.

1. A mutual hail insurance company incorporated under the provisions of Chapter 22, General Laws of the Thirty-third Legislature, has the right to sell the real estate paper in which it has invested its surplus funds for the purpose of paying its policy holders in cases of necessity in unprecedented losses.

2. It is not improper for the Commissioner of Insurance and Banking to require the losses to be paid out of this accumulated fund to be submitted to his department for approval prior to payment.

3. The Commissioner of Insurance and Banking is authorized by the statute to designate a depository for the funds and securities of the mutual hail insurance company incorporated under the provisions of Chapter 22, General Laws of the Thirty-third Legislature.

October 18, 1915.

Hon. John S. Patterson, Commissioner of Insurance and Banking, Capitol.

DEAR SIR: The facts presented by your communication and the letter accompanying same are substantially as follows:

The Texas Mutual Hail Insurance Company was chartered under an act of the Thirty-third Legislature authorizing the creation of private corporations without capital stock for the purpose of providing mutual insurance against loss or damage by hail. It now appears that this company has met with considerable losses and that it is going to take all of its available assets to pay them. However. they have within the last two years accumulated some four thousand dollars over and above their running expenses, which amount has been invested in first mortgages on real estate as provided by the

statute. These mortgages do not mature soon and it is necessary for the company to raise funds thereon in order to pay their losses. They propose now to sell these notes and utilize the receipts therefrom to settle their losses.

Article 4918g of Vernon's Sayles' Civil Statutes being Section 7 of the Act of the Legislature under which this company was incorporated, provides:

"All companies incorporated under this act shall set aside 60 per cent of all premiums collected as a policy holders' fund for the payment of losses, which fund shall be used for no other purpose, and the remainder of the gross premiums collected shall be used, if needed, for paying the expenses of said company, and if not needed for such purpose such remainder not so used shall be added to the policy holders' fund at the end of the current year, and if, at the end of such current year the total of said policy holders' fund has not been appropriated or necessary in the payment of losses to policy holders, then such amount of said fund so remaining may be invested in first mortgage notes on lands in this State, said investment not exceeding 50 per cent of the value of said lands, or in bonds of this State, provided said bonds have been approved by the Attorney General, which funds or securities shall be deposited in trust for said policy holders with any bank approved by the Commissioner of Insurance and Banking as a reserve fund, which fund may be used for the payment of policy holders, *if necessary*, in case of excessive and unprecedented losses, and such company may collect and receive the interest and dividends thereon to be used in defraying the expenses and paying the losses of said company."

In view of the condition of this company we are of the opinion that the company has the right to sell the real estate notes accumulated by it and to deposit the funds realized therefrom in some bank approved by you as a reserve depository for the company and which fund may be used for the payment of policy holders if necessary in case of excessive and unprecedented losses. It is not entirely clear from this statute that your department is to be the judge of the necessity of paying out this revenue fund to policy holders; that is, it is not clear that the losses on which this fund is to be paid must be first approved by you before payment, but since you are charged with administering the law and the company's reports must be made to your department and since its entire affairs are subject to your inspection it will not be improper for you to require the presentation of all claims against this company to be made to you for your examination and approval before their payment.

Yours truly,
C. M. CURETON,
First Assistant Attorney General.

MUTUAL HAIL INSURANCE—BY-LAWS OF COMPANY.

October 27, 1914.

Hon. W. W. Collier, Commissioner of Insurance and Banking, Capitol.

MY DEAR SIR: We are herewith returning you the charter and by-laws of the Jones and Haskell Mutual Hail Association.

The applicants, Mr. A. C. Thompson and others, made application to you for permission to solicit insurance against hail, on the mutual plan. The application was granted and they were authorized to solicit as requested, under the terms and provisions of Chapter 22, Acts of the Thirty-third Legislature. Having completed their solicitation they now make application for the issuance of a charter, by authority of the provisions of that chapter of the General Laws passed by the Regular Session of the Thirty-third Legislature.

Section 3 of this act of the Legislature provides that a charter cannot be issued until an amount equal to not less than fifty per centum of the first premium for insurance has been paid in cash to the company and the premium note taken for the balance, with the provision that annual premiums must aggregate not less than twice the maximum liability to be incurred on any one risk.

In Article 4 of the by-laws it is stated that the rate of insurance shall be ten per cent of the amount per acre insured, one per cent of which must be paid in cash, which goes to a promotion fund, the balance to be secured by note and first mortgage lien on the property. By reference to the affidavit accompanying the by-laws it is shown that the first premium of ten cents per annum and the premium note of ninety cents per acre is in the hands of the association, against which assessments may be levied. It is plain that these provisions do not comply with the law.

I.

From the foregoing provisions it is clear that the actual premium levied against each acre of land is $1.00 and only ten cents of it has been paid in cash. The statute above referred to provides that one-half of it must be paid in cash and the balance evidenced by a note. The by-laws and affidavit do not comply with the law, in the respect just mentioned.

II.

The affidavit should likewise show the maximum amount on any one risk. This is not shown, nor can it be determined by the by-laws. This should be stated, and the total amount of premiums levied and collected or to be collected should be shown, in order that we may determine whether or not the annual premiums aggregate not less than the maximum liability to be incurred on any one risk.

III.

Section 7 of Chapter 29, General Laws of the Thirty-third Legislature, provides that the by-laws of every company organized under the act shall provide that every member, in addition to his annual premium paid in cash, or in cash and notes, shall be liable for a sum equal to another annual premium, or the by-laws may provide a sum equal to three or five annual premiums, such additional liability being made assessable at the discretion of the Commissioner or the

company's board of directors for the members' proportionate share of loss and expense, should the company's funds become impaired. The by-laws do not contain this provision.

IV.

It seems to us that Article 20 of the by-laws is somewhat in conflict with Section 6 of Chapter 29 of the General Laws of the Thirty-third Legislature, for this section of the act provides:

"Every peron to whom a policy of insurance has been issued by a mutual company incorporated in this State shall be a member of such company so long as his policy remains in force and shall be entitled to one vote at the meetings of the members of such companies, and shall further be entitled to his equitable share of all benefits derived from being a member of such company."

We are not sure that we understand the meaning of Article 20, but it provides that members of the association can retain their membership by paying in cash one-half the original cash fee collected each year. If the purpose of this is to restrict the rights of members, as set forth in Section 6, then it is not authorized by the law.

V.

Section 8 of Chapter 29, aforesaid, reads as follows:

"The by-laws of such companies shall specifically provide for the rules and regulations of the government, providing for the collection of adequate premiums or assessments, either all in cash or part cash and part by note, such premiums being based upon the greater or less risk attached to the property insured, and they shall state clearly and plainly the extent of each member's liability to other members, shall provide for the accumulation of a surplus fund to which shall be added not less than 10 per cent of the annual saving being made by the company, shall require (provide) for the bonding of the company's officers, and shall name such other provisions and safeguards as may be deemed proper and not contrary to the laws of the State, and a notice in heavy type shall be printed on all policies calling to the attention of the insured that the by-laws are a part of his contract with the company."

It will be noted that this section requires that the by-laws shall make the rate proportionate to the risk attached to the property insured. The by-laws submitted by this association do not do this, for they assume to make and levy a level rate or level premium. It may be that the risk of crops and the hazard of hail is such that it is unnecesary to do this, we merely direct attention to that proposition. However, this section does provide that the by-laws shall contain a provision for the accumulation of a surplus fund, to which shall be added not less than ten per cent of the annual saving being made by the company, and does require that the by-laws contain a provision that the company's officers shall be bonded. We fail to find these provisions in the by-laws.

VI.

We notice that the by-laws contain a provision for a promotion fee. The law does not authorize a promotion fee in companies of this character. The expenses of a company of this sort are provided for in Section 10 of Chapter 29, referred to, and the expense which may be incurred is limited to 35 per cent of the annual premiums, a statement of which must be annually made to the Commissioner. If any promotion fee is to be incurred it must come out of this 35 per cent of the annual premiums. The by-laws should contain a provision stating what per cent of the annual premiums may be used for the purpose of expenses and if the members desire may direct in what manner this shall be expended.

VII.

We note the several articles of the by-laws relative to the election of directors, general and special meetings, etc. These several provisions do not seem to be in harmony with that portion of the law governing these subjects. Section 15 of Chapter 29 provides that corporations organized thereunder shall be amenable and subject to the provisions of all the laws of the State governing stock fire insurance companies, in so far as they are applicable, and not in conflict with the provisions of that act. Chapter 29 makes no provision as to the number of directors corporations organized thereunder shall have, nor as to their annual or special meetings or other subjects relative thereto. Therefore, under Section 15, we must defer to those provisions of law relative to stock fire insurance companies which are applicable to corporations chartered under Chapter 29. Therefore, so far as the number and qualifications of directors are concerned, the election of directors, the annual meeting of the members of the company, special meetings, quorum of members and as to who shall be directors and other features not necessary to discuss at this time, reference must be had to various articles of the statute, among others the following: Revised Statutes, Articles 4713 to 4722, inclusive, copies of which are shown in Sections 58 to 66 of your Texas Insurance Laws, Edition of 1913.

According to the charter, Article 5, and the by-laws the number of directors of this proposed association shall be five, but by reference to the Revised Statutes, Article 4714, it will be seen that this association must have not less than seven directors, all of whom must be members of the company, that is policyholders of the company, because the policyholders are its members. The other provisions of law referred to in the articles of the statute above should be substantially followed also in the preparation of the by-laws.

VIII.

For the reasons suggested, the charter and by-laws referred to are not in proper form and can not be filed by you.

Yours very truly,

C. M. CURETON,
First Assistant Attorney General.

DIGEST OF OPINIONS ON INSURANCE.

CORPORATIONS—INSURANCE—CASUALTY COMPANIES—TITLE GUARANTY COMPANIES—WORDS AND PHRASES.

By C. M. Cureton, First Assistant Attorney General.

1. A corporation chartered for the purpose of doing a title insurance business under Sayles' Statutes, Articles 4942a, et seq., cannot have its capital stock paid in by conveying to the corporation an abstract company.
2. The capital stock of such corporation can only be paid in in cash or be invested in bonds of the United States or of this State or of any county or municipality of the State or in bonds or first liens upon unencumbered real estate, etc.
3. "Cash" means ready money, either in current coin or in legal tender, in bank bills or checks payable and receivable as money.
4. Statutes cited or construed: Vernon's Sayles' R. C. S., Arts. 4942a and 4942e.

Authorities cited:

Offutt vs. Troll, 139 S. W., 487.
Watson vs. Martin, 77 Atl., 450; 20 Ann. Cases, 1288.
Dazet vs. Landry, 30 Pac., 1064.
Hopper vs. Flood, 54 Cal., 218.
Blair vs. Wilson, 28 Gratton (Va.), 165.
Haviland vs. Chace, 39 Barbour, 283.
Pallisier vs. U. S., 136 U. S., 257.

(47 Op. Atty. Gen., 193.)

INSURANCE—MUTUAL ASSESSMENT ACCIDENT INSURANCE.

By C. M. Cureton, First Assistant Attorney General.

1. A mutual assessment accident insurance company can engage only in accident insurance, except it may, as provided in Chapter 149, General Laws of the Thirty-fourth Legislature, issue policies, insuring against disability resulting from sickness or disease, and in connection therewith pay to the beneficiaries of its deceased members a funeral benefit which shall not exceed $100.
2. A mutual assessment accident insurance company cannot issue straight life insurance policies.
3. Constitution and statutes cited or construed: Harris' Constitution, Art. 3, Sec. 35; R. S., Arts. 4724, 4794, 4798; Acts 28th Legislature, Chap. 111; Acts 34th Legislature, Chap. 149, Sec. 2.

Authorities cited:

Giddings vs. San Antonio, 47 Texas, 556.
Sutherland on Statutory Const., Sec. 120.
National Bank vs. Matthews, 98 U. S., 621.
National Bank vs. Whitney, 103 U. S., 99.
Fowler vs. Scully, 13 Am. Rep., 609.

(48 Op. Atty. Gen., —.)

TITLE INSURANCE—CONTRACTS.

By C. M. Cureton, First Assistant Attorney General.

1. A title insurance policy must specify the length of time for which it is to run in order for it to be a valid and enforceable contract.

2. A title insurance company cannot issue a policy of indemnity without fixing a definite date when the risk assumed by it shall cease, but every such policy must specify the term for which it is to run.

3. Statutes cited or construed: R. S., Art. 1121, Sub. 69; Acts 32d Legislature, Chap. 117, Sec. 1, Sub. I.

Authorities cited:

5th Elliott on Contracts, Sec. 4422.
Frost on Guaranty Insurance, Sec. 235.
1st Cooley's Briefs on Insurance, p. 12.
Fochrenback vs. German American Title and T. Co., 12 L. R. A. (N. S.), p. 466 and 7.
State of Minnesota vs. Minn. Title Ins. and Trust Co., 19 L. R. A. (N. S.), 639.
5th Elliott on Contracts, Sec. 4832.
1st Cooley's Briefs on Insurance, 513.
Clark, Rosser & Co. vs. Brand & Hammonds, 62 Ga., 23.
Strehn vs. Hartford Fire Ins. Co., 19 Am. Rep., 770.
Fuchs vs. Germantown Farmers' Mutual Ins. Co., 60 Wis., 291.
Marshall Fire Ins. Co. vs. Morris & Co., 105 Ala., 505.

(43 Op. Atty. Gen., 45.)

TITLE INSURANCE—ABSTRACT PLANT.

By C. M. Cureton, First Assistant Attorney General.

1. A title insurance company which owns an abstract plant for the purpose of facilitating its business as a title insurance company may likewise utilize such abstract plant for the purpose of making and selling abstracts generally to the public.

2. Statutes cited or construed: R. S., Art. 1121, Sub. 69; R. S., Art. 1164; Acts 33d Legislature, Chap. 117, Sec. 1, Sub. I.

Authorities cited:

Brown vs. Schleier et al., 118 Fed., 931.
Canning Co. vs. Stanley, 133 Iowa, 60.
Trenton Pettorico Co. vs. Title Guaranty, etc., Co., 64 N. Y. Supp., 116.
Economy Bldg. and Loan Assn. vs. West Jersey Title and Guaranty Co., 44 Atl., 854.
Elmer vs. Title Guaranty and Trust Co., 50 N. E., 420.
Eillock vs. Idaho Title, etc., Co., 133 Pac., 119.
Bodine vs. Wayne Title, etc., Co., 33 Penn. Super., 63.

(43 Op. Atty. Gen., 50.)

INSURANCE—CASUALTY INSURANCE COMPANIES—TAXATION.

By C. M. Cureton, First Assistant Attorney General.

1. Casualty companies are subject to the gross receipts tax enacted by the Thirty-second Legislature.
2. Statutes cited or construed:

Revised Statutes, Article 4764, General Laws, Thirty-second Legislature, Chapter 108.

(42 Op. Atty. Gen., 44.)

COMMISSIONER OF INSURANCE—AUTHORITY OF—INSURANCE COMPANY —CANCELLATION OF PERMIT OF.

By C. M. Cureton, First Assistant Attorney General.

1. The Insurance Commissioner cannot revoke the permits of an insurance company for failure to pay a judgment against it, until the judgment has become final, and unless it be a valid judgment.
2. So long as there is pending an independent original suit to determine the validity of a default judgment against an insurance company, the judgment is not final within the terms of Revised Statutes, Article 4508, and the Insurance Commissioner has no authority to revoke the company's permit.
3. The Commissioner has no authority to determine the validity of the judgment so long as a suit is pending to set it aside, nor to pass upon the question of the jurisdiction of the courts with reference to such suit; those are questions for the judicial department of the government, and not within the authority of the Commissioner, who is an executive officer.
4. Statutes cited or construed:

Revised Statutes, Articles 1589, 4508; Constitution, Article 2, Section 1.

Authorities cited:

H. & T. C. Ry. Co. vs. Red Cross Stock Farm, 91 Texas, 628.
Edleman vs. McGlathery, 74 Texas, 280.
Black on Judgments, Vol. I, Sec. 302.
Smith vs. Giles, 60 Texas, 341.
Howard Iron Works vs. Buffalo Elevating Co., 81 N. Y. Supp., 452.
In re Boyd, U. S. 3d Fed. Cases, 1091-1093.
Nashville, etc., Ry. Co. vs. Mattingly, 40 S. W., 673.

(46 Op. Atty. Gen., 134.)

OPINIONS RELATING TO IRRIGATION LAWS.

IRRIGATION.

Section 14, Irrigation Law of 1913.

Section 14 of the Irrigation Law of 1913 was not intended to affect the priority of an appropriation theretofore made, and an appropriator under the former irrigation law who fails to comply with the requirements of Section 14 does not lose thereby his priority.

The right of an appropriator under the Irrigation Law of 1895 does not extend to the full amount of the water as described in his application, but it is limited to the amount of water actually used under the said appropriation.

December 9, 1914.

Hon. J. C. Nagle, Chairman of Board of Water Engineers, Austin, Texas.

DEAR SIR: In your letter of December 1 you submit to us the following two questions:

"1st. An irrigation corporation was chartered in 1902. In pursuance of said incorporation, it complied with the irrigation law then in force. It also constructed a large canal and installed a pumping plant on the "A" river, and continued to operate its pumping plant and canal till and including the year 1912. Subsequent to 1912, said irrigation incorporation was dissolved, but disposed of said pumping plant and canals to "B." Neither the said company nor "B" made any filing with the Board of Water Engineers prior to July 1, 1914. Has the said company and the vendee lost the priority of right by failing to comply with the law relative to the making or certified filing with this board prior to July 1, 1914, or would "B," in the event he files an application now and is granted a permit, have priority over subsequent and intervening appropriators the same as the company would have had, had it complied strictly with the law?

2nd. If "B" has any priority, does such priority extend to the full limits of the company's declaration, or would it be limited by the extent of land actually irrigated by "B," or by the said company, prior to its conveyance to "B"?

As we understand the facts stated in your first question, an irrigation corporation made an appropriation of water under the irrigation law of 1896 and complied with said law by constructing a canal and pumping plant, after having filed its application, with the sworn statement required by said law, but that the vendee of the said irrigation company has failed to comply with that portion of Section 14 of the irrigation law of 1913 requiring that every person, association of persons, corporations, etc.:

"* * * who shall have heretofore filed for record, or shall hereafter, in compliance with the provisions of Section 12, file for record the sworn statement in writing as set out therein, shall, within one year after this act shall take effect, file in the office of the board a certified copy of such sworn statement and a true copy of the map as described in Section 12, and in addition thereto, a sworn statement showing what has been done under or in pursuance of such filing or statement; what work or construction has been completed or partially completed; what portion of said work is in use and what portion is in possession and not in actual use; what amount or volume of water is being actually taken. * * *"

You desire to know whether such vendee by failing to comply with the law lost his priority to the water to which he was entitled under the former law.

Section 12 of the irrigation act in substance requires every person who has heretofore constructed any dam, reservoir, canal, etc., for any of the purposes named in the act, who has not heretofore done so, to file within one year after the act takes effect in the office of the county clerk a sworn statement showing the number of acres to be irrigated, the size of the ditch, the map, etc. It is to be observed that the language of this section is the same as the language of Article 3120, Revised Statutes, 1895, being Section 6 of the irrigation law of 1895, under which appropriations were made under said law.

Section 12 relates to persons or corporations who have before the passage of the act constructed dams, canals, etc., for the purposes of the act, and its apparent purpose is to secure the recording in the county clerk's office of the record of such construction, etc. Where such record has already been recorded, as the law of 1895 required, it is, of course, unnecessary to record it again in the county clerk's office.

Section 14 provides that all persons who have filed with the county clerk the record provided for in section 12, either before or after the passage of the new irrigation law, shall file a certified copy of such record with the Board of Water Engineers, in order that such board may have a complete record of all claims of appropriators existing prior to the taking effect of the new law, to guide the board in the proper disposition of other applications for appropriations.

In the second paragraph of Section 14 of the new law is a provision which allows any person or corporation who has prior to January 1, 1913, diverted water for any of the purposes in the act and who is continuing so to divert it to secure the right to continue to divert the same amount of water by filing a sworn statement with the board, thus giving to such person or corporation a prior right to the water as against the State, although it has made under the irrigation law of 1895 no valid appropriation of water. The last phrase of said paragraph of section 14 is as follows:

"Provided that nothing herein shall be construed to affect or relate to any priority or right as between any claimants, appropriators or users from any source of water supply."

Sections 15 and following, of the act of 1913, have to do with applications to appropriate "the unappropriated water of the State." These sections regulate and provide for new appropriations under the new law.

Section 98 of the act is as follows:

"Nothing in this act contained shall be held or construed to alter, affect, impair, increase, destroy, validate or invalidate any existing or vested right, existing at the date when this act shall go into effect."

Article 3119, Revised Statutes, 1895, is as follows:

"As between appropriators, the first in time is the first in right."

It is settled that the right to take water from a stream and to use it for irrigation or other lawful purpose is a valuable property right.

Bigham Bros. vs. Port Arthur Channel and Dock Co., 106 Texas, 192; 97 S. W., 686.
Mud Creek Irrigation Co. vs. Vivian, 74 Texas, 170; 11 S. W., 1078.
McGee Irrigation Ditch Co. vs. Hudson, 22 S. W., 967 (Sup.).

It is apparent that the value of a right of appropriation of water depends, and oftentimes depends entirely, upon its priority. After the riparian owners take the water to which they are entitled and the first appropriator takes his proper quantity of the water in the stream there may be none for the second appropriator. The act of 1913, as has been pointed out, disclaims any intention to affect or impair any vested right. It would, of course, be unconstitutional in so far as it might undertake to impair vested rights. Since the right of an appropriator under a previous law is a valuable property right a requirement in a later law that such appropriator comply with certain regulations, under penalty of losing his property right, would be an impairment of vested rights. The irrigation law of 1913 does not provide that if an appropriator under the former law fails to comply with Section 14 of the law he shall lose his right of priority. The law merely requires of all users of water the filing of the certified copy of the sworn statement, etc., without expressly and explicitly fixing any penalty for the failure to file the same. This is a rule or regulation imposed for the assistance of the board in the administration of the law.

In Sections 39 and 40 penalties are imposed upon any one who diverts any water coming under the act without first complying with the provisions of the law, and the appropriator under the law of 1895 who continues to divert water without complying with Section 14 would be subject to the prosecution and penalties provided by these sections. The last phrase of Section 14, to the effect that "nothing herein shall be construed to affect or relate to any priority or right as between any claimants, appropriators or users from any source of water supply" is doubtless intended to have general application to all the provisions of Section 14, and if it does is an express disavowal on the part of the Legislature of any intention that a failure to comply with Section 14 shall in any way affect priorities as between claimants or appropriators of water.

We therefore advise you that in our opinion the vendee referred to in your letter, by failing to file the sworn statement with the board, did not lose his right of priority, but that he is subject to the prosecution and penalties prescribed in Sections 39 and 40, if he has diverted any water since July 1, 1914.

Your letter contains a suggestion that the vendee may perhaps maintain his priority by making application and obtaining a permit under Section 15 of the act. Section 15 of the act, however, refers to new appropriations of unappropriated water of the State, and we believe that if the vendee should make such new appropriation he would thereby abandon his old appropriation and whatever rights of priority he may have under it. We believe that the proper course for

him to follow would be to file with the board at this time the certified copy required by section 14, and that this, though the law requires that such certified copies be filed prior to July 1, 1914, would be such compliance with the law as would exempt him from prosecution for using the water after the filing of such certified copy.

In your second question you inquire as to the extent of the right of priority of the vendee of the original appropriator, whether it would extend to the full limit of the original appropriation, or whether it would be limited to the amount of water now actually being used.

The irrigation act of 1895 declares that the unappropriated waters of the State are the property of the public and may be acquired by appropriation. Appropriation is made under the law by the filing with the county clerk of the sworn statement and map required by Article 3120, Revised Statutes, 1895, the beginning of the work of construction within ninety days after the filing of the statement and its diligent and continuous prosecution to completion under the terms of Article 3122. Completion is defined in Article 3123 as "the conducting of the water in the main canal to the place of intended use." It is uniformly held that in those States where there is no statute designating the completion of the work as the consummation of the appropriation and fixing a time for such completion the appropriation is completed by the application of the water attempted to be appropriated to beneficial use within a reasonable time.

Kinney on Irrigation, 2n ed., Sec. 725.

The statute of this State, above quoted, fixes the time and manner for the completion of an appropriation, being similar to the California statute. It appears, therefore, that the amount of water which an appropriator under the act of 1895 became entitled to use on the completion of the appropriation was measured by the water by him conducted in the main canal to the place of the intended use. But because the amount of water available for irrigation is always limited, especially in arid regions, it is well settled that the doctrine of "beneficial use" has continuous application and even where by statute the completion of the irrigation works is made the consumnation of the appropriation the appropriator must, nevertheless, within a reasonable time, make actual application of the water to a beneficial use, under penalty of losing his right by abandonment or non-user.

See Kinney on Irrigation, 2nd ed., Sec. 726.
Bailey vs. Tintinger (Mont.), 122 Pac., 575.

The same rule applies also to the continued use of the water. The rule of beneficial use is thus stated by Kinney:

"Upon this proposition there is one general rule which may now be considered as settled law in all of the States where the law of appropriation is in force, and that is that the quantity of water which can be lawfully claimed under a prior appropriation is limited to that quantity or amount which is needed and within the amount claimed, and within a reasonable time, is actually and economically applied to the beneficial use or purpose

for which the appropriation was made or to some other beneficial use or purpose."

Many cases are cited in support of the principle.

See Kinney on Irrigation, 2nd ed., Sec. 1877.

In a California case the rule is thus stated:

"If this be so, then his rights to water would be measured, as are the rights of every other private appropriator—not by the amount which he took, not by the amount which he claims, not, as the court decrees, by an amount sufficient thoroughly and properly to irrigate a thousand acres of land, but it would be measured by the amount which he has been actually taking and applying to a beneficial use upon that land. His right to priority in the use of water would also be measured by and limited to this quantity.

See Leavitt vs. Lassen, 157 Cal., 82; 29 L. R. A. (N. S.), 213.

This rule is recognized in Texas in the case of Biggs vs. Miller (147 S. W., 632-636), in which it was held that no matter how much water a prior appropriator might be entitled to use under its original appropriation it could not by injunction deprive a subsequent appropriator of water which the first appropriator did not use or need on lands in cultivation served by his system.

So in the case stated by you, while the appropriator referred to may have been entitled to use within a reasonable time after the completion of its works the full amount of water measured by its original declaration, the continuance of such priority to its full extent, would depend upon the continued beneficial use of the water, and if the appropriator or his vendee has ceased to apply any portion of the water to beneficial use he has to that extent lost his priority over subsequent appropriators.

Yours very truly,

G. B. SMEDLEY,
Assistant Attorney General.

IRRIGATION—WATER RIGHTS.

Water can be appropriated under the Irrigation Law of 1913 only as appurtenant to the land described in the application and permit, but the right acquired is not inseparably appurtenant to the land.

One who has appropriated water for irrigation, either under the irrigation law of 1895 or under the law of 1913, may change the place of use of the water to land other than that for which the appropriation was made, or may transfer his right to another for use on other land without obtaining a permit to do so from the Board of Water Engineers, provided the rights of others are not injured thereby, and provided a greater amount of water is not used.

The same is true of persons or corporations owning irrigating systems; but the rights of persons owning lands contiguous to the canal, or of other persons, must be respected.

If an appropriator of water, under the irrigation law of 1895, who fails to file before July 1, 1914, the certified copy and sworn statement provided by Section 14 of the new irrigation law, tenders these documents to the Board after July 1, 1914, they should be filed by the board.

The right given by the last paragraph of Section 14 of the irrigation law to one using water prior to January 1, 1913, can be acquired only by filing before July 1, 1914, the sworn statement required by Section 14.
Discussion of priorities between persons using water prior to the enactment of the irrigation law of 1913, and appropriators under that law.
Irrigation Law of 1913.

January 18, 1915.

Hon. W. T. Potter, Secretary Board of Water Engineers, Building.

DEAR SIR: In your letter of December 31 last, you submit to the Attorney General a request for his opinion on several separate questions, which we will undertake to answer in their order. The first question is as follows:

"Will an appropriator of water, where the permit to appropriate same is given by the Board of Water Engineers under the present irrigation law, be limited in his appropriation to the land described in his application, or may he apply the water permitted to be appropriated to other and different contiguous lands than those described in the application, provided that such use will not involve the taking of a greater quantity of water than that defined in the permit?"

Since this question involves the construction of the new irrigation law, it is necessary to refer briefly to several portions of the law which relate to the question.

Section 15 of the new irrigation law has to do with applications for appropriation of water. It specifically provides the form and contents of the application for appropriation, and after setting out the form and the contents of the applications under the act, the following additional requirement, as to the contents of the application, is made, if the appropriation is intended for the purpose of irrigation, "and if such proposed use is for irrigation, a description of the lands proposed to be irrigated and, as near as may be, the total acreage thereof." It is also required that the application be accompanied by a map showing "substantially the location and extent of the proposed works," etc. The last paragraph of Section 15 of the law is as follows:

"Provided, however, that nothing in this act shall be held or construed to require the filing of an application or procuring of any permit for the alteration, enlargement, extension or addition to any canal, ditch or other work that does not contemplate or will not result in an increased appropriation or the use of a larger volume of water."

Section 37 of the law regulates the form of the permit to be issued by the board under an appropriation, and, among other things, it is required that if the appropriation is for irrigation the permit must contain "a description and statement of the approximate area of the lands to be irrigated."

Section 47 of the law defines the term "water right" as follows:

"A water right is the right to use the water of the State when such use has been acquired by the application of water under the statutes of this State and for the purposes stated in this act."

The definition of the words "water right" in the law does not un-

dertake to limit or confine the right to the particular land for which the appropriation was made.

Section 48 of the law expressly limits the rights to the use of water acquired under the act to the amount which is devoted to "beneficial use."

By Section 59 is provided that "the permanent water right shall be an easement to the land and pass with the title thereto."

Section 73 requires that all surplus water taken from a stream and not used by the appropriator shall be conducted back to the stream. It does not require that the same be conducted to the stream if not used on the land for which it was originally appropriated.

Sections 81 and 82 prohibit the diversion of water from the watershed of the stream to the prejudice of any person or property within the watershed, and require that before water can be diverted from the watershed a special application shall be made to the Board of Water Engineers.

Section 44 fixes the fees for appropriation of water, and in the event the water is appropriated for irrigation purposes the fees are measured by the acres of land proposed to be irrigated, being one cent for each acre.

The foregoing sections are the only sections of the law which appear to have any direct bearing on the question stated. On account of the provisions of Sections 15 and 37, above referred to, which require that the application shall describe the land proposed to be irrigated and that the permit shall describe the land to be irrigated, and in view of the authorities which will be hereinafter referred to, we think it clear that under the act an appropriation of water for the purpose of irrigation can be made only as appurtenant to a certain tract of land.

Section 59, as has been above shown, expressly provides that a permanent water right shall be an easement to the land and pass with the title thereto. It is perhaps true that this section relates rather to a water right acquired from a person or corporation owning an irrigation ditch, than to the water right acquired by the original appropriator. This provision of Section 59 is, however, in harmony with the general purpose of the law, which we believe to be, that the right acquired by an appropriation is acquired only as an incident to a certain tract of land; that is, the land described in the application and in the permit; and under the authorities, it is clear that such water right, in the absence of a reservation, would pass with an absolute conveyance of the land to which it is appurtenant.

It does not follow, however, that the right acquired by an appropriator is inseparably appurtenant to the land, or that the right to use the water may not be transferred to other land owned by the appropriator, or that such right may not be sold apart from the land to another land owner. There is nothing in the new irrigation law of this State expressly providing that the right acquired by an appropriator shall be inseparably appurtenant to the land described in the application and permit, and nothing to expressly prohibit the appropriator from transferring his rights to the water to another person who will devote the same to a beneficial use, or from using the water himself on other land owned by him.

The question, therefore, which is presented, is whether from those sections of the law, which apparently make the right acquired by an appropriator appurtenant to the land described in the application, it is to be inferred that it was the intention of the Legislature that such right should not be separated from the land to which it originally attached.

There are no decisions in Texas on this question, and before examining the decisions of some of the other States, we will refer briefly to some general statements of the law in Cyc. and two of the leading text books on irrigation.

On page 720 of 40th Cyc. is the following statement of the rule:

> "A prior appropriator of water has the right to change the point of diversion, or the place, manner or purpose of the use of the water, so long as he does not thereby take a greater quantity of water than that originally appropriated or otherwise injuriously affect the rights of junior appropriators or claimants, but he cannot make a change which results in his use of more water than he is entitled to under his appropriation, or a greater waste of water, to the detriment of those who have rights in the water subject to his appropriation."

Many authorities are cited in the foot-notes in support of the text, and it is to be observed that the only authorities cited contrary to the text are cases from the State of Oregon.

In Section 677 of Farnham on "Waters and Water Rights," we find the following:

> "In case the water was appropriated for irrigation purposes, the appropriator may use it upon a different portion of his land from that to which it was first applied."

In support of this statement the case of Woolman vs. Garringer, 1 Mont., 535, is cited.

In the second edition of Kinney on "Irrigation and Water Rights," this question is discussed at length in Section 871, and also Sections 1015 and 1016, and the decisions and statutes of many of the States are reviewed.

It is enough, in this connection, to state that it appears from the sections of the text book referred to that in the majoriy of the States the appropriator may use the water on land other than that for which it was originally appropriated, and that the author is a very vigorous defender of this doctrine.

The case of Johnston vs. Little Horse Creek Irrigation Company, 13 Wyo., 208; 79 Pac., 22; 70 L. R. A., 341; 110 Am. St. Reps., 986, is perhaps the most valuable of the cases on this question on account of the similarity between the law of Wyoming construed in that case and the Texas irrigation law. In that case an appropriator had transferred to another the right which he had acquired by his appropriation for the purpose of irrigation. It was contended by the subsequent appropriator that this act amounted to an abandonment of his right on the part of the prior appropriator, it being argued that a sale of a water right separate from the land for the irrigation of which the water was appropriated was not permitted under the laws of Wyoming. It is shown by the opinion of the court that it was not.

contended that there was any statute expressly prohibiting the sale of a water right acquired for the irrigation of land separate therefrom, but the claim was made that such prohibition was necessarily implied from certain provisions of the statutes. The statutes referred to were practically identical with the portions of Sections 15 and 37 of our irrigation law which relate to the application and permit requiring that the land on which the water is to be used shall be described in each. The court held that from these statutes it was not necessarily implied that an appropriator could not transfer his right to another separate from the land, saying in the opinion:

"It may be conceded that the various provisions in the statute requiring a showing as to the lands to be irrigated, and a description thereof in the final certificate of appropriation, tend to emphasize the principle that a water right required for the irrigation of lands becomes appurtenant to the lands irrigated, but we are unable to give to such provisions the interpretation contended for by the learned counsel for plaintiffs in error. They do not, in our judgment, have the effect, in any true sense, of destroying the reason upon which the right of sale separate from the land is upheld. They do not, in our judgment, have the effect to declare that the right to use water acquired by appropriation is not in itself a property right, nor can any of the provisions to be found in our statute be legitimately construed as either expressly or impliedly depriving the right of its qualities as property which it otherwise might have, and which, in every other State, is conceded to it."

Further discussing this question, and explaining the reason why the requirement was made, that the original application should describe the land on which the water was to be used, the court said:

"There is no reasonable indication in the statutes, in our opinion, that the requirements for describing the land to be irrigated in applications for permits or in certificates of appropriation was adopted on the theory that the water right becomes inseparably attached to the particular land, so as to forever be incapable of transfer to other lands. A more reasonable view of the purpose of the requirement is to show that an actual beneficial use has been or is intended to be made of the water claimed to have been appropriated or intended to be appropriated; and to enable those charged with the duty of adjudicating priorities to determine upon some definite basis the amount and quality of the appropriation, as well as to preserve a convenient record of water rights as appurtenant to certain tracts of land. But the fact that the legislative development of this growing subject has failed to provide for a record of transfers of the right to other lands, which we think might be done, is not to be held ground for holding that the right of transfer does not exist."

The court held that the water right, when sold, became appurtenant to the other land if it was intended by the grantee for irrigation or other beneficial use, and without some beneficial use after sale it would doubtless be held that the right was abandoned. As showing why a water right should not be held to be inseparably appurtenant to land, the court said:

"Should the theory be adopted that water appropriated for the irrigation of a certain tract of land must be forever connected with that particular tract, and cannot be separated therefrom in any manner by sale, by any other equally beneficial use, or otherwise, much injustice might be caused by reason of the failure of the particular tract to further respond to the skill of the husbandman. It might become valueless for many reasons

unnecessary to mention, and the appropriator who may have expended much money and time in completing the appropriation would be compelled to forfeit it instead of supplying it to other lands. The State, certainly, as trustee of the water, and interested in its conservation and economical distribution, can hardly be concerned in having a particular tract of land irrigated in preference to any other. Moreover, forfeitures have never been favored in the law."

The Arizona statute, construed in the case of Slosser vs. Salt River Valley Canal Company (Arizona), 65 Pac., 332, is also similar to our Texas law in that it gave the right of appropriation for irrigation only to one owning arable irrigable land. Construing this statute in the above case the court held that only such land owner could appropriate water, and that a water right, to be effective for the purpose of irrigation, must be attached to and pertain to a particular tract of land. The court held, however, that the appropriator might convery his water right apart from the land to another owning irrigable land, basing this right of alienation upon the general right which one has to enjoy and dispose of his property, and upon necessity.

In illustrating how a water right, if inseparably appurtenant to a tract of land, might lose its value, the court said:

"The right of alienation of a water right is one which is based upon the general right of property, and arises out of the necessity, in order that injustice may not be done to the owner, of permitting such alienation, for the reason that it frequently happens, through no fault of the owner, and by the operation of natural laws, that land to which water rights have been attached becomes unsuitable for cultivation. Floods frequently wash away and destroy farming lands, or leave deposits of coarse gravel and boulders upon them; and other natural causes frequently render such lands not only unprofitable, but impossible of irrigation and cultivation. Natural justice, therefore, is subserved by recognizing the right of a water-right holder to change his appropriation, under such circumstances, to lands capable of profitable cultivation, or to sell his right to another, to be used by the latter for a beneficial use recognized by the statute."

The Nebraska statute was modeled after the Wyoming law, and under the statute is was held in the following two cases that an appropriation for irrigation can be made only as an incident to land to which the right to use the water attaches. See Farmers Irrigation Company vs. Frank, et al., 100 N. W., 286, and Farmers Irrigation Company vs. Gothenburg Water Power and Irrigation Company, 102 N. W., 487.

In the case last cited, the Gothenburg Company had made appropriation for power purposes and had filed, in accordance with the law, a map showing the location of its reservoir and canal; a subsequent appropriation was made by the other company, and thereafter the Gothenburg Company extended its canal and began to use the water for the purpose of irrigating lands contiguous to its canal as extended. The contention was made in the case that the Gothenburg Company had no right to use the water on land other than that for which it was originally appropriated. The court, after referring to the statutes on the question, answered the contention as follows:

"It would indeed be a harsh rule to hold that after appropriating water and after conveying it, it may be, for many miles, and at a great expense, the appropriator should not not be allowed to put it to a beneficial use at some other point than that to which it was first conveyed, if he can no longer make a useful application of it at the first location. It has been the uniform rule to allow appropriators of water, after it has been actually taken and applied to some beneficial purpose, to change the place or character of its use. Maeris vs. Bicknell, 7 Cal., 262; 68 Am. Dec., 257; Davis vs. Gale, 32 Cal., 26; 91 Am. Dec., 554; Woolman vs. Garringer, 1 Mont., 535; Wimer vs. Simmons, 27 Ore., 1; 39 Pac., 6; 50 Am. St. Rep., 685. The appropriation having actually been made by the defendant, it acquired the right to use the water thus actually appropriated, either for the purpose for which it was first taken, or for any other useful or beneficial purposes within the objects claimed in its notice of appropriation. There is no evidence that, by reason of the extension of defendant's ditch, any greater amount of water than 200 cubic feet per second is diverted; and as long as the defendant takes no more water by reason of the longer ditches than it had taken previously, and actually applies it all to a beneficial use, the plaintiff cannot complain."

The appropriation in the Nebraska case was made under the law of 1895, the language of which was similar to our irrigation law. Before the canal of the Gothenburg Company was extended, a statute was enacted authorizing a person or corporation, entitled to use water, to extend its ditch, flume, or aqueduct to places beyond that where the first use was made. Referring to this statute, the court in the case last above cited held that it was merely declaratory of the law as it existed before its enactment, but held that such extension of the canal could not be made without obtaining permission of the Board of Irrigation, for the reason that new statute became merely a portion of the general irrigation law, under which it was incumbent upon a person or corporation desiring to construct canals, etc., first to obtain permission of the board. It is interesting to note in this connection that the last paragraph of Section 15 of our law gives, at least by implication, the right to an appropriator to enlarge or extend its canal or ditch, but that this portion of Section 15 goes further than does the Nebraska statutes of 1903, in that it authorizes such extension without obtaining permission of the Board of Water Engineers so long as the extension does not contemplate or will not result in an increased appropriation or use of water.

The constitution of Idaho contains the following section:

"Sec. 4. Whenever any waters have been, or shall be, appropriated or used for agricultural purposes, under a sale, rental or distribution thereof, such sale, rental or distribution shall be deemed an exclusive dedication to such use; and whenever such waters, so dedicated, shall have once been sold, rented or distributed to any person who has settled upon or improved land for agricultural purposes, with the view of receiving the benefits of such water under such dedication, such person, his heirs, executors, administrators, successors or assigns shall not thereafter, without his consent, be deprived of the annual use of the same, when needed for domestic purposes or to irrigate the land so settled upon or improved, upon payment therefor, and compliance with such equitable terms and conditions as to the quantity used and times of use as may be prescribed by law."

In the case of Hard vs. Boise City Irrigation and Land Company, 76 Pac., 331; 65 L. R. A., 407, the contention was made that on ac-

count of this section of the Constitution, water which had been appropriated for irrigation for a certain tract of land could not be used on other land, but the court, while recognizing that the right to use water was appurtenant to the land, held that it did not become inseparably attached to the land, and that, even under this constitutional provision, the owner of the land for which the water was appropriated might change the place of use of the water, or might sell or transfer the water right to another so long as the rights of others were not interfered with.

In California, Section 1412 of the Civil Code expressly authorizes a person entitled to the use of water to change the point of diversion and also the place of use, if others are not injured by such change.

In Colorado, Section 3226 of the Revised Statutes expressly gives an appropriator the right to change the point or points of diversion of water by means of a petition addressed to the district court. The Supreme Court of Colorado, in the case of Latham Dam Company vs. Bijou Irrigation Company, 41 Col., 213; 93 Pac., 483, referring to this statute, said:

"The right to change the point of diversion or place of use of water which has been obtained by appropriation is one of the instances of ownership, and existed and was exercised in this State long before this remedial statute was enacted."

The Oregon court is the only court, as far as we have learned, that, in the absence of a statute making the right to use the water inseparably appurtenant to the land for which it was appropriated, has held that the appropriator may not use the water on lands other than those for which the appropriation was made. See

Whited vs. Cavin, 105 Pac., 396.
Ison vs. Sturgill, 109 Pac., 579.

Several of the states have enacted statutes attempting to make the right of an appropriator inseparable from the land. These statutes are referred to in Section 871 of Kinney on "Irrigation and Water Rights." As shown by the discussion in Sections 1015 and 1016 of Kinney's work, these statutes are perhaps of doubtful constitutionality, since the right to transfer property, so long as such transfer does not injure the rights of others, is ordinarily an incident to the right of ownership.

Article 1016 of Kinney's work contains an interesting discussion of the reasons why a water right should not be inseparable from the particular tract of land.

Recurring to our irrigation law, we conclude from the authorities which have been cited and for the reasons contained in the quotations made from them, especially from the Wyoming, Nebraska and Arizona cases, that while in Texas the right acquired by an appropriator for irrigation is appurtenant to the land described in the original appropriation and in the permit, the appropriator may use the water which he has appropriated on lands other than those for which the original appropriation was made by him, or he may transfer his rights to the water to another who will use the same on other land, provided

the rights of others are not injuriously affected thereby, and, provided, of course, a larger volume of water than that originally appropriated is not used. It is to be remembered, of course, that the water must be applied to a beneficial use and that the right to use the water continues only so long as it is so applied with reasonable diligence and only to the extent that it is so applied.

But for the last paragraph of Section 15 of our irrigation law, we would conclude, on the authority of the case of Farmers Irrigation Company vs. Gothenburg Water Power and Irrigation Company, 102 N. W., 487, above discussed, that an appropriator could not transfer his right to the water to other land without first obtaining permission of the Board of Water Engineers.

The last paragraph of Section 15, however, seems to indicate that it is not necessary to make application to the board in case of enlargement or extension of the irrigation works, unless an increased appropriation or use of water is contemplated.

Section 43 of the act gives the Board of Water Engineers the right "to adopt and enforce such rules, regulations and modes of procedure as it may deem proper for the discharge of the duties incumbent upon it under the provisions of this act," and a rule requiring application to the board before the diversion of water to land other than that for which it was appropriated, would be a salutary rule if the board had adequate power to enforce the same. We are inclined to believe that the law is defective and that it should contain a specific requirement that before water, appropriated for use in a particular place, may be diverted to other places of use a permit shall be obtained from the board. This would be of great assistance to the board in its work and would serve as a means of preventing such diversion of water to the injury of others.

Your second question is as follows:

> " 'A' is the owner of a certain area of land and, prior to the enactment of the present irrigation law, complies with the provisions of Article 4996, Revised Civil Statutes of this State; he appropriates and uses water in pursuance thereof on a stated area. May he transfer the use of the water he has appropriated to a contiguous area, provided such transference does not involve the use of a greater quantity of water, regardless of whether or not he owns, or does not own, such contiguous area?"

This question is practically the same as the first question in your letter, except that it relates to water appropriated under the irrigation act of 1895, being Articles 4991 and following of the Revised Civil Statutes of 1911. Under that irrigation act, the appropriation was accomplished by filing in the office of the county clerk a sworn statement showing the number of acres proposed to be irrigated, a description of the ditch, reservoir or other work, the volume of water to be used, etc., and by the construction and completion of the work within the time provided by law. The act did not provide for the issuance of a permit and it did not require that the sworn statement should describe the land on which the water would be used.

Under the same authorities, therefore, and for the same reasons which we have given in answering your first question, we advise you that the appropriator referred to in your second question may

use the water on a different tract of land from that for which the land was originally appropriated, provided the change in the place of use does not injure the rights of others, provided he does not use a greater quantity of water than that to which he is entitled under his appropriation, and provided, of course, he continues to apply the water to a beneficial use.

Your third question is as follows:

> " 'A' owns no land, but, prior to the enactment of the present irrigation law, complies with the provisions of Article 4996 of the Revised Civil Statutes of Texas, constructs a canal system, and has been delivering water under annual contracts, but has sold no permanent water rights; and under this system has been irrigating a given area for a number of years. 'A' now finds it more advantageous to extend his system to an area not heretofore served, and not owned by parties with whom he has heretofore had annual contracts. Does the present law require 'A' to make an application to this board for a permit to make this extension in order to serve the proposed new area?"

Our answer to this question is the same as the answer to the second question, and we add that, for the reason stated in our answer to your first question, it appears that the extension of the canal and the use of the water on the other land than that for which it was originally appropriated may be made without an application to the Board of Water Engineers for a permit.

In answering this question, we call particular attention to the fact that the water can not be applied to other lands than those for which it was originally appropriated if it results in an injury to the rights of any person. Both the irrigation act of 1895 and the present irrigation law give to the owner of land adjoining or contiguous to any canal, ditch, flume, or lateral, constructed and maintained under the law, a right to demand that the person or corporation owning and operating such canal, ditch, etc., furnish the necessary water to such person to irrigate his lands or for mining, etc. Corporations constructing irrigation systems or canals under these laws are public service corporations. They are given the right of eminent domain, and they are required to serve the public by furnishing water at reasonable rates and under reasonable regulations. See Borden vs. Trespalacios Rice and Irrigation Co., 82 S. W., 461; 98 Texas, 494; American Rio Grande Land and Irrigation Company vs. Mercedes Plantation Company, 155 S. W., 286.

Even though the owner of the canal system referred to in your third question has sold no permanent water rights, but has been delivering water under annual contracts, nevertheless, persons owning land contiguous to the system have a right, under the statute, to obtain permanent water rights at reasonable rates, and also have the right to use the water at a reasonable rental, and the irrigation system can not be extended and the water originally appropriated applied to other lands in the event the owners of the lands contiguous to the system as originally constructed demand permanent water rights or demand the use of the water. The owners of the lands contiguous to the canal system are expressly given, by Section 57, not only the right to demand a permanent water right, but also the right to use

or rent the water in the canal to irrigate their land, or for mining and other purposes. Of course, if the owners of the contiguous lands do not within a reasonable time request permanent water rights, or the use of the water, the canal company would have the right to extend its system and to furnish the water not contracted for to persons owning lands contiguous to the canal as extended and beyond the area served by the original canal.

Your fourth question is as follows:

"Under the same conditions as stated under the third proposition, if the lessees, or parties with whom 'A' has heretofore had contracts, find it to their disadvantage for any reason to continue to make the annual contracts with 'A' as they have heretofore been doing, would 'A' have the right, under his prior appropriation, to divert the water appropriated by him, to other and different lands through extensions of his existing works, without obtaining a permit from this board, provided he used no greater quantity of water than that originally appropriated by him?"

We think we have answered this question in our answer to your third question. If the owner of the canal, under the facts stated in your fourth question, were not permitted to extend his system so as to serve lands other than those originally served the value of his property would be practically destroyed. We believe, as we have stated in our answer to your first question, that in all cases of this character the law should require that the appropriator make application to the Board of Water Engineers for permission to extend his canal, but the law contains no such provision.

In answering your second, third and fourth questions, we call your attention to the fact that we do not mean to be understood as saying that the appropriator is not required to file with the Board of Water Engineers the certified copy and sworn statement showing the description, size, etc., of his works, as required by Section 14 of the irrigation law. As we have heretofore advised you, the failure to file such sworn statement will not affect the priority of the appropriation, but if such appropriator uses any of the waters of the State without filing such statement, he will be subject to the penalties prescribed in Sections 39 and 40.

Your fifth question is as follows:

" 'B' filed his water appropriation with the county clerk in conformity with Article 4996 of the Revised Civil Statutes of Texas, before the present irrigation law went into effect; 'B' failed to file a certified copy of such appropriation with the Board of Water Engineers before July 1, 1914. Should the Board of Water Engineers accept his certified filing and sworn statement, if tendered to it at any time subsequent to July 1, 1914?"

Replying to this question, we beg to advise you that we have heretofore ruled in an opinion of date December 9, 1914, addressed to the Hon. J. C. Nagle, Chairman of the Board of Water Engineers, that while a certified copy and sworn statement required to be filed by Section 14 of the irrigation law, according to the language of the section, shall be filed within one year after the act takes effect, the failure to file such certified copy will not, and could not, affect the priority of the right of appropriation, but will render the person or corporation

required to file it subject to the penalties provided in Sections 39 and 40. The purpose of requiring the filing of this statement is that the Board of Water Engineers may have a record of all persons, etc., who are entitled by appropriations under the old law to the use of water from the streams of the State. While such statement should be filed in the time fixed by the law, and while a person or corporation would be subject to prosecution and penalties for the failure so to file it, the purpose of the requirement will be at least partially accomplished by the filing of the statement after the expiration of the year, and, as stated in our opinion of December 9, 1914, we believe that the filing of such certified copy and sworn statement after the expiration of the time fixed by the law would be such compliance with the law, as to exempt one from prosecution for using the water after the filing of the certified copy. As authority for this position, we quote the following from page 92 of Cooley's "Constitutional Limitations":

"* * * the doctrine concerning directory statutes is this: that where there is no substantial reason why the thing to be done might not as well be done after the time prescribed as before, no presumption that by allowing it to be so done it may work an injury or wrong, nothing in the act itself, or in other acts relating to the same subject-matter, indicating that the Legislature did not intend that it should rather be done after the time prescribed than not to be done at all, there the courts assume that the intent was that if not done within the time prescribed it might be done afterwards. * * *

"Those directions which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly and prompt conduct of the business, and by a failure to obey which the rights of those interested will not be prejudiced, are not commonly to be regarded as mandatory; and if the act is performed, but not in the time or in the precise mode indicated, it may still be sufficient, if that which is done accomplishes the substantial purpose of the statute."

We therefore advise you that such certified copy should be accepted and filed by the Board of Water Engineers, even though tendered after the expiration of one year from the time the irrigation act of 1913 took effect.

Your sixth question is as follows:

" 'B' was a user of water prior to the enactment of the present irrigation law, but failed to comply with the provisions of Article 4996 of the Revised Civil Statutes of Texas, or with Section 12 of the present irrigation law, prior to July 1, 1914. In such case, should the Board of Water Engineers accept for filing a certified copy of his water appropriation, and sworn statement, if tendered subsequent to July 1, 1914? Or should the board, in such instance, require the filing of an application for a permit, in the event 'B' desires to continue to make use of the water for any of the purposes named in the law?"

As we understand this question, it relates to a person or corporation who has been using water from a stream of the State prior to the enactment of the present irrigation law without having made any appropriation whatever under the former law. The last paragraph of Section 14 of the present irrigation law is as follows:

"Every person, association of persons, corporation or irrigation district who has, prior to the first day of January, 1913, actually taken or diverted

any water and applied same to any of the uses and purposes named in this act, and is at the date of the filing of the statement herein provided to be filed, continuing to use and apply such water, who shall, within one year after this act shall go into effect, file with the board the sworn statement last described in this section, shall, as against the State, have the right to take and divert such water to the amount or volume thus being actually used and applied; provided, that nothing herein shall be construed to affect or relate to any priority or right as between any claimants, appropriators, or users from any source of water supply."

It is to be observed that this portion of the law undertakes to give certain rights to a person or corporation who has, prior to the first day of January, 1913, actually taken or diverted any water for any of the purposes named in the act. This right is given "as against the State," and it is expressly provided that nothing in this portion of the act shall affect the priority as between any claimants, appropriators, etc. The right is secured by filing with the Board of Water Engineers, within one year after the act takes effect, the sworn statement described in Section 14. The right given by this portion of the statute amounts practically to nothing more than a right of appropriation, but the right is secured simply by complying with Section 14, which requires less formality than does an original appropriation under Section 15. This is a special right given to a person or corporation who, prior to the first day of January, 1913, has been using the water, and it is to be secured only by complying with the terms of the act. Since this is true, the Board of Water Engineers should not accept the certified copy and sworn statement under Section 14, if tendered subsequently to July 1, 1914. If the person in question desires after July 1, 1914, to secure a right to use the water, he must proceed under Section 15, and make an original appropriation.

We call your attention also to Section 49a of the new irrigation law. This section gives to any person, corporation, etc., having prior to March 28, 1913, constructed any dam or dams across any river or other stream for the purposes named in the act the right to use a quantity of water equal to the holding capacity of the dam, by making application as provided in Section 14 of the act. It is to be observed that this application is given priority over all other applications.

The purpose of this section apparently is to protect persons who have gone to the expense of constructing dams across the streams of the State, and to give them a prior right to the amount of water stored by the dam. This priority is secured by filing the application "as provided in Section 14," which means, of course, that the application must be filed within one year from the time the act takes effect, for it could not have been intended that the priority should continue indefinitely without a compliance with the law. Like the right given in the last paragraph of Section 14, this is a special right conferred upon certain persons, under certain conditions and is to be secured only by complying with the law. It follows that the right can be secured only by filing within one year from the time the act went into effect the documents referred to in Section 14.

Your seventh question is as follows:

"In the event that 'B,' as described in the sixth proposition above stated, makes an application to the board for a permit to use the water for any of the purposes named in the statute, would his priority date from the date on which his application was filed, or from the date on which he first began to use the water without having complied with the statutes hereinbefore referred to?"

Answering the same, we beg to advise you that if "B" is one of the persons described in the last paragraph of Section 14 of the act, his priority would date from the time when his application was filed under Section 14, rather than from the date on which he first began to use the water. He was using the water, under the facts stated in your letter, without authority of law, and, as stated above, he can secure a right to the water only by complying with the law. The portion of Section 14 referred to expressly provides that the right is given only against the State and that it shall not affect priorities or appropriators, etc.

For example: "B" has been using the water from a stream without complying with the law, but does not file the documents required to be filed by Section 14 until June 30, 1914. Between the time the irrigation law took effect and June 30, 1914, "C," "D," "E," and "F" make valid appropriations from the same stream under Section 15; the rights acquired by "C," "D," "E" and "F," under these circumstances, are prior to the right acquired by "B."

If "B," referred to in your letter is a person or corporation who has constructed a dam across any river prior to March 28, 1913, for any of the purposes named in the act, his application when made, under Section 14, is given by the law priority over all other applications. This priority exists by virtue of the new irrigation law and became effective when the law went into effect and dates from that time, provided "B" complies with the terms of the law by filing his application under Section 14 within one year from the time the law went into effect. For example: "B," who has constructed a dam across one of the streams of the State prior to March 28, 1913, files his application with the board on June 30, 1914; "C," "D," "E" and "F" make valid appropriations from the same stream, under the new irrigation law, and prior to June 30, 1914; the rights of "B," as above acquired, are superior to the rights of "C," "D," "E" and "F."

We trust that we have fully answered all the questions referred to in your letter. The delay in giving you this opinion has been unavoidable on account of the volume of work in this office.

Very truly yours,

G. B. SMEDLEY,
Assistant Attorney General.

IRRIGATION—EMINENT DOMAIN.

Section 76 of the Act of April 9, 1913.

The Irrigation Act of 1913 undertakes to give to any person, corporation, irrigation district, etc., constructing or operating an irrigation canal the

right to acquire by condemnation a right of way over private lands and also lands for pumping plants, etc.

Whether the taking of the land of another for a right of way and for a pumping plant, in order to irrigate private land, is a public use or not is a question to be determined by the courts after a full development of all the facts of the particular case, and that portion of the irrigation law which undertakes to give the right of eminent domain for such purposes, though it is perhaps unconstitutional, should not be held unconstitutional until the particular facts of the case have been developed and passed upon by the courts.

September 17, 1915.

Hon. W. T. Potter, Secretary of the Board of Water Engineers, Capitol.

DEAR SIR: In your letter of August 30 to the Attorney General you state that the owner of certain land has made application to the Board of Water Engineers for a permit to divert water from a given source, his pumping plant to be located on the land of another and his ditch for the conveyance of water to his land to cross the land of another.

It appears to be the purpose of this applicant to obtain a right-of-way for his pumping plant and ditch on the land of the other person, by eminent domain, under Section 76 of the irrigation law.

You desire to know whether such person has this right of eminent domain, when the water is to be used solely on the land of the person seeking to invoke the right.

Section 76 of the irrigation act of 1913 contains the following:

"Any person, association of persons, corporation or irrigation district or any city or town may also obtain the right of way over private lands and also the land for pumping plants, intakes, headgates and storage reservoirs by condemnation by causing the damages for any private property appropriated by any such person, association of persons, corporation or irrigation district or city or town to be assessed and paid for as provided in cases of railroads."

This language is so general that when read alone or in connection with the other sections of the act it manifests a purpose on the part of the Legislature to give the right of eminent domain to any person or corporation whatever, even though such person or corporation may not be a carrier of water for the public or for other persons, and even though the water may be used solely on the land of the person seeking to acquire the property by condemnation.

It is well settled that private property may not be taken for private purposes. This is guaranteed to the property owner, both by the Federal and the State Constitutions. The question presented, therefore, is whether or not the irrigation of the private land of an individual in Texas is a public purpose. The act of the Legislature, in giving the right of eminent domain in such general terms doubtless amounts to a declaration on the part of the Legislature that the irrigation of any land in the State is a public purpose, and this declaration or construction by the Legislature is entitled to respect. The courts have held, however, that the question is one for the courts to determine, regardless of the action of the Legislature. As said by

Judge Williams in the case of Borden vs. Rice and Irrigation Company, 98 Texas, 494, 509.

"And whether or not a given taking is for a public use can always be investigated in the courts, whatever may have been the action of the legislative department concerning it."

Again, in the same opinion, appears the following:

"Any citizen whose property is sought to be taken in aid of a given enterprise is to have a hearing, in which the question whether or not the use to which the property is to be devoted is a public one may be fully considered, and if it be found that such is not the character of the use the statute does not authorize and the constitution forbids the taking."

There are two lines of cases on the question as to what is a public use, such as will authorize the exercise of the extraordinary right of eminent domain. One line of these cases holds that the person or corporation who exercises the power must be charged with duties to the public, and that there must be in fact a right of use secured to the public in the thing for which the property is taken. The weight of authority as shown by the opinion of Judge Pleasant, in the case of Borden vs. Rice and Irrigation Company, 82 S. W., 461-466, supports this construction. The other line of cases holds that the term "public benefit" is synonymous with public use, and that though property is taken by the individual for the development of his private land the taking is a public purpose when the development of such private land inures substantially to the benefit of the public, and this even though the public has no right of use whatever in the thing for which the property is taken and even though the person exercising the power is not charged with any special duty to serve the public. See Kinney on Irrigation and Water Rights, Sections 1068 and 1069.

The exact question under consideration has not been directly decided in Texas. The nearest decision is the case of Borden vs. Rice and Irrigation Company, above cited. In that case is was seriously contended that the portion of the irrigation law of 1895, which gave to corporations chartered for the purpose of irrigation the right of eminent domain was unconstitutional and that the taking was not for public purposes, but for the benefit, primarily, of the corporation. But the Court of Civil Appeals and the Supreme Court of Texas held the law constitutional, and the case was affirmed by the Supreme Court of the United States, without a written opinion. See 204 S. W., 667.

An examination of the opinion of the Supreme Court in that case shows that the question was considered to be one of difficulty, even though the corporation in that case was chartered for the purpose of carrying water for other persons and furnished water to a considerable number of persons to irrigate various tracts of land. The discussion of the question whether the taking was for a public use is introduced in the opinion of the Supreme Court by the following language:

"This brings us to the question upon which we have had most doubt and

difficulty; that is: Is the purpose for which the law authorizes the taking of private property a public one?"

A careful examination of the opinion shows that the court's conclusion that the taking was for a public purpose was based primarily upon the public duties with which the irrigation company was charged by the statute and with the rights of use which were guaranteed by the statute to a considerable number of the public. In discussing the question of public use Judge Williams, speaking for the court, said:

"We are not inclined to accept that liberal definition of the phrase "public use" adopted by some authorities, which makes it mean no 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. With the Court of Civil Appeals and counsel for plaintiffs and those authorities which they follow, we agree that property is taken for public use as intended by the Constitution only when there results to the public some definite right or use in the business or undertaking to which the property is devoted. And we further agree that this public right or use should result from the law itself and not be dependent entirely upon the will of the donee of the power."
98 Texas, p. 509.

The language of Judge Pleasants in the opinion of the Court of Civil Appeals is equally as positive. He said:

"The mere fact that the use for which private property is sought to be condemned will conduce to public benefit will not, however, of itself justify the exercise of the power of condemnation. One of the highest functions of a free government is to preserve inviolate the right of the citizen to the possession and enjoyment in his own way of his private property. That the property of a citizen may be put to a use more beneficial to the public than the owner has devoted it will not authorize the taking of the property by the State and turning it over to the use of another, unless such taking be for the use of or by the public, as distinguished from a use beneficial or advantageous to the public. We agree with counsel for appellee that "the true meaning of the term 'public use' as employed in the Constitution, is not that use which either the Legislature or the courts may deem a public benefit or advantage, but the term means the same as '*use by the public*,' and is synonymous with the employment or application by the public of the thing taken. Therefore the term means that, though property is vested in private individuals or corporations, the public yet retain certain definite rights to the use or employment of the property." There are cases which hold that the term "public benefit or welfare" is synonymous with "public use" as that term is used in the provisions of the Constitution restricting the right of the exercise by the State of the power of eminent domain to a taking for public use; but the great weight of authority supports the rule as above announced."

These expressions of the opinions of the two learned judges above named, if followed by our courts in construing the irrigation act of 1913, will necessitate holding section 76 of said Act unconstitutional, when the condemnation is sought for the purpose only of irrigating the land of an individual. It is possible, however, that our courts, because of the necessity of the case and in order to encourage irrigation and a development of the arid portions of the State, would follow the late decisions of some of the western States, and hold such use a public one (though in view of the recent opinion of our Supreme Court in the case of Waples vs. Marrast, 184 S. W., 180, decided

since this opinion was written, it seems not at all likely that our Supreme Court would hold such purpose a public one).

Our Supreme Court, in the case of Imperial Irrigation Company vs. Jayne, 104 Texas, 395, apparently on account of the necessity of the case and in order to encourage irrigation went so far as to hold that our statutes by implication gave to irrigation companies the right to maintain dams and storage reservoirs on land which had been appropriated to the public school fund.

The Supreme Court of Utah in the case of Nash vs. Clark, 27 Utah, 158; 1 L. R. A. (N. S.), 208, under constitutional provisions similar to those of the Texas constitution and under a statute very similar to the irrigation act of 1913, held that the reclamation of land by irrigation is such a public purpose that the Legislature might authorize the condemnation of right-of-way over private property to irrigate land belonging to a private individual. This case was affirmed by the Supreme Court of the United States in 198 U. S., p. 361. It appears, however, that that court did not commit itself to the principle announced by the Utah court, but followed the latter court, because the peculiar facts of the particular case and the conditions rendering the condemnation necessary were matters properly to be decided by the State court. This is shown by the following statement by Justice Peckham:

"But we do not desire to be understood by this decision as approving of the broad proposition that private property may be taken in all cases where the taking may promote the public interest and tend to develop the natural resources of the State. We simply say that in this particular case, and upon the facts stated in the findings of the court, and having reference to the conditions already stated, we are of opinion that the use is a public one, although the taking of the right of way is for the purpose simply of thereby obtaining the water for an individual, where it is absolutely necessary to enable him to make any use whatever of his land, and which will be valuable and fertile only if water can be obtained."

It is to be noted that the trial court in the case of Clark vs. Nash expressly found that the particular land in question could be irrigated only by the construction of a ditch across the land sought to be condemned, and that the particular land unless irrigated by this water would be wholly without value and would not be available for any useful purpose. It was these facts and other facts pointed out in the opinion of the Supreme Court of the United States that apparently induced that court to affirm the decision of the State court.

In the note under this case in 1 L. R. A. (N. S.) the editor says:

"Nash vs. Clark pushes the doctrine of the right to exercise the power of eminent domain for the benefit of a private individual further than it has ever before been pushed, for the purpose of draining or irrigating private property."

The other similar decisions are cited and explained in this note, and it is pointed out that the constitution of the State of Montana contains a provision to the effect that ditches necessarily used in connection with the appropriation of the water shall be held to be a public use.

The case of Clark vs. Nash and the quotations hereinbefore made from the case of Borden vs. Rice and Irrigation Company show that whether a particular taking of property is for public purpose and therefore permitted by the Constitution, depends upon the facts of the particular case.

It may be that the land referred to in your letter is similarly situated to the land involved in the case of Nash vs. Clark; that is, that it can be irrigated only by the construction of a ditch across the land of the other person and that without such irrigation it would be wholly without value and could be used for no purpose. Again, it may be that such facts do not exist, but that the land has considerable value and may be put to a number of uses without such irrigation. It may be that the construction of the ditch referred to in your letter would, in some manner not disclosed, inure to the benefit of a substantial number of the public in the particular community. These are matters which could be developed in court, and perhaps only by a trial in court. It is also settled that before property can be condemned a necessity for the condemnation of the very property must be shown. This need not be an absolute necessity, but the condemnation must be reasonably necessary. The existence or non-existence of such necessity in the case referred to in your letter can be shown most satisfactorily by a full development of all the facts in the trial.

The granting by the Board of Water Engineers of a permit under the application referred to in your letter would not in any way affect the question as to whether the applicant could condemn the property referred to. The question whether the contemplated use of the property would be a public use or not would remain to be determined by the courts.

Since it is not the province of the Attorney General to hold any portion of any law unconstitutional, unless it is clearly so, and since the decision of the question by our courts will, under the authorities, depend in great measure upon the particular facts of the case, we are unable to give you a direct and positive answer to the question contained in your letter and advise you to grant the permit, if the application is regular and the applicant is otherwise entitled to the permit, leaving the question as to his right to condemn the lands of the other person to the courts.

Very truly yours,

G. B. SMEDLEY,
Assistant Attorney General.

IRRIGATION.

Act of April 9, 1913.

The right of an appropriator or other user of water from a stream of the State is limited to the amount of water beneficially and economically used, and other use of same would amount to waste, which could be prevented by any person injured.

The unappropriated waters of the streams of the State is the property of the State in its sovereign capacity, the beneficial title to such waters being in the general public.

The Board of Water Engineers is not given by the law the authority to file suits for the prevention of waste of the public waters, such being the duty, however, of the Attorney General if by such waste the general public is injured, and it being a part of the duties of the board to determine whether such water is being wasted to the public injury.

An action can be maintained in the name of the State by the Attorney General to prevent the waste of the waters of a stream of the State only when the waste is such as substantially to injure a considerable number of the public who have rights in the waters of the stream, or in case the waste is so excessive as to amount to a destruction of the resources of the State.

The Board of Water Engineers has the authority to employ an assistant or assistants to determine whether the waters of the streams of the State are being wasted.

The contract between an irrigation corporation and a water user is valid only in so far as the terms are reasonable.

A contract between an irrigation corporation and a water user measuring the water and providing for payment by second feet or acre feet rather than in general terms of sufficient water to irrigate so many acres is valid, provided the amount of water specified is reasonably sufficient to irrigate the land of the water user.

November 19, 1915.

Hon. W. T. Potter, Secretary Board of Water Engineers, Capitol.

DEAR SIR: From your letter of November 9, to the Attorney General, it appears that the water users of certain corporations operating irrigation canals under appropriations of the waters of a major stream of the State made under the act of 1895 have been wasting water to such an extent as to cause a shortage in the available water supply of the stream. You desire to know whether the present irrigation law confers upon the Board of Water Engineers the power to control or limit the diversion of water by said corporations to an amount which is beneficially used and to take such steps as may be necessary to prevent waste, and if so, by what method of procedure.

This question has to do with the important subject of the waste of the waters of the streams in the State and the power of the State through its officials to conserve these waters for beneficial use by those of its citizens who are or who may become entitled to use such waters. It is a general rule and well settled that the rights of an appropriator of water, regardless of the quantity designated in his appropriation, is limited to the amount which he beneficially and economically uses. See Kinney on Irrigation, 2 Ed., Sections 728, 1877; Bailey vs. Tintinger (Mont.), 122 Pac., 575; Leavitt vs. Lassen, 157 Calif., 82; 29 L. R. A. (N. S.), 213. This rule is as old as the Roman law. In the Pandects it is thus stated:

> "It is not acreage, but the use to which water is put, that measures the right to the water."

In Texas it is held that this rule is applicable to appropriations made under the irrigation law of 1895.

Biggs vs. Miller, 147 S. W., 632.
Matagorda Canal Co. vs. Markham Irrigation Co., 154 S. W., 1176.

The provision of the irrigation law of 1895 (Revised Statutes, 1895, Article 3127) that all surplus water of a running stream not used for

the purposes named in the act shall be conducted back to the stream is further evidence of the policy of the State to prevent waste of its waters. In addition to a similar provision in the irrigation law of 1913 (Section 73) it is expressly provided in said law that "the rights to the use of water acquired under the provisions of this act shall be limited and restricted to so much thereof as may be necessarily required for the purposes stated in this act irrespective of the carrying capacity of the ditch, and all water not so applied shall not be considered as appropriated." (Section 48.) Also in that section of the law defining a water right (Section 47) is contained the limitation that "such use shall be the basis, the measure and the limit to the right to use water of the State at all times not exceeding in any case the limit of volume to which the user is entitled and the volume which is necessarily required and can be beneficially used for irrigation or other authorized uses."

Our irrigation law, therefore, in harmony with the general law on the subject, since 1895 at least, as construed by our courts and as shown by express provisions above referred to, has limited the rights of water users to beneficial and economical or necessary use which, of course, amounts to a prohibition of waste.

There is nothing either in the irrigation law of 1895 or in the act of 1913 expressly relating to or defining waste of water from the streams of the State and no penalties are provided for such waste. There is no doubt but that one having rights to the use of water from a stream may by proper action in court prevent the waste to his injury of the waters of the stream by one having prior rights to the water. But may such waste be prevented by the Board of Water Engineers or by other officers of the State?

The law nowhere expressly confers upon the Board of Water Engineers the authority to prevent such waste and it does not specify any method for its prevention. It is true that the law gives the Board very general supervision over the public waters of the State in that all applications for appropriations must be made to it; all permits to use water must be obtained from it; the power and duty to refuse to issue permits if the proposed use conflicts with existing rights "or is detrimental to the public welfare," is imposed upon the Board. Among its duties is to measure the flow of the streams of the State and to make itself conversant with "the needs of the State concerning irrigation matters and the storage and conservation of the waters of the State for other purposes." These general powers are broad enough to include the authority and duty to ascertain whether the waters of the streams of the State are beneficially used or wasted to the end that proper steps may be taken to prevent such waste to the injury of the State for the general public.

As above pointed out, the statute is silent as to the method by which this end may be accomplished, and it does not confer upon the Board the authority to prevent such waste by action in court and since it is a general rule that in the absence of express authority State officers may not sue in their own names unless they are clothed with corporate or quasi corporate character, it does not appear that the Board could maintain in its name an action to prevent such waste. Such

action, if it could be maintained in behalf of the State or the general public, should be brought in the name of the State by the Attorney General, upon which officer is placed the general duty to prosecute all actions for the protection of the rights of the State or the general public. It remains to be determined whether such action may be maintained in the name of the State.

Before discussing the question ,whether the waste of public waters may be prevented by an action in the name of the State, it may be well to note that the Board of Water Engineers may, by virtue of the authority conferred upon it by the law to grant permits for the appropriation of water, in many instances effectively prevent the waste of water and secure its application to beneficial use. For example, an appropriator, although taking from the stream no more water than the amount specified in his appropriation, wastes or permits his water users to waste, a substantial quantity of the water taken. Since under our law water not applied to a beneficial use is not considered as appropriated, the volume of water which is being diverted and wasted by the appropriator yet remains the property of the State, subject to appropriation, and the granting of a permit to a second appropriator for this volume of water may in many instances effectively prevent its waste.

Both by the irrigation law of 1895 and by the act of 1913 it is expressly declared in the first section of each of said acts that the unappropriated waters of the ordinary flow and underflow of the streams, etc., of the State, together with the flood waters, are the property of the public or of the State. The law of 1895 declares the waters to be the property of the public, whereas the irrigation law of 1913 declares them to be the property of the State. The result is the same, however, for it is generally held that the effect of a declaration, whether in a constitution or in a statute, that the waters of a stream are the property of the State, is to make the State the owner of such waters, not in its corporate capacity, but in its capacity as sovereign or as trustee for the general public. The general public therefore or those of the general public who may need or desire to acquire the right to use such water are the beneficial owners of the unappropriated waters of the State.

In the case of Walbridge vs. Robinson, 22 Idaho, 236; 125 Pacific, 812; 43 L. R. A. (N. S.), 240, in construing a statute declaring the waters of streams to be the property of the State, the court said:

"We think it clear that the title to the public waters of the State is vested in the State for the use and benefit of all the citizens of the State under such rules and regulations as may be prescribed from time to time by the law-making power of the State. * * *"

"There is no doubt in our minds but that the State in its sovereign capacity is the owner of the waters flowing in the streams thereof and may exercise its authority over the same."

See, also, Kinney on Irrigation, Sections 372, 387, p. 656.

Of the general power of the State to maintain a suit in its own courts there is no doubt. As said in the case of State vs. Delesdenier (7 Texas, 76): "Of the right of the State to appear in her own courts and prosecute suits in her own behalf there can be no question; it is

an incident of sovereignty not dependent upon any statute." While this is true, the State, like any other litigant, must, in order to maintain an action be able to show an injury and the injury must not be an invasion of private rights but of public rights. The rule is thus stated by Chief Justice Stayton in the case of State vs. Farmers Loan Company (81 Texas, 530; 17 S. W., 60):

"The rule universally asserted is, that to entitle any person or corporation to maintain an action it must be shown that the one instituting the suit or action has an interest in the subject matter of litigation either in his own right or in a representative capacity; and a State is not exempt from this rule; though it ought to be conceded that such representative character could be established by a positive law when the relation would not be held to exist in its absence.

"In view of this rule, it has been steadily held that an action or suit can be maintained by an Attorney General in behalf of the State for the redress of an injury to the public or to prevent this, and that he can not maintain a suit or action when private rights alone are involved."

Applying the above rule to the question in hand we conclude that if any person or corporation, whether an individual appropriator or an irrigation corporation or a water user, is so wasting or permitting the waste of the waters of a public stream of the State as substantially to injure any considerable number of the public who have rights in the waters of the stream, such waste could be prevented by a suit for injunction or other proper procedure in the name of the State. If, however, the waste were such as to injure only an individual or a few individuals as distinguished from a considerable number of the public, a private right would be involved instead of a public right, and an action to prevent the waste would properly be maintained by the individual injured, and not by the State.

There are many cases illustrating the right of a State to maintain a suit in its sovereign capacity to prevent injury to the general public, some of which cases we will refer to. The case of State vs. Pacific Express Company, 30 Neb., 328; 115 N. W., 619; 18 L. R. A. (N. S.), 664, was a suit brought in the name of the State by the Attorney General to enjoin excessive express rates. The contention was made that no suit could be maintined by the State, in the absence of statute authorizing it, when injury was being done to the public. In the opinion the court quoted from the United States Supreme Court in the case of re Debs, 158 U. S., 584, as follows:

"Every government, intrusted by the very terms of its being with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other; and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. The obligation which it is under to promote the interest of all, and to prevent the wrongdoing of one, resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court."

The case of State vs. Ohio Oil Company, 150 Ind., 21; 49 N. E., 809; 47 L. R. A., 627, was a suit in the name of the State of Indiana to enjoin the waste of natural gas. The defense was made that the owner of the land was the owner of the gas underneath it and had a right

to take from the land any or all of such gas in which he had the property right. The court held, however, that the title to natural gas does not vest in any private owner until it is reduced to possession and that like wild animals the ownership of natural gas is in the State, not in its corporate capacity, but in its sovereign capacity for the benefit of all of its people, and that the State has the right to prevent the waste of such natural resource to the injury of the general public.

In the case of Hathorn vs. Natural Carbonia Gas Company, 194 N. Y., 326; 87 N. E., 504; 23 L. R. A. (N. S.), 436, it was held that the owner of land might not, for the purpose of marketing gas from mineral water percolating under his land, pump and waste the water to such an extent as to impair the flow of the water from springs on the land of others. The doctrine of reasonable use was applied, which was announced with reference to percolating waters in the case of Forbell vs. New York, 164 N. Y., 522; 58 N. E., 644; 51 L. R. A., 695.

In the case of McCarter, Attorney General, vs Hudson County Water Company, 70 N. J. E., 695; 65 Atl., 489; 14 L. R. A. (N. S.), 197, in an interesting opinion by Justice Pitney, it was held that the Attorney General in behalf of the State might maintain an action to prevent the diversion of water from a stream of the State by riparian owner for use in another State. This case was affirmed by the Supreme Court of the United States. See 209 U. S., 349. Justice Holmes, who delivered the opinion of the court, pointed out that the opinion of the New Jersey court was rested in part on the State's ownership of the bed of the stream from which the water was taken, and declined to place the decision of the Supreme Court of the United States on the same ground, placing it on the broader ground of the right of the State to protect and conserve its natural resources. Since this opinion of the Supreme Court of the United States recognizes the existence of a very broad power in the States to protect their natural advantages and resources for the benefit of the public, we copy the following portion of the opinion:

"It sometimes is difficult to fix boundary stones between the private right of property and the police power when, as in the case at bar, we know of few decisions that are very much in point. But it is recognized that the State, as quasi-sovereign and representative of the interests of the public, has a standing in court to protect the atmosphere, the water and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned. Kansas vs. Colorado, 185 U. S., 125, 141, 142; S. C., 206 U. S., 46, 99; Georgia vs. Tennessee Copper Co., 206 U. S., 230, 238. What it may protect by suit in this court from interference in the name of property outside of the State's jurisdiction, one would think that it could protect by statute from interference in the same name within. On this principle of public interest and the police power, and not merely as the inheritor of a royal prerogative, the State may make laws for the preservation of game, which seems a stronger case. Geer vs. Connecticut, 161 U. S., 519, 534.

"The problems of irrigation have no place here. Leaving them on one side, it appears to us that few public interests are more obvious, indisputable and independent of particular theory than the interest of the public of a State to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use. This public interest is omnipresent wherever there is a State, and grows more pressing as population grows. It is fundamental, and we

are of opinion that the private property of riparian proprietors cannot be supposed to have deeper roots. Whether it be said that such an interest justifies the cutting down by statute, without compensation, in the exercise of the police power, of what otherwise would be private rights of property, or that apart from statute those rights do not go to the height of what the defendant seeks to do, the result is the same. But we agree with the New Jersey courts, and think it quite beyond any rational view of riparian rights that an agreement, of no matter what private owners, could sanction the diversion of an important stream outside the boundaries of the State in which it flows. The private right to appropriate is subject not only to the rights of lower owners, but to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health.

"We are of opinion, further, that the constitutional power of the State to insist that its natural advantages shall remain unimpaired by its citizens is not dependent upon any nice estimate of the extent of present use or speculation as to future needs. The legal conception of the necessary is apt to be confined to somewhat rudimentary wants, and there are benefits from a great river that might escape a lawyer's view. But the State is not required to submit even to an aesthetic analysis. Any analysis may be inadequate. It finds itself in possession of what all admit to be a great public good, and what it has it may keep, and give no one a reason for its will."

The right of the State of Texas to maintain an action to prevent the waste of its public waters might be rested as it was by the New Jersey court on the State's ownership of the beds of its streams as the beds of most of the streams in Texas are the property of the State, but we believe the right is more properly placed on the general authority of the State to prevent the injury of the general public.

An action by the State to prevent waste of the waters from a stream by an appropriator might also be based upon the breach of the appropriator's contract or the abuse of the privilege or franchise of the appropriator. It is clear that an appropriator has no title to the water itself. His right is merely to divert and use a certain amount of water and to use it beneficially and economically.

A waste of the water is therefore clearly a breach of this contract or an abuse of the privilege and the State in case of injury to the public could maintain a proper action to prevent such breach or abuse. This principle is specially applicable to an appropriator which is a corporation chartered under the irrigation laws. It is settled that such corporations are quasi public corporations. See:

Borden vs. Rice and Irrigation Co., 98 Texas, 494.
Imperial Irrigation Co. vs. Jayne, 104 Texas, 395.
Colorado Canal Co. vs. McFarland, etc., Co., 94 S. W., 400; 109 S. W., 435.
American Rio Grande Land and Irrigation Co. vs. Mercedes, etc., Co., 155 S. W., 286.

The limits of the right or franchise of such corporation in respect to the water appropriated by it are to apply the water to beneficial and economical use within a reasonable time and a wasting of the water would be the exercise of a power not conferred upon such corporation, and the abuse of its franchise or privilege, and such abuse of its franchise to the injury of the public could be prevented by suit in the name of the State. The following language of Chief Justice

Stayton in the case of State vs. Farmers Loan Company, 81 Texas, 530, is applicable:

"The right of the Attorney General in behalf of the State through the courts to prevent any private corporation from exercising any power not conferred by law when this is hurtful to the public, or the assumption of a franchise which in itself is a public wrong, cannot be questioned and would exist from the nature of the office in the absence of a constitutional provision expressly conferring it."

If such waste were persisted in by the corporation an action could doubtless be maintained by the State on that account for the cancellation of its charter.

To repeat our conclusion, for the several reasons above set out and on the authorities which have been referred to, it is our opinion that the Board of Water Engineers has the authority, and it is its duty to use all proper means in its power to determine whether the waters of the streams of the State are being wasted, and if the water is being wasted to such an extent as to injure the public generally or to deprive of water to their injury a considerable number of persons entitled to use such water, a suit for injunction or other appropriate remedy could be maintained by the State. If the waste were not considerable or affected only private rights as distinguished from public, or if it deprived of water an individual or a few individuals only, there would be no public injury sufficient as the basis for a suit in the name of the State.

It is true that any injury to any property right affects the public welfare or good, and to deprive any person of water for his growing crops works an indirect injury to the public, but since such injury is indirect rather than direct, and because it would be practically impossible for the State to undertake to prevent every injury or invasion of private rights which indirectly harms the public, it appears that an action could be maintained by the State only as above shown when the waste affects directly a considerable number of the public.

The rule above stated, we believe, the correct rule applicable to most instances of the waste of the public waters. It is not to be forgotten, however, that the waters of the streams are public property and a very important part of the valuable resources of the State. Under the authority of the case of Hudson Water Company vs. McCarter (209 U. S., 349) an excessive or persistent waste of the waters of a stream may amount to a destruction of the resources of the State, such as can be prevented by action in the name of the State even though no present injury is being done to any member or members of the general public.

Because the supervision and to a large extent the control of the waters in the public streams of the State is placed directly under the Board of Water Engineers, the duty of determining whether or not such water is being wasted to the injury of the public rests primarily on the Board. When the Board has obtained the information and the evidence showing that the waters of a public stream are being wasted to such an extent as to injure the general public, the matter should be referred by the Board to the Attorney General, whose duty it will will be to institute such suit or suits as will prevent the injury, and

in this important work we are sure the Board will have the co-operation of the Legal Department of the State.

It further appears from your letter that certain canal corporations who have appropriated water from one of the more important streams of the State are desirous of preventing unnecessary waste of water by those with whom the canal companies have water contracts and that these companies propose to raise a fund and place the same at the disposal of the Board of Water Engineers for the employment by the Board of an assistant or assistants to remain on the ground for the purpose of ascertaining whether or not preventable waste is taking place. You desire to know whether such assistant paid in the manner above set out could be legally designated by the Board for the performance of said services. It appears to us that the question is one of policy rather than of authority. By Section 9 of the Act the Board is given the authority to appoint such experts and employes as may be necessary to perform any duty that may be required of them by the Act, and as has been stated above, we believe that one of the duties of the Board is to determine whether or not the waters of the State are being properly conserved. If the Board has no appropriation available for the payment of the assistant desired, we know of no legal reason why he could not be paid out of funds contributed by the canal companies for that purpose. Such assistant or employe would have no right directly to control the waters of the stream, for such right of direct control does not appear to be expressly made one of the duties of the Board. He would have no authority to enforce on the part of the water users the performance of the terms of their contracts with the canal companies since that is no part of the duty of the Board but is a matter between the companies and their water users. We believe that the general extent of his authority would be merely to observe the manner of the use of the water and to determine and report to the Board whether or not the water was being beneficially and economically used. His position would be one of considerable difficulty for the reason that the result of his observations might be an action against the canal companies who contribute the funds to pay his salary, and for the further reason that he would have to be careful not to do or suggest anything which might be used as an excuse either by the canal company or by the water user for failure to comply with the contract between the canal company and the user. For these, and for other reasons which may suggest themselves, we have said that the question is one of policy, and it would be preferable that the person performing these duties be paid, if possible, by the State.

However, to answer your second question directly, we advise you that in our opinion the Board of Water Engineers has the authority to appoint such assistant or assistants for the purpose above referred to and that it has such authority even though the assistant or assistants are to be paid, not by the State, but out of funds raised for that purpose in the manner referred to in your letter.

Your third question is as follows:

"Under the law, may the canal companies contract to supply water to the individual users on a quantity basis of, say, so much per acre?"

We assume that by the use of the term "canal companies" you have reference to corporations chartered under the provisions of Article 3125 Revised Statutes, 1895, or under Section 54 of the irrigation law of 1913, which have the right of eminent domain, and which, as has been shown, are quasi public corporations, and that by the term "individual users" you refer to persons who make contracts with such corporations for water for irrigation and persons entitled to the water by reason of owning land adjoining or contiguous to the reservoir ditch, etc., of such corporations as is provided by Section 56 of the law of 1913.

It is settled that such corporations may make contracts to furnish water "upon reasonable terms" only, and whether such terms are reasonable or not is usually a question of fact to be determined by the jury in each case in view of all the surrounding conditions and circumstances.

In the case of Raywood vs. Erp & Wright, 105 Texas, 161; 146 S. W., 155, the above principle is announced, and in that case the court holds that a provision limiting the amount of damages under a water contract to so much per acre is unreasonable and void. The case further holds that an agreement to furnish enough water to make an average crop of five sacks of rice per acre on a certain number of acres cannot be said to be manifestly unreasonable, but that it is a question for the jury to determine under all the facts of the case. In the case of American, etc., Irrigation Company vs. Mercedes Plantation Company (155 S. W., 286) it is held that one owning lands on the ditch of a canal company is given by statute and has by virtue of its ownership a complete and definite right to receive water from the ditch for the irrigation of his land, and the court says:

"The only matters open to contract with reference to the water were the price and terms upon which it would be delivered and the time at which it would be delivered."

Judge Williams in the case of Borden vs. Rice and Irrigation Company (98 Texas, 511; 86 S. W., 15) in discussing the nature of the power of an irrigation corporation to contract with water users, said:

"The power to contract, here given, to the owner of the plant cannot, if the business is to be regarded as affected with a public interest, be recognized as absolute and uncontrolled. Common carriers and others engaged in public callings have the power to contract, but it cannot be so employed as to absolve them from their duties to the public or to deprive others of their rights. Rights are evidently secured by this statute to those so situated as to be able to avail themselves of the water provided for, and those rights it is the duty of the owners of the contemplated business to respect; and the power to contract, under the well-recognized principles applicable to those charged with such duties, must be exercised in subordination to such duties and rights. Reasonable contracts are what this statute means, and not contracts employed as evasions of duty."

The nature of the right of the land owner to water is thus stated by Kinney in Section 1497 of Kinney on Irrigation and Water Rights:

"Therefore, each member of the community who desires to become an

actual and bona fide consumer, upon making application to the company therefor, and by paying or tendering the rate fixed for supplying it, has a right to the use of a reasonable quantity of the water in a reasonable manner sufficient for the beneficial use or purpose to which he wishes to apply it; provided, of course, that the company still has water under its control which has not theretofore been disposed of to others."

The irrigation laws of this State do not expressly provide whether contracts with water users shall be made upon a quantity basis or upon a flat acreage basis. Section 56 of the irrigation law of 1913 in the same language as was used in the irrigation law of 1895 provides in substance that a person owning land contiguous to the ditch or canal of the irrigation corporation and having a contract to use the water from the canal or ditch shall be entitled to be supplied from the same "with water for irrigation of such land in accordance with the terms of his or their contract." By Section 57 of the same act it is provided that a person owning land contiguous to the ditch who desires to use water, but has not been able to agree upon a price for same, shall nevertheless be furnished by such corporation "the necessary water to irrigate his land," provided the corporation has water not already contracted.

In view of this language the amount of water to which the land owner is entitled is the amount sufficient to irrigate his land and a contract for that amount of water would be a compliance with the statute, and would be reasonable and valid whether the volume were measured by so many cubic feet per second time or by so many acre feet or were fixed in general terms merely as water sufficient to irrigate so many acres of land, and the rate charged for the water would of course have to be reasonable whether it were so much per foot or so much per acre of irrigated land. The amount of water would have to be reasonably sufficient to irrigate the land, and if the amount specified in the contract is reasonably sufficient for that purpose it does not appear that the contract could be said to be unreasonable because of the method used in measuring the water. Whether so many cubic feet per second or so many acre feet would be sufficient to irrigate the land of a water user would be a question of fact depending upon many considerations, as, for example, the character of the crop to be raised, the length of the irrigation period, the loss from seepage and evaporation. etc. We believe this conclusion is not only sustained by the language of the law, but that it is in harmony with the decision in the case of Raywood Company vs. Erp & Wright, 105 Texas, 161; 146 S. W., 155.

In addition to what has been said, Section 46 of the Irrigation law expressly declares that a cubic foot of water per second of time shall be the standard unit for the measurement of flowing water, not only for the purpose of determining the flow of water in streams, but for the purpose also of distributing water for beneficial use, and that the standard unit of volume of static water shall be the acre foot. This section seems to amount to a direction that the right of an appropriator of water, and doubtless also of a water user, under an appropriator, is to be measured either in second feet or in acre feet.

Section 67 of the same law confers upon irrigation corporations the

right to make reasonable rules and regulations for the manner and method of supply, and the use and distribution of water. This authority is also doubtless broad enough to authorize such corporations in their contracts with water users to measure the water and to charge for it by second feet or by acre feet, provided of course the water user is to receive under such measurement an amount reasonably sufficient to irrigate his land.

It appears, moreover, that the method of contracting and charging for water according to a quantity basis rather than by the indefinite method of sufficient water to irrigate so many acres necessarily leads to the more economical use of the water and strongly tends to prevent waste.

Very truly yours,

G. B. SMEDLEY,
Assistant Attorney General.

IRRIGATION—TANKS.

Chapter 171 of the Acts of the Thirty-third Legislature of Texas.

A tank situated on land privately owned and which is supplied by *surface water*, as herein defined, or by water from a well fed by an underground river with a well defined course, is not within the terms of the irrigation law, and the owner of the tank may use the water for any lawful purpose. If the tank is supplied by water, whether of the ordinary flow or flood water, of a natural watercourse, as herein defined, it is within the terms of the irrigation law.

September 10, 1914.

Hon. H. N. Graves, County Attorney, Georgetown, Texas.

DEAR SIR: In your letter of August 14 you desire to know whether the irrigation law, passed by the Thirty-third Legislature, applies to private tanks situated on lands the title to which passed from the State prior to the passage of said law, and whether the owner of the land on which such tank is situated must obtain, under the penalties provided by the act, a permit to use the water for irrigation or stock-raising.

In our opinion it is clear that an ordinary tank on land privately owned does not, and could not, come within the irrigation law, for the simple reason that the water of such ordinary tank belongs to the owner of the land, who may use it as he sees fit.

Lest this opinion may be misunderstood, it is perhaps necessary to refer briefly to the terms of the irrigation law and to some of the authorities on the subject. The first section of the law is as follows:

"Section 1. Certain waters declared State property.—The unappropriated waters of the ordinary flow and underflow and tides of every flowing river or natural stream, of all lakes, bays or arms of the Gulf of Mexico, collections of still water, and of the storm, flood or rain waters of every river or natural stream, canyon, ravine, depression or watershed, within the State of Texas, the title to which has not already passed from the State, are hereby declared to be the property of the State, and the right to the use thereof may be acquired by appropriation in the manner and for the uses and purposes hereinafter provided."

It will appear at a glance that this section is very awkwardly worded, and that it is almost, if not entirely, impossible to determine from reading it what waters are intended to come under the act. The phrase, "the title to which has not already passed from the State," has been the cause of difference of opinion. Some have contended that it refers to the water, the title to which has not already passed from the State, while others contend that it refers to the beds of the rivers, the canyons, etc., the title to which has not already passed from the State. This is a problem which we shall not undertake to solve, believing that the correct solution as to what waters come within the scope of the act may be reached by reading it in the light of the earlier irrigation laws of the State and the decisions of our courts, and bearing in mind that the act expressly provides that it shall in no manner impair riparian or other vested rights, and that it could not so operate.

By the irrigation law of 1889 (Acts 1889, p. 100), which appears to have been the first general irrigation law, it is provided that "the unappropriated waters of every river or natural stream within the arid portions of the State" are declared to be the property of the State and subject to appropriation. The only express exception made to the right of appropriation is that no person owning land along any stream shall be deprived of the use of the water for domestic purposes.

By the Irrigation Law of 1895 (see Articles 3115 and following, Revised Statutes of 1895) "the unappropriated waters of the ordinary flow or underflow of every running or flowing river or natural stream, and the storm or rain waters of every natural stream, canyon, ravine, depression or watershed within those portions of the State of Texas in which, by reason of the insufficient rainfall or by reason of irregularity of rainfall, irrigation is beneficial for agricultural purposes" are declared to be the property of the public and subject to appropriation. It appears that the only exceptions made in this act are that the owner whose land abuts on a running stream may use the same for domestic purposes, and that anyone whose land is within the area of the watershed from which storm or rain waters are collected may construct on his land such dams, reservoirs or lakes as may be necessary for the storage of water for domestic purposes.

In spite of the fact that neither of these two irrigation laws made any reference to the right of a riparian owner to take water from the stream for irrigation, it has been uniformly held that such right exists and that it is superior to the right of appropriation. See

Irrigation Co. vs. Vivian, 74 Texas, 170.
McGee Irr. Ditch Co. vs. Hudson et al., 85 Texas, 587.
Watkins, etc., Co. vs. Clements, 98 Texas, 578.

As said by Justice Stayton in speaking of the law of 1889:

"Section 2 of the act cannot operate, and probably was not intended to operate, on the rights of riparian owners existing when the law was passed." (McGee Irr. Co. vs. Hudson, supra.)

The contention has been made that the rights of appropriation given by the several irrigation laws of the State exist only in those streams, the lands on the borders of which were owned by the State at the

time the laws went into effect, and, further, that the waters of those streams, the beds of which are privately owned, are not subject to appropriation, this on the theory that the ownership of the bed of the stream carries with it the ownership of the water in the stream. There are some expressions in the opinion in the case of McGee vs. Hudson, supra, on which this contention is founded, but the later cases clearly recognize that the right of appropriation exists even in very small natural streams. the beds of which are privately owned. See:

Santa Rosa Irr. Co. vs. Pecos River Irr. Co., 92 S. W., 1014.
Watkins Land Co. vs. Clements, 98 Texas, 578.
Toyah Creek Irr. Co. vs. Hutchins, 52 S. W., 101.
Matagorda Canal Co. vs. Markham Irr. Co., 154 S. W., 1176.
Fleming vs. Davis, 37 Texas, 173.

Of course, it is also shown by the above authorities that any appropriation of the waters from such streams is subordinate to riparian rights, which also exist in natural streams or water courses regardless of their size or the ownership of the bed. See Kinney on "Irrigation and Water Rights," Section 468. The right of the riparian owner is not a property right in the water itself; it is a right to the use of the water. It has been said that even the State has no property right in the water of a running stream (Kinney on "Irrigation," Section 289). Running water, under the civil law, was classified as *res communes*, which term was defined as "things the property of which belongs to no person." This classification included the air, the water which runs in the river, the sea and its shores. The common law followed this classification, and under the common law running water is not property, but it becomes such when reduced to actual possession (Kinney, Sections 288, 289). This classification shows how and why it is that a person does not own the waters of a small stream which flows through his land even though he does own the bed of the stream.

In addition to the waters of rivers and other streams. the act of 1913 makes the unappropriated waters of all lakes and collections of still water subject to appropriation. It has been the policy of this State to reserve from private ownership the beds of all lakes of any considerable size, particularly those lakes which are navigable, and it is doubtless true that the beds of most of the large lakes in the State are owned by the State. It is to those lakes that the act doubtless primarily refers. It may be that the language of the act is broad enough to make all lakes and collections of still water, no matter of what size, situated on land yet belonging to the State, subject to appropriation, but we will not undertake to determine that question at this time. It can hardly be that it was intended to include within the scope of the act lakes or ponds situated entirely within the bounds of land privately owned and included within the bounds of such land as granted by the State. Such water is part and parcel of the land. It is water which is in the possession of and under the control of the land owner. Such water surely was not intended to come within the term "unappropriated water of the State." It is to be borne in mind that the right of appropriation of the waters of such of the lakes and

collections of still water as come within the act is subordinate to the rights of those who own lands bordering on such lakes, for the general rule is that "the foundation of riparian rights, *ex vi termini* is in the ownership of the bank or shore. . . . They may and do exist through the fee in the bed of the river or lake bed in the State" (Kinney, Section 451).

In contrast to the waters of rivers, streams, lakes and the like, are those which are classified as "surface waters." Surface water has been defined as: "Water on the surface of the ground, the source of which is so temporary or so limited as not to be able to maintain for any considerable time a stream or body of water having a well defined and substantial existence" (Kinney, Section 318).

Most of the law to be found on the subject of surface water has to do with its disposal rather than its conservation and use. Under the common law rule, it is said to be a "common enemy," and the owner of the land on which it is found may do with it, what he pleases so long as he does not cause it to be discharged upon the land of his neighbor in such an unnatural manner as to cause damage. This common law rule is adopted in Texas. See Sullivan vs. Dooley, 73 S. W., 82. This case quotes with approval from another case as follows:

"Surface water is that which is diffused over the ground from falling rains or melting snows, and continues to be such until it reaches some bed or channel in which water is accustomed to flow. Surface water ceases to be such when it enters a watercourse in which it is accustomed to flow, for, having entered a stream, it becomes a part of it and loses its original character."

There can be no rights of appropriation in surface water from its very nature. It has been said that it is not subject to appropriation for the reason that "its movements are too erratic and capricious" (Kinney, Section 654).

No riparian rights attach to surface water for it has no channel or well defined course to which land may be riparian. Since a land owner may do what he will with surface water flowing over his land, he may impound it in a tank or reservoir, and it is his absolute property. Though the surface water may usually drain over the land of another, he has no means of preventing the upper proprietor from impounding the water (Kinney, Section 318). The ownership of land carries with it the right to make such use of the surface water upon it as the owner may desire.

The positive statement in the foregoing paragraph that the ownership of land carries with it the right to make such use of surface water upon it as the owner may desire, should be qualified to a certain extent. The right to divert and use water for irrigation and other purposes is based upon and generally limited to the use of the same in the beneficial enjoyment of the land. For example, a riparian owner has the right to use a certain quantity of water for the irrigation of his land, but it can not use the water on non-riparian land nor can he waste it. On the same principle, while a land owner has the right to impound all the surface water on his land and use it for any pur-

pose incident to the enjoyment of his land, we do not believe he would have the right to impound the surface water on his land and wilfully waste it to the injury of a lower proprietor over whose land the water would otherwise flow. This would be particularly true in an arid region where surface water rather than being avoided as a "common enemy" might be welcomed as a "common bounty."

It is true that Section 1 of the Act of 1913 by the use of such general words as "rainwater," "of every depression" or "watershed" may indicate an intention to place even surface water under the terms of the act, but, as has been pointed out, the act disclaims any intention to impair vested rights, and it could not be assumed, even in the absence of such disclaimer, that the Legislature intended to take from the land owner one of the rights inherent to the land, namely: to use and dispose of the surface water at his pleasure.

Surface waters must not be confused with flood waters of streams. Flood waters of a stream, as long as they may be identified as such, are subject to appropriation under our irrigation law, but flood waters which leave a stream never to return to it become surface water. See:

Sullivan vs. Dooley, 73 S. W., 82.
Fordham vs. Northern Pac. Ry. Co., 30 Mont., 421; 76 Pac., 1040.

As has been shown, surface water may cease to be such by finding its way into a natural watercourse, and then it is subject to riparian rights and appropriation, as hereinbefore discussed.

Justice Brewer, in the case of Gibbs vs. Williams (25 Kansas, 214; 37 Am. Reps., 241,) gives the following definition of a watercourse:

"For a watercourse there must be a channel, a bed to the stream, not merely lowland or depression in the prairie over which the water flows. It matters not what the width or depth may be, a watercourse implies a distinct channel; a way cut and kept open by running water; a passage whose appearance, different from that of the adjacent land, discloses to every eye, on a mere casual glance, the bed of a constant or frequent stream; and such flow must be necessary to prevent the flooding of a considerable tract of land."

It is not an essential characteristic of a watercourse that it have a continuos flow of water, but the source of its water supply must be permanent and the flow of the water must recur with some degree of regularity (Kinney, Sections 306, 307).

A watercourse may be a canyon, ravine or depression, as well as a river or creek, provided it has the essential characteristics above defined.

The foregoing general statements of the law are perhaps essential to an accurate answer to your question, for you did not state whether the tank is natural or artificial or what is the source of its water supply.

If the source of the water supply is from a well, as is often the case in this State,—particularly in the west,—the irrigation law has no application unless the well is fed by an underground river with a well defined course. See:

H. & T. C. Ry. Co. vs. East, 98 Texas, 146; 81 S. W., 279.

Wheelock vs. Jacobs, 70 Vt., 162; 43 L. R. A., 105; 67 Am. St. Reps., 659.
S. P. Ry. Co. vs. Dufour, 95 Cal., 615; 19 L. R. A., 92.

If the tank is supplied by surface water, it is not within the terms of the irrigation law. If the tank is supplied with water, whether of the ordinary flow or flood water of any river, stream or other natural watercourse, as hereinbefore defined, it is within the terms of the irrigation law.

A tank may be constructed by building a dam across a ravine or depression. If such ravine or depression is a natural watercourse with a permanent source and periodic flow, as hereinbefore explained, the water impounded comes within the terms of the law. If the water thus impounded is surface water, as hereinbefore defined, it is not under the law.

The owner of a tank who impounds the water from a river or other natural water course may have riparian rights to a certain amount of water. We will not undertake to discuss here the relative rights of riparian owners and appropriators.

Because, as a rule, an ordinary tank on land privately owned is supplied by surface water or by a well fed by percolating water, we have answered in the first portion of this opinion that an ordinary tank is not within the terms of the irrigation law.

Very truly yours,

G. B. SMEDLEY,
Assistant Attorney General.

OPINIONS CONSTRUING LIQUOR LAWS.

CRIMINAL LAW—INTOXICATING LIQUORS—SOLICITING ORDERS IN LOCAL OPTION TERRITORY—EXTRADITION.

Persons in another State who solicit orders for intoxicating liquor in local option territory in this State are not "fugitives from justice" and therefore not extraditable. However, no limitation will run against prosecution and defendant may be arrested and brought to trial at any time in the future and in any manner that it can be accomplished in due form of law.

November 14, 1914.

Hon. J. T. Bowman, Private Secretary to the Governor, Building.

DEAR SIR: I beg to acknowledge receipt of your favor of the 12th instant, transmitting to this Department the record pertaining to the application for requisition on the Governor of Louisiana for the extradition of J. Y. Covington, indicted by the grand jury of Clay County for a felony, to wit: for soliciting orders for intoxicating liquors in local option territory in violation of Section 5 of what is known as the Allison Law.

You state that Mr. Covington appears to be a member of the firm of J. Y. Covington & Company, wholesale liquor dealers at Monroe, Louisiana, and that the indictment is based upon a circular letter sent to a citizen of Clay County soliciting orders for the sale of intoxicating liquor.

You propound the inquiry, whether or not the defendant, under the facts as exhibited by this record, could be considered a fugitive from justice of this State and subject to extradition under the law.

I note that the application for requisition in this case contains the following recitation:

"That the said J. Y. Covington is a fugitive from justice, if the following facts constitute him one: He mailed under his signature a great number of circular letters from Monroe, Louisiana, to various citizens of Clay county, Texas, soliciting orders for intoxicating liquors, he has caused said letters to be deposited in the mails at Monroe, La., addressed to said citizens of Clay county, Texas, but as far as applicant knows, said J. Y. Covington has never in person been in Clay county, Texas, but has maintained his residence and business in the State of Louisiana and has violaed the law of this State by sending letters from the State of Louisiana to Clay county, Texas, soliciting orders for intoxicating liquors."

It, therefore, appears with reasonable certainty that the defendant is a resident of Louisiana and was not present in the State when the crime for which he is indicted, is alleged to have been committed, but that the same was committed by mailing at the postoffice in Monroe, Louisiana, addressed to certain citizens of Clay County, Texas, mail matter containing advertising intended to solicit sales for intoxicating liquor. Your question, simplified, is whether or not a person charged with crime in one State may be extradited from another State as a fugitive who was not personally present, but only constructively present when the crime is alleged to have been committed.

The Constitution of the United States, Article 4, Section 2, is as follows:

"A person charged in any State with treason, felony, or other crime, who shall flee from justice and be found in another State. shall. on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime."

Congress, in carrying this constitutional provision into effect, enacted Article 5278, Federal Statutes, which provides substantially as follows:

That whenever the executive authority of any State demands any person as a fugitive from justice of the executive authority of any other State to which such person has fled and produces evidence of the commission of a crime certified to by the demanding executive of the State from whence the person fled, it shall be the duty of the executive authority to which such person has fled to cause him to be arrested, etc.

Article 1188 of the Code of Criminal Procedure of this State reads as follows:

"A person charged in any other State or territory of the United States with treason, felony or other crime. who shall flee from justice and be found in this State, shall, on demand of the executive authority of the State or territory from which he fled, be delivered up to be removed to the State or territory having jurisdiction of the crime."

From a reading of all these provisions of the Federal and State laws on the subject, it would seem that, in order to be a fugitive from justice extraditable under these laws, a person must have committed a crime in the State from which he fled, the extradition proceedings being to have him arrested and returned for trial to the State from which he fled. The Code of Criminal Procedure of this State controlling the conduct of the Governor in demanding the return of a fugitive from justice reads as follows:

"Whenever the governor of this State may think proper to demand a person who has committed an offense in this State and has fled to another State or territory, he may commission any suitable person to take such requisition; and the accused person, if brought back to the State, shall be delivered up to the sheriff of the county in which it is alleged he has committed the offense."

In construing these provisions of the Constitution and the Statutes, the courts have uniformly held that the person charged must have been in the State when the crime on which the criminal charge is based was committed, or that such defendant while in the State put in motion the instrumentalities that resulted in the commission of the crime, and thereafter left the State.

The courts have never held that the statute covered a case where the party was not in the State at the time when the act is alleged to have been committed.

Roberts vs. Reilly, 116 U. S., 80.
Appleyard vs. Moss, 203 U. S., 222; 118 U. S., 691; 114 U. S., 642.

I refer you to the language of the Supreme Court, in the case of Hyatt vs. Corkran, 188 U. S., 713. In this case the relator, Corkran, was indicted in the State of Tennessee, charged with the crime of theft and false pretense; the Governor of New York honored a requisition made by the Governor of Tennessee for the extradition of the defendant; after being arrested the relator sued out a writ of habeas corpus, resisting extradition on the ground that he was not in the State of Tennessee at the time of the alleged commission of the crime for which he was indicted and therefore was not a fugitive from justice, that he had not fled from the State of Tennessee within the meaning of the Federal Constitution and statute and could not be extradited in said proceedings.

The Supreme Court in discussing the case, among other things said:

"It is, however. contended that a person may be guilty of a larceny or false pretense within a State without being personally present in the State at the time, therefore, the indictments found were sufficient justification for the requisition and for the action of the Governor of New York thereon. This raises the question whether the relator could have been a fugitive from justice when it is conceded he was not in the State of Tennessee at the time of the commission of those acts for which he had been indicted, assuming that he committed them outside of the State.

"The exercise of jurisdiction by a State to make an act committed outside its borders a crime against the State is one thing, but to assert that the party committing such act comes under the Federal statuate, and is to be delivered up as a fugitive from justice of that State, is quite a different proposition.

"The language of Section 5278, Rev. Stat., provides, as we think, that the act shall have been committed by an individual who was at the time of its commission personally present within the State which demands his surrender. It speaks of a demand by the executive authority of a State for the surrender of a person as a fugitive from justice, by the executive authority of a State *to which such person has fled*, and it provides that a copy of the indictment found, or affidavit made before a magistrate of any State, charging the person demanded with having committed treason, etc., certified as authentic by the governor or chief magistrate of the State or territory *from whence the person so charged has fled*. shall be produced. and it makes it the duty of the executive authority of the State *to which such person has fled* to cause him to be arrested and secured. Thus the person who is sought must be one who has fled from the demanding State. and he must have fled (not necessarily directly) to the State where he is found. It is difficult to see how a person can be said to have fled from the State in which he is charged to have committed some act amounting to a crime against that State, when in fact he was not within the State at the time the act is said to have been committed. How can a person flee from a place that he was not in? He could avoid a place that he had not been in; he could omit to go to it; but how can it be said with accuracy that he has fled from a place in which he had not been present? This is neither a narrow nor, as we think, an incorrect interpretation of the statute. It has been in existence since 1793, and we have found no case decided by this court wherein it has been held that the statute covered a case where the party was not in the State at the time when the act is alleged to have been committed. We think the plain meaning of the act requires such presence, and that it was not intended to include, as a fugitive from the justice of a State, one who had not been in the State at the time when, if ever, the offense was committed, and who had not, therefore in fact, fled therefrom." (188 U. S., pp. 712-713.)

As to whether or not a defendant is a fugitive from justice is a question of fact that is usually raised by the defendant after his

arrest and it is not ordinarily presented at the initiatory proceedings, such as these.

However, from the facts of this case, as presented in the record, they seem to challege at the outset the authority of the Governor to make the requisition.

In view of these facts and in view of the law and the construction given by the courts, we conclude the defendant in this case is not a fugitive from justice within the meaning of the Constitution and Federal Statutes and within the meaning of our own Penal Code, and that therefore he is not extraditable.

This does not mean, however, that he has not violated the law and is not amenable to prosecution under the indictment which has been returned against him by the grand jury of Clay County.

No limitation will run against this prosecution and this defendant may be arrested and brought to trial at any time in the future and in any manner that it can be accomplished in due form of law.

Yours very truly,

B. F. LOONEY,
Attorney General.

INTOXICATING LIQUORS—SOCIAL CLUBS IN DRY TERRITORY.

It is a violation of the law for a fraternal organization, through any of its members, to either solicit or take orders for intoxicating liquors in dry territory.

Section 6 of the Allison Law is not affected by any decision which has been rendered by the Court of Criminal Appeals.

March 19, 1915.

Hon. C. A. Martin, County Attorney, Paris, Texas.

DEAR SIR: Under date of March 16, you submit to this Department the following inquiry:

"Mr. F. C. Geron is chairman of the committee on entertainments of the Moose Lodge. As such chairman he receives contributions to a common fund, and in return therefor he issues receipts to the members, said receipts showing the amount of money paid. This money is used to purchase beer to be consumed by the members who make the contributions at a luncheon given by the Moose Lodge. Only those members, however, who have paid in their money and hold receipts therefor are permitted to participate in the consumption of the beer. No member is permitted to contribute after the order for the beer has been placed. The beer is ordered in the name of the Moose Club and is received and signed for as follows: 'Moose Club, per F. C. Geron.' Mr. Geron places the seal of the Moose Club on the record of the Express Company. As chairman of the committee on entertainments, he receives the beer, takes it to the lodge room, and on the night of the luncheon gives to those who have receipts the amount of beer to which they are entitled as shown by said receipts. No one is permitted to take beer from the lodge room. Neither Mr. Geron nor any other member of the entertainment committee receives any pay for his services. In other words, Mr. Geron takes up a collection and orders the beer for the members who contribute and they have a Dutch lunch. He and the members state that they solicit no one to contribute, but that all contributions are made voluntarily. Does Mr. Geron, the Moose Lodge, or any member thereof, violate any penal law of Texas, and, if so, what law and in what respect?"

Our answer to your inquiry is that we believe the arrangement described would be a violation of the law. While there are several provisions of the law that we think would be infringed, for the purpose of this opinion, however, we think it only necessary to mention one. Section 6 of Chapter 31 of the laws passed by the First Called Session of the Thirty-third Legislature is as follows:

> "It shall be unlawful for any person, firm or corporation in person, by letter, circular or other printed or written matter, or in any other manner to solicit or take orders for any intoxicating liquors in any county, justice precinct, town or other subdivision of a county where the qualified voters thereof have by a majority vote determined that the sale of intoxicating liquors shall be prohibited therein."

Under the above section, it is a violation of the law, complete in itself, to solicit an order for intoxicating liquors whether the solicitor takes the order or not. It is a distinct violation of the law to take an order whether the person taking the same solicited the order or not. In other words, it is a violation of the law to solicit or take orders for intoxicating liquors, and to constitute the offense it is not necessary that the person shall both solicit and take orders.

Under the plan and arrangement described in your letter, the chairman of the entertainment committee of the Moose Lodge receives contributions to a common fund and in return therefor he issues receipts to the members, said receipts showing the amount of money paid. The money thus received is used to purchase beer, and the member making the contribution receives a quantity of beer in proportion to the amount of money contributed.

We do not think that it can be seriously contended that this arrangement is more or less than taking an order accompanied by the money, which order is transmitted to some liquor dealer and is filled. The order for the intoxicating liquors is received by the seller or else the liquor would not be shipped. The order is necessarily transmitted by someone to the seller, and, likewise, the order is necessarily taken by someone to be transmitted or else the liquor would not be shipped. The effect then of the whole transaction is that the chairman of the entertainment committee of the Moose Lodge *takes orders for intoxicating liquors in violation of Section 6 of the Allison law.*

The court's decision with reference to the transportation of intoxicating liquors in no way affects Section 6 of the Act, because Section 6 is separate and distinct from every other portion of the act and is not dependent upon any other portion of the act for its life and vitality.

Since we are clearly of the opinion that the arrangement set out by you is violative of Section 6 of the Act, it is not necessary for us to enter into a discussion of the other provisions of the liquor law which may be infringed by the plan described.

We think the doctrine laid down in the case of Barnes vs. the State, 170 S. W., 548, makes it plain that many other provisions of the law relating to intoxicating liquors would be infringed by the method proposed to be followed by the club.

You are, therefore, advised that it is the opinion of this Department

that the plan proposed to be adopted by the Moose Lodge of Paris would violate the law.

Yours very truly,

W. A. KEELING,
Assistant Attorney General.

INTOXICATING LIQUORS—LOCAL OPTION—DRY TERRITORY.

Decision of the Court of Criminal Appeals in the Elmer Peede case does not affect the provisions of the bill relating to soliciting and taking orders for intoxicating liquors in dry territory.

November 2, 1914.

Hon. J. E. Bradley, County Attorney, Groesbeck, Texas.

DEAR SIR: In your communication to this Department you state that since the Court of Criminal Appeals rendered its decision in the Elmer Peede case numerous mail order houses have been mailing circulars, letters, etc., soliciting orders for the sale of intoxicating liquors, and several newspapers in the State have published advertisements of mail order houses proposing to ship intoxicating liquor by order to any person who desired it in prohibition territory in this State. You desire to be advised as to the full scope and effect of the decision of the court in the above named case as to whether or not it would be permissible under any circumstances to solicit or take orders in dry territory in this State.

As we understand the decision in the Elmer Peede case, it simply construed that the Allison Law does not prohibit interstate shipment of intoxicating liquors, when intended for personal use, into dry territory in this State. The decision in no way affects the provisions of the bill relating to soliciting and taking orders. Section 6 of the bill is the only section relating to this subject. It stands out isolated and alone and has the effect of absolutely prohibiting soliciting or taking orders in dry territory in Texas for any purpose whatever. The section is as follows:

"It shall be unlawful for any person, firm or corporation in person, by letter, circular or other printed or written matter, or in any other manner, to solicit or take orders for any intoxicating liquor in any county, justice precinct. town, city, or other subdivision of a county where the qualified voters thereof have by a majority vote determined that the sale of intoxicating liquors shall be prohibited therein."

While the court permits the shipment of intoxicating liquors into dry territory in this State, yet it is not permissible to either solicit or take orders for intoxicating liquors in any dry territory, and it matters not that the liquor is intended for personal use and is interstate, still it would be a violation of the law to solicit or take orders for same. It is a separate and distinct offense that is denounced by this section, and does not in any way affect interstate commerce and is therefore not within the scope of the court's decision in the Peede case. The Department has heretofore held that any newspaper advertise-

ment, the effect of which is to solicit orders in dry territory for intoxicating liquors, is within the scope of the act and is therefore prohibited. The newspaper publishing such an advertisement is amenable to the provisions of the act.

Sections 14, 15 and 16 prescribe the penalties. If the concern publishing the advertisement soliciting the orders is a corporation, it will come under the provisions of Section 14; as to the criminal features Section 15 treats of this. As to the evidence necessary for a conviction, Section 16 governs. These sections are as follows:

"Sec. 14. Any corporation which shall violate any of the provisions of this Act, shall for each such violation forfeit and pay the sum of five hundred dollars to the State of Texas. The county attorney for the county or in case there is no county attorney for said county, then the district attorney for the district, including such county in which such violation may occur, shall, upon credible information furnished him, institute suit or suits in the name of the State of Texas against such corporation for the recovery of said penalties; and in case of a recovery of any penalties, the said attorney instituting and prosecuting said cases shall be entitled to one-fourth of the amount thereof as commission for his services, and the remainder thereof shall be paid into the Road and Bridge Fund of said county; provided, that the State of Texas shall in no event be liable for any costs in any suit authorized by this law to enforce its provisions and the State shall not be required to give bond for costs in any suit instituted under the provisions of this Act.

"And provided further, that should any county or district attorney refuse to bring such suit after credible information has been furnished him, then and in that event any private person, a citizen of the county in which the violation occurred, may institute suit in his own name for the use and benefit of the State of Texas as provided for herein for the recovery of such penalties provided for in this Act; and said person so instituting any suit may be required to give security for costs as provided for under the general laws of the State of Texas.

"Provided further, that should any private citizen institute suit as herein provided for, and he be required to give bond, and thereafter any county or district attorney desiring to prosecute same, said attorney shall be permitted so to do, and his name shall be entered upon the Court docket where said case is pending, and thereafter said private citizen and his sureties shall be relieved of all costs in said case at that time remaining unpaid, which have accrued or which may thereafter accrue."

"Sec. 15. Any person, or any officer, agent or employe of any firm or any corporation who shall violate any of the provisions of this Act, shall be deemed guilty of a felony and upon conviction thereof shall be confined in the State penitentiary for not less than one nor more than three years."

"Sec. 16. A conviction for a violation of any of the provisions herein may be had on the unsupported evidence of an accomplice or participant, and such accomplice or participant shall be exempt from prosecution for any offense under this law about which he may be required to testify."

We, therefore, advise you that it would be your duty to institute both criminal and civil proceedings against all concerns offending against the provisions of this Act.

Yours very truly,

W. A. KEELING,
Assistant Attorney General.

INTOXICATING LIQUORS—GUARDIANSHIP OF HABITUAL DRUNKARDS.

Where a party makes application for or opposes the appointment of a guardian for an habitual drunkard and on the trial thereof he is defeated the cost should be adjudged against him.

Where the person is found to be an habitual drunkard the cost should be paid from his estate, if sufficient; and, if insufficient, the cost should be paid by the county. If the defendant be discharged the person at whose instance the proceeding was had shall pay the cost, unless such proceeding was instituted by an officer acting in his official capacity, in which case the cost shall be paid by the county.

Guardianship proceedings against habitual drunkards are commenced by the filing of information and the issuance by the county judge of a warrant and it is not necessary to issue and post citation, as in proceedings for the guardianship of minors.

Revised Statutes, Articles 4238, 4245, 4286, 4287 and 4288.

September 20, 1915.

Hon. W. O. Murray, Jr., County Attorney, Floresville, Texas.

DEAR SIR: The Attorney General has your favor of recent date, in which you desire advice from this Department upon two propositions, as follows:

First: Where a party files an information, under Article 4240, Revised Statutes, 1911, for the purpose of having a person declared to be an habitual drunkard is the informant responsible for the cost of the court in said proceeding?

Second: Is it necessary in such a proceeding to have any further notice than the warrant issued on the information? In other words, would it be necessary to have the notices posted ten days, as in case of ordinary guardianship?

Answering your questions in the order stated above, we beg to advise that Article 4286, Revised Statutes, is as follows:

"In all cases where a party shall make any application or opposition, and on the trial thereof he shall be defeated, all costs occasioned by such application or opposition shall be adjudged against such party by the courts."

Under this article it is held that where a stranger volunteers to prevent the father of a *non compos mentis* from being appointed guardian and seeks the appointment himself and is defeated it is proper to adjudge the cost against him. Hepley vs. Hugen, 120 S. W., 957.

The next two succeeding articles, 4287 and 4288, dealing with the same subject, are as follows:

"When any person is found to be of unsound mind or to be an habitual drunkard, the cost of the proceeding shall be paid out of his estate; or, if his estate be insufficient to pay the same, such costs shall be paid out of the county treasury, and the judgment of the court shall be accordingly."

"If the defendant, in the case mentioned in the preceding article, be discharged, the person at whose instance the proceeding was had shall pay the costs of such proceeding; unless the informant be an officer acting in his official capacity in filing the information, in which case the costs shall be paid out of the county treasury."

We think the above two articles fully answer the question propounded by you, that is to say, that in the event the person is found to be

of unsound mind or an habitual drunkard the cost shall be paid from his estate, if it be sufficient; or if it be insufficient then such cost shall be paid out of the county treasury and the judgment of the court shall be accordingly.

While, on the other hand, if the defendant be discharged then the person at whose instance the warrant was issued and the trial had shall be responsible for the cost, unless he be an officer acting in his official capacity, as it is made his duty to do under Article 4239, Revised Statutes.

Replying to your second question, you are advised that upon the filing of an information setting up that such person complained against is an habitual drunkard and is without a guardian it is the duty of the judge, either in term time or in vacation, to issue a warrant to the proper officer commanding that such person be brought before him at the time and place to be named in such warrant. (Article 4238, Revised Statutes, 1911.) Upon such person being brought before the county judge at the time and place mentioned in the warrant it is the duty of the county judge, under Article 4241 to impanel the jury to try the issue as to whether or not such person is an habitual drunkard.

Under Article 4243, if the jury finds the defendant is an habitual drunkard it is made the duty of the county judge to proceed immediately and *without further notice* to appoint a guardian of the person and estate of such defendant, in the same manner as in case of a minor.

All of the statutes of this State dealing with the subject of guardian and ward are based upon the act of August, 18, 1876, which act remains substantially intact, and the proceeding above referred to with reference to the appointment of guardians of habitual drunkards is entirely separate and apart and distinct from the procedure laid down for the appointment of guardians of minors. In the first place, such proceeding is instituted and a trial had upon question of fact, that is to determine whether or not such person be an habitual drunkard, and if the jury should so determine then it is made the duty of the county judge to appoint a guardian of the person and estate of such habitual drunkard, without the notice required in proceedings to appoint a guardian of a minor.

We therefore advise you, in answer to this question, that there is no necessity for the issuance and service of citation upon the appointment of a guardian of an habitual drunkard, and that the judge may do so without notice. upon a verdict of the jury to the effect that such defendant is an habitual drunkard.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

OPINIONS RELATIVE TO MUNICIPAL BONDS.

MUNICIPAL BONDS.

1. The proceeds of bonds voted for the purpose "of constructing and establishing" a waterworks system in a city may be used for the purchase of an existing waterworks system in said city and for the purpose of repairing and extending such a system after purchase.
2. Such portion of a bond issue of a city as is not needed for the purposes voted may be canceled.

March 16, 1916.

Hon. James M. Edwards, Tyler, Texas.

DEAR SIR: We are in receipt of a letter from you which is in part as follows:

"The City Commission has tentatively agreed with the Tyler Waterworks Company to buy the existing waterworks system for $65,000. May the Commission legally and properly use $65,000 of the proceeds of the said bonds (referring to City of Tyler Waterworks Bond Issue of $250,000, approved by this Department February 5, 1916), for the purpose of buying and paying for the present waterworks system, and use the balance of such proceeds, or so much thereof, as may be necessary to rehabilitate and extend the present waterworks system "

We will discuss the matter somewhat at length in order that you may readily understand the reasons for the conclusions we have reached and also in order that we may retain references to the authorities for the future use of this Department in deciding similar matters.

The city of Tyler is chartered under and by virtue of Section 5 of Article 11 of the Constitution and Chapter 147 of the General Laws of the State of Texas passed by the Thirty-third Legislature at its Regular Session.

In Section 1 of said charter the city is empowered to "own, lease and operate, and regulate public utilities."

By Section 2 of said charter it is provided that in addition to the powers granted therein "the city shall have and may exercise all other powers which, under the Constitution and laws of Texas, it would be competent for this charter specifically to enumerate."

Section 29 of said charter is in part as follows:

"The Commission, for the purpose of providing the inhabitants of the city with water, light, heat and providing for their health and comfort, shall have the power to buy, own, construct, within or without the city limits, and to maintain and operate a system or systems of waterworks, etc."

Section 31 of said charter is in part as follows:

"Should the Commission determine to construct or acquire any public utility by purchase, condemnation or otherwise as herein provided, it shall have the power to obtain funds for the purpose of constructing or otherwise acquiring said public utility, and paying the compensation therefor, by issuing coupon bonds."

Section 36 of said charter is in part as follows:

"The City Commission shall have authority to appropriate so much of the revenue of the city emanating from whatever source * * * for the purpose of construction, purchase or otherwise acquiring and thereafter maintaining and operating a waterworks plant, etc., * * * and in furtherance of these purposes, they shall have power to borrow money upon the credit of the city and issue coupon bonds of the city therefor in such sum or sums as they may deem expedient."

Section 39 of the charter provides:

"All bonds shall specify for what purpose they are issued."

It will thus be seen that the city, under its charter, has full power to construct, purchase or otherwise acquire and to maintain and operate a waterworks plant.

The purpose of the city of Tyler waterworks bond issue of $250.000, however, as stated throughout the transcript of the proceedings submitted to this Department was as follows:

"For the purpose of raising the funds necessary to *construct* and *establish* a system of waterworks for said city."

To answer your questions, then, it will be necessary to ascertain whether such funds voted for the above purpose may be used for the purpose of purchasing an existing system of waterworks and of rehabilitating and extending such system.

In determining what construction should be placed upon the phrase "to construct and establish a system of waterworks," we will first examine the original grant of authority to cities to levy a tax for waterworks purposes. This authority is contained in Section 9, Article 8 of the Constitution, which provides in substance that a city or town—

"For the *erection* of public buildings, streets, sewers, waterworks and other permanent improvements (may levy) not to exceed twenty-five cents on the one hundred dollars valuation in any one year."

This grant of authority, by enactments by the Legislature, has become a part of the general law of the State and can now be found in Articles 925 and 882, Revised Statutes.

We will quote that portion of each of said articles which we think will be helpful in deciding these questions.

Article 925 is in part as follows:

"The city or town council of any city or town in this State incorporated under the general law * * * may levy and collect twenty-five cents on the one hundred dollars valuation of all property in such city or town for current expenses, and may levy and collect an additional twenty-five cents on the one hundred dollars valuation for the purpose of *construction* or the *purchase* of * * * waterworks, sewers, and other permanent improvements within the limits of such city or town."

Article 882 is in part as follows:

"All cities and towns providing for permanent public improvements, as contemplated by Article 925, shall have the power to issue coupon bonds of the city therefor in such sum or sums as they may deem expedient, * * * provided that the aggregate amount of bonds issued for the *construction* or the *purchase* of public buildings, waterworks, sewers and other

permanent improvements shall never reach an amount where the tax of twenty-five cents on the one hundred dollars valuation of property will not pay current interest and provide a sinking fund sufficient to pay the principal at maturity."

It will thus be seen that the purpose mentioned in Section 9, Article 8 of the Constitution, is "for the *erection* of * * * waterworks." It will also be seen that the construction which the Legislature in passing the acts, of which Articles 925 and 882 are parts, placed upon the phrase used in the Constitution "for the erection of waterworks" was "for the *construction* or the *purchase* of waterworks."

It is true the word "erect" is not used in the city charter of the city of Tyler but in the statement of the purpose for which the funds of the bond issue were to be used the word "construct" is used, and it has been held that the words "erect" and "construct" are synonymous and interchangeable. See

State vs. Gordon, 135 S. W. (Mo.), 929.
Butz vs. Murch Bros. Const. Co., 97 S. W. (Mo.), 895.

And the quotations made above from Articles 925 and 882 of the Revised Statutes show that the Legislature of Texas considered them synonymous and interchangeable. They also show that the Legislature considered the term "for the erection of" to imply the power not only to construct but also to purchase.

The words used in the statement of the purpose in the bond proceedings are "to construct and establish a system of waterworks" and it has been held that the terms "establishment" and "construction" are interchangeable and synonymous. See

Larson vs. Webster Co., 130 N. W. (Iowa), 165.

We will now consider whether the term "to construct and establish a system of waterworks" would authorize a use of the funds for the purchase of an existing waterworks system. Ostrander vs. City of Salmon, 117 Pac., 695, is a case in point. In the fourth paragraph of the opinion of the Supreme Court in that case, it is said:

"It is contended by the appellant that the municipality had no legal authority to purchase waterworks already constructed, or to make the same a part of the municipal water system. This argument is based upon the provisions of Subdivision 1, 2315, Revised Codes: 'To provide for the construction and maintenance of necessary waterworks and supplying the same with water.' It is urged that the word 'construction' as used in this subdivision will not authorize a municipality to purchase works already constructed. We think it was not intended by the Legislature, by the language thus used, to prohibit a municipality from purchasing waterworks already constructed, and to make the same all or a part of a general water system for such municipality. The very fact that the municipality is authorized to provide for the construction and maintenance of necessary waterworks implies authority to purchase works already constructed, and to make the same all, or a part of, a general system of waterworks. This construction clearly appears when we take into consideration the provisions of Section 2238 of the Revised Codes, which prescribes additional powers of cities and villages. Subdivision 36: 'Acquire,' by purchase or otherwise, waterworks or plants and illuminating plants, to supply to municipalities and the inhabitants thereof with water and light. A municipality may have a water system

owned and operated by private individuals or corporations, and such system may be inadequate to supply the demands of the municipality, or such system may be operated in such a manner as to be oppressive to the inhabitants of such municipality, and at the same time the municipality may be able to purchase such system at a less cost than a new system of equal adequacy could be constructed, and, because of these facts and other facts, the city might conclude that it would be wise to purchase such system and make it all or a part of a general water system for the municipality, and it clearly was not intended by Subdivision 1 of Section 2315 to limit a municipality in its power to purchase a water system."

See also Simpson vs. City of Nacogdoches, 152 S. W., 858.

In the case of Seymour vs. City of Tacoma, 32 Pac., 1077, the Supreme Court of the State of Washington in effect held, that the word "construct" includes the power to purchase when it relates to the construction of internal improvements.

In the case of Dick vs. Scarbrough, 53 S. E., 86, the Supreme Court of South Carolina, considering a statute of that State which empowered municipal authorities to provide for the issuance of bonds "for the purpose of enlarging, extending or *establishing* waterworks," said:

"It is true, power to hold an election to authorize the issuance of bonds to purchase waterworks is not given in this statute by use of the word 'purchase' but 'establishing' municipal waterworks may be accomplished by purchase as well as by construction. Establishing waterworks obviously here means the acquirement and inauguration of a system of waterworks as a municipal enterprise and as municipal property by either construction or purchase."

See also Clark vs. City of Los Angeles, 116 Pac., 722.

In the case of Hurd vs. City of Fairburg, the Supreme Court of Nebraska, 128 N. W. Rep., 640, adopting the opinion of the trial court, said:

"The authority to establish a system of electric lights would seem to confer power to do anything necessary to provide the city with a permanent and efficient electric lighting plant. If, by purchasing an old plant and putting it into proper repair and good condition, the city could establish a lighting plant more cheaply than by constructing a new one, I think the city would have authority to do so. Thus it has been held that 'power to establish markets' necessarily conferred the power to purchase and hold the land on which such market was to be erected and to construct buildings thereon for market purposes. People vs. Lowber, 28 Barb. (N. Y.), 65, 70; Ketchum vs. City of Buffalo, 21 Barb. (N. Y.), 294. 298. So of a hospital. City of Richmond vs. Supervisors of Henrico County, 83 Va., 204, 2 S. E., 26. 27; Beekman vs. People, 27 Barb. (N. Y.), 260. 264. If authority to 'establish' a market or hospital confers power to purchase land and put a building upon it, I can see no reason why the power to establish a system of electric lights should not confer power to purchase land with buildings already upon it, if by that means the city can get property which it can make into a permanent and efficient lighting plant. I therefore conclude that the power to establish a lighting plant confers power, in a proper case, to purchase a plant already in existence."

In the case of Territory vs. Baxter, 83 Pac. (Okla.), 709, it was held, that the express power to "erect" a jail includes the implied power to purchase a site on which to erect such jail. It has also been held in effect, that the word "erect" is synonymous with the word

"remodel" as applied to changes in a building. Greenought vs. Allen Theatre and Realty Co., 80 Atl. (R. I.), 260.

This Department, therefore, is of opinion that although the purpose, as stated in the proceedings had in the issuance of $250,000 of City of Tyler Waterworks Bonds, was "to *construct* and *establish* a system of waterworks," the proceeds of the sale of the bonds can be used for the purpose of purchasing an existing waterworks plant.

We will now determine whether proceeds of bonds voted for the purpose above mentioned can be used to rehabilitate, repair and extend a waterworks plant purchased by the city.

In the case of Brown vs. Graham, 58 Texas, 256, the Supreme Court held that the power granted in Section 9, of Article 8, of the Constitution, to "erect" a public building included the power to make an addition to or to repair such a building. Also, as bearing upon a proper construction of the word "erect" we call attention to the fact that Section 9, of Article 8, of the Constitution, also contains a provision that "the Legislature may also authorize an additional annual ad valorem tax to be levied and collected for the further *maintenance* of the public roads." Construing the word "maintenance" the higher courts of Texas have held that it includes the laying out, opening and constructing of new roads, and also the repairing of those already laid out. See Dallas County vs. Plowman, 99 Texas, 512; 91 S. W., 221; Smith vs. Grayson County, 44 S. W., 921.

Again, in the case of Bell County vs. Lightfoot, 138 S. W., 382, the Supreme Court of Texas, construing that portion of Article 610 which authorizes and empowers the county commissioners court to issue the bonds of the county "for purchasing or constructing bridges for public purposes, within the county or across a stream that constitutes a boundary line of the county," said:

"We think it well settled that the authority to *construct* bridges for public purposes embraces the *repairing* and maintenance of such structures," citing the Fowler case, 53 N. Y., 60.

In the case of the State vs. Millar, Mayor, et al, 96 Pac., 751, the Supreme Court of Oklahoma held:

"We believe the words 'the construction of waterworks in said city' printed on the ballots are sufficiently comprehensive to include such work as *re-equipping*, and making *extensions* to, the city's existing waterworks system. Such a construction is certainly within the reasoning of the Supreme Court of the United States in Grant vs. Hartford & New Haven R. R. Co. and the other cases cited supra. In this case we have an insufficient waterworks plant; the city wishes to re-equip and extend it. It seems to us that the term 'construction of waterworks' includes within its meaning work of the above class, and that the people would be sufficiently informed, by its being printed on the ballot of the character of work to be performed and the nature of the indebtedness they were voting to incur."

In the City of Graymount vs. Stott, 49 So. (Ala.), 570, it was held that the word "construction" includes extension.

This Department is therefore of the opinion that a part of the proceeds of the sale of the bonds in question may be used to repair and

extend the waterworks system, if it is purchased by the City of Tyler.

You also ask the following question:

"May the city legally and properly cancel and annul $50.000 of the said bond issue, and sell only $200,000 of the same and expend the proceeds in the manner above indicated?"

We also answer this question in the affirmative.

Very truly yours,

JNO. C. WALL,
Assistant Attorney General.

MUNICIPAL BONDS—INTEREST.

Where Statute prescribes rate of interest to be voted bonds cannot be issued to bear a different rate.

June 26, 1916.

Hon. Dan Lewis, County Attorney, San Antonio, Texas.

DEAR SIR: The Department acknowledges receipt of your letter requesting an opinion of the Department upon the question of the authority of the board of trustees of the San Antonio Independent School District to execute and issue the bonds of said district, bearing interest at the rate of 4½ per cent, instead of 5 per cent interest as submitted and voted in the election.

Your letter reads as follows:

"The San Antonio Independent School District recently submitted to the voters in the district the question of issuing five per cent bonds of the district in the amount of $800 000. At the bond election, the people of the district voted in favor of the issuance of the bonds. The proposition submitted to the people was whether or not to issue $800,000 in five per cent bonds. When these bonds were advertised for sale, some bidders for these five per cent bonds bid premiums as high as $56,000 above the par value of the bonds. Other bidders indicated that they would pay par and four or five thousand dollars premium for the bonds, provided the bonds were changed from five per cent bonds to four and one-half per cent bonds. The question which I desire to submit to you for an opinion is as follows: Under circumstances such as outlined above, will you approve an issue of bonds if presented to you bearing four and one-half per cent per annum interest, when the proposition submitted and voted on at the bond election called for five per cent bonds. In other words, if the people voted for five per cent bonds, will you approve and pass four and one-half per cent bonds, everything else being perfectly regular and legal?"

It is within the knowledge of the Department that the bonds referred to by you ($800,000.00) have been sold and are now in the hands of purchasers, and as to those bonds the Department must answer you in the negative.

We find no provision in the special law creating the San Antonio Independent School District for the refunding of bonds by the district. At the same time we find no provision therein that would prevent the board acting under the general law for the purpose of refunding the $800.000 of bonds recently issued, and issue in lieu thereof 4½ per cent bonds, provided, of course, the holders of said bonds are willing

to surrender them; or unless the period of redemption has arrived at which the board may exercise its option of redemption, in which event the board may issue refunding bonds to take up and stand in lieu of the old bonds bearing 4½ per cent interest.

But we presume your question was asked with the intention of getting an expression of the Department upon the question of whether the bonds, prior to their sale to the purchasers, may be issued to bear interest at a rate less than that voted by the taxpayers.

It is our opinion that where the statute requires that the rate of interest shall be voted by the taxpayers, the bonds can not be issued to bear a different rate, but that where the statute is silent on the subject and does not require that the rate of interest be voted, the bonds may be issued to bear a less rate. In such event, no taxpayers would be heard to complain and all parties would be estopped from claiming invalidity by recitals in the face of the bonds. See the case of Cleveland vs. Spartanburg, 54 S. C., 83; see also Dillon on "Municipal Corporations," 5th Ed., Volume 2, Sections 889, et seq.

We regret that the unprecedented volume of work upon the Department has prevented us from giving an earlier reply to your letter.

Yours very truly,

W. M. HARRIS,
Assistant Attorney General.

COUNTIES—COUNTY DEPOSITORIES—WORDS AND PHRASES.

Revised Statutes. Articles 2440, 2441, 2442, 2444 and 2449; Twenty-ninth Legislature, General Laws, page 387.

1. Money derived from the sale of county road bonds are county funds, in the sense that term is used in the county depository law.
2. The county treasurer must deposit the proceeds of the sale of county road bonds in the county depository.
3. The county depository must receive these proceeds. paying interest thereon in accordance with agreement and bond as a depository.
4. If the depository does not receive such funds and pay interest thereon, it breaches its agreement and bond and the county may maintain an action against the depository.

September 28, 1915.

Hon. Dayton B. Steed, County Judge, Sherman, Texas.

DEAR SIR: In view of the absence of your county attorney, we are addressing this opinion to you. in response to your letter of September 24.

So much of your letter as is necessary to present the question at issue reads as follows:

"On the 15th of this month Grayson County sold $862,000 worth of road bonds, after the same had been approved by the Attorney General. We also have a county depository which takes our county funds at four and one-fourth per cent interest on daily balances. Now this is the question upon which I desire your opinion: Is the money derived from the sale of our road bonds county funds, in the sense in which that term is used in the county depository law, and under the law, can we insist upon the depository taking such funds as it takes the other current funds of the

county derived from taxation year by year? In other words, can we rightly insist on the depository taking the funds derived from the sale of our road bonds, or is it a special fund which the depository has a right to refuse to take? Our depository insists that the money derived from the sale of road bonds is a special and unusual fund, not in contemplation when it made its bid for the county funds and it declines to take it as county funds in its bid."

In reply to the question propounded we beg to advise you that the funds derived from the sale of your county road bonds should be placed in the county depository as other county funds, and that the county depository will be due the county the same rate of interest thereon as on other county funds. You are further advised that you can rightfully and lawfully insist upon the depository taking the funds derived from the sale of your county bonds and that the depository cannot decline to take these funds and pay the interest thereon without breaching its contract and agreement with you and rendering itself liable, by reason of such breach. The reasons which have led us to this conclusion will now be stated.

Revised Statutes, Article 2440, requires the commissioners courts of the various counties of the State, at a stated time, to receive propositions from any banking corporation, association or individual banker that may desire to be selected *"as the depository of the funds of such county."*

Revised Statutes, Article 2441, provides that when any banking corporation, association or individual banker desires to bid they shall deliver to the county judge a sealed proposal, stating the rate of interest which said banking coporation offers to pay *"on the funds of the county,"* etc.

Article 2442, in part, provides:

"It shall be the duty of the commissioners court at ten o'clock a. m., on the first day of each term, at which, by Article 2440, bids are required to be received, to publicly open such bids and cause each bid to be entered upon the minutes of the court, and 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; provided, the commissioners court may reject any and all bids. The interest upon such county funds shall be computed upon the daily balances to the credit of such county with such depository, and shall be payable to the county treasurer monthly, and shall be placed to the credit of the jury fund or to such funds as the commissioners court may direct."

Article 2444 provides that as soon as the depository selected has given bond an order shall be entered on the minutes of the commissioners court designating the same *"as the depository of the funds of said county."* This same article continuing further, reads:

"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 thereafter to deposit the same with said depository to the credit of said county.*"

Revised Statutes, Article 2449, sets forth the method of paying the county's obligations, and provides in substance 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 treasury 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 depository in favor of the legal holder of said warrant,"* etc.

Considering these several articles of the statute referred to, as well as to the whole law of which these articles are a portion the conclusion is inevitable that the purpose of the law was to establish a depository "of all the funds of the county." Certain portions of the law clearly show that it contemplates the division of the recources of the county into various funds. This is shown by Revised Statutes, Article 2449.

The word "funds" not only has its ordinary meaning, as applied to the county's money, but it has reference also to the various divisions or accounts into which the county's recources are divided by law or by the commissioners court, under authority of law. But whether the word "funds" refers to the county's moneys or to the division of the county's moneys into various accounts, or both, is immaterial to the discussion.

The expression "funds of a bank" has been construed to mean all of its funds of every character.

Yellowstone County vs. First Trust and Savings Bank, 128 Pac., 596, 46 Montana, 439.

However, in our law not only is the general expression "the funds of the county" used, but in Article 2442 it is specifically stated that the depository is selected as the depository of *all the funds* of the county.

In Article 2444 the county treasurer is required to transfer to the depository so selected *"all the funds belonging to said county."*

The use of the language referred to needs no interpretation or construction. The word "all" does not mean "some" nor "a part," but means the whole, the entire quantity, the whole amount.

Joslin vs. Williams, 107 N. W., 837, 76 Neb., 594.
Haverly vs. Elliott, 57 N. W., 1010, 39 Neb., 201.
Beckstead vs. Griffith, 82 Pac., 764.
Heitman vs. Commercial Bank, 65 S. E., 590.

Again, it is quite elementary that in the construction of a statute we should give effect to every word, if possible, and in such manner as to make the entire act harmonious and be consistent as well with the general purpose and intention of the Legislature, and avoid, if we may, absurdities. It is the rule also that where the law is plain and unambiguous, whether it be expressed in general or limited terms, it should be held that the Legislature intended to mean what it has plainly expressed.

State vs. Delesdenier, 7 Texas, 76.
Anderson vs. Nabors, 94 Texas, 236.

And that where the Legislature has made no exception to the operation of a statute the courts cannot make any exception.

Somers vs. Davis, 49 Texas, 541.
McAnnelly vs. Ward Bros., 72 Texas, 342.

It is a rule of equal merit and general observation that words of common use must be taken in their ordinary sense, unless the reason for giving them a different meaning is apparent, and this reason must clearly appear, if there is one.

Fristoe vs. Blum, 92 Texas, 76.
Tompkins vs. McKinney, 93 Texas, 629.
Engelking vs. Von Wamel, 26 Texas, 469.

As heretofore suggested, in construing a statute it should not be held that the Legislature intended to do an unreasonable or absurd thing.

Authorities supra.
Ry. Co. vs. Todd, 94 Texas, 632.

Giving the expression "county funds" and "all county funds" their usual, ordinary meaning they would necessarily embrace the funds derived from a sale of county road bonds, because these funds are county funds. On the other hand, if the construction insisted upon by the depository in this instance should be followed then the Legislature would be in the attitude of having passed an absurd law, one that provided a depository for only a portion of the county funds and having left unprovided for funds derived from the sale of bonds. In other words, we would be compelled to hold that although the Legislature started out to provide a depository system for the counties of the State in order to provide care of its funds and prevent county treasurers from farming out the same to friendly bankers, yet it failed to do so, although it used language sufficiently broad to have embraced this purpose. A construction so plainly against the clear meaning of the statute cannot be indulged in.

In the case of State of Nebraska vs. First National Bank of Crete, 23 L. R. A., page 67, the Supreme Court of Nebraska had before it for construction a depository statute of the State, being "an act to provide for the depositing of state and county funds in banks." The act provided that the State Treasurer should deposit in the depository selected "the amounts of money in his hands belonging to the several current funds in the treasury." The phrase "several current funds," etc., was construed to mean all the moneys belonging to the State in the possession or under the control of the State Treasurer, except certain funds which the Constitution was held to prevent being deposited in depositories. The court held that the sinking fund of the State, permanent educational funds and various other funds were current funds and this on the theory that the law intended to embrace all the funds of the State, saying, among other things:

"The subject matter of the act and the obvious scope and purpose of its

provisions conclusively show it was the intention of the Legislature that the statute should apply to all funds of the State alike."

The original act of the Legislature, of which the present county depository law is a part, in its caption declared that it was "an act relating to state and county finances and the finances of cities incorporated under the general laws of this State; *providing for a system of State, county and city depositories for State, county and city funds,*" etc.

General Laws of the Twenty-ninth Legislature, page 387.

This caption shows that the purpose was to establish a "*system.*" This of itself shows that the intention of the Legislature was to cover the entire subject of county finances and established a system of handling county funds. Certainly it cannot reasonably be contended that the Legislature, in undertaking to establish a system for handling county finances, would stop short of embracing all the funds of the county in such a system. Nor did it stop short of it, but declared, as we have seen, that all the funds of the county should be placed in the depository selected under the law. Following, then, the express language of the statute, giving its words their usual and primary meaning, and construing the language in a manner harmonious with the entire context of the act and in harmony with the caption of the original legislative enactment we find that but one consistent construction and interpretation is possible, and that is that all county funds, whether derived from taxation or bond issues, must be placed in the depository and that the depository must receive these funds. in accordance with its bid, contract and bond.

You are advised, therefore:

(a) That moneys derived from the sale of county road bonds are county funds, in the sense that term is used in the county depository law.

(b) That your county treasurer must deposit these moneys in the county depository under the pains and penalties of Revised Statutes, Article 2444.

(c) That the county depository must receive these funds derived from the sale of county bonds, paying the interest thereon, in accordance with its bid, contract, agreement and bond with the county.

(d) That if the county depository does not receive the same and pay interest thereon then it has breached its contract, agreement and bond and the county may maintain an action against the depository for such breach.

I enclose you, as well, Departmental Opinions Nos. 265 and 364,* showing a construction heretofore made consistent with the one here given the present statute.

Yours very truly,

C. M. CURETON,

First Assistant Attorney General.

*28 Op. Atty. Gen., 483.

BONDS—STATE BOARD OF EDUCATION—WAIVER—WORDS AND PHRASES.

One of objects of statute was to prohibit purchase of bonds by State Board except from county, municipality or school district issuing them and said Board cannot consider purchase of bonds where ownership thereof is in third parties.

December 1, 1915.

Hon. W. F. Doughty, State Superintendent of Public Instruction, Capitol.

DEAR SIR: The Department acknowledges receipt of your inquiry in which you state:

"The city of San Angelo sometime during the year 1914-15 issued $80,000 in school building bonds which were sold to the First National Bank of that place. The bank now desires to offer the bonds to the State Board of Education, and through its attorney, Lee, Hill & Lee, asked if under Article 2740, Revised Statutes. 1911, the State Board of Education is allowed to consider the purchase of said bonds."

You further state that it has been uniformly held by the State Board of Education that the Board was not authorized by law to consider the purchase of bonds when the title to the bonds offered for sale had passed from the corporation or municipality issuing them; that the contention of the attorneys for said bank is that by the waiver by the State Board of Education the Board did not refuse to purchase the bonds, but simply waived its prior right of purchase. and that the State Board of Education has never refused to buy the bonds as the word "refused" is used in this statute; that the formal issuance of waiver is the only action ever taken by the State Board of Education in declining or failing or refusing to purchase the bonds as the word "refused" is used in the statute.

So much of said Article 2740 as is pertinent to this inquiry reads:

"Whenever any county. or incorporated city, independent or common school district, road precinct, drainage, irrigation, navigation and levee districts of this State issues any bonds. and they have been approved by the Attorney General, as is required by the previous articles of this chapter. the county judge of the county, or the mayor of the incorporated city, or the president of the board of trustees of the independent or common school district, or the county judge or party authorized by law to sell the bonds of road precincts, or drainage, irrigation, navigation, or levee districts. as the case may be, shall notify the State Board of Education of all bids received for such bonds; and the county judge, or mayor. or president of the board of trustees, as the case may be; shall give the State Board of Education an option of ten days in which to purchase such bonds: provided, that the Board of Education will pay the price offered for such bonds by the best bona fide bidder; and, if the Board of Education shall fail to purchase such bonds within the prescribed time. then the county judge, or mayor, or president of the board of trustees, as the case may be, shall sell the bonds to the best bona fide bidder. * * * provided. that where said board shall refuse to purchase bonds from the county city, or independent or common school district, road precinct, drainage, irrigation, navigation and levee districts. or the parties to whom said bonds were issued, then in no event shall said board purchase said bonds from any subsequent owner or holder of the same."

The answer to your inquiry depends upon a proper construction of the word "refuse" as used in the statute. If the act of the State Board of Education in issuing its waiver of its prior right to purchase the bonds referred to can be considered a "refusal" to purchase the bonds, the Board would be without authority to consider their purchase at this time, they being in the hands of third parties.

Apparently one of the objects of the statute was to authorize the investment of the permanent school fund in the character of bonds in said article mentioned, and another was to prohibit the purchase of such bonds from subsequent owners or holders thereof.

The State Board of Education is by the statute given the discretion to exercise its prior right of purchase within the ten days prescribed by the statute, or to refuse to exercise such right. There must have been an offer of the bonds to the State Board for purchase, else no waiver could have issued—there would have been nothing for it to have waived.

The word "refuse" signifies the denial of a request. An averment in an action for debt that payment had been "refused" pre-supposed a previous demand. Shaler vs. Vann Wormer, 33 Mo., 386. The ordinary signification of the word "refuse" is to deny a request or demand. Burns vs. Fox, 14 N. E., 541; 113 Ind., 205.

The word "refused" as defined by the Century Dictionary means to deny, as a request, demand or invitation, to decline to accept, to reject, as to refuse an offer.

"Refusing" in its ordinary meaning, carries the idea of an application to the person refusing. Davis vs. Lumpkin, 32 S. E., 626; 106 Ga., 582.

A "failure" to purchase said bonds by the State Board does not necessarily imply an offer of the bonds to the Board, while the issuance of its waiver does imply a declination or refusal by the Board to purchase. It is our opinion that the word "refuse" as used by the statute must be given the same meaning as the word "decline." The absolute prior right of purchase existed in the Board during the ten days allowed by the statute, and it could not be divested of this prior right, except by its own act of refusal to exercise the right.

The word "refusal" as used in the political code of California providing that an office becomes vacant on the refusal or neglect of one who is elected or appointed thereto to file his official oath or bond within the time prescribed, means to decline the acceptance of something offered; that the person could not refuse the appointment of an office until he received information of his appointment. People vs. Perkins, 85 Calif., 509; 26 Pac., 245.

It is contemplated by the statute that when an offer of sale of bonds is made to the State Board the offer shall be accepted or the Board shall decline or refuse to accept the offer.

In the case of Persons vs. Hight, 4 Ga., 474, involving the construction of a statute providing that "if any party plaintiff shall 'fail or refuse' to make discovery relative to allegations of usury set up in the plea, the defendant might make affidavit in writing which could be used on trial." it was held that the words "fail" and "refuse" mean substantially the same thing.

The State Board in the present instance failed, declined and refused to exercise the right given it under the statute. "Refusing to comply" ordinarily means the same as "failing to comply." Smith vs. Hance, 11 N. J. L., 244.

Although the action of the Board of Education in the issuance of a waiver of its prior right to purchase bonds must be considered a refusal to purchase within the meaning of the Statute, such refusal would not prohibit the Board subsequently purchasing the bonds from the county, municipality or school district issuing them; but such refusal coupled with ownership by third parties is prohibited by the statute.

It is therefore our opinion that one of the objects of the statute was to prohibit the purchase of bonds by the State Board except from the county, municipality or school district issuing them and that the State Board cannot consider the purchase of bonds where the ownership thereof is in third parties.

Very truly yours,

B. F. LOONEY,
Attorney General.

CITIES AND TOWNS—MUNICIPAL CORPORATIONS—SLAUGHTER HOUSES—LIVE STOCK—INSPECTION OF.

Revised Statutes, Articles 841-843, 844. 845. 846-848, 1096d.

1. A city can compel both the ante mortem and post mortem inspection of livestock intended for sale in a city.
2. Except meats shipped in from another State or foreign country, in which instance the city can, of course, only exercise the right of inspection after the meats are placed on sale in the local markets.
3. The cities cannot, either directly or indirectly, adopt any method which will prohibit the sale of fresh meat slaughtered in other States or foreign countries. but that it can only inspect this class of meat before or at the time it is offered for sale in the local market.
4. Cities have the right to establish municipal abattoirs and compel the slaughter of all animals to be offered for sale in the city at these abattoirs.
5. But that at these abattoirs all persons must have an equal right to slaughter their own stock, paying the city therefor reasonable compensation for the privilege.
6. Whether or not the city may compel the slaughter of animals intended for interstate commerce at the city abattoir, is not decided.

January 21, 1916.

Hon. B. F. Looney, Attorney General, Capitol.

DEAR SIR: I beg to say that I have made a careful investigation of the matters referred to in the letter of Colonel Ike T. Pryor, addressed to you as Attorney General, and have reached the conclusions which will be hereafter specified. I may say also in this connection that I have had the advantage of the investigation made by Assistant Attorney General Smedley and in the preparation of this opinion have used the tentative opinion prepared by him and the authorities cited and discussed therein. So much of Colonel Pryor's letter as is pertinent to the conclusions hereafter stated is as follows:

"I have been invited to deliver an address in El Paso at the Nineteenth Annual Convention of the American National Live Stock Association on January 25th, my subject to be 'Municipal Abattoirs.' In preparing this address I would like to quote your valuable opinion to the extent that any city within the State of Texas would have the right to pass a city ordinance compelling all livestock—the meat of which is offered for consumption to the people of that particular city—to be inspected on the hoof by a city inspector to ascertain if the animal is in a healthy condition before being slaughtered, thereby giving absolute protection to the consumers of fresh meats within that city as to the wholesomeness of said meats.

"I want to go a little further and assert that if the cities of Texas and other States will adopt this method it will prohibit the sale of fresh meat slaughtered in distant cities or States or foreign countries and shipped into that particular city for food consumption.

"You can readily understand my object in advocating the Municipal Abattoir plan. After the animals have been inspected by a city inspector they could then be delivered to the city abattoir and slaughtered for food consumption and I might add could be inspected—especially an animal that was suspicious and what would be called a 'suspect'—both on the hoof and on the hook.

"I specify *city abattoirs* to prevent any individual or corporation from controlling the price of the slaughter of the animal. It is not my intention to have the city prohibit any butcher or slaughterer from killing his own live stock, but the city abattoir owned and controlled by the city would be equipped for killing live stock at the minimum cost. This would preclude individuals from competing and obviate the necessity of individuals killing their own live stock."

The inquiry necessarily involves a consideration of some of the Texas statutes relative to the power and authority of incorporated cities. The general statutes governing incorporated cities contain various provisions touching upon the questions involved.

Revised Statutes, Article 841, authorizes incorporated cities to regulate the inspection of beef and other articles of merchandise not involved here.

Article 843 authorizes cities to make such rules and regulations in relation to butchers as they might deem necessary and proper.

Articles 844 and 845 confer authority upon cities to abate and remove nuisances which affect the public health or comfort.

Article 846 gives cities the power to compel the owner of slaughter houses and soap, tallow and chandler establishments, hide houses, etc., to cleanse, remove or abate the same as may be necessary for the health. comfort and convenience of the inhabitants.

Article 848 confers authority upon cities to direct the location and regulate the management and construction of, restrain, abate and prohibit within the city limits slaughtering establishments and hide houses or establishments for keeping or curing hides, establishments for making soap, for steaming or rendering lard. tallow, etc.

It will be noted from the foregoing statutes that the general laws of this State confer large powers on cities in the regulation of slaughtering establishments, even to the extent of prohibiting their operation within the incorporated limits of cities of the State.

Aricle 1096d, Vernon's Sayles' Civil Statutes, Volume 1, page 532, authorizes cities who have authority to adopt the Home Rule Amendment to the Constitution to establish city abattoirs and to operate these institutions.

From these several provisions it is clear enough that cities have authority to regulate slaughtering houses within their limits or prohibit their establishment within the corporate limits of any city, as well as authority to establish and operate at public expense abattoirs or public slaughter houses.

The first question submitted is whether or not the cities of a State would have the right by ordinance to compel the inspection of live stock on the hoof by a city inspector to ascertain if the animal is in a healthy condition before being slaughtered where it is contemplated that such animal will be offered for sale within the corporate limits of the city.

I beg to answer this question and state that in my opinion a city has such authority, and this, notwithstanding the fact that the State maintains a Pure Food Department which does to some extent inspect the foods offered for sale in the cities of the State. The case of the State vs. Peoples Slaughter House and Refrigerating Company, 15 So. Rep., 408, seems to be in point on this question.

In the case of the City of New Orleans vs. Lozes, 25 Southern, p. 979, it was expressly held that the city had ample warrant of law to pass an ordinance requiring ante mortem inspection of animals intended to be slaughtered for use as human food, as well as requiring post mortem inspection immediately of such animals before same is placed upon the market for sale. However, the conclusion thus stated is subject to one qualification. A city could likely not prohibit the sale of meats in the original package which had been shipped from outside of the State, but when the original packages of this class of meats is broken and it is exposed for sale in the retail trade, the city would have the right to inspect it before it was sold in the retail trade. In other words, while the city has the right to inspect the meats sold in retail trade, it could not prohibit interstate traffic in meats nor burden interstate commerce by its ordinances. I am of the opinion that the city could not either directly or indirectly prohibit the sale of fresh meats slaughtered outside of the State or in foreign countries and shipped into a domestic city for food consumption, but that upon the arrival of meat slaughtered out of the State, it could be subjected to city inspection before it is sold in the retail trade.

It is unnecessary for me to discuss the right of a city to establish an abbatoir, for the reason that under the Home Rule Amendment any city having a population of five thousand or more may adopt that amendment and with it the law specifically giving it authority to establish a city abattoir. I may say, without stopping to cite the authorities, that cities under five thousand inhabitants, in my opinion, also have the authority without the necessity of specific statutory provisions.

Conceding then the right of cities to establish abattoirs, the next question which naturally suggests itself is whether or not the slaughtering of animals at any other place than at the city abattoir may be prohibited. In my opinion, it may be.

In the Slaughter House Cases, 16 Wallace, page 36, the Supreme Court of the United States held that an Act of the Legislature of Louisiana granting to a certain corporation created by the act of the ex-

clusive right for 25 years to have and maintain slaughter houses in New Orleans and prohibiting all other persons from building, keeping or having slaughter houses and requiring that all cattle and animals intended for sale or slaughter should be brought to the slaughter houses of this particular corporation, was constitutional and valid and was in the nature of a police regulation for the health and comfort of the people, within the power of the State Legislature, unaffected by the Constitution of the United States. In that case those desiring to slaughter cattle did the work of slaughtering themselves, but on the premises of the slaughter house corporation, paying the company therefor a reasonable charge. The court in discussing the question presented, among other things, said:

"The regulation of the place and manner of conducting the slaughtering of animals and the business of butchering within a city and the inspection of the animals to be killed for meat and the meat afterwards are among the most necessary and frequent exercises of this (police) power."
Slaughter House cases, 16 Wall., 63.

One of the questions discussed in the Slaughter House Cases was whether or not a monopoly was created by granting to one particular corporation the exclusive privilege of operating a public slaughter house in the city of New Orleans. The court held that it did not create a monopoly as against the Federal Constitution, and that inasmuch as the Supreme Court of Louisiana had held that the Act did not create a monopoly as against the State Constitution, that the act was valid as against this particular attack. The act as a whole was sustained, but we particularly mention the question of monopoly and it is one which must arise in the present case.

The general rule is, that the power to license and regulate a lawful and necessary business will not give to a municipal corporation the power to make contracts which create or tend to create a monopoly.

Dillon on Municipal Corporations, Vol. 2, Section 668.

The question therefore is, whether or not the establishment of a city abattoir with the necessary requirement that all animals to be slaughtered for sale in the city should be butchered at the municipal establishment, establishes a monopoly in contravention of the laws of this State. On the authority of cases hereafter cited, we answer that it does not.

In the case of Newson vs. the City of Galveston, 76 Texas, 559, the Supreme Court of this State held that the city of Galveston under its charter had power to establish market houses and to require fresh meats to be sold there and also to forbid their sale at other places. By its charter the city was authorized and empowered to establish and erect markets and market houses, designate, control and regulate market places and privileges, inspect and determine the mode of inspecting meat, fish, vegetables and all produce, etc. Without reviewing its various ordinances on the subject, it is sufficient to say that the city erected a commodious market house for the accommodation of the public and those vending in fresh meats, etc., containing stalls to let for such purposes at a reasonable rental fixed by the city council, and

that within the limited territory in which the market was located it prohibited the establishment of private markets, the court holding the ordinance of the city valid and that it did not deprive the plaintiff in that case of either his privileges as a citizen or his property, among other things saying:

"Under the provisions of the charter empowering the city to establish market houses, designate, control, and regulate market places, and to regulate the vending of fresh meats, poultry, fish, and other things, no doubt can exist of the power of the city to establish market houses and to require fresh meats to be sold there, and also to forbid their sale at other places. Such a power is most necessary for the protection of the health of a city, and has often been recognized under charters not so clearly conferring it as does the charter of the city of Galveston. Buffalo vs. Webster, 10 Wend., 100; Burk vs. Seabury, 8 Johns, 420; Winsboro vs. Smart, 11 Rich. L., 552; Bowling Green vs. Carson, 10 Bush., 65; New Orleans vs. Stafford, 27 La. Ann., 417; St. Louis vs. Webster, 44 Mo., 549; Wartman vs. Philadelphia, 33 Pa. St., 209; Ash vs. People, 11 Mich., 351; Tied. on Police Power, 104; Dill. on Mun. Corp., 381-92.

"The case of Le Claire vs. City of Davenport, 13 Iowa, 210, goes much further, in that it protected a private individual in exclusive privilege to furnish market place.

"Palestine vs. Barnes, 50 Texas, 538, seems to have recognized the power of a municipal corporation to confer like exclusive market privileges."
Newson vs. City of Galveston, 76 Texas, 564.

In the case of the City of Palestine vs. Barnes, 50 Texas, 538, the Supreme Court of this State held that it was not beyond the authority of the city acting under the general charter law to contract for the erection of a market house with a person or corporation conceding in consideration of such a building and the use of a part of same the exclusive market privileges in such city with the rights to lease stalls, collect rents and an exemption from city taxes for the term of 21 years.

In the case of Ex Parte Gus Canto, 21 Texas Court of Appeals, page 61, it was held that the charter of the city of Bryan conferring upon the city council the power to regulate the erection, use and continuance of market houses authorizes the enactment of an ordinance prohibiting the sale of fresh beef, within market hours, at a place within the city of Bryan other than the market house of said city. In discussing the case, Judge Hurt, writing the opinion of the court, among other things ,said:

"The first proposition relied upon by counsel for the applicant is, that the city had no authority under its charter to pass such an ordinance. The charter grants authority 'to regulate the erection, use and continuance of market houses.' 'In England the regulation of markets by by-laws has long been exercised, and such by-laws are sustained as being reasonable and conducive to the health and good government of the municipality. In this country, however, the practice is almost universal on the part of the Legislature, to confer upon the municipal agencies more or less authority with respect to markets and market places; and such grants are not so strictly construed as those which invest the corporation with powers of a more extraordinary and unusual character.' (Dill. on Munic. Corp., Sec. 380.)

"Tested by the above principle, and, for the purpose of this argument, conceding that the authority must be granted, we are of the opinion that the charter of the city of Bryan confers such authority.

"The second ground relied upon by appellant as a reason why said ordinance is void, is, that said ordinance, under the facts of this case, creates a monopoly; and that, to force appellant to patronize the city market would have the effect to encourage and foster the monopoly. When this supposed offense was committed, the city was in control of the market house by lease from the owner, Mr. Lasker, and by ordinance each person occupying a stall must pay for the use to the city the sum of thirty dollars per quarter, and each person occupying a stand five dollars per quarter.

"The power to make by-laws relative to the public houses, etc., while it would not authorize a corporation entirely to prohibit the sale of meats, etc., within its limits, because this would be in general restraint of trade, will, nevertheless, authorize a by-law forbidding the hawking about or selling meats, etc., by retail, except at the public markets, and within certain limits about the same.' (1 Dill. on Munic. Corp., 386.) Nor will the exaction of a reasonable amount as a license from those occupying stalls and stands in the public market house create a monopoly. From the facts of this case, the price for the stalls and stands appear to us to be quite moderate and reasonable. (1 Dill. on Munic. Corp., 385-387.)"

Ex parte Canto, 21 Texas Court of Appeals, p. 61.

From these authorities we are led to the conclusion that inasmuch as the right to regulate public markets where fresh meats and other merchandise is sold, rests upon the same basis as the right to regulate slaughter houses, that the establishment of a municipal abattoir where all animals are to be slaughtered for sale in the city must be slaughtered, does not conflict with the Constitution of this State; and as suggested above, on the authority of the Slaughter House Cases, we are of the opinion that such an ordinance would not conflict with the Constitution of the United States. It will be recalled that in the Slaugter House Cases the authority to establish the exclusive slaughter house and operate the same was conferred upon a private corporation, and one of the principal contentions was, that by reason of this fact the act was void; as suggested, however, the court ruled to the contrary. In doing so the court adverted to the fact that if the slaughter house there had been established by the city its constitutionality doubtless would not have been questioned, saying:

"If this statute had imposed on the city of New Orleans precisely the same duties accompanied by the same privileges which it has on the corporation which it has created, it is believed that no question would have been raised as to its constitutionality."

Slaughter House Cases, 16 Wall., p. 64.

However, in the Slaughter House Cases the public was not denied the right to slaughter its own animals, that is any butcher who desired or any other person could take the animals intended for slaughter to the public slaughter house and there slaughter them himself, paying a reasonable fee for the privilege. In other words, there was no monopoly of the right to slaughter conferred upon the corporation in that case. We are of the view that a statute taking from the entire public the right to slaughter animals and conferring it upon a city or upon any one person or particular group of persons, would create a monopoly in violation of the Constitution of this State, but that the city would have the right to construct and operate a city abattoir where any individual or corporation that desires to slaughter animals may take their own animals to this municipal establishment and there slaughter

them themselves, paying therefor a reasonable fee for the privilege.

I have not discussed the question of the right of a city to compel corporations engaged in interstate commerce to slaughter animals for interstate commerce at the city abattoir, because not involved in this inquiry.

It may be said generally that slaughter houses belong to the class of occupaions which have a tendency to affect the public health and a determination by the municipality under authority to declare and abate nuisances, that they are nuisances and shall be prohibited within the city limits, is an exercise of legislative discretion, which is regarded as final and binding upon the courts; that when expressly authorized, cities may prohibit the maintenance or operation of slaughter houses within the corporation limits; generally, the city may prohibit the maintenance of slaughter houses, or it may prescribe the localities where the business shall be carried on and prescribe the system of regulation thereof. (Dillon on Municipal Corporations, Section 691.)

The conclusions reached in this opinion are:

1st. That a city can compel both the ante mortem and post mortem inspection of live stock intended for sale in a city.

2nd. Except meats shipped in from another State or foreign country, in which instance the city can, of course, only exercise the right of inspection after the meats are placed on sale in the local markets.

3rd. That the cities can not, either directly or indirectly, adopt any method which will prohibit the sale of fresh meat slaughtered in other States or foreign countries, but that it can only inspect this class of meat before or at the time it is offered for sale in the local market.

4th. Cities have the right to establish municipal abattoirs and compel the slaughter of all animals to be offered for sale in the city at these abattoirs.

5th. But that at these abattoirs all persons must have an equal right to slaughter their own stock, paying the city therefore reasonable compensation for the privilege.

6th. Whether or not the city may compel the slaughter of animals intended for interstate commerce at the city abattoir is not decided.

Very truly yours,

C. M. CURETON,
First Assistant Attorney General.

MUNICIPAL CORPORATIONS—SCHOOLS—HOME RULE AMENDMENT—
ELECTION OF SCHOOL TRUSTEE.

City over 5000 and under 10,000 inhabitants cannot amend charter making election of school trustees at a date othen than prescribed by general law.

February 26, 1916.

Hon. W. F. Doughty, State Superintendent, Capitol.

DEAR SIR: In your communication of the 23rd instant, you submit the following:

"Will you please give me your official opinion on the following question:

Is it legal for a city of over 5,000 and under 10,000 inhabitants, * * * to provide by charter for the election of the school trustees at some other time than at the general election, which date as fixed by law is the first Saturday in April?"

Replying, I beg to say that in my opinion your question should be answered in the negative. Constitution, Article 11, Section 5, contains the following provision:

"* * * no charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the General Laws enacted by the Legislature of this State."

The above language also appears in what is known as the Home Rule Act passed by the Thirty-third Legislature. Acts of 1913, page 307, Section 1.

The Legislature by general law has fixed the first Saturday in April of each year as the general school trustee election day. Revised Statutes, 1911, Article 2818.

In view of the above language set out both in the Constitution and the act of the Legislature, the designation by a city of any day other than the first Saturday in April as school trustee election day would be manifestly illegal.

Some confusion has arisen relative to that provision in the Act of 1913 reading:

"To provide for the establishment of public schools and public school system in any such city and to have exclusive control over same and to provide such regulations and rules governing the management of same as may be deemed advisable * * *"

The above is among the many other powers of local self-government conferred upon those cities adopting charters or amendments under the act. But we do not think this provision is susceptible of the construction that anything could be done incompatible with the general law. It confers only the right to establish, manage and control, and regulate the public schools, and in no instance implies that such city can do any act with reference thereto in conflict with the general laws specifically regulating schools in those cities having assumed control thereof. For example: It could not be correctly contended that a city operating under a special charter would have the right to delegate the control of its schools, the employment of its teachers, and the payment of their salaries, to the mayor, or to a city manager, in view of the provisions of the general law.

Among the other powers of local self-government conferred by the Act of 1913 is the following:

"* * * to regulate and control the conduct of theaters, moving picture shows, ten pin alleys, vaudeville shows, pool halls, and all places of public amusement."

But no city would have the right by an ordinance, by a charter provision, by a referendum vote, or in any other manner, to ignore the general law enacted by the Legislature for the State at large which

prohibits places of public amusement from being operated on Sunday.

Trusting that the above clearly answers your inquiry, I beg to remain,

Very truly yours,

B. F. LOONEY,
Attorney General.

OPINIONS ON PRIVATE CORPORATIONS.

CORPORATIONS—POOL AND BILLIARDS.

1. Pool and billiard clubs cannot be chartered under Subdivision 36, Article 1121, Revised Statutes, for the reason that these amusements are "*games*" and not "*sports.*"
Revised Statutes, Article 1121, Subdivision 36.

February 20, 1915.

Hon. John G. McKay, Secretary of State, Capitol.

DEAR SIR: Two charters have been presented to your Department and by you referred to us, involving the question as to whether or not corporations in the form of social clubs may be chartered under the laws of this State for the purpose of maintaining and operating billiard and pool tables.

This question has been passel upon by us before, in Opinion No. 1306,* but in that opinion the precise matter under investigation was

*40 Op. Atty. Gen., 73.

whether or not such a club could be organized for the purpose of profit.

I.

The parties tendering one of the present charters have had prepared a very able and elaborate brief on the question and through your department have requested a reconsideration of the subject, or rather a consideration of the issue upon the direct question as first stated in this opinion. Because of the importance of the matter and the very earnest insistence of those tendering the present charters and in view of the elaborate brief prepared by Mr. Thomas H. Stone, attorney, Houston, Texas, on the question, we have concluded to write an opinion on the direct issue involved and common to the two charters under examination.

We make the opinion a general one in its nature, so that it will apply in all cases where it is sought to organize clubs for the maintenance of pool and billiard tables. We will then write an opinion upon each of the charters tendered to you, making reference in such opinions to the general opinion above referred to.

II.

The insistence is made that a club corporation may be chartered for the purpose of operating pool and billiard tables under Subdivision 56 of Article 1121 of the Revised Statutes of this State, which authorizes the formation of corporations "to support and maintain bicycle clubs, and other innocent sports." The question directly at issue is whether or not the conduct of a pool or billiard hall or the operation of pool and billiard tables in a club is an innocent sport, within the terms of Subdivision 36, above quoted.

III.

It is elementary that the words in a statute are to be interpreted in accordance with their common and ordinary usage, and the popular meaning given them unless it appears by the context, or otherwise, that they are used in a different sense.

Lewis' Sutherland on Statutory Construction, Vol. 2, Section 590.

Technical words relating to an art, science or trade when used in a statute dealing with the subject matter of such an art, science or trade are ordinarily to be taken in their technical sense and will be so construed, unless the context or other considerations plainly show a contrary intent.

Sutherland, Section 393.

These rules are laid down by the Texas authorities as follows:

"Words of common use must be taken in their ordinary sense in construing statutes unless the reason for giving them a different meaning is apparent; that the rules for the construction of statutes require that the words employed by the Legislature should be understood in their ordinary and popular acceptation, unless technical words are used, or it clearly appears from the context that they are not to be so understood."

Fristoe vs. Blum, 92 Texas, 76.
Engelking vs. Von Wamel. 26 Texas, 469.
Turner vs. Cross, 83 Texas, 215.

IV.

The games of pool and billiards as commonly understood are not sports in the usual and ordinary sense of that word, but are games and therefore are not embraced within the terms and provisions of Subdivision 56 of Article 1121.

The use of words and phrases and the meaning attached to them may be determined by their statutory use, their judicial, colloquial and technical use and by their literary and historical employment.

V.

We will first examine the statutes of this State, to see what meaning has been given to pool and billiards, whether they have been treated as games or have been classed with sports, or if these terms have been used by the lawmakers of this State from time immemorial when making reference to these particular kinds of amusement.

The Penal Code, Article 551, makes it an offense for any person to keep or exhibit for the purpose of gaming any gaming table or bank of any name or description whatever. The succeeding article declared that it is the purpose of the one just referred to to include every species of gaming device known by the name of table or bank, and declares that it shall be construed to include "all games which in common language are said to be played, dealt, kept or exhibited." The next succeeding article makes clearer still what is included in those preceding, for it declares:

"Article 553. Lest any misapprehension should arise as to whether certain

games are included within the meaning of the foregoing articles, it is declared that the following games are within the meaning and intention of said articles, viz.: faro. monte, vingt et un, rouge et noir, roulette, A. B. C., chuck-a-luck, pool and rondo; but the enumeration of these games specially shall not exclude any other properly within the meaning of the two preceding articles. Any game played for money upon a billiard table, or table resembling a billiard table, other than the game of billiards licensed by law, is punishable under the provisions of this chapter."
(Article 553, Penal Code.)

It will be noted that in the last quoted article the Legislature has said "lest any misapprehension should arise as to whether certain games are included within the meaning of the foregoing articles," etc,, it is declared that the games named therein are included and among others they specially name "pool." The exact language referred to being quoted above as follows, "it is declared that the following games are within the meaning and intention of said articles, to wit: .... pool, ..." The lawmaker then goes further and declares that the enumeration of "*these games*" shall not exclude any other properly within the meaning of the preceding articles. Then the Legislature says "any *game* played for money upon a billiard table other than the *game of billiards* licensed by law is punishable under the provisions of this chapter." The succeeding articles, including those making it a felony to bank games, make reference in the same substantial manner to those defined in the articles which we have quoted.

In fact, so far as the statutory classification of pool and billiards is concerned they are classed at all times as games and pool and billiard tables referred to as gaming paraphernalia.

The latest expression of the legislative view on this subject is that contained in the pool hall act, and in Section 12 of that act (Acts of 1915, page 36), the previous statutory classification of these amusements is adhered to and pool and billiard tables are treated as tables for the purpose of having played thereon the games of pool and billiards. In defining a pool hall the statute uses the following language:

"The term 'pool hall' as used herein shall mean and include the following: Any room, hall or building in which are exhibited any pool or billiard tables or tables for the purpose of permitting games to be played thereon for hire, revenue, prize, fees or game of any kind."

VI.

The judiciary of the State in passing upon questions necessitating a reference to the amusements of pool and billiards constantly refer to them as games and not as sports.

In the case of Smith vs. The State, 17 Texas, page 191, Judge Lipscomb of the Supreme Court of this State constantly treats biliads as a game and uses the word "game" as a proper one in describing the amusement commonly referred to as the "game of billiards." From that opinion we will present for your consideration, as showing a judicial application of the word "game" as being the

proper word when referring to the amusement of billiards, the following excerpt:

"The principles of the defence, disclosed in the appellant's affidavit, were well discussed by this court in its opinion in the case of Barker vs. The State (12 Texas, 272), and according to the ruling in that case, the defense disclosed in this could not have been available. It shows that pin pool would be regarded in Cuba and in Mexico as a game of billiards, but that it would not be so regarded in America. It is to the latter alone we must look, and in construing the statute licensing the game of billiards, we have nothing to do with the meaning of the term billiard table in other countries. If other different games could be played upon the table, under its name, it would not legalize them in our State.' The statute of our State, in licensing billiard tables. has reference to the game then known and played called billiards, and will neither tolerate the change of the game, nor the introduction of other games to be played upon the table licensed. We look to the game, and not the name by which it may be called. There was a time when so much regard was paid to the name of a game, that when a game was prohibited, those professors of the science of gambling had only to change the name of the game to avoid the penalty. and the history of jurisprudence will show the following absurdities: When the game of roulette was prohibited, those astute, scientific gentlemen changed the name to rouge et noir, from that to roulette poulette, and then to A B C, and to E O, and the last to O E. But such shallow devises can no longer be made available. Common sense has triumphed over such absurdities, and by the introduction of the word "device" into our statute, courts will inquire, not into the name, but the game, to determine whether it is a prohibited game; and if it is not the licensed game, the license will neither protect the owner of the table, nor the players, from the penalty of the law."
(17 Texas Reports, 192.)

In the case of Taylor vs. The State, 50 Texas Criminal Reports, the Court of Criminal Appeals of this State likewise referred to pool, classifying it as a game, among other things saying:

"It is urged, however, that the subsequent allegations, explanatory of what had gone before. towit: 'a pool table then and there kept and exhibited for gaming purposes,' eliminated any difficulty concerning the preceding allegations, on the ground that a pool table as defined cannot be a banking game, but must be a table game. Century Dictionary defines pool as a game played on a billiard table with six pockets, by two or more persons. 'In the United States the game is played with fifteen balls, each ball numbered, and counting from 1 to 15. The object of each player is to pocket the balls, the number of each ball being placed to his credit.' Whether this last allegation in the indictment is intended to define the game of pool as above, constituting it a table game, is complicated with difficulty; as it does not state that it was a game of pool played as a table game, but calls the game as played a pool table. We hold that even if it be conceded that the subsequent allegation meant a game of pool played in the ordinary way as a table game, still the preceding allegation being in the alternative would leave the indictment in a confused state. The court should have entertained a motion to quash. This of course disposes of the case."
(50 Texas Criminal Reports, page 184.)

Other opinions of our Texas courts treat the amusements of pool and billiards as games in the same manner, making the word "game" clearly and plainly a characteristic description of the amusements of pool and billiards, as obtains in the judicial language of the State.

Mayo vs. The State, 82 S. W., 516.
Moore vs. The State, 92 S. W., 1082.

The courts of other States have likewise constantly and continually referred to the amusements known as pool and billiards as games and classed these amusements, as does our statute, along with cards, checkers, etc.

The City of Clearwater vs. Bowman, 82 Pac., 546.
Squier vs. The State, 66 Ind., 317.
Sykes vs. State of Ala., 67 Ala., 77.
United States vs. McKenna, 149 Fed., 252.
Ellison vs. Lavin, 66 L. R. A., 604.

We will not quote extensively from these cases; it suffices to say that they constantly refer to the amusements of billiards and pool as games, showing a judicial classification of these amusements as games. In the last case cited the Court of Appeals of New York, speaking through Judge Cullen, among other things, said:

"Throwing dice is purely a game of chance, and chess is purely a game of skill But games, of course, do not cease to be games of chance because they call for the exercise of skill by the players, nor do *games of billiards* cease to be games of skill because at times, especially in the case of tyros, their result is determined by some unforseen acident, usually called luck."

In the case cited above from the Federal Court the district judge quoted with approval an extract from the Lavin case, just quoted above.

In the case of Sykes vs. The State, 67 Alabama, supra, the appellant was charged with having a billiard table in operation in his saloon. In the opinion rendered by the court quotations and references are made to various authorities on the game of billiards, in which that amusement is treated by those authorities, as well as by the court writing the opinion, as a game. The court, among other things, said:

"The testimony tends to show the defendant had two tables—one to play billiards on, and the other, for playing the game of pool. The difference in the structure of the tables was slight. The billiard table was a modern one, without pockets. The pool table, on the model of the former billiard table. having six pockets. Both games were played with balls and cues, but while billiards was played with four balls, pool was played with a greater number. Under the title 'Billiard,' American Cyclopedia. it is said: 'Billiard tables are divided into three classes; they may have four pockets, six, or none at all.' In another place, the reader is referred to Michael Phelan's book, 'The Game of Billiards,' for 'description of other games played on the billiard table, such as pyramid pool, pin pool, etc.' This work was published in 1873. In Webster's Unabridged Dictionary, printed in 1870. the game of billiards is described as being played on a table having pockets at the sides and corners of the table. Defendant had both a billiard table without pockets, and a table with pockets, but in all other respects, like the billiard table. 'It was further proved and admitted that, formerly the game of billiards was played altogether on tables with pockets, like the one on which the game of pool was played in this case; but that lately. and within the last four or five years, in some places such tables with pockets are not used for the game of billiards, and the billiard tables are now made and used without pockets.' "

(67 Alabama Reports, pages 79 and 80.)

The court, in Squier vs. The State, cited above, classified pool and billiards as follows, saying:

"The game which the appellant suffered the minor to play was shown by the evidence to have been called 'pool', or, perhaps 'fifteen-ball pool.' And we think it was clearly enough that the game thus played is not strictly, nor in ordinary parlance, a game of billiards. The game of pool, it would seem, might be played upon the old style of billiard table having pockets, but not upon the modern pocketless tables. The game played in this case was played with fifteen balls, while billiards is played with three or four balls only.

"We shall not enter into a minute description of the two games, billiards and fifteen-ball pool, as shown by the evidence, in order to show the difference between them. It is sufficient to say, that, in our opinion, the evidence shows them to be different games, each having a name which distinguishes it from the other. We can not concur with the counsel for the State, in the proposition, as we understand their brief, that the words 'billiards' should be regarded as a generic term, broad enough to cover any game that may be played upon a billiard table. It seems to us that the word should be construed in its ordinary sense, as it is commonly understood, and not to include a game commonly known, not by that name. but by another. If playing cards were an indictable offense, a man indicted for playing whist could hardly be convicted on proof that he played euchre, though both games are played with cards.

"The word billiards. as used in the indictment. is descriptive of the kind of game which the appellant is alleged to have suffered the minor to play; and the variance between the allegation in this respect and the proof is, in our opinion, fatal. Bartender vs. The State, 51 Ind., 73."

(66 Indiana Reports, pages 318 and 319.)

In the Bowman case, supra, the court definitely refers to billiards and pool as games, and quotes with approval the definition of pool in the Century Dictionary, among other things saying:

"We think the Legislature intended, in the employment of the term 'billiard table,' to include all tables on which the game of billiards was played at the time: and the language will also embrace billiard tables under any modification they may undergo. Even at the present time the word 'billiard table' is employed as a generic term. including the form adapted to the playing of pool. This is illustrated by the definition of 'pool' in the Century Dictionary as a 'game played on a billiard table with six pockets by two or more persons.'"

(82 Pac., 526-527.)

With reference to the colloquial classification of the amusements of pool and billiards it is perhaps unnecessary to cite any authority, for the reason that they are constantly referred to as games. I venture the ascertion that no one within the experience of the average man has ever heard the games of billiards and pool referred to as "the sport of billiards." or "the sport of pool," or the "sports of billiards and pool." As showing, however, the colloquial classification of these amusements we direct your attention to the testimony in two cases, to wit:

Rainbolt vs. State, 101 S. W., 217.
Goforth vs. The State, 3 S. W., 383.

These cases are Texas cases and the witnesses Texas people, reflecting in their testimony the colloquial classification of these amusements.

The word "sport" is usually confined to field sports, though of course it may have other meanings, but its usual signification is that suggested.

White vs. Western Assurance Company of Toronto, 54 N. W., 193.
Wirth vs. Calhoun, 89 N. W., 785.

In the first stated case the court refers to a sportsman, quoting the Century Dictionary as follows:

"One who sports, a man who practices field sports, especially hunting or fishing, usually for pleasure and in a legitimate manner."

In the last named case the question was whether or not a theatrical performance, consisting of music and dancing and feats of contortion, was sport or sporting. The statute under examination read, so far as it is necessary to refer to the case, as follows:

"If any person of the age of fourteen years or upward shall be found on the first day of the week, commonly called Sunday, sporting, rioting, quarreling, hunting, fishing or shooting he or she shall be fined, etc."

The statute went somewhat further than the quotation does in also making it an offense to labor at common labor on Sunday. The court, after disposing of the question and in holding that the theatrical performance was not embraced within the terms of common labor, then took up the issue as to whether or not it fell within the word "sporting," as used in this statute, and quoted with approval the definition of "sport" as defined in Webster, among other things saying:

"'Sport' is defined by Webster as follows: 'To divert; to make merry; to represent by any kind of play; to exhibit or bring out in public, as to sport a new equipage; to play; to frolic; to wanton; to practice the diversions of the field; to trifle.' According to the same lexicographer, 'sporting' means 'indulging in sport; practicing the diversions of the field.' If we use the definition of 'sport,' instead of the term itself, in defining the term 'sporting,' the definition would be as follows: (1) to indulge in diverting; (2) to indulge in merrymaking; (3) to indulge in representing by any kind of play; (4) to indulge in being out in public, as to indulge in sporting a new hat or carriage; (5) to indulge in play or frolic; (6) to indulge in wantonness; (7) to indulge in trifling; (8) practicing the diversions of the field. It is obvious, we think, that the Legislature did not employ the term in the sense of the first, second, fourth, fifth or sixth definition above given. They are too broad. They include too much. If adopted in the construction of the statute, our Sunday law would rival the most stringent of the blue laws. The third is a sense in which the term is rarely used, and is illustrated in the Century Dictionary by a line from Dryden: 'Now sporting on the lyre the loves of youth.' As thus illustrated, it, also, is too broad, as it includes many common and innocent diversions. The seventh has no application to this case. This leaves the eighth, 'practicing the diversions of the field,' as the definition the lawmakers probably had in mind when the law was enacted. This appears still more probable on the examination of other definitions. In the Century Dictionary the general meaning of 'sporting' is said to be 'engaging or concerned in sport or diversion'; the specific meaning, 'interested in or practicing field sports.'" (89 N. W., 787.)

From the foregoing it is seen that the court took up each of the

several definitions of sporting as given in Webster and concluded that the Code under which the prosecution was brought could not refer to any of the definitions there given except the eighth one which was "practicing the diversions of the field," and it is this definition which it seems to us the Legislature had in mind in providing that corporations might be chartered for the purpose of promoting bicycle clubs and other innocent sports.

The Supreme Court of this State has already held that in drafting the purpose clause of a charter under this subdivision a definite sport must be described or set forth.

Smith vs. Wortham, 157 S. W., 741.

The court in an opinion rendered in the Smith case referred to baseball as a well recognized and definite innocent sport. It seems to us that this case is persuasive of the insistence which we make that the word "sports," as used in this statute, does not refer to games, but refers to those classes of amusements which have been recognized from time immemorial as sports, not to that class such as cards, dice, pool and billiards, which have been from time immemorial classified as games.

Mr. Stone, in his brief on the question, has cited the case of State vs. Miller, 36 Atl., 795, as being an authority which classifies or defines billiards as a sport. The writer is familiar with this case, and it does not appear that the same is in point. The court there was construing a section of the Connecticut law, which was broad enough to embrace the game of billiards, whether it be considered as a sport or a game. Section 3097 of the general statutes of that State was the particular statute then under examination and it in part read:

"Every person, who, between the hours of twelve o'clock on Saturday night and twelve o'clock on Sunday night next following shall keep open any place * * * in which any sports or games of chance are at any time carried on shall be fined not less than $50," etc.

The court in passing upon the question there referred to and treated the game of billiards as a sport, but did so because for a long period of time the legislation in the State of Connecticut had classed billiards as sports; however, the statute used the words "games of chance" which was broad enough to embrace billiards, in the event it was not embraced within the term "sports" under the legislative history of that State. The court, among other things, said:

"It is a matter of common knowledge that the sport of billiards is an ordinary subject of such business, and that a place kept for the transaction of that business, if kept open on Sunday, may be peculiarly liable to interfere with the lawful restrictions for securing the quiet required on that day; and, moreover, for a long period our legislation has expressly classed 'billiards' under 'sports,' when the word has been used in a similar connection. It is immaterial what motive induced the Legislature to use this language in Section 3097. 'Sport' is a very general term, covering field sports and other means of recreation necessarily not a subject of the business described in the statute. Possibly 'games of chance' were added to exclude any doubt as to their being covered by the more general term, or to emphasize the fact of their inclusion; possibly because it has been an ancient legislative cus-

tom to describe amusements regulated by statute under similar circumstances as sports or games. The language of the statute is in other respects intentionally broad, so as to provide against ingenious evasions. It is sufficient that the whole section expressed with adequate clearness the real meaning of the words used, and includes as one subject of the business specified the sport of billiards." (30 Atl., 790.)

The statutes of Connecticut for the year 1750 had classified these things which were commonly and ordinarily called games, such as dice and cards, as either games or sports.

36 Atl., 795.

In fact the classification given in this case to the effect that billiards is a sport arises out of the old blue laws of the State of Connecticut, and as shown by the court would not have been given in the opinion referred to but for the fact that "for a long period of time our legislation (of Connecticut) has expressly classified billiards under sports * * * It has been an ancient legislative custom to describe amusements regulated by statute under similar circumstances as sports or games."

This case is the single case in all the decisions of 603 of the American courts, so far as the writer has been able to find, that has ever classified the game of billiards as a sport, and this is done in this case in view of the peculiar legislative history of the State of Connecticut and may be considered rather as a reflex of the old blue laws of that State, than an intelligent classification based upon a common and ordinary use of the term "sport."

VII.

We have heretofore endeavored to present to you the general use of the general classifications of pool and billiards as games, as distinguished from sports, made in our statutes in the judicial language of our courts and that of other States, as well as the colloquial classifications, and we have seen that from all three sources we find that pool and billiards are constantly classified as games, and not as sports. The same result will be reached when we consider the question from a literary and historical standpoint.

Concerning the word "sport," the Encyclopedia Brittanica, 11th edition, Vol. XIV, p. 735, says:

"Sport (a contracted or shortened form of 'disport,' to amuse, divert oneself. O. Fr. *so disporter*, or *deporter*, to leave off work, hence to play. Lat. *dis-*, away, and *nortare*, to carry; the origin of the meaning lies in the notion of turning away from serious occupations, of 'diversion') play, amusement, entertainment or recreation. The term was applied in early times to all forms of pastimes. It was, however, particularly used of out-of-door or manly recreations, such as shooting with the bow, hunting and the like. Modern usage has given several meanings to 'sport' and 'sports.' Generally speaking, 'sport' includes the out-of-door recreations, the 'field sports,' such as fishing, shooting, fox hunting, etc., connected with the killing or hunting of animals as opposed to organized 'games,' which are contests of skill or strength played according to rules. It also includes the special class of horse racing, the votaries of which, and also of the prize ring, have arrogated to themselves sometimes the name of 'sportsman,' applying that word

even to those who follow racing simply as an occasion for betting. On the other hand, the plural 'sports' is generally confined to athletic contests, such as running, jumping, etc. (See Athletic Sports and subsidiary articles.)"

The Book of Sports, issued by James the First in 1617, on the recommendation of Thomas Morton, Bishop of Chester, for use in Lancashire, granted authority to the people to indulge in certain amusements on Sunday, which, among others, were dancing, archery, leaping, vaulting, May-games, and prohibited certain other sports, as bear-baiting etc. (25th Ency. Brittanica, page 735.)

Even in those ancient days, the word "sport" or "sports" was usually applied to out-of-door recreations just as it now is, as shown by the above excerpts from the Brittanica.

On the other hand, pool and billiards are usually classed as *games*, and not as "sports." In the article on the subject of billiards in the Ency. Brittanica, Volume III, page 934, et seq., they are both constantly spoken of and referred to as *games*. The article begins by saying: "Billiards, an indoor game of skill, played on a rectangular table, etc." This authority refers to the Cotton's Complete Gamester, published in 1674, an English work in which the *game* of billiards is referred to as the "most gentile, cleanly and ingenious *game*." In discussing the subdivisions of English billiards, the Encyclopedia refers to the pastime as a *game* as follows: "The principal *games* are three in number,—*billiards proper, pyramids and pool;* and from these spring a variety of others. The object of the player in each *game*, however, is either to drive, etc."

Further along the same authority says: "The *game* of billiards proper consists of the making of winning and losing hazards, etc."

Again: "The *game* commences by stringing for the lead and choice of balls, etc."

Referring again to the same subject, the Encyclopedia says: "These *games* are played on three-inch pocket tables, etc."

Concerning pool, the same authority says: "Pool, a *game* which may be played by two or more persons, consists entirely of winning hazards. * * * the three-ball carom *game* is the recognized form of American billiards. * * * The cushion-carom *game* is a variety of the ordinary three-ball games, etc. * * * the four-ball *game* * * * the original form of American billiards * * * is pratically obsolete."

The Encyclopedia contains a long bibliography on the subject of pool and billiards, and in this these amusements are treated as *games* and not as "sports." For example, the works by Mr. E. White, published as early as 1807, was entitled "Practical Treatise on the *Game* of Billiards." Another work by Mingual, published in 1834, was entitled "The Noble *Game* of Billiards." Russell Marden published in 1840 a book called "Billiards, *Game*, 500 Up." The Encyclopedia says that these older books, however, have been largely superseded by such modern authorities as J. Roberts, "The *Game* of Billiards," and others.

It is quite clear from this very thorough and comprehensive article on the subject of pool and billiards, as contained in the Brittanica,

Eleventh Edition, that these amusements have been, from time immemorial, referred to as games, and not as "sports."

The Encyclopedia Americana, another very thorough and comprehensive work of recent publication, contains an article on the subject of "Billiards" by Mr. Geo. F. Slosson, the American billiard expert. He begins the article as follows:

"Billiards, the generic name of a group of *games*, is played in the United States usually on a 5x10 table, etc. * * * the origin of the game of billiards is shrouded in mystery, but it is known to have been played in a crude way since before the birth of Christ. * * * About this time the French made it an indoor table game by playing it on a square table with pockets at each corner. * * * All match or tournament games are now played on 5x10 tables and are very popular in all leading public rooms and clubs throughout the United States."

Further on in his article, Mr. Slosson says:

"It is only the last 50 years that billiard tables, and their paraphernalia, and billiard playing itself, have made giant strides. * * * Then was played the four-ball game on a 6x12 table, six pockets. * * * Experts soon became so proficient in this style of game as to render it necessary to place restrictions on the bed of the table, etc. * * * The superb play of the professionals in this country and in France, where the same style of game is played, etc. * * * Various are the styles of billiards played now as three-cushion caroms, cushion caroms, champions' game, balk-line game, and the regular three-ball game. * * *

"Pool may be said to be, broadly speaking, a branch of billiards, and is very popular with the masses. Pool is played on a 5x10 or 4½x9, six-pocket table, and generally with galley attachments, a new devise that rather adds to the popularity of the game. * * * The most popular of the various pool games is continuous pool. * * * There are various other kinds of pool games: American, pyramid, Chicago, forty-one, and others. For a complete list of the various styles of games, also all styles of billiards, with the rules governing them, the reader is referred to 'Handbook of Standard Rules of Billiards and Pool.' * * * Billiards is without a doubt far superior in point of skill and science to any games played either indoors or out-of-doors." (Enc.-Americana, Volume II.)

The New International Encyclopedia, Volume III, page 70, also contains a comprehensive article on the *game* of "billiards." The article begins by saying:

"Billiards, a *game* of skill, whose development as a scientific indoor *game* is wholly modern,"

This article quotes a line from Spencer's *Mother Hubbard's Tale* (1591), in which those who played billiards were spoken slightingly of as follows:

"With dice, with card, with balyards far unfit,
With shuttlecock, miscoming manly wit."

Thus at that early day it seems that billiards was accepted with other amusements, which were then and are yet plainly *games*, to-wit: dice and cards. This article adverts to the fact that billiards was originally an out-of-doors sport played on the ground. It was likewise, at the same time, played in a similar form indoors on tables. This article is not so comprehensive as that in the Brittanica, and the statement that billiards was originally an out-of-door sport may well

be doubted, because the history of the *game* extends back at least to the beginning of the Christian era, and it may be true that in England it was played out-of-doors at one time, but this was not the origin of the *game* but merely a branch of it, which has even come down to our own day as the *game* of croquet. However, the article referred to, throughout its length, treats billiards as a *game*. For example, it says:

"The English game is played with three balls, etc. * * * In the United States the *game* of billiards is now played almost exclusively on the carom-tables. * * * The original American four-ball game of caroms and pockets was played on a 6x12 table; * * * and what has come to be known as the balk-line *game* is a development made necessary by the wonderful skill acquired by professionals, etc."

This article likewise treats the *game* of pool as a branch of the *game* of billiards, and constantly refers to it as a *game* or *games*. For example, it says:

"Other pool games, either obsolete or of less importance, are pin pool, two-pin pool, little corporal, red, white and blue, bouchon pool, Parisian pool, high number pool, and pool for 31 points."

VIII.

We also direct your attention to the fact that in the technical language of those who manufacture pool and billiard tables the same classification is given to those amusements as that upon which we insist, to wit, that they are *games*.

In 1911 the Brunswick-Balke Collender Company issued a handbook of rules of billiards. In this book, page 5, in writing up the history of the *game*, is found the following language:

"The origin of 'The Noble *Game*' has forever been a mystery and a contested point, and its invention has been attributed by various authorities to several nationalities. Our presidents, from George Washington to the present time, have practiced the game in the billiard parlor of the Executive Mansion. * * * Henry Ward Beecher and other great divines have in strong terms of praise advocated the game. * * * The venerable Dr. McCook of Princeton College renown, is a warm advocate of the *game*. * * * Billiards is a mathematical game and affords scope and exercise for those faculties which discipline and strengthen the mind. The kings of France have at all times been considered most powerful friends of the *game*. Mary, Queen of Scots, was a passionate patroness of the game. * * * The Empress Josephine entertained so great an idea of the fascinations of the game that during Napoleon's moody moments she would challenge him to a bout at billiards, and he never appeared more happy than while engaged in the *game*."

In that portion of the book, page 30, giving the rules of the game, it is said:

"Certain general rules defining foul strokes govern all *games* of billiards."

"The three-ball carom *game* is played, etc. (page 33); the playing rules of the four-inch balk-line game govern the eighteen-inch balk-line game, with the following exceptions (page 43a)."

This work contains pages under various sub-heads, all of which treat billiards as a *game*, as, for instance, (page 44) the space game; page 45, the progressive carom game; page 46, four-ball carom game; page 47, American four-ball pocket game; on the same page (47), cushion carom game; page 48, three-cushion carom game; page 49, bank shot game; page 50, the game of billiards for the English championship; and, page 55, the game of continuous pool.

There are many subdivisions, all treating pool and billiards as *games*, as well as scores or excerpts from the text of the work which might be quoted, showing that pool and billiards are *games* and not "sports." This work, as put out by one of the largest, if not the largest, manufacturing firms of billiard and pool tables in America, purports to be (quoting from the title) "a complete handbook of standard rules of all the prominent *games* of billiards and pool as practiced by the great professionals and other leading players in all parts of the world."

IX.

We think it must be admitted that there is a substantial concurrence of statutory, colloquial, literary, historical, judicial and technical authorities that pool and billiards are *games* and are not in the usual and ordinary sense of the term "sports," and that therefore corporations can not be chartered under Subdivision 36 of Article 1121, Revised Statutes, for the purpose of promoting the games of billiards and pool.

Yours very truly,

C. M. CURETON,
First Assistant Attorney General.

CORPORATIONS—STOCKHOLDERS' MEETINGS.

Revised Statutes, Articles 1153, 1174, 1160.

1. Ordinary business corporations can not hold stockholders' meetings outside of the State.
2. But the usual business of such corporations, such as is usually transacted by directors or other agents may be transacted without the State as well as within it.
3. But corporations whose members reside in various States, and which are conducted rather for mutual protection, instead of as ordinary business corporations, similar to those referred to in the opinion, may hold stockholders meetings without the State as well as within it.

October 22, 1914.

Hon. F. C. Weinert, Secretary of State, Capitol.

DEAR SIR: We recently received a letter from Mr. J. V. Hardy, who represents the Mohair Growers Association and the Angora Goat Breeders Record Association of the United States, asking us for certain information with reference to the authority and conduct of two proposed corporations. The inquiry and the ruling which will be made thereon are of general importance and therefore instead of advising

Mr. Hardy, we have chosen rather to follow the letter of the law and write an opinion on the question to you, however transmitting a copy of the same to Mr. Hardy for his information. The body of his letter is as follows, to wit:

"Have just returned from Albuquerque, N. M., where we had a Mohair Growers Convention. We are now a copartnership, and a resolution was passed allowing us to incorporate to store, grade and sell mohair.

"I know you are familiar first hand and beg to know if we incorporate in Texas and maintain the warehouse and secretary's office there. if we can hold our Angora Shows and Animal Conventions in other States when desired?

"Again, if the Angora Goat Breeders Record Association should take out a charter in Texas and cancel the one we now have in Missouri (which requires we meet in the State each year and nowhere else) could we hold our meetings elsewhere? This for the reason we want to meet in Frisco next year."

The substance of the two inquiries propounded is whether or not these proposed corporations could be chartered under the laws of Texas and if so, would they have authority to hold their stockholders meetings for the election of directors and other business outside of the State of Texas.

Article 1153, Revised Statutes, provides in substance that the board of directors of corporations shall transact all its business and that an annual election shall be held for directors, at such time and place as the by-laws of the corporation may require.

Article 1174, Revised Statutes, provides that each corporation shall keep its principal office within the State of Texas. There is no article which specifically provides that the meetings of stockholders and directors shall be held within the boundaries of a State; but the extent of the statutory provision is, that its principal office shall be kept within the State. At the principal office of the corporation must, of course, be kept the record of all stock subscribed and transferred and of all business transactions; and under Article 1160, Revised Statutes, these books and records must at all reasonable times be open to the inspection of the stockholders. However, as to ordinary corporations the rule is that it cannot hold meetings or pass votes or have any legal existence in another State. This prohibition, however, as to the performance of acts outside of the State where chartered refers to acts of a strictly corporate character, such as must be discharged by the corporators themselves, such as the organization of the corporation and the election of its directors. The better opinion is, that the mere transaction of such business as is usually done by the directors or other agents of the body may be done as well without the State as within it.

Franco-Texas Land Co. vs. Laigle, 59 Texas, 343;
Beattie vs. Hardy, Secretary of State, 98 Texas, 836.

In the case first above cited it was expressly held by the Supreme Court that the corporation did not have the right to hold a stockholders meeting outside of the State of Texas, and that directors elected at a meeting of the stockholders held outside of the State were neither *de jure* officers of the company nor *de facto* directors.

The holding of the Texas court is similar to that of other jurisdictions.

21 American and English Ency. of Law, p. 839;
Place vs. People, 87 Ill. App., 527;
Hodgson vs. Ry. Co., 46 Minn., 434.

It is plain from the authorities which we have cited that if the two corporations proposed by Mr. Hardy are to be of the ordinary kind and class of business corporations, then that the meetings of the stockholders for the purpose of electing directors must be held in the State of Texas, if their charters should be issued by the State, but that the ordinary business of the corporation, such as is usually done by directors or other agents of corporate bodies may be done without the boundaries of the State, as well as within it.

III.

However, there is a class of corporations which may hold meetings of their stockholders for the purpose of amending their by-laws or fundamental laws in the election of directors beyond the boundaries of the State of their creation. In the case of the Sovereign Camp, Woodmen of the World, vs. Fraley, 59 S. W., 870, et seq., the Woodmen of the World was chartered under the laws of Nebraska with power to make its own Constitution, laws, rituals, rules of order, discipline, secret work, and to establish subordinate branches. The purposes of the organization were declared to be to organize and establish a social, fraternal, beneficiary and benevolent order and to create a fund for certain beneficiary purposes. The affairs of the corporation were to be conducted by an executive council. The plan was to organize local camps, called "membership camps," and what was known as "head camps," having supervisory control and authority over the membership camps, from which head camps delegates were to be selected, which composed the sovereign camp of the order. These delegates were required to meet on the second Tuesday of March at such place as might be designated by the sovereign camp, the sovereign executive council, or the sovereign consul commander. It was provided that the first meeting should be held at Omaha in the State of Nebraska. At a regular meeting of the delegates to the sovereign camp held at St. Louis, Missouri, in 1897, which was without the State of the creation of the corporation, certain amendments to the fundamental law of the corporation were enacted and the issue arose as to whether or not these amendments were legally adopted—it being claimed on the one hand that they were not so because of the fact that the adoption of these amendments was strictly corporate business and the corporation could not hold a meeting for the transaction of corporate business or a meeting of the sovereign camp beyond the boundaries of the State of Nebraska, which was the State of the corporation's creation. The Supreme Court of Texas, speaking through Judge Brown, held that the meeting in St. Louis was the legal and proper one and that the rule invoked as to ordinary corporations and to which we have heretofore referred, did not apply to

corporations of the character then before the court. In the opinion referred to the Supreme Court of Texas said:

"It is claimed that the corporation could not hold a meeting for the exercise of strictly corporate functions outside of the State of Nebraska, under whose laws it was organized. That is the rule with regard to ordinary corporations. Land Co. vs. Laigle, 59 Texas, 343. That rule, however, is based upon public policy, which seeks to protect the stockholders from meetings which might be held at places remote from their homes, or of which they had not been notified; but the reason is not applicable to this class of corporations, because, in the first place, there are no stockholders, in the sense in which that term is ordinarily used. Such associations are composed of members living in various States—usually the greater number outside of the State in which the corporation was created. Their interests demand that the meetings of the supreme legislative departments be held as near the membership as possible, and to accomplish this purpose the place of meeting is usually changed at each convocation of the body. Sound public policy sustains such a proceeding, as consistent with the rights of persons interested in the management of the corporation. In the second place, when a corporation like this is created, with power to organize subordinate bodies over so large a scope of country as the United States and the Dominion of Canada, it is necessarily contemplated that the greater part of the business will be transacted beyond the territory of the State in which it has its origin, and the authority to hold the meetings at such place as may be best adapted to the purpose of its creation arises by implication. Derry Council No. 40, Junior Order United American Mechanics of Hummelstown, Pa., vs. State Council of Pennsylvania (Pa. Sup.), 47 Atl., 208." (59 S. W. Rep., p. 881.)

An examination of this quotation discloses the grounds upon which Judge Brown placed the right of this corporation to hold meetings at a place other than the State of its domicile. The purpose of the ruling in the case of Franco-Texas Land Company vs. Laigle, 59 Texas, 343, heretofore cited by us, was to preserve a sound public policy which seeks to protect the stockholders from meetings which might be held at places remote from their homes or of which they have not been notified, but the court says that this reasoning is not applicable to that class of corporations where in the first place there are no stockholders in the sense in which that term is ordinarily used and where the association is composed of members living in various States, usually the greater number outside of the State in which the corporation is created. The court likewise holds that the sound public policy sustains a proceeding consistent with the rights of the persons interested in the management of the corporation. In other words, where the stockholders of a corporation reside principally outside of the State and are not in the strict sense of the word stockholders but rather members conducting an association for mutual protection, then that the rule invoked by public policy and announced in the Laigle case does not apply, but that corporations of the last named class may hold their stockholders conventions or meetings beyond the boundaries of the State of their creation, because such act is in line with the same sound rule of public policy which gave rise to the converse thereof in the case of ordinary business corporations.

IV.

We do not know just the method of organization or the extent of

the membership in the two corporations suggested by Mr. Hardy, but from our general knowledge of the purpose of these classes of organizations, we would infer that stockholders or members of both the proposed Mohair Growers Convention and Angora Goat Breeders Association probably reside in the various States of the Union and that the proposed corporations would not be business corporations in the strict sense of the term, but would rather be organizations of those engaged in the occupations named for mutual protection and that they are capable of being organizations within the rule laid down by Judge Brown in the quotation made by us from the Fraley case. As suggested we do not know just exactly how these corporations are to be organized, but they can be organized so as to bring themselves entirely within the rule suggested by Judge Brown in the case referred to.

V.

We, therefore, advise you that if these corporations are organized as ordinary business corporations, then meetings of the stockholders could not be held beyond the boundaries of the State; on the other hand, if they are organized within the limitations of the rule suggested by Judge Brown and briefly referred to by us, then that meetings of the stockholders may be held beyond the boundaries of the State. If it is determined to organize these corporations under the latter rule, then the articles of association should be full enough with details to show the territory from which the membership is to be taken, the general plan of the corporation's operation and should state that the stockholders meetings are to be held within the State of Texas, and in such other States as may be from time to time selected by those upon whom the power to select places of holding conventions is conferred by the by-laws. In fact, we would suggest that in addition to the charters of these corporations that a tentative set of bylaws should be tendered you when the charters are offered for filing.

Yours very truly,

C. M. CURETON,
First Assistant Attorney General.

CORPORATIONS—CHARTER FEES—FEES OF OFFICE—COMMERCIAL CLUBS—BOARDS OF TRADE—WORDS AND PHRASES.

(By C. M. Cureton, *First Assistant Attorney General.*)

CORPORATIONS—CHARTER FEES—FEES OF OFFICE—COMMERCIAL CLUBS

1. A corporate charter, the purpose of which is to transact the business of the commercial clubs or boards of trade as authorized by Subdivision 56, of Article 1121, is a corporation intended for *mutual benefit* within the provisions of Article 3837 and the fee of the Secretary of State for filing the same. is not less than $50.

2. The word *profit* when used with reference to the affairs of corporations, refer to that which the directors of the corporation dis-

tribute among its stockholders without intrenchment upon the capital of the company.

3. The word *benefit* as used in this statute, is a comprehensive term and includes both general and special benefits, as well as direct and indirect benefits. It embraces within its meaning whatever is of advantage, or whatever promotes the prosperity of those to whom it is applied.

4. Corporations as chartered under Subdivision 56 of Article 1121, as commercial clubs or boards of trade, are exempted from the payment of franchise taxes, by Revised Statutes, Article 7403.

5. Statutes cited or construed:

Revised Statutes, Article 1121. Sub-division 56.
Revised Statutes, Articles 3837-7403.
Authorities cited:
Robertson vs. DeBrulatour, 80 N. W., 938.
McLouth vs. Hunt, 39 L. R. A., 230.
Fechtler vs. Palm Bros. & Co., 133 Fed., 462.
Simcoke vs. Sayre, 126 N. W., 816.
Words and Phrases (2nd Series), Vol. 3.
Lewis Sutherland on Statutory Const., Sec. 380.
Dallas Co. vs. Club Land etc., Co., 95 Texas, 200.
Ferguson vs. Borough of Stamford, 22 Atl., 782.
Synod of Dakota vs. State, 14 L. R. A., 418.
Booth & Co. vs. Weigand, 10 L. R. A. (N. S.), 693.
Beveridge vs. Lewis, 59 L. R. A., 581.
Spokane Traction Co. vs. Granath, 85 Pac., 261.
Edwards vs. James, 7 Texas, 372.
Cannon vs. Vaughan, 12 Texas, 399.
Houston, etc., Ry. Co. vs. State, 95 Texas, 507.

(47 Op. Atty. Gen., 261.)

CORPORATIONS—CHARITABLE AND EDUCATIONAL—FRANCHISE TAXES—FILING FEES.

A corporation, the purpose of which is stated to be the accumulation and loan of money to young men to defray their expenses while studying for the Christian ministry and to young women to defray their expenses while studying to be Christian missionaries, where such corporation is organized for charitable purposes and not for profit, may be incorporated under Subdivision 2, of Article 1121, Revised Civil Statutes.

The fee for filing the charter of such a corporation is $10.00.

Such corporation is not subject to a franchise tax.

Articles 1121, 3837 and 7403, Revised Statutes, 1911.

December 9, 1915.

Hon. John G. McKay, Secretary of State, Capitol.

DEAR SIR: Under recent date you submit to this Department the proposed charter of McFadden Ministerial Loan Fund, and desire to be advised if same should be filed under Sudivision 2 of Article 1121 of the Statutes of 1911, and if so that we further advise you the amount of the filing fee to be charged by your department and also whether or not such corporation would be subject to the payment of a franchise tax.

The purpose clause of the proposed charter is in the following language:

"The purpose for which it is formed is the accumulation and loan of money to young men to defray their expenses while studying for the Christian Ministry in Texas Christian University, at Fort Worth, Texas; and the funds so accumulated shall be used for that purpose exclusively throughout the life of this corporation; except said funds may also be used for making loans to young women to defray their expenses while studying, in said University, to become Christian missionaries, provided their applications for loans are approved by unanimous vote of the executive committee of this corporation."

We note that Section 6 of the charter is in the following language:

"This corporation is organized for charitable purposes, and not for profit, and shall not have any capital stock, and all of its accumulations, less its necessary expenses, shall be added to its funds for carrying on the purposes of its organization. This corporation does not own any goods, chattels, lands or rights, but owns credits of the estimated value of the sum of seven thousand four hundred and fifty dollars."

Article 1121 of Revised Statutes of 1911 sets out various purposes for which corporations may be created in this State. Subdivision 2 of this article is in the following language:

"The support of any benevolent, charitable, educational or missionary undertaking."

In our opinion the purpose for which this corporation is proposed to be organized, as stated in the charter offered, brings the same clearly within the provisions of subdivision 2, Article 1121, as above quoted, in that it shows the same to be clearly a charitable educational undertaking, and not for profit. The only purpose of this proposed corporation is to enable young men and young women to obtain an education, in order to fit them for the Christian ministry or as Christian missionaries, respectively. It does not carry with it any of the usual elements of an ordinary trading corporation, but in our opinion shows clearly upon its face that its only purpose is charitable and educational and we therefore advise you that you should file same under subdivision 2 of Article 1121, Revised Statutes, 1911.

As to the amount of fees that should be charged by your department for the filing of this charter we quote that section of Article 3837, Revised Statutes of 1911, applicable thereto, which is as follows:

"For each and every charter, amendment or supplement thereto, of a private corporation intended for the support of public worship, any benevolent, charitable, educational, missionary, literary or scientific undertaking, the maintenance of a library, the promotion of painting, music or other fine arts, the encouragement of agriculture or horticulture, the maintenance of public parks, the maintenance of a public cemetery not for profit, a fee of ten dollars to be paid when the charter is filed."

We think the above quoted portion of the statute is applicable to this case and that therefore a fee of $10 should be charged.

With reference to the liability of such a corporation for the payment of the franchise tax and from what has been said above with reference to the nature of this corporation it follows that we are of the opinion that the same would be exempt from the payment of a

franchise tax under Article 7403, Revised Statutes, 1911, which is as follows:

"The franchise tax imposed by this Chapter shall not apply to any insurance company, surety, guaranty or fidelity company, or any transportation company, or any sleeping, palace car and dining car company which now is required to pay an annual tax measured by their gross receipts, or to corporations having no capital stock and organized for the exclusive purpose of promoting the public interest of any city or town, or to corporations organized for the purpose of religious worship, or for providing places of burial not for private profit, or corporations organized for the purpose of holding agricultural fairs and encouraging agricultural pursuits, or for strictly educational purposes, or for purely public charity."

This corporation being formed for educational and charitable purposes the same would be exempt under this Article from payment of a franchise tax.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

PRIVATE CORPORATIONS—CHAMBERS OF COMMERCE—ATTORNEY GENERAL.

1. Corporation can only own such property as shall be required for the success of the enterprise or purpose for which it was chartered.
2. Corporation can only make such contracts and enter into such obligations as are essential to the transaction of its authorized business.
3. Corporations are limited to the exercise of such powers only as are necessary to the accomplishment of the purposes for which they are chartered.
4. Constitution and statutes make it the duty of the Attorney General to see that corporations do not exceed their charter powers, and to bring necessary suits for penalties and for forfeiture where the laws in these respects are violated.
5. There exist no express powers in corporations to make contributions to the propaganda of a commercial organization, nor can there be found an implied power justifying such expenditures.

January 26, 1915.

Hon. Marshall Spoonts, County Attorney, Fort Worth, Texas.

DEAR SIR: Under date of the 23d inst. you write this Department as follows:

"The Chamber of Commerce of Fort Worth, organized for the purpose of promoting the business welfare of the city, is desirous of obtaining an opinion as to whether or not under the doctrine invoked in the suit of the State vs. The Commercial Secretaries, it would be unlawful for corporations to contribute to their up-keep. There will be, of course, some political activity of this organization along civic lines and along lines going to the up-building of Fort Worth, but no action on their part as a body to further any cause of any individual in any kind of a political contest. I would appreciate your opinion on this matter so that no misunderstanding can arise."

I can answer your inquiry best by calling your attention to the law that controls the activities of corporations and the laws under which this Department proceeded against the Texas Business Mens Association and others.

Article 1140, Revised Statutes of 1911, in expressing the powers of private corporations, reads as follows in Subdivision 4:

"To purchase, hold, sell, mortgage or otherwise convey such real and personal estate as the purposes of the corporation shall require, etc."

Subdivision 7 of this article reads as follows:

"To enter into any obligation or contract essential to the transaction of its authorized business."

As thus limited corporations can only own such property as shall be required for the success of the enterprise or purposes for which the corporation was chartered, and can only make such contracts and enter into such obligations as are *essential* to the transaction of its authorized business. The powers of corporations and a construction somewhat of the statute above quoted are discussed by Judge Gaines in Northside Ry. Co. vs. Worthington, 88 Texas, 562. Among other things Judge Gaines said:

"Corporations are the creatures of the law and they can only exercise such powers as are granted by the law of their creation. An express grant, however, is not necessary. In every express grant there is implied power to do whatever is necessary or reasonably appropriate to the exercise of the authority expressly conferred. The difficulty arises in any particular case whenever we attempt to determine whether the power of a corporation to do an act can be implied or not. The question has given rise to much litigious controversy and to much conflict of decision. It is not easy to lay down a rule by which the question may be determined, but the following as announced by a well known text-writer commends itself not only as being reasonable in itself, but also as being in accord with the great weight of authority. 'Whatever be the company's legitimate business, the company may foster it by all the usual means; but it may not go beyond this. It may not under the pretext of fostering entangle itself in proceedings with which it has no legitimate concern. In the next place, the courts have, however, determined that such means shall be direct, not indirect; i. e., that a company shall not enter into engagements as the rendering of assistance to other undertakings from which it anticipates a benefit to itself, not immediately. but immediately by reaction, as it were, from the success of the operations thus encouraged, all such proceedings inevitably tending to breaches of duty upon the part of the directors, to abandonment of its peculiar objects on the part of the corporation.' Citing Green's Bryce's Ultra Vires, 88. In short, if the means be such as are usually resorted to and a direct method of accomplishing the purposes of the corporation, they are within its powers; if they are unusual and tend in an indirect manner to promote its interest, they are held to be ultra vires."

See, also, 56 Texas, 594; 67 Texas, 699; 68 Texas, 176; 74 Texas, 173; 74 Texas, 479; 101 U. S., 81.

The general rule which seems to be laid down in these cases is that the implied powers of the corporation are only such as are necessary to the direct and exclusive business of the particular corporation; that there are incidental matters which might afford a profit to the corporation and might be conducive to the general welfare, but the corporation is limited to the exercise of such powers only as are necessary to the accomplishment of the purposes of the charter.

It will thus be seen that the corporation is hedged about by its charter and the laws controlling the corporation, which by implication are a part of its charter. The activities of a corporation might be put

forth in many ways that would be conducive to its welfare and conducive to the welfare of the community in general that could not be permitted by the law of its creation. Article 1165, Acts of 1911, (Revised Statutes), provides:

"No corporation, domestic or foreign, doing business in this State, shall employ or use its stock, means, assets or other property, directly or indirectly, for any other purpose whatever than to accomplish the legitimate objects of its creation or those permitted by law."

Article 1166 reiterates the same doctrine and expressly prohibits corporations from making any character of political contributions.

The Constitution and statutes make it the duty of the Attorney General to see that corporations do not exceed their charter power and to bring necessary suits for penalties and for forfeitures where the laws in these respects are violated. Candidly, I believe the objection which we successfully urged against contributions by corporations to the propaganda of the Business Mens Association can with equal plausibility be urged against contributions made by corporations to the propaganda of a commercial organization. There certainly exist no express powers in the corporations to make such contributions, and I do not believe under the decisions of the courts there can be found an implied power justifying such expenditure of their means and assets simply because the matters are entirely too remote and disconnected from the business of any corporation organized for business or industrial purposes whatever that purpose may be.

The ends sought to be attained may within themselves be perfectly legitimate, laudable and necessary, in a large sense, to the community, and such as individuals acting for themselves and using their own means could with perfect propriety accomplish. The question I am discussing here is the power of a corporation, a creature of the law, hedged about by the law of its creation, which it transgresses when it steps beyond the scope of either the express or implied powers conferred upon it.

Yours very truly,

B. F. LOONEY,
Attorney General.

CORPORATIONS—NAMES—CHARTERS—SECRETARY OF STATE.

(By C. M. Cureton, *First Assistant Attorney General.*)

1. The attempt of a corporation to use the name of a private individual as a part of its corporate name without the consent and over the protest of such person is unauthorized in law, and is not such a name as the proposed incorporators may, in law, assume for their proposed corporation.

2. Under such circumstances, the Secretary of State has the authority, and it is his duty to decline to file such articles of incorporation for said reason.

3. Statutes cited or construed:

Revised Statutes, Articles 1122 to 1132.
Authorities cited:
Ramsey vs. Tod, 95 Texas, 614.
Johnston vs. Townsend, 103 Texas, 122.
Miller vs. Tod, 95 Texas, 404.
Smith vs. Wortham, 106 Texas, 10.
1st Cook on Corps., Sec. 15.
Fort, etc., Assn. vs. Model, etc., Assn., 159 Pa. State, 308.
First Presbyterian Church of Harrisburg, 2nd Grant's cases, Sup. Ct. of Pa., p. 240.
Eliza Walker and others, 1 Tenn. Chancery, p. 97.
Bagby & Rivers Co. vs. Rivers, 67 A. S. R., 357.
Hopkins on Trademarks, 2d Ed., Sec. 69, 83.
Kneedler vs. Glanzer, 55 Fed. Rep., 895.
Reeves vs. Denicke, 12 Abbott's Prac. (N. S.), 92.
Weed vs. Peterson, 12 Abbott's Prac. (N. S.), 178.
28 Am. & Eng. Encyc. of Law, 385.
Bagby, etc., Co. vs. Rivers, 67 A. S. R., 353.
Armington vs. Palmer, 43 L. R. A., 95.
Kathreiner's Malzkaffee Fabriken, etc., vs. Pastor Kneipp Medicine Co., 82 Fed., 321.
Hendricks vs. Montague, 17 L. R. Chancery Div., 638.
Hopkins on Trademarks, 2d Ed., Sec. 66, p. 144.
Same authority, Section 69, pages 150, 154, 155, 156.
28 Am. & Eng. Encyc. of Law, 85.
Hazelton Boiler Co. vs. Tripod Boiler Co., 142 Ill., 507.
Guth Chocolate Co. vs. Guth, 215 Fed., 750.

(48 Op. Atty. Gen. —)

OPINIONS RELATIVE TO PUBLIC LANDS AND MINERAL RIGHTS.

PUBLIC LANDS—MINERAL SURVEYS.

1. The provision of Section 19 of the Mineral Act of 1913, to the effect that placer claims "shall conform as nearly as practicable, to existing surveys and their subdivisions," is directory only; it is not intended by such provision, to require locations to follow or parallel section lines or to prohibit them from crossing section lines. The purpose is that they conform to the section lines when, under all the circumstances, it is feasible and reasonable for them to do so.

August 24, 1916.

Hon. J. T. Robison, Commissioner, General Land Office, Capitol.

DEAR SIR: In a recent letter you have requested the Attorney General for a construction of Section 19 of the mineral law of 1913 (Acts of Regular Session, Thirty-third Legislature, page 416), and particularly the following language of said section: "* * * provided all placer claims located shall conform as nearly as practicable to existing surveys and their subdivisions." You state that you have heretofore construed the above clause as prohibiting one placer claim from extending across the lines of a land survey, and that "conformity would also require the lines of such claim to be parallel with the land survey lines, as well as within it." You advise further that you have construed the words "existing surveys and their subdivisions" to relate to land surveys and not to mineral surveys.

You advise that the immediate occasion for this request is a contention with reference to certain locations of sulphur in Culberson County.

It appears from your letter that you have been given the provision above quoted, a strict construction, and that certain persons interested in locations have been insisting on more liberal construction.

We have made a very careful investigation in this matter, and have reached the conclusion that the language used is intended to be directory, and that it should be given a liberal construction to encourage the development of the resources of the State. The emergency clause of the act in question shows that the purpose of its passage was that the mineral resources of the State might be properly developed. We think this clause should be given a liberal construction for three reasons. First, because of the purpose of the whole act above referred to; second, because of the language used, which indicates that it was not the intention to apply a strict rule; and, third, because the authorities which we have been able to find bearing upon the question indicate that such construction should be given.

The use of the words "as nearly as practicable" precludes the idea of the existence of an exact rule to be applied in every case. The word "practicable" is synonymous with "feasible." As said by one of the appellate courts of the State of New York, in the case of Willcox vs. Supreme Council, etc. (123 N. Y. Supp., 83, 86), "The word

'practicable' does not necessarily mean 'possible of execution.' An act is practicable if, under all the circumstances, it is feasible; if it can be done lawfully, with reasonable convenience." Similarly, the Supreme Court of Missouri, in the case of Benjamine vs. Metropolitan Street Railway Company (245 Mo., 598; 151 S. W. 91), defined the word "practicable" as meaning "capable of being done or accomplished with available means or resources," and said, further, that the word "practicable" includes the element of reasonableness. One of the definitions of the word, given by Webster, is "capable of being done or accomplished with available means or resources."

We understand that in Culberson County, where the placer claims are situated, out of which your question arose, the land has been surveyed into blocks and the blocks have been subdivided into sections. We are advised, further, that the section lines, if they were ever surveyed on the ground, were not marked, or certainly were not permanently marked, and that in order to find a section line of a particular section in Culberson County it is necessary for a surveyor to locate the block lines and to construct a particular section from the block lines.

A placer claim is acquired by taking the steps named in the statute. The prospector first finds or discovers the mineral which he desires and he then stakes off his claim and posts the notice provided for in Section 16, stating the name of the location of the claim and the date of the posting, and describing the claim by length and width "together with the section number if known," and he is required to place stone or concrete markers at the corners of the claim. Within three months from the posting of the notice, he is required to file with the county clerk, a copy of the notice which has been posted, and an affidavit that he has performed certain work. Within one year from the date of the posting of the original notice the locator is required to file with the county surveyor an application for the survey of the claim, giving the name of the claim "and such description of its boundary and location as will enable the surveyor to identify the land." After the survey is made, the locator is required to file the field notes, a plot of the survey, together with the application and affidavit, in the General Land Office. When he has complied with these different steps, the locator is entitled to the exclusive use and possession of his claim as long as he continues to perform an amount of work upon it equivalent to $100 worth of labor per annum. It thus appears that the rights of the locator and the particular land to which he is entitled are fixed and designated when he finds and marks his claim and posts the notice on it, and that after he has taken the other steps provided for in the law, he is entitled to the exclusive use and possession of that particular land. It is not contemplated that he shall stake off a certain tract of land and that when he has his survey made within the year, the survey shall include other land than that originally staked off. It is not contemplated that the prospector be accompanied by a surveyor when he first discovers and stakes off his claim. The fact that Section 16 of the act requires that the notice give the section number *"if known,"* shows that it is contemplated that it is more than likely the locator will not know even what section he is on.

If the section lines are so well marked and defined that an ordinary person prospecting for minerals can find the section lines, and without unreasonable trouble or expense, stake off his claim so as to conform to the section lines, it is in that respect practicable in such case that the claim conform to the section lines. But if the section lines are not marked and defined, and an ordinary prospector cannot find them without the aid of a surveyor, and without the expenditure of unreasonable time, and an unreasonable amount of money, it is not practicable for the location to conform to the section lines.

If we are correctly informed as to existing conditions in Culberson County, that is, that the section lines are not clearly marked and defined, and that in order to make the original location conform to the section lines a prospector would have to be accompanied by a surveyor, then, we advise you that it is not practicable that the placer claims in that section conform to the section lines, and that they should not be required to do so.

For other reasons, it may not be practicable to require such claims to conform to the section lines. The minerals desired may be so deposited that a prospector cannot obtain the amount of mineral land to which he is entitled without crossing a section line, or without so staking off his claim as not to parallel or not to conform to the section lines. For example, the particular deposit of minerals desired may cross a section line, and it may be that in the particular section of the country the minerals are so deposited that the prospector cannot obtain his forty acres without crossing the section line. In such case it would not be practicable to require the claim to conform to the section lines, and the prospector ought not to be required to stake out two claims of, for example, twenty acres each, one on each side of the section line, instead of staking out the whole of his claim across the section line. The locator is required to do a certain amount of work upon his claim each year, and if he were required to stake out two claims instead of one, he would have to perform double the amount of labor.

The section of our mineral laws which have been quoted appears to have been copied from the Federal Mining Laws. Section 2331 of the Revised Statutes of the United States (Volume 5, Federal Statutes, Annotated, page 43), contains the following provision: "And all placer-mining claims located after the 10th day of May, eighteen hundred and seventy-two, shall conform as nearly as practicable with the United States system of public land surveys and the rectangular subdivisions of such surveys." This section of the Federal Mining Law was construed in the case of Mitchell vs. Hutchinson, 142 Cal., 404; 76 Pac., 55. As shown by the findings of fact in the case, the location did not conform to the United States system of public land surveys, and the rectangular subdivisions thereof, and the description of the location by metes and bounds consisted of nine courses, of which only five conformed to the lines of the public land surveys. The facts show that this was occasioned by the peculiar manner in which the minerals were deposited. The court held that the location was valid because, under the facts of the case, it was not reasonably practicable for the location to conform to the lines of the surveys. We quote the following from the opinion:

"The findings show that the location was made upon surveyed government land, and that the description thereof by metes and bounds consisted of nine courses, of which only five conformed to the lines of the United States system of public land surveys. This fact would not of itself, however, render the location invalid, for it is well settled that, under Sections 2329, 2330, and 2331 of the Revised Statutes of the United States (U. S. Comp. St., 1901, p. 1432), placer claims are required to conform to the lines of the public survey only where such conformity is reasonably practicable, and that, where such conformity is not reasonably practicable, it is sufficient if they conform to such lines as near as is reasonably practicable. It was held by Secretary of the Interior Teller, in Re Rablin, 2 Land Dec., Dep. Int., 764, that it was the intention of Congress to provide for cases where the situation of the deposits is such that conformity of the location with subdivision lines is unreasonable, and to permit persons to take certain quantity of land fit for mining, and not to compel them to take such a quantity irrespective of its fitness for mining, and that it was not practicable to conform to the lines of the survey in a case where the entire placer deposit in a canyon within certain limits is claimed. and where the land on either side is entirely unfit for mining or agriculture. See, also. Esperence M. Co., 10 Copp's Land Dec., 338; in re Pearsall & Freeman, 6 Land Dec., Dep. Int., 227; Lindley on Mines, Sec. 448."

The case above referred to is the only one which we have been able to find construing the section of the Federal law, above referred to. On page 44 of the fifth volume of Federal Statutes, Annotated, an Alaska case is cited, but we have not access to the report. The holding in that case is thus stated by the annotator:

"A miner may locate twenty acres, or less if he desires, of placer mining ground in any form he chooses, excluding known mineral lands; no miners' rule, regulation, or custom can limit him in the area or form of his claim, nor in its width or length: any such rule, regulation or custom is void for conflict with both the spirit and letter of the mining law."
(Price vs. McIntosh (1901), I Alaska, 300.

This case indicates that the application of a strict rule to the area and form of a placer claim would be in conflict with both the spirit and the letter of the mining law.

To summarize our conclusion, we advise you that in a territory where the section lines are so well marked and defined that they can be easily found and followed by a prospector without the aid of a surveyor, and in a case where the prospector can secure the claim which he desires by staking off his claim in conformity with, or parallel to the section lines, it would be practicable to require the location to conform to the section lines; but that otherwise, it would not be, and that the law should be given in these particulars a liberal construction, to encourage prospectors and the development of the the country.

We note the reference in your letter to the fact that you have construed the words "existing surveys and their subdivisions" in Section 19 of our mineral act to refer to the section lines and not to mineral surveys. We are inclined to believe that this is the correct construction, for the reason that our statutes generally, with reference to public lands, use the words "sections" and "surveys" synonymously. The use of the word "subdivision" leads also to the same conclusion, as appearing to refer to half sections, quarter sections, and forty-acre tracts. We are further inclined to believe that this construction is correct because the provision in Section 19 appears to have been

copied from Section 2331 of the Revised Statutes of the United States. It is, in our opinion, unfortunate that such language was used, for the section lines in this State, especially in that portion of the State where minerals may be found, have not been well marked. The surveys of the public lands of the United States were doubtless made with more care than were the surveys of the sections of this State, and certainly are more easily identified and more clearly marked than are the surveys in Texas. We believe that it will rarely be practicable for a placer claim in Texas to conform to the section lines.

Very truly yours,

G. B. SMEDLEY,
Assistant Attorney General.

PUBLIC LANDS—MINERAL RIGHTS.

(Chapter 173, General Laws, Thirty-third Legislature.

An application for a survey made under Section 4 of the Mineral Act of 1913 does not so fix the status of the land as to prohibit other applications within 90 days from the time of the filing of the first application; and if the first applicant fails to have the land surveyed within the 90 days, a second applicant, whose application was filed before the expiration of the 90 days from the date of the first application, may fix his rights to a permit, provided the survey is made under his application within the 90 days and the field notes filed in the Land Office, as required by law.

If a person makes application for the maximum acreage under Section 4 and makes a second application within 90 days from the date of the first application and has the land surveyed, not under the first application, but under the second application, the second application is valid.

May 12, 1915.

Hon. J. T. Robison, Commissioner General Land Office, Austin, Texas.

DEAR SIR: In your letter of May the 4th, you sumbit three questions arising out of Chapter 173, General Laws of the Thirty-third Legislature, being what is known as the Mineral Act of 1913. These questions all relate to applications for the purpose of obtaining permits to prospect on unsurveyed public land, submerged land, etc., under Section 4 of the act.

The first question submitted is whether a second application is valid when made within 90 days from a first application for the same land, the first applicant not having a survey made under his application.

The method prescribed by Section 4 for obtaining the right to prospect for oil or gas on unsurveyed public school land, submerged land, etc., is as follows: The applicant first files with the county surveyor an application to have the particular tract of land surveyed. The surveyor is required to file and record this application and within 90 days from the time of the filing of same to survey the land and to deliver to the applicant the field notes and the original application. These papers must then be filed in the General Land Office within 100

days after the time the application was filed with the county surveyor.

By Section 5, it is provided that if upon examination the papers are found to be correct and in compliance with the act, the applicant shall be entitled to the right to prospect for oil or gas upon the land, and the Commissioner shall issue to the applicant a permit.

This act contains no provision prohibiting the filing of other applications with the county surveyor within the 90 days. It is to be observed also that the steps by which the right to the permit is acquired are very similar to the steps by which one purchases unsurveyed public school land. In each case the original application for the purpose of obtaining a proper description and correctly defining the land is made to the county surveyor; in each case the field notes made by the county surveyor are required to be made and filed in the General Land Office within a certain time; and in each case the application for the purchase or the permit is filed in the General Land Office and the evidence of the purchase or of the right to prospect, being in the one case the award and in the other the permit, is issued by the Commissioner of the General Land Office. It has been held that the application to the county surveyor for the purpose of purchasing unsurveyed public school land does not fix a right in the land, but that it is merely a preliminary step toward the acquisition of the land which is acquired after the field notes are approved by the Commissioner and the application to purchase is filed in the General Land Office.

Adair vs. Hays, 72 S. W., 256.

It appears likewise that the application to the county surveyor for the purpose of prospecting for oil on unsurveyed public school land, etc., is but a preliminary step toward the acquisition of the permit and does not fix of itself any right to prospect for oil in the land. The other steps must be taken. It is true, of course, that if the applicant follows up his original application to the county surveyor, has the land surveyed and the field notes filed in the Land Office in the time required by law, he is entitled to the permit; that is, that the first person who makes the application to the county surveyor for the particular land fixes his right to acquire the permit by taking the subsequent steps, but there is no reason why he may not abandon the right thus fixed by failing to take such steps in the time required by law.

We note the suggestion that by filing with the county surveyor an application and failing to have the land surveyed a person may retard the development of the particular area, or that a combination of persons, by filing a series of applications and failing to have the land surveyed, might retard the development of the land. It is perhaps true that other persons might assume that the persons filing such applications were acting in good faith and would have the land surveyed under the rights fixed by them, and this might, in some cases, slightly retard the development of the particular territory, but a third person, not in the combination, could file his application for a survey at any time and could acquire a right to a permit by

taking the other steps under the statute, in the event the prior applicant did not take the steps to fix his right. In many cases a contrary holding, that is, a holding that an application for survey would render other applications invalid if made within 90 days, would result also in retarding the development of the area, and under such holding a combination of persons, not acting in good faith, would also be able to induce other persons not to file on the land through a series of filings 90 days apart.

We therefore advise you, in response to your first question, that the second application within 90 days from the date of the first application is valid and that if the first applicant does not comply with the law the second applicant by complying with the law may obtain a right to a permit.

Your second question is as follows:

"A and B file as above stated (that is, B files within 90 days from the date of A's filing) and C also files after the expiration of A's time, but within 90 days after B files. Are B's application and survey superior to C's?"

Replying to this question, we advise you, for the reasons above stated, that in such case B may acquire the right to a permit by having the survey made and otherwise complying with the law, in the event A does not have a survey made and does not comply with the law. If neither A nor B has the land surveyed and otherwise complies with the law, then C, by having his survey made and by complying with the law, may obtain the right to a permit.

Your third question is whether a person who files with the county surveyor, under Section 4, an application for the maximum acreage and does not have a survey made under such application, but within 90 days from its date files a second application, acquires any right by virtue of the second application.

Section 4 of the act, as amended at the First Called Session of the Thirty-third Legislature, contains the following:

". . . Locations and surveys under this section shall not exceed 1280 acres in undeveloped territory and not exceeding 1000 acres within ten miles of a producing gas or oil well. . . ."

Section 10 of the act, as amended by the First Called Session, is as follows:

"No person, association of persons, corporate or otherwise, shall hold or own at one time by permit or lease, direct or through assignment, nor hold or own a controlling interest in more than two sections of 640 acres each, more or less, of surveyed school land, university, asylum or other public land, nor more than 1280 acres of islands, lakes, bays, marshes, reefs or unsurveyed school, university, or asylum or other public land in any undeveloped field nor more than one thousand acres within ten miles of any producing oil or gas well."

A reading of these two sections of the law shows the purpose of the Legislature that no person or corporation shall obtain or hold the right to prospect for or to take oil or gas from a greater acreage than that prescribed by the law. One application, of course, cannot

be for more than 1280 acres or 1000 acres, as the case may be, and a person who has obtained a permit or lease covering 1280 acres or 1000 acres cannot obtain a permit or lease on other land.

For the reasons stated in answering your first question, however, we see no reason why the second application by a person who has made application for the maximum acreage, but who has failed to have the land surveyed, is invalid. The making of the second application in such case should be treated as an abandonment of the first application. The law leaves it with the applicant after the survey is made to file the field notes and his application in the Land Office within 100 days from the date of filing of the application with the surveyor, and we know of no reason why the preliminary right acquired by the first application may not be abandoned by the applicant. We therefore advise you that, in the case stated in your letter, the second application would be valid.

Very truly yours,

G. B. SMEDLEY,
Assistant Attorney General.

PUBLIC LANDS—MINERAL LAWS.

When a tract of submerged land in one of the bays has been surveyed and a permit issued to prospect therein for oil or gas and the permit has been cancelled by the Commissioner for the failure of the owner of the permit to develop the tract, as required by the law, a person desiring to file an application for permit to prospect for oil on the same tract should file his application therefor with the Clerk of the County Court in which the land is situated, in accordance with Section 3 of said Act.

Chapter 173, Acts of the Thirty-third Legislature.

February 27, 1915.

Hon. J. T. Robison, Commissioner of the General Land Office, Austin.

MY DEAR SIR: In your letter to the Attorney General, of February 26th, you state that in the year 1914 an application was filed to prospect on a tract containing 931-½ acres in Nueces Bay, under Chapter 173 of the General Laws of the Thirty-third Legislature, that therefore a permit was issued on said application, but because no work of development was performed during six months, as required by law, the permit was canceled by you, and that the original application to prospect on this land was made under Section 4 of the act. You refer us to Section 12 of the act, which provides in substance that after the cancellation of a permit or lease the area included therein shall be subject to the application of another than the forfeiting owner "in the same manner as in the first instance." You desire to know whether a person applying for a permit after the cancellation of the original permit should file his application with the clerk of the county court in which the land is situated, as provided by Section 3 of the act, or whether he should file it with the county surveyor, as provided by Section 4.

Section 1 of the act referred to specifies the different lands which

are open to mineral prospecting under the act. It includes all public school lands, all other public lands, fresh water lakes, islands, bays, etc., belonging to the State, as well as lands which have been sold by the State with a reservation of the minerals.

In Section 2 of the act it is provided that any person, association of persons, or corporation desiring to obtain the right to prospect for and develop oil or gas in any of the surveyed public free school land, university or asylum or other public lands in the State, also in any fresh water lakes owned by the State, in any islands, bays, etc., may do so under the terms and conditions of the act.

In Section 3 it is provided that any one desiring to prospect for and develop oil or gas "in any of the surveyed lands mentioned herein" shall file with the clerk of the county court a separate application for each tract applied for. The last sentence of this section makes it the duty of the county clerk to file and record the application "and note the same on his register opposite the entry of the proper survey, if surveyed, or in his record book, if unsurveyed," and the applicant is required to file the original application in the General Land Office within thirty days.

Section 4 provides that any one desiring to prospect for and develop oil or gas in any of the islands, salt water lakes, bays, marshes, etc., or any of the unsurveyed public land shall file his application for each tract with the surveyor of the county in which the land is situated. The surveyor is required to survey the land within 90 days after the application is filed with him and to deliver to the applicant the field notes and the original application, after having recorded the same. These papers must then be filed in the General Land Office within 100 days after the application was filed with the county surveyor.

Section 5 makes it the duty of the Commissioner, after receiving an application under either of the two preceding sections, to file the same and if upon examination the papers are found to be correct and in compliance with the law to issue a permit to the applicant.

It is apparent that the procedure under Section 3 of the act is simpler, quicker and less expensive than is the procedure under Section 4, and that it was necessary that the applicant for the permit to prospect on the lands included in Section 4 should file his application with the county surveyor, because such lands had not theretofore been surveyed and a survey was essential to a proper location and description of the land. When the records of the county surveyor's office and of the Land Office show that land has already been surveyed it is, of course, unnecessary to have the county surveyor or any other surveyor make a new survey, and this being true the applications for such lands are required by Section 3 to be filed with the county clerk.

The land referred to in your letter being submerged land in Nueces Bay was, of course, land of which there was no official survey of record, either in the Land Office or in the office of the county surveyor, and it was of course necessary that the original application be made to the county surveyor under Section 4. You refer specifically to the language of Section 12 to the effect that after a permit or lease has been canceled "the area included therein shall be subject to the

application of another than the forfeiting owner in the same manner as in the first instance." If this language is to be followed literally it of course follows that the application of the other person after the cancellation would have to be made, in accordance with Section 4 of the act, to the county surveyor, for it was in that manner that the original application was made, but the law surely was not intended to require a useless and unnecessary thing. The particular land has been surveyed and the field notes made and recorded in the office of the county surveyor. These field notes have been sent to the Commissioner of the Land Office and approved by him and they have become a record of the General Land Office. To all intents and purposes, therefore, the area is, at least for the purposes of the act under consideration, "surveyed land," and when the applicant after cancellation desires to make application for the same land as was included in the original application and survey we believe that it should be made under Section 3. As has been pointed out the procedure under Section 4 is more expensive and requires more time than does the procedure under Section 3. It is true that Section 4 refers to bays owned by the State, and Section 3 refers only to surveyed lands. The submerged lands in the bays are in one sense not land but water, but so far as this act is concerned and for the purposes of the act, and bearing in mind the reason for the two different methods of procedure under the two sections of the act, we conclude that this submerged land, in the case cited by you has become for the purposes of the act "surveyed land." This construction is not necessarily contrary to the words "in the same manner as in the first instance," which are used in Section 12, for this phrase can very well be construed to mean "in the same manner as areas of this character are applied for in the first instance." By "areas of this character" in this connection we mean "surveyed areas." We believe that this construction conforms more nearly to the spirit and purpose of the act than would an absolute, literal construction of the language referred to in Section 12, and that this construction is the most reasonable and the fairest construction.

We have referred above to that portion of Section 3 which makes it the duty of the county clerk, after receiving applications made under said section to record the applications and to note the same on his register, opposite the entry of the proper survey, if surveyed, *or in his record book, if unsurveyed.* The words italicized, "or in his record book, if unsurveyed" at first appear to be meaningless, for the reason that the only applications made under this section are applications covering surveyed lands, but the phrase perhaps has a bearing upon the very question under investigation. It is not to be assumed that the words were used for no purpose whatever, or that they are to be disregarded as meaningless. The register referred to in this section is doubtless the record of surveyed public school lands showing the classification, appraisement and sales of same which the county clerk is required to keep in his office. He has no record in his office of unsurveyed, unsold lands of the State, nor is he required by this act to keep a record of lands which have been applied for by the filing

of applications with the county surveyor under Section 4 of the act. These words, therefore, "or in his record book if unsurveyed," doubtless have reference to the very character of land referred to in your letter, that is to land which has been applied for and surveyed under Section 4 of the act and which has thereby become surveyed land for the purpose of this act, but which is not included among the surveyed lands, as they appear in the register kept by the county clerk. If the words quoted do not have this meaning they must be disregarded as meaningless.

For the reasons given we therefore advise you that the application in the instance referred to in your letter should be made to the county clerk.

Very truly yours,
G. B. SMEDLEY,
Assistant Attorney General.

PUBLIC LANDS—MINERAL LOCATIONS.

Acts of April 9, 1913.

Under this Act the terms, conditions and proceedings provided for the location of vein or lode claims apply to the location of placer claims, except where the terms, conditions, etc., of the location of placer claims are expressly specified in the Act.

The maximum size of a placer claim is expressly fixed at forty acres.

An aggregation of placer claims may not exceed 320 acres, that is one person or an association of persons may locate as much as 320 acres of placer claims.

One person or association of persons may locate not more than five vein or lode claims, each not exceeding 1500 by 600 feet.

The limitation of Section 31 of five mining claims to one person applies to all mining claims named in Sections 15 and 19, that is placer claims, as well as lode and vein claims, and limits the number of any of such claims in the aggregate to five, except that under the express provisions of Section 19 one person or association may locate as many as eight placer claims.

November 1, 1915.

Hon. J. H. Walker, Acting Commissioner of the General Land Office, Austin, Texas.

MY DEAR SIR: In a recent letter you submit several questions as to the maximum quantity that one person may locate for mining under the Act of April 9, 1913.

An examination of this act shows that Sections 15 to 18, inclusive, relate to vein or lode claims, and that Section 19 relates primarily to placer claims. The subsequent sections of the act, including Section 31, appear to be general sections relating to both of the two general characters of locations.

In Section 19, which has to do with placer claims it is expressly provided that such claims "shall be subject to location and entry and lease on the same terms and conditions and upon similar proceedings as are provided herein for vein or lode claims."

This section then contains the following provision:

"No placer claim shall include more than forty acres and no aggregation of individual claims shall exceed three hundred and twenty acres."

We take it that this provision is intended to relate only to the size of placer claims, and not to vein or lode claims.

Section 19 does not undertake to specify the method whereby a placer claim shall be located, or to provide for the surveying of the claim, the filing of the field notes in the Land Office, etc. For these terms, proceedings, etc., the preceding sections which relate to lode or vein claims must be looked to.

We therefore advise you in answer to your first question that placer claims, that is those claims referred to in Section 19, may embrace forty acres, whereas the claims described in Section 15, that is vein or lode claims, may embrace only an area of 1500 by 600 feet, that is about twenty-one acres.

You call our attention to Section 31, and desire to know what is the effect of the limitation as to quantity contained in this section. It contains the following:

"No individual, firm, association of persons or corporations shall be entitled to locate or lease more than five mining claims of any character defined in Sections 15 and 19."

It appears that this section was intended to apply both to vein or lode claims and to placer claims, and in so far as it limits one person or association to five placer claims it is inconsistent with that part of Section 19 which limits such claims to 320 acres.

Since Section 31 is a general section applying to the several characters of claims and Section 19 relates specifically to placer claims, we believe that the limitation in Section 19 should control as to placer claims and that one person or association of persons may acquire as many as eight placer claims, notwithstanding the provisions of Section 31. As to vein or lode claims the limitation of Section 31 applies, since nowhere else in the act is specified the maximum number of vein or lode claims which one person or association may acquire.

The language of Section 31 which has been quoted above seems to indicate a purpose to limit one person to five claims in the aggregate, whether placer or vein or lode claims, and this limitation will control except that under the express provisions of Section 19 one person or association may acquire as many as eight placer claims.

Very truly yours,

G. B. SMEDLEY,

Assistant Attorney General.

PUBLIC LANDS—MINERAL ACT OF 1913.

One person or corporation may hold for mineral purposes either a maximum of 1280 acres if not within ten miles of a producing well or a maximum of 1000 acres if within ten miles of a producing well. He may not hold both 1280 acres and 1000 acres.

June 20, 1916.

Hon. J. T. Robison, Commissioner General Land Office, Austin, Texas.

DEAR SIR: The Attorney General is in receipt of your letter of the 10th instant, submitting the following question:

"Can one person hold, under Chapter 173, of the Act approved April 9, 1913, known as the Mineral Law, 1000 acres within 10 miles of a producing well and 1280 acres beyond 10 miles from a producing well or does the law limit one person to 1280 acres and to 1000 acres according to its locality?

"In determining this I would be glad if you would also state if one person may hold 1280 acres in one locality and 1280 acres in another locality, say 50 miles away, and can one person hold 1000 acres in 10 miles of one producing well and the same person hold 1000 acres in 10 miles of another producing well, the two localities being, say, several miles apart."

Section 3 of the Mineral Act of 1913, as amended at the First Called Session, contains the following as to the quantity of public land that may be awarded to one person or corporation for oil or gas development:

"No individual or corporation shall be awarded exceeding 1280 acres of public lands of the State for oil or gas development purposes, and no individual or corporation shall be awarded exceeding 1000 acres for oil or gas development purposes within ten miles of any producing oil or gas well. The said 1280 acres in undeveloped territory, or the 1000 acres within ten miles of any producing oil or gas well, may be in as many different tracts of land or fresh water lakes as the applicant may desire, provided the applicant correctly described the land or fresh water lakes desired for development purposes."

Section 4 of the same act contains the following:

"Locations and surveys under this section shall not exceed 1280 acres in undeveloped territory and not exceeding 1000 acres within ten miles of a producing gas or oil well."

Section 10 of the same act is as follows:

"No person, association of persons, corporate or otherwise, shall hold or own at one time by permit or lease, direct or through assignment, nor hold or own a controlling interest in more than two sections of 640 acres each, more or less, of surveyed school land, university, asylum or other public land, nor more than 1280 acres of islands, lakes, bays, marshes, reefs, or unsurveyed school, university, or asylum or other public land in any undeveloped field nor more than 1000 acres within ten miles of any producing oil or gas well."

It appears that the purpose of those portions of the mineral law which have been quoted is, first, to prevent the awarding to any person or corporation of more than 1280 acres if the land is not within ten miles of a producing well, or more than 1000 acres if the land is within ten miles of a producing well; and that the further purpose of the law is to prevent any person or corporation from owning at any one time more than 1280 acres or more than 1000 acres, as the case may be.

In our opinion, the language means that one person can own either not more than 1280 acres if not within ten miles of a producing well or not more than 1000 acres if within ten miles of a producing well, but that one person cannot own both 1280 acres and 1000 acres. We are also of the opinion, especially in view of the language of Section

10 above quoted, that 1280 acres or 1000 acres, as the case may be, is the total maximum acreage which one person or corporation can hold at one time, regardless of location.

Yours very truly,

G. B. SMEDLEY,

Assistant Attorney General.

PUBLIC LANDS—MINERAL ACT OF 1913.

A person owning an undivided interest (whether of 40, 50, 60 or other per cent) in a tract of land filed on for mineral purposes, under the Mineral Act of 1913, may not file on another maximum acreage, under said Act.

The restriction contained in Section 10 of said Act should be construed so as to limit a person to 1280 or 1000 acres whether owned or controlled solely or by joint ownership or by ownership of corporate stock.

May 28, 1915.

Hon. J. T. Robison, Commissioner, General Land Office, Austin, Texas.

DEAR SIR: In your letter of May the 21st you refer to Section 10 of the Mineral Act of 1913, which section is as follows:

"No person, association of persons, corporate or otherwise, shall hold or own at one time by permit or lease, direct or through assignment, nor hold or own a controlling interest in more than two sections of 640 acres each, more or less, of surveyed school land, university, asylum, or other public land, nor more than 1280 acres of islands, lakes, bays, marshes, reefs, or unsurveyed school, university, or asylum or other public land in any undeveloped field nor more than one thousand acres within ten miles of any producing oil or gas well."

You desire a construction of the limitation contained in the above section, submitting the following question:

"Suppose one files on the maximum quantity then sells an undivided 4-10 or 40 per cent interest or sells an undivided half interest or 50 per cent, or sells an undivided 6-10 interest or 60 per cent, can either of such persons so selling then file on another maximum acreage?"

We are of the opinion that the section above referred to should be given a liberal construction to accomplish what we believe to be the purpose of the law and so as to prevent discriminations for which there is no reason.

It is our opinion that it is the purpose of the law to restrict one person to ownership of or control over 1280 acres or 1000 acres, as the case may be, whether the person owns the land solely or whether his ownership or interest in it consists of an undivided interest or of ownership of stock in a corporation having the mineral rights in the land. For example: A person who owns an undivided 40 per cent interest in 1280 acres should be permitted in his own name to file on 60 per cent of 1280 acres, or 768 acres. He would thus have ownership or control over the full amount of 1280 acres. If the same person desired to acquire the mineral right in land, not solely, but together

with some other person, he could acquire an interest of 60 per cent in another 1280 acres in addition to his 40 per cent interest in the first 1280 acres.

Similarly, a person owning an undivided interest of 50 per cent in 1280 acres should be permitted to acquire in his own name the mineral right to 640 acres, or he should be permtted to acquire a one-half interest in the mineral rights to 1280 acres. A person owning an undivided 60 per cent interest in 1280 acres should be permitted to acquire in his own name the mineral right to 512 acres, or he should be permitted to acquire an undivided 40 per cent interest in 1280 acres.

It follows from the foregoing construction that none of the persons named in your letter could file on another maximum acreage, but each of them could file on such additional acreage as above indicated.

Yours very truly,

G. B. SMEDLEY,
Assistant Attorney General.

PUBLIC LANDS—MINERALS.

The owners of school lands purchased under the Act of 1883 are the owners of the minerals in or on them and such lands are not subject to prospect under the Act of 1913.

ATTORNEY GENERAL'S DEPARTMENT,
December 3, 1915.

Hon. J. T. Robison, Commissioner, General Land Office, Austin, Texas.

DEAR SIR: You submitted, some time ago, to this Department, the following statement of facts and question:

"Applications under Chapter 173, Act of Thirty-third Legislature, Regular Session, for permits to prospect surveyed school lands purchased from the State under the Act of 1883, have been filed in this office. At the date of sale the land in each case was classed by the board as agricultural land. Some of the tracts have been paid for and patented unconditionally. The applications to prospect for and develop petroleum oil and natural gas on these lands appear to be regular in all respects. Will you kindly advise this Department whether the minerals in such lands are reserved, and if so, whether such lands come within the scope of the act relating to the disposition of minerals, and whether permits should be issued."

The reason for our failure to answer this question sooner is the importance and apparent difficulty of the question. We have been furnished with interesting briefs on both sides of the question by able attorneys, which have been given careful consideration.

Section 14 of the Act of April 12, 1883, which was a general act relating to the classification and sale of public school land, is as follows:

"The minerals on all lands sold or leased under this Act are reserved by the State for the use of the fund to which the land now belongs."

The lands referred to in your letter were classified and sold as

agricultural and some of them have been patented unconditionally, that is, without reservation of the minerals.

Article 4041 of the Revised Statutes of 1895 is as follows:

"The State of Texas hereby releases to the owner or owners of the soil all mines or minerals that may be on the same, subject to taxation as other property."

This article is in the same language as Section 7 of Article 14 of the Constitution.

In the case of Cox vs. Robison (150 S. W., 1149) our Supreme Court held that said section of the Constitution released the rights of the State in those mines and minerals owned at the time of its adoption, that it had no prospective operation, and that that portion of the law of 1895, which required the reservation by the State of the minerals in school lands classified and sold as mineral bearing was valid.

Assuming, without expressing any opinion as to the correctness of the assumption, that the State in the sale under the Act of 1883 of the lands referred to in your letter reserved the minerals, we are of the opinion that by Article 4041 Revised Statutes of 1895, the State released to the owners of the land purchased under the Act of 1883 the minerals in the land. Interesting questions have been suggested to us as to the constitutionality and the proper construction of this article, but a discussion of these questions and an expression of our opinion regarding them would be idle, since these questions have been settled by the opinion of the Supreme Court in the case of Cox vs. Robison. Justice Phillips in the opinion used the following positive language:

"The same Legislature that enacted the Statute before us likewise enacted the Revised Statutes of 1895, containing Article 4041 in the same language as the constitutional provision, *the effect of which was to release the rights of the State to all minerals in lands granted prior to* 1895."

We know from an examination of the careful and exhaustive opinion of the court and from the purpose and history of the case that the whole subject of the State's ownership of minerals in the lands which it had sold was carefully investigated by the court, and that it was the purpose of the court to set at rest this vexed question, and on this account we do not consider the words above quoted to be dicta. In any event we deem it the duty of this Department and the other departments of the State government to respect and follow this deliberate expression of the opinion of our Supreme Court.

Accordingly, we advise you that the owners of the lands purchased under the Act of 1883, and referred to in your letter, are the owners of the minerals in and on the lands, and that the applications for permits to prospect on the lands under the Act of 1913 should be rejected.

Respectfully yours,

G. B. SMEDLEY,

Assistant Attorney General.

OPINIONS ON PUBLIC OFFICERS.

PUBLIC OFFICERS—COURTS OF CIVIL APPEALS—SPECIAL JUDGES.

Revised Statutes, Articles 7061, 7063, 7064, 7059a.
Constitution, Article 5, Section 11.
A special Associate Justice of the Court of Civil Appeals is entitled to same pay as a special District Judge, which includes per diem, mileage, and hotel bills fixed by statute.

February 10, 1915.

Hon. H. B. Terrell, State Comptroller, Capitol.

DEAR SIR: You have transmitted to us the account of Hon. Newton P. Willis, for salary and expenses as Special Associate Justice of the Court of Civil Appeals for the Seventh Supreme Judicial District. The account is for eight days' service, the time necessarily occupied in disposing of the case or cases in which Judge Willis was acting as Associate Justice, as well as for mileage and hotel expenses.

Revised Statutes, Article 7061, reads as follows:

"Special judges, commissioned by the Governor, in obedience to Section 11, Article 5, of the Constitution, shall receive the same pay as district judges for every day they may be necessarily occupied in going to and returning from the place where they may be required to hold court, as well as the time they are actually engaged in holding court."

Special judges of the Courts of Civil Appeals and the Court of Criminal Appeals are judges commissioned by the Governor under Section 11, Article 5, of the Constitution.

Article 7063, Revised Statutes, provides:

"The amount of salary due any special judge shall be ascertained by dividing the salary allowed a district judge by three hundred and sixty-five. and then multiplying the quotient by the number of days actually served by such special judge."

Article 7064 is the provision stating in effect how a special judge commissioned by the Governor shall obtain his salary. He must in effect present to the Comptroller an account therefor, showing the number of days he was necessarily occupied in going to and returning from the place or places where he served as such, which account must be verified by affidavit and certified to be correct by the Clerk of the Court in which the service was performed; it is also provided that evidence shall accompany the affidavit showing that the special judge was commissioned by the Governor.

From this provision of the law, which we have quoted above, it is quite plain that Judge Willis has brought himself within the terms of law showing that he was duly commissioned by the Governor of the State as Special Associate Justice and that he was necessarily occupied in the disposition of the case eight days, for which he is entitled to the same pay the District Judge would have received for the same period of service, which is $8.21 per day, the salary of district judge

being $3000 per year, as shown by the Revised Statutes, Article 7059. The only questions therefore really at issue are whether or not Judge Willis is entitled to his mileage and per diem for hotel bills. It will be noted from Revised Statutes, Article 7061, quoted above, that a special associate justice of the Court of Civil Appeals shall receive the same pay as district judges for every day they may be necessarily occupied in going to and returning from the place where they may be required to hold court, as well as the time they are necessarily engaged in holding court. We think this provision means that one shall receive the same compensation that one would receive if he were a district judge under the same circumstances. This being true it is our opinion that Revised Statutes, Article 7059a is applicable to special associate justices of the Courts of Civil Appeals, as well as special associate judge of the Court of Criminal Appeals.

This article reads:

"All district judges within this State, all district attorneys of the State of Texas, and the judge of the Criminal District Court of Harris and Galveston counties, when engaged in the discharge of their official duties in any county in this State other than the county of their residence, shall, in addition to the compensation now provided by law for their services, be allowed their actual and necessary expenses while engaged in the discharge of such duties, not to exceed the sum of two ($2.00) dollars per day for hotel bills, and not to exceed three cents per mile when traveling by railroad, and not to exceed fifteen cnts per mile when traveling by private conveyance, in going to and returning from the place where such duties are discharged, traveling by the nearest practicable route, such sum to be paid by the State upon the sworn account of the district judge and district attorney, respectively, entitled thereto, showing the actual and necessary traveling expenses, and other actual and necessary expenses incurred in the discharge of their official duties in compliance with the provisions of this Act; provided, there shall never be paid to any such judge or district attorney more than the sum of two hundred ($200) dollars in any one year under the provisions of this Act; provided, further, that the account for such services above provided for shall be recorded in the minute book of the district court of the county in which such district judge or district attorney shall reside."

It follows from what we have said above that in our opinion Judge Willis is not only entitled to his per diem of $8.21, but that he is entitled to his hotel bills, not to exceed the sum of $2.00 per day, and that he is entitled to mileage, not to exceed three cents per mile while traveling by railroad and not to exceed fifteen cents a mile when traveling by private conveyance in going to and returning from the place where his duties were discharged, traveling by the nearest practicable route.

We have not checked in a clerical manner the various items shown in this account, but we have laid down the rules stated above. from which you will be able to do this. In other words, Judge Willis is entitled to per diem, mileage and hotel bills; as to whether or not he has stated this correctly in this account is for you to determine, that being purely a matter for an auditor and not for legal construction.

Yours very truly,

C. M. CURETON,

First Assistant Attorney General.

PUBLIC OFFICERS—INTEREST—PUBLIC FUNDS.

Revised Statutes, Articles 2164, 2169.
Holding:

(a) A bank can not legally receive any fund from an officer which has been paid or deposited in court to abide the result of any legal proceeding, as set forth in Revised Statutes, Article 2164, except that such money shall be sealed up in a secure package so that the identical money may always be accessible and subject to the control of the court; that it can not receive this class of funds in any manner as an ordinary deposit or pay interest thereon; but if such bank does receive such fund in any other manner and pay interest thereon then that such interest becomes the property of the owner of the original fund and can only be paid to the officer officially, to be paid by him into court or paid out in such manner as the court may direct.

(b) That neither a bank nor anyone else can legally pay any official, whether a county, State, city or district or municipal officer, interest on any public funds of any kind or character, regardless of the source, with the understanding that such interest is to become the personal property of such official; that all such interest under every circumstance becomes the property of the State, county, city, district or municipality owning the original fund, or the person owning the original fund, and if paid by the bank can be paid lawfully only to the official or to some other proper person.

(c) In all instances embraced within the foregoing Sections (a) and (b) when the interest on the funds is paid to the officer it should be paid to him in his official capacity and he should be required to execute an official receipt, draft or other instrument. the same as if there had been delivered to him the whole or part of the original fund. Any failure of the bank to treat this interest as a part of the original fund would. in the event of a loss, make the bank. responsible to the owner of the original fund for the interest so paid.

December 12, 1914.

Hon W. W. Collier, Commissioner of Insurance and Banking, Capitol.

DEAR SIR: The substance of your communication is as follows:

"One of the State banks operating in this State has propounded to me the following interrogatories:

"'Could we legally pay a county, State or district official interest on trust funds, or other deposits, which he might make with us in his official capacity; or in other words, would we be permitted to pay him interest on his official balances? Would it be legal for us to pay the interest to him for his personal account; or in other words. if he does not include this interest in his report, but would apply it to his own personal use and benefit. Should we pay interest on such an account to an official. could one of our stockholders complain or recover the amount so paid?'

"I would thank you to kindly give me your opinion with reference to the above."

I.

Your inquiry is broad enough to embrace every character of funds which come into the hands of a public officer by reason of his office. The question directly at issue is whether or not should such officer deposit these funds in the bank at interest, or from some other source receive some character of interest or other compensation for use of the funds, is such interest or other compensation the property of the officer or does it become an accretion to and a part of the original fund belonging to the person, estate or party to whom rightly belongs the original fund.

If the interest accruing upon funds in the manner suggested becomes the property of the officer then, of course, it may be paid to him personally without any liability on the part of the bank or party paying, or upon the part of the officer to account to those who own the original fund. On the other hand if this interest thus accruing becomes the property of the owner of the original fund then, of course, it can not be paid to such officer personally, but must be paid to him officially and be accounted for by him at the time he accounts for the corpus of the original fund. Public officers in this State ordinarily receive funds from various sources, which while not always denominated trust funds nevertheless are so in fact; as for example, taxes collected by public officers are paid by the collectors thereof to other public officers, whose duty it is to receive the same. Again there are fees of office and funds paid into court for the purpose of paying court costs or witness fees. Again there are sometime funds paid into court by way of tenders, or for some other purpose arising out of a judicial inquiry or proceeding.

The ruling which we will make in this opinion applies to all funds, from whatever source, which come into the hands of a public officer in the course of his official duty, and will likewise apply to all public officers, whether of the State, county, municipality, school district, city, town or any other division of the civil government of this State. The opinion is unlimited in its application to public funds and as to those whose duty it is to receive them. It is intended to be broad in its effect and general in its application throughout the State and the various divisions and municipalities of the State. It seems to us that it would be an unnecessary labor to review at length the various statutes of the State controlling public funds or prescribing the duties of county and district clerks, tax collectors, county treasurers and those occupying similar offices in the city and municipal governments or those occupying State offices charged with the collection and custody of public funds. It is sufficient to say that the various officers suggested, and those performing duties involving the collection and custody of public funds, are usually required to give bond, conditioned that such officer will faithfully execute the duties of his office and pay over according to law all moneys which may come into his hands. These are the usual terms of bonds of the class suggested, and it is not necessary to here set out the various bonds of the various officers suggested, because they are all substantially alike, with no sufficient difference to have any influence or bearing on the ruling here made.

II.

There is one class of funds to which we first desire to direct your attention before discussing the general rules adhered to in this opinion. We refer to the funds referred to in Article 2164, Revised Statutes, in which it is provided that whenever during the progress of any cause any money shall be paid or deposited in court to abide the result of any legal proceedings the officer having the custody of the fund is required to seal up the identical money in a secure pack-

age and deposit it in some bank or vault, keeping it accessible and subject to the control of the court.

The funds referred to in Article 2169 probably come within the purview of the article just quoted. This, however, it is not necessary for us to determine. It is sufficient to say that funds paid into court under the provisions of Article 2164 must be sealed up by the officer having the custody thereof and placed in such original package in some safe or bank and when required by the court this identical package of money must be produced. In no event could a fund of this character be deposited in a bank in the ordinary manner or disposed of in any other manner than that specified in the statute; if so, the officer handling the fund in any other way would violate the law and become liable, with his bondsmen, for such violation; and a bank participating knowingly in any such violation would become as guilty as the officer himself. However, if such officer should violate the law in the manner suggested, by depositing the money as an ordinary deposit in the bank and be allowed interest thereon then the interest as it accrues will become the property of the owner of the original fund and not of the officer under the authorities hereafter discussed.

III.

It may be laid down as a general rule that where a public officer receives funds by virtue of his office any interest thereafter received or accruing upon such funds becomes a part thereof, notwithstanding the fact that the officer was an insurer of the funds, where he was not the owner thereof. The true test is not whether he is absolutely liable to account, but whether he is the owner of the funds. If he is not the owner of the funds but they are public funds paid to him in his official capacity then any interest received by him on such funds is to be considered as an accretion to the principal and becomes the property of the State, county, city, municipality or district owning the original fund.

Adams vs. Williams, 24 Am. & Eng. Annotated Cases, p. 1129; 52 Southern, 865.
Rhea vs. Brewster et al., 8 Am. & Eng. Annotated Cases, 389; 130 Iowa, 729.
State vs. McFetridge, 20 L. R. A., 223 (239).
Eshelby vs. Board of Education, 63 N. E., 586.
Thompson vs. Territory, 62 Pac., 355.
United States vs. Mosby, 133 U. S., 273 (286).

In the case of Adams vs. Williams, decided by the Supreme Court of the State of Mississippi, it was held that even though the treasurer of a levee board is the insurer of public moneys received by him he is not entitled to receive interest thereon, the same belonging to the State. The facts in the case were in substance as follows:

F. I. Williams was elected secretary and treasurer of the levee commissioners for the Yazoo-Mississippi delta levee district in the State of Mississippi and gave bond as such with the Aetna Indemnity Company of Hartford as his surety. The condition of his bond was for the faithful discharge and performance of the duties of his office as treasurer. He received certain funds belonging to the levee dis-

trict and deposited the same in a banking institution to his credit as treasurer and the bank by agreement with him paid him interest on this fund. Williams accounted to the board for all of the original fund placed with him as treasurer, but declined to account for the interest paid him on this fund when placed in the bank. He appropriated the interest to his personal use, making no entry of the receipt thereof on the books of his office and no report to the board of levee commissioners. On this state of facts the court based the holding above referred to. The court not only held that the interest belonged to the levee district, but that the surety company was responsible for the failure of Williams to pay over the interest to the district.

The court in discussing the question, among other things, said:

"These moneys coming into his hands were the money and property of the board, and not his money, and the interest, which was a mere accretion on this money, was payable, like the property to which it was an accretion, to the board, whose property the same was. Because thereof, the surety knew of these conditions in the bond, and because these conditions required the treasurer to pay over all increments on the fund to the levee board as well as the principal, this defense is unsound. The act of Williams in depositing the money in the bank was legal, and an act done '*virtute officii*'; the abuse being his applying the interest to his individual use in violation of Section 29. The case of State vs. Harney. 57 Miss., 863, and of Adams vs. Saunders, 89 Miss., 784, 11 Ann. Cas., 327, 42 So., 602, 119 Am. St. Rep., 720, are direct authorities in support of this proposition; that the act of Williams in taking this interest for his own use was an illegal act, done, however, by virtue of his office, and an act that could not have been done except by virtue of his office, and because he was such treasurer and handled this vast sum of money. What all the world knows, this court certainly knows, to wit: That the moneys which Mr. Williams deposited in the bank came from and through the levee board whose property the money was." (Vol. 24, Am. & Eng. Ann. Cas., 1135).

Continuing further the court said:

"It is immaterial that the treasurer stipulated for interest on the deposits, or that the banks paid him such interest, or that both the treasurer and the banks thought he should retain the interest as his own, believing that he was entitled thereto. Such intention and belief cannot affect the ownership of the interest, or its essential character as a portion of the public funds in the hands of the treasurer. Notwithstanding such intention and belief, the interest was, in fact, paid to the said treasurer, and belonged to his said office, within the meaning and intention of the bond in suit. A lawful act cannot be rendered unlawful merely because the actors intended to follow it by an unlawful act. So when the treasurer lawfully received money, which of right belonged to his office, he receives it by virtue of his office. and cannot, by forming and executing an intention to retain the money as his own, divest the act of receiving the money of its official character. It remains that he received it '*virtute officii*.' In the light of these principles. the contention above referred to by the learned counsel for the appellee all fall to the ground. In the Furlong case, 58 Miss.. 717, the act was illegal. The act here of depositing the money was not illegal, and the citation of the Furlong case is beside the mark. In the Eshelby case, supra, it was said: 'It does not follow from the absolute liability of the treasurer that the funds coming into his hands are his, nor that upon the receipt of money in his official capacity the relation of debtor and creditor is established between himself and the district. On the contrary, it is quite clear that. instead of being the debtor of the district, he is its treasurer. the custodian of its funds, and that he acquires control of the funds, without acquiring title to them.'

"Speaking of its own statutes, which for this purpose are just as our own, the court, in the McFetridge case, 84 Wis., 473; 54 N. W., 1,998; 20 L. R. A.,

223, says: 'From beginning to end, they are entirely inconsistent with the theory that the Legislature intended by the enactment of any of them to vest the said treasurer with the legal ownership of the public moneys which come into his hands, thus making him merely the debtor of the State in respect thereto. If such were his relation to the State, it would be difficult to show that such funds were not subject to be seized for his debts, or, in case of the death of the treasurer in office, that the same would not go to his administrator as part and parcel of his estate; the the State being, perhaps, a preferred creditor. It is inconceivable that any Legislature intended such results, and there is nothing in any statute which forces the conclusion that they did so say. A close analyses of the above statutes, or any extended discussion of them, is quite unnecessary. A perusal of them is sufficient to carry conviction to the mind that the legislature never intended to divest the State of its title to the public funds, in the hands of its treasurer, and the consequent control over these funds which results from ownership thereof'." (Vol. 24, Am. & Eng. Ann. Cases, pp. 1136 and 1137.)

In the case of Rhea vs. Brewster, supra, the clerk of the court received money paid into court as a tender and the Supreme Court of Iowa held that he was liable to account for interest which he received on the money which came into his hands by virtue of his office. In discussing the question the court, among other things, said:

"The true test, as it seems to us, is not whether he is absolutely liable to account, but whether he is the owner of the funds in his hands. If he is not such owner, and the moneys coming into his hands belong to the county, or some one else, any increment thereto is and should be treated as a part of the principal. This is the view approved in the better considered cases, and the only one consonant with sound public policy. In an early New York case (Richmond County vs. Wandel, 6 Lans (N. Y.) 33, 59 N. Y., 645), a county treasurer was held liable for interest received by him on county funds, not only because of his fiduciary relation, but for the interest belonging to the county, the court saying: 'The notion that a public officer may keep back interest which he has received upon a deposit of public moneys, as a perquisite of office, is an affront to the law and morals; if done with evil intent it is nothing less than embezzlement. Having been received by Wandel as county treasurer, the item of interest is within the terms of the bond.' See, also, Hughes vs. People, 88 Ill., 78; U. S. vs. Mosby, 133 U. S., 273; 10 U. S. Sup. Ct. Rep., 327; 33 U. S. (L. Ed.), 625; Hunt vs. State, 124 Ind., 306; 24 N. E. Rep., 887." (Vol. 8, Am. & Eng. Ann. Cases, pages 390, 391.)

In the case of Eshelby vs. Board of Education, 63 N. E., page 586, the Supreme Court of the State of Ohio held that the treasurer of a school district who deposited its funds in the bank, which bank allowed interest on the average balance of the deposit, is required to account to the school district for such interest.

In discussing the principles upon which that opinion is based the court, among other things, said:

"Counsel for the plaintiff in error has made it quite clear that the liability of the treasurer is absolute, and that it differs in that respect from that of the ordinary trustee or bailee who may be exempt from liability on account of funds lost without his negligence or connivance. But it does not necessarily follow that funds coming into the hands of the treasurer are his, nor that upon the receipt of money in his official capacity the relation of debtor and creditor is established between him and the district. To the contrary, it is quite clear that, instead of being the creditor of the district, he is its treasurer,—the custodian of its funds,—and that he acquires custody of the funds without acquiring title to them. * * * Since the funds belong to the school district, the ultimate question in the case is answered in favor of

the defendant in error by the elementary proposition that, in the absence of a statute or stipulation to the contrary, the increment follows the principal. It does not aid an inquiry as to what the law is to suggest that the district would not be injured by the deposit of its funds at interest payable to the custodian, since he may deposit it without interest." (63 Northeastern Reporter, page 586.)

In the case of the United States vs. Mosby, 133 U. S., page 286, Mosby was a consul of the United States at Hongkong, China, and while in such position came in possession of large sums of money belonging to the United States, by virtue of his office. These funds he duly paid over to the Government of the United States and filed a claim for a large portion thereof for various reasons, among others was an item of $104.51, interest on deposit at the bank, referring to interest on deposit of public moneys which had come into his possession by virtue of his office. The Supreme Court of the United States held that Mosby could not recover this interest money, saying:

"The moneys are stated to be public moneys, in respect to which the consul was a trustee, and any interest which he received on the funds belonged to the United States. He was not required to put the funds out at interest, but if he did so the accretion belonged to the government." (133 U. S., page 286.)

The obligation of a public officer of the United States in respect to accounting for funds is the same as that of an officer under the laws of this State.

Coe et al. vs. Force, County Judge, 50 S. W., 617.
Wilson et al. vs. Wichita County, 67 Texas, 649.
Boggs vs. The State, 46 Texas, 12.

IV.

We therefore advise you as follows:

(a) A bank can not legally receive any fund from an officer which has been paid or deposited in court to abide the result of any legal proceeding, as set forth in Revised Statutes, Article 2164, except that such money shall be sealed up in a secure package so that the identical money may always be accessible and subject to the control of the court; that it can not receive this class of funds in any manner as an ordinary deposit or pay interest thereon; but if such bank does receive such fund in any other manner and pay interest thereon then that such interast becomes the property of the owner of the original interest on any public funds of any kind or character, regardless of fund and can only be paid to the officer officially, to be by him paid into court or paid out in such manner as the court may direct.

(b) That neither a bank nor anyone else can legally pay any official, whether a county, State, city, district or municipal officer, the source, with the understanding that such interest is to become the personal property of such official; that all such interest under every circumstance becomes the property of the State, county, city, district or municipality owning the original fund, or the person owning the original fund, and if paid by the bank can be paid lawfully only to the official or to some other proper person.

(c) In all instances embraced within the foregoing Sections (a) and (b) when the interest on the funds is paid to the officer it should

be paid to him in his official capacity and he should be required to execute an official receipt, draft or other instrument, the same as if there had been delivered to him the whole or part of the original fund. Any failure of the bank to treat this interest as a part of the original fund would, in the event of a loss, make the bank responsible to the owner of the original fund for the interest so paid.

V.

In conclusion we desire to say that it is intended that this opinion shall be construed as broadly as it is written, that it applies to every class of public trust funds coming into the hands of an official by virtue of his office and that it applies to every officer into whose hands funds of this character may come by virtue of his office, whether such officer be a State officer, county officer, city officer, district or municipal officer.

Yours very truly,

C. M. CURETON,

First Assistant Attorney General.

COMMISSIONERS COURT—OATH OF COMMISSIONER—QUORUM—VOTE

It would be a violation of the oath of a commissioner for him to accept employment from the Commissioners' Court to superintend the public works of the county.

Where a full court is present two members thereof voting "aye" and one member voting "no" and two members refusing to vote, the question is carried.

Articles 2238 and 2239, Revised Statutes, 1911.

February 4, 1916.

Hon. H. R. McInnis, County Attorney, Llano, Texas.

DEAR SIR: The Attorney General is today in receipt of your communication without date, wherein you ask for an opinion of this Department upon the two questions, as follows:

1. "Can't the Commissioners Court employ one of their own members at a reasonable compensation to act as superintendent over any public works of the county?

2. "Where there is a full court and the question is as to employing a competent man to see that the contract is complied with in the construction of certain bridges, agreeing to give him a stipulated sum for his services, and on that proposition two members vote for the employment, one against, and one refusing to vote, is not the court justified in employing the man?"

Replying thereto in the order propounded we advise:

1. By Article 2239 of the Revised Statutes of 1911 it is provided that in addition to the oath of office prescribed by the Constitution a county commissioner 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 be issued to him as fees of office."

We are therefore of the opinion that for a county commissioner to enter into a contract to superintend the public works of the county would be a violation of this provision of his oath of office and would subject him to removal. Not only would the commissioner be subject to removal from office, but we are also of the opinion that such a contract would be void and of no effect, as it is against public policy for an officer to be allowed to contract with himself or a court of which he is a member.

2. Replying to your second question we are of the opinion that under the state of facts presented by you the affirmative vote prevailed, and that upon such vote the court could be justified in employing a man to superintend the construction of the bridges.

The number necessary to constitute a quorum of the commissioners court is fixed by Article 2236 in the following language:

"Any three members of the said court, including the county judge, shall constitute a quorum for the transaction of any business, except that of levying a county tax."

As we understand your question all members of the court, including the county judge, were present, that upon the question of whether or not the court would employ a man to superintend the construction of bridges being put, two members of the court voted for such employment, one member voted against it and one refused to vote. As these figures account for only four we assume that the commissioners only voted and that the county judge did not vote, as he had a right to do. It is well settled by the great weight of authority that where a legal quorum is present the act of the majority of such quorum is the act of the body itself.

See 23rd American & English, page 591, and authorities cited.

It is also a well established rule that when a part of the members present refuse to vote at all a vote may be legally decided by a majority of those actually voting, though they do not constitute a majority of the whole number present. This rests upon the principle that members present and not voting will be deemed to assent to the action of those who do vote.

Dillon on Municipal Corporations, Sec. 527.
23 American and English, 592, and authorities cited.

It therefore appears that the question you raise was legally carried in the commissioners court, upon two grounds:

That it received a majority vote of a quorum and also that applying the rule that a member present and not voting is counted as though he had voted in favor of the question, his silence giving assent thereto and therefore in legal effect the proposition to employ a man to superintend the construction of bridges received four votes for and one against it.

We therefore answer your second question and say that the com-

missioners court, under the vote as described by you, has authority to employ such man.

With respect, I am,

Yours very truly,
C. W. TAYLOR.
Assistant Attorney General.

NOTARY PUBLIC—APPOINTMENT AND QUALIFICATION—FEES OF COUNTY CLERK.

May 12, 1915.

To the District and County Attorneys of Texas.

GENTLEMEN: Anticipating a great many inquiries relative to the appointment and qualifications of notaries public, I am taking the liberty, under the direction of the Attorney General, of directing to you this general letter, containing excerpts from former opinions hitherto rendered by this Department, in which many practical questions relative to the qualification of such officers, are carefully discussed.

IN GENERAL.

The jurisdiction of a notary public extends only to the boundary line of his county. A notary for K. county cannot perform the duties of his office in D. county.

A notary public is required to be a resident of the county for which he is appointed. If, for instance, a man has his residence, or home, in B. county, and transacts his business in an office or store just across the line in C. county, he cannot act as a notary public for C. county, as his legal residence is not in that county, although his office or place of business is therein situated.

Neither the Constitution nor statutes of this State prohibit a person from holding and exercising at the same time the office of mayor and notary public. Article 16, Section 40, Constitution of Texas.

The Governor may appoint additional number of notaries public at any special session of the Legislature, who shall hold their office until the first day of June succeeding next regular session of the Legislature, after their appointment. Chapter 3, Acts of 1913, First Called Session.

A notary public is not exempt from jury service. Id.

Since the appointment of a notary public is confirmed by the Senate, in fact the appointment being made in part by that branch of the Legislature, a member of the State Senate would be ineligible to act as a notary public. Opinion of Attorney General of May 21, 1914.

A married woman can hold the office of notary public. Chapter 32, Acts of 1913. Opinion of Attorney General of September 24, 1914.

The inability of an unmarried woman, under the age of twenty-one, to enter into a contract would preclude her from qualifying as a notary public.

A member of the House of Representatives can, at the same time, hold the office of notary public, as that branch of the Legislature is not required to confirm, or have anything to do with the appointment of notaries public except to suggest names to the Governor. The Governor makes the appointment and such appointment is then confirmed by the Senate. Opinion of Attorney General of April 2, 1915.

The office of notary public is named in the Constitution (Sec. 40, Art. 16) as one of those offices which may be held by a person holding another civil office of emolument. A county official whose duties do not conflict with the duties of a notary public can, at the same time, hold the office of notary public. The Attorney General has held that a county commissioner, county superintendent of public instruction, county attorney and county surveyor can each qualify as a notary public. See Figures vs. State, 99 S. W., 412; (1912-14 Report of Attorney General, 725).

The offices of county clerk, and deputy county clerk, are incompatible with the office of notary public; that is, the duties required of a notary public are also a part of the duties devolved by law upon a county clerk or deputy county clerk. Opinion of Attorney General of January 10, 1913.

There is nothing in the statute prohibiting a notary public from taking the acknowledgment of a relative. However, no notary public can legally take the acknowledgment of his wife.

A notary public should keep the record of acknowledgments to chattel mortgages and bills of sale in the same book and in the same manner as acknowledgments to deeds.

APPOINTMENT AND QUALIFICATION.

Notaries public have until midnight of June 10 in wihch to qualify, but if they are absent from the county or sick at the time the clerk receives the commission, they have ten days after their return to the county or recovery from sickness in which to qualify.

The commissions of notaries public in this State expire at midnight on May 31, and they cannot act as such notaries until they have been reappointed and have requalified according to law.

A mere clerical error in the name of an appointee for notary public would not invalidate his appointment. This applies, of course, where the names sound alike, and it can be proven that the person whose name was misspelled was in fact an appointee for notary public.

The county clerk would be authorized to qualify as notary public a person whose name is, for instance, John *H.* Doe, although the appointment may read John *R.* Doe. The courts have uniformly held that the middle initial is no part of the name. The identity of the person named in the commission should be determined by the officer before whom the oath is taken.

A notary public whose term expires on June 1 could not administer the oath of office to another notary on June 1 until he himself had requalified. In other words, a notary's commission expires at midnight of May 31.

Notaries public appointed for the county of N., and after the crea-

tion of J. county *out of N. county,* reside in J. county, cannot qualify and act as such for the new county, and there is no way by which the appointment can be transferred to the new county. The party will have to wait until another session of the Legislature before he can be appointed a notary public.

The bond of a notary public must be approved by the county clerk. No acknowledgment to bond is necessary.

A person having been appointed a notary public for W. county could not qualify and act in any other county. When a notary public moves to another county his office thereby becomes vacant.

A bona fide railroad employe, holding pass, can qualify as a notary public. Acts of 1911, page 151.

It notaries public qualified within ten days after they were notified by the clerk, and it happened to be prior to the first day of June, they would be *de jure* officers, and their acts would be just as valid as if they qualified after the first day of June. Opinion of Attorney General of June 10, 1911.

A justice of the peace is not, under the law, required to also take the oath and give the bond required of notaries public. Under the Constitution a justice of the peace is entitled to hold the office of notary public *ex officio,* or, "without any other warrant or appointment than that resulting from the holding" of the office of justice of the peace. Opinion of Attorney General of December 7, 1914.

A notary public may take the oath of office before a justice of the peace, or any other officer *in his county* authorized to administer oaths.

That a notary must *qualify* before the county clerk is evident, but it is not believed that such qualification means that he cannot take the oath of office before any other person authorized to administer oaths. The authorities go even further, and say that where the statutes themselves prescribe who shall administer an oath of office to a certain officer, that such a statute is merely directory, and that the oath may be administered by any officer authorized to do so by general statute. Opinion of Attorney General of June 10, 1895.

FEES OF COUNTY CLERK.

The county clerk is entitled to charge $1.00 for the commission of a notary public, which is to be remitted to the Secretary of State, and 50 cents for administering the oath of office, *if administered by him,* and 50 cents for approving the bond. The clerk is entitled to no fee for recording the bond.

Very respectfully yours,

W. P. DUMAS,

Chief Clerk to Attorney General.

LEGISLATURE—MEMBERS OF—CONSTITUTIONAL LAW.

Construing: Constitution, Article 3, Sections 4, 5 and 9; Article 4, Section 4; Section 1 of Article 16; Section 17. Revised Statutes, Articles 5505 to 5516

1. The terms of office of the members of the Thirty-third Legislature expire on the third day of November, A. D. 1914.
2. But they shall continue to perform the duties of their office until their successors shall be duly qualified.
3. Their successors, that is, the members of the Thirty-fourth Legislature, can not qualify, except in the manner and at the time provided by Chapters 1 and 2 of Title 82 of the Revised Statutes, which time will be on the second Tuesday in January, A. D. 1915, by taking the oath of office administered by the Clerk of the House when the Legislature assembles.

October 20, 1914.

Hon. O. B. Colquitt, Governor, Capitol.

DEAR SIR: In your inquiry you request the opinion of the Attorney General as to whether a special session of the Legislature. called to assemble after the third day of November, A. D. 1914, and prior to the second Tuesday in January, A. D. 1915, would be composed of the present membership of the Thirty-third Legislature or of those elected to the Legislature on November 3 of this year.

I.

This inquiry involves constructions of various constitutional and statutory provisions. Section 4 of Article 3 of the Constitution reads as follows:

"The members of the House of Representatives shall be chosen by the qualified electors, and their term of office shall be two years from the day of their election."

It is clear from this section that the terms of office of the present membership of the Thirty-third Legislature will expire on November 3 next; but the provision of the Constitution just above quoted must be construed in connection with another, to wit: Section 17 of Article 16, which reads:

"All officers within this State shall continue to perform the duties of their offices until their successors shall be duly qualified."

Provisions of the Constitution *relating to the same subject must be construed together.*

G. H. & S. A. Ry. Co. vs. the State, 77 Texas, 379.
State vs. Moore, 57 Texas, 313.

Construing these two provisions of the Constitution together, they mean that the term of office of a member of the Legislature shall be two years, beginning with the day of his election, but that, nevertheless, after the expiration of the term thus fixed by the Constitution. he shall continue to perform the duties of his office until his successor shall have been duly qualified.

23 Am.-Eng. Ency. of Law, page 314.
Jones vs. City of Jefferson. 66 Texas, 576.
Badger vs. United States, 93 U. S.. 602.
Salamanca Township vs. Wilson, 109 U. S., 627.

And this is so even where the commencement of such successor's term and consequently his right to qualify have, by law, been put off by a date later than the end of the incumbent's regular term. (23 Am. and Eng. Ency. of Law, pp. 413-414, citing State vs. Tilletts, 4 Ohio Circuit Decisions, page 509.)

The Constitution of the State does not direct when members of the Legislature shall qualify, nor in what manner, except they are required to take the oath of office prescribed by that instrument, which must be done before they enter upon their duties. (State Constitution, Section 1, Article 16.)

The Constitution provides that "the Legislature shall meet every two years, at such times as may be provided by law and at other times when convened by the Governor." (Section 5, Article 3.)

Section 9 of the same article provides: "The House of Representatives shall, when it first assembles, organize temporarily and thereupon proceed to the election of a speaker from its own members." Section 4, Article 4 provides that "the Governor shall be installed on the first Tuesday after the organization of the Legislature, or as soon thereafter as practical, and shall hold his office for a term of two years, or until his successor shall be duly installed."

II.

In response to these various provisions of the Constitution, the Legislature has enacted certain articles of the civil code which are, in effect, enabling acts to put in practical operation the provisions of the Constitution just referred to.

Chapter 1 of Title 82, Article 5505, Revised Statutes, is as follows:

"The Thirty-third Legislature shall assemble to hold its biennial session on the second Tuesday in January, A. D. 1912 (1913), at 12 o'clock M., and shall meet biennially thereafter on the same day and hour until otherwise provided by law."

The language of this codification is somewhat confusing, but by reference to the Code of 1895, as well as that of 1879, it is very clear that what was intended was that the Thirty-third Legislature should meet on the second Tuesday in January, A. D. 1913, and that the Legislature should meet biennially thereafter on the same day and hour until otherwise provided by law. It is well settled, of course, that we are to rely upon the law as enacted rather than as compiled by the codifiers.

Robertson vs. The State, 159 S. W., 722.

When we do this and consult the code of 1895 and of 1879, it is plain that the meaning which we have given the above and latest codification is the correct one. Chapter 2 of Title 82, Revised Statutes of 1911 pertains to the organization of the Legislature and was enacted in response evidently to the several provisions of the Constitution to which we have heretofore referred. This chapter, article by article, reads as follows, to wit:

"Article 5506. Those persons receiving certificates of election to the Senate and House of Representatives of the Legislature, and those Senators whose terms of office shall not have terminated, and none others, shall be competent to organize the Senate and House of Representatives.

"Article 5507. For the purpose of organization, as provided for in the preceding Article, it shall be the duty of the Secretary of State to preside at each recurring session of the Legislature.

"Article 5508. He shall attend at the time and place designated for the meeting of the Legislature, and shall appoint a clerk, who shall have been chief clerk of the House the preceding session, if he be present, to take a minute of the proceedings.

"Article 5509. The clerk, under direction of the Secretary of State, shall call all the counties in alphabetical order.

"Article 5510. When the counties are called and the members elect appear and present their credentials, it shall be the duty of the clerk, under the order and direction of the Secretary of State, to administer to each the oath prescribed by the Constitution.

"Article 5511. Should returns of election in any county for members of the Legislature not be made to the office of the Secretary of State, the clerk shall nevertheless call such county.

"Article 5512. Any person appearing at said call and presenting the proper evidence of his election shall be admitted or qualified in the same manner as though the return of his election had been made to the office of the Secretary of State.

"Article 5513. Should there not be a quorum in attendance on the day appointed for the meeting of the Legislature, it shall be the duty of the Secretary of State and clerk to attend from day to day until a quorum shall appear and be qualified as above.

"Article 5514. When a quorum shall have appeared and qualified, the House shall proceed to the election of a speaker, unless a majority of the members present shall think proper to defer said election.

"Article 5515. When an election for speaker shall have been had, the speaker-elect shall immediately take the chair and the House proceed to its further organization by electing the necessary officers, to whom the speaker shall administer the oath of office.

"Article 5516. Should there be no Secretary of State, or in case he be absent or unable to attend from any cause, the Attorney General shall attend and perform the duties prescribed in this title."

These articles of the Civil Code were enacted in August, 1876, after the adoption of the Constitution by the people in February of that year and may be regarded as a legislative interpretation of the constitutional provisions referred to; and, as such, by a coincidence in point of time with the adoption of the Constitution and acquiesced in and acted upon for a period of more than thirty-eight years, will be sustained by the courts as within the authority and power of the Legislature as limited by the Constitution. Cooley on *Constitutional Construction,* page 81; Black on *Interpretation of Laws,* Section 20. Mr. Black says.

"The contemporary construction of the constitution, especially if universally adopted, and also its practical construction, especially if acquiesced in for a long period of time, are valuable aids in determining its meaning and intention in cases of doubt."

Says Judge Cooley:

"Where there has been a practical construction, which has been acquiesced in for a considerable period, consideration in favor of adhering to this construction sometimes present themselves to the courts with a plausi-

bility and force which it is not easy to resist. Indeed, where a particular construction has been generally accepted as correct, and especially when this has occurred contemporaneously with the adoption of the constitution, and by those who had opportunity to understand the intention of the instrument, it is not to be denied that a strong presumption exists that the construction rightly interprets the intention." (Cooley on Constitutional Limitations, p. 82.)

III.

Taking, therefore, Chapters 1 and 2 of Title 82 as constitutional acts of the Legislature, the question at issue is easy of solution. Members of the Legislature, under this law, may only take the oath of office and organize the Legislature in the manner and at the time prescribed by the statute.

Clearly the Legislature had the right to prescribe this, because it was not prohibited from so doing by the Constitution and, being a matter of legislation not interdicted by the fundamental law, the Legislature could constitutionally govern the time, manner and method of taking the oath of office and organizing the Legislature. The general rule is that State legislation is valid unless prohibited by the State or Federal Constitution; and, except in the particulars wherein it is restrained by the Constitution of the United States, the Legislative Department may exercise all legislative power which is not forbidden expressly or by implication by the provisions of the Constitution of this State.

Brown vs. City of Galveston, 97 Texas, 9.
Lytle vs. Halff Bros., 75 Texas, 132.
Cooley's Constitutional Limitations, 6th ed., 204.

From what we have said it follows:

(a) The terms of office of the members of the Thirty-third Legislature expire on the 3rd day of November, A. D. 1914;

(b) But they "shall continue to perform the duties of their office until their successors shall be duly qualified."

(c) Their successor cannot be duly qualified except in the manner and at the time provided in Chapters 1 and 2 of Title 82, Revised Statutes, which provide for the meeting of the Legislature and the administration of the oath of office of its members in assembly on the second Tuesday in January, which, in the instance particularly in view, is the second Tuesday in January, A. D. 1915.

IV.

You are therefore advised that should you call another Special Session of the Legislature between November 3, A. D. 1914, and the second Tuesday in January, A. D. 1915, that such session will be composed of those members of the Legislature now serving as members of the Thirty-third Legislature and not of those who will be elected to the Legislature on November 3, next.

Whatever may be thought of the wisdom, or as an original proposition of the constitutionality, of the legislative act referred to, pre-

scribing the time and manner of qualifying members of the Legislature, the law has been in effect too long and was enacted too near the time of the adoption of the Constitution for this Department or the courts to criticize either the one or question the constitutionality of the other.

In giving you this advice we have but applied to the facts suggested by you the plain letter of the statute, which has been in force in this State unquestioned and unchallenged, a constant guide and precedent, for more than a third of a century.

Respectfully submitted,

C. M. CURETON,

First Assistant Attorney General.

OFFICERS—JUSTICE OF THE PEACE—NOTARY PUBLIC—OFFICIAL BONDS.

A justice of the peace is not required to also take the oath and give the bond required of notaries public.

December 7, 1914.

Hon. Rector Lester, County Attorney, Canyon, Texas.

DEAR SIR: In your communication of the 14th ultimo you submit the following:

"Please let me know if a justice of the peace has to make out a notary bond if he succeeds himself, where he makes a regular official bond to the county."

Replying thereto, I beg to say:

Section 19, Article 5 of the Constitution of Texas provides, in part, as follows:

"* * * And the justices of the peace shall be ex officio notaries public. * * *"

Also, Section 20, Article 4:

"All commissions shall be in the name and by the authority of the State of Texas, sealed with the State seal, signed by the Governor, and attested by the Secretary of State."

Article 1535, Revised Statutes, 1879, provided:

"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 by the Constitution, *and give the bond elsewhere prescribed for notaries public*"

But Article 1564, Revised Statutes, 1895 (now Article 2287, Revised Statutes, 1911), is as follows:

"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."

In view of the difference in the wording of the articles above quoted, we have carefully followed the acts of the legislatures, relating to justices of the peace, from the time of the enactment of the original law in 1876 on up to the codification of 1911, to ascertain the intention of the codifiers of the statutes of 1876 when they inserted in Article 1535 the words *"and give the bond elsewhere prescribed for notaries public."* But we find no amendments to that section of the original act from which the said article derives its meaning. The section is as follows:

"Justices of the peace shall be commissioned by the Governor to act as justices of the peace in their respective precincts, and also to act as notaries public. They shall also discharge all the duties of coroner, except such as devolve upon constables by Section 21 of the Constitution. They shall be authorized to solemnize the rites of matrimony." (Section 28, Ch. 103, Acts of 15th Legislature.)

The "bond elsewhere prescribed for notaries public" is prescribed in Article 3364, Revised Statutes, 1879, and which article is verbatim the same as Article 6003, Revised Statutes, 1911. At the time of the codification of 1879 justices of the peace were not required to give bond. (Chapter 103, Acts Fifteenth Legislature 1876.) Thereafter in 1879 the law was amended requiring him to give bond, conditioned on the faithful and impartial performance of the duties required of him (as justice of the peace) by law. This amendment is as follows:

"There shall be elected by the qualified voters of each justice's precinct in the several counties of this State, at each biennial election, one justice of the peace, who shall hold his office for two years and until his successor shall be elected and qualified. He shall enter into bond, payable to the county judge and his successors in office, in the sum of one thousand dollars, conditioned that he will faithfully and impartially discharge and perform all the duties required of him by law, and that he will promptly pay over to the party entitled to receive it, all moneys that may come into his hands during his term of office. This law shall apply to all justices of the peace appointed by the county commissioners court." (Ch. 98, Acts 19th Legislature, amending Article 1533, R. S. 1879, and which is now Article 2283, R. S. 1911.)

By the Acts of 1881, page 95, a notary public was required to give a bond conditioned on the faithful performance of the "duties of his office," section two thereof being a re-enactment of Article 3364, Revised Statutes, 1879, above referred to.

The Constitution, as quoted above, provides that a justice of the peace *shall* be *ex officio notary public.* The phrase *ex officio* has been defined "from office; by virtue of the office; *without any other warrant or appointment than that resulting from the holding of a particular office."* 18 Cyc., 1500. According to the language of the Constitution, therefore, a justice of the peace is also entitled to hold the office of notary public "without any other warrant or appointment than that resulting from the holding" of the office of justice of the peace. In other words, he is not appointed a notary public by

the Governor; and, therefore, is not required to give a bond as notary public.

Article 10, Revised Statutes, 1911, declares that "all oaths, affidavits, or affirmations necessary or required by law, may be administered, and a certificate of the fact given, by any judge or clerk of a court of record, justice of the peace, or by any notary public within this State." It is a matter of common knowledge among members of the legal profession, as well as among a large majority of the laity, that a justice of the peace is not required by law to keep a seal as a justice of the peace, and in the case of Daugherty vs. Yates, 35 S. W., 937, it was held that a justice of the peace when performing a notarial act must authenticate the same by his seal, which is the seal of a notary public, and which a justice of the peace is authorized to use ex officio, and the only one, he having none as justice of the peace.

It is, therefore, the opinion of this Department, and you are so advised, that a justice of the peace is not, under the law, required to also take the oath and give the bond required of notaries public.

Yours very truly,

B. F. LOONEY,
Attorney General.

CONSTITUTIONAL LAW—PUBLIC OFFICERS—STATE SENATOR.

Constitution construed: Section 18, Article 3; Section 17, Article 16.

1. The term of office of a State Senator expires on the date of the election at which his successor is elected, and he then becomes qualified for appointment to a public office created during his term of office as Senator, notwithstanding the provision of the Constitution that under the law he may hold over as Senator until his successor qualifies.

2. The phrase contained in Section 18, Article 3, of the Constitution, "the term for which he may be elected," means the definite term fixed by the Constitution, towit, two or four years, as the case may be, and does not embrace the "hold-over" period during which a Senator may perform the duties of his office after the expiration of his term of office.

October 30, 1914.

Senator C. B. Hudspeth, Capitol.

DEAR SIR: In your communication you state that the Governor contemplates tendering you by appointment the office of district judge of one of the districts having jurisdiction over your county; you state also that this office was created during your present term of office as State Senator.

You desire to know whether or not after the third day of November. A. D. 1914, you would be eligible to appointment to this place.

In response to your inquiry we beg to advise you that you will be eligible after November 3, 1914, to this office. However, your inquiry involves a construction of a portion of Section 18 of Article 3 of the Constitution, which reads as follows:

"No Senator or Representative shall, during the time for which he may be elected, be eligible to any civil office of profit under this State which shall have been created * * * during such term."

Your present term of office will expire on November 3, A. D. 1914, you having been elected Senator four years (or two years, as the case maye be,) prior to that date. No question whatever would arise under this state of facts and the constitutional provision referred to, but for the existence of Section 17 of Article 16 of the Constitution, which provides that all officers within this State shall continue to perform the duties of their office until their successors shall be duly qualified. The question really resolves itself back to the inquiry as to what is meant by the phrase "the term for which he may be elected," as contained in Section 18, Article 3, previously quoted herein.

It is a cardinal rule that in construing the Constitution we should give to the words therein used the meaning commonly understood; that the framers of the Constitution must be understood to have employed the words in their natural sense and to have intended what they said.

Stockton vs. Montgomery, Dallam, p. 473.
Black on Interpretation of Laws, Sec. 16.

The word "term" is uniformly used to designate a fixed and definite period of time.

Throop on Public Officers, Sec. 303.

When used in reference to the tenure of office means ordinarily a fixed and definite time.

State vs. Smith, 14 Mo. Appeals, 589.
State vs. Bridenthal, 40 Pacific, 652.
Crovatt vs. Mason, 28 S. E., 891.
State vs. Tallman, 64 Pacific, 759.
State vs. Stonestreet, 12 S. W., 897.

In the last cited case, concerning the meaning of the phrase, "term of office," the Supreme Court of Missouri said:

"The phrase, 'term of office,' in ordinary parlance means the fixed period of time for which the office may be held. We have a rule for construing statutes which requires that words and phrases shall be taken in their plain, ordinary and usual sense. * * * Going to the standards of our language, we find that a term means 'the time for which anything lasts, any limited time, the term of life' (Webster's Dictionary), and turning to the authorities, they announce that the expression, 'term of office,' uniformly designates a fixed and definite period of time." 12 S. W., 897.

This quotation gives the usual and general definition of the phrase "term of office," which, if applied to the constitutional provision under examination, the phrase "the term for which he may be elected," the meaning of which we are trying to find, would be interpreted to mean the fixed period of time for which he may be elected, which in your instance would be four years (or two years, as the case may be,) from the date of your election as Senator and which will expire on November 3, A. D. 1914.

In the case of State vs. Smith, 14 Missouri Appeals, 589, a charter

provision prohibited any change in the salary of a city official during his term of office. The officer's term of office was four years "and until his successor shall be elected and qualified." The salary of the office was increased during the four year term. It was held that the officer was entitled to the increased salary for a time during which he held over after the expiration of the four year term. This clearly shows that the court was of the opinion that the "hold-over" portion of the officer's service was no part of his original term of office, and therefore not within the inhibitions of the charter.

In the case of the State vs. Bridenthal, 40 Pacific, 651, the court had before it for construction a provision of the statutes of Kansas, which provided that the Governor should appoint a bank commissioner "whose term of office should be four years and until his successor was appointed and qualified." The Constitution of that State, among other things, provided "the tenure of any office not herein provided for may be declared by law; when not so declared such office shall be held during the pleasure of the authority making the appointment, but the Legislature shall not create any office the tenure of which shall be longer than four years." It was insisted by the parties that the Legislature did not intend in enacting the law referred to to enlarge the term or extend it beyond the period fixed by law, four years. It was said that the hold-over provision was not intended to enter into or to be descriptive of the term, but upon grounds of public convenience and necessity, and in order to prevent an absolute vacancy, the law will recognize the incumbent as an officer de facto until his successor is appointed and qualified.

Concerning this subject the Supreme Court of Kansas said:

> "It is the opinion of the court that as a 'term' means a fixed and definite period of time, the time definitely fixed in the law at four years is the term of office, and that the 'hold-over' provision, whatever view may be taken of the same, does not invalidate or destroy the entire section with reference to tenure."

It is very clear from this opinion that the word "term" or phrase "term of office" was intended to mean the definite period fixed by the law within the terms of the Constitution and that the hold-over period was not within the meaning of the Constitution any portion of the term of office.

These cases cited by us seem to be logical and correct, sufficient authorities to sustain the position taken by us in respect to the matter now being examined. Our opinion is that the word "term," as used in Section 18 of Article 3, refers to the fixed period of time for which you were elected Senator, to wit, four years preceding November 3, A. D. 1914 (or two years, as the case may be,) for the rule is same whether you hold a short term as Senator; and that the mere fact that you have the right to hold over until your successor is qualified does not render you ineligible for appointment to the position which is to be tendered you by the Governor. Your ineligibility extends only over the term for which you were elected and ceases on November 3, A. D. 1914.

However, in this connection we wish to direct your attention to

the fact that you can not be appointed by the Governor until after November 3, A. D. 1914; that the appointment must be made after that date, because you are not qualified for appointment to the office until after that date, notwithstanding the fact you may resign prior to that date.

Barnum vs. Gilpin, 38 Am. Rep., 304.
People ex rel Ellis vs. Lennon, 49 N. W., 308.

In the last named case the charter of the city provided, among other things, that "no member of the common council shall, during the period for which he was elected, be appointed to or be competent to hold any office of which the emoluments are paid from the city treasury." The court held that an alderman whose term of office had not expired was ineligible to hold the office of chief of police who was appointed by the common council and paid from the city treasury, although he had resigned before the appointment was confirmed.

We understand that you are the nominee for State Senator from your district and will be elected to that position, to succeed yourself, on November 3, 1914. However, under the ruling which we have this day given the Governor members of the Senate and Legislature can not qualify as such until the second Tuesday in January, A. D. 1915, and therefore you can not be called upon to perform any duties, nor can you take possession of the office to which you will be elected on November 3, 1914, until the date named; therefore your acceptance of the district judge's office, which, as we understand, expires by force of law in December next, will not be an abandonment of the office of Senator to which you will be elected on November 3, A. D. 1914; the question, however, as to abandonment of the office is probably one within the jurisdiction of the Senate itself and one which we can not settle, but which will be for determination between you and the Senate when you tender your credentials next January.

You are advised, therefore, that after November 3, A. D. 1914, you are eligible for appointment to the office of district judge, although the office is one which was created during your present term as State Senator.

Yours very truly,
C. M. CURETON,
First Assistant Attorney General.

COUNTY CLERK—FINANCE LEDGER—SCHOOL DISTRICT ACCOUNTS.

County clerk should open an account on finance ledger with the tax collector for each common school district levying a special tax, and his compensation therefor would be included in ex officio salary.
Articles 1402 to 1407, Revised Statutes.

January 26, 1916.

Hon. John E. Kilgore, County Attorney, Huntsville, Texas.

DEAR SIR: In your favor of January 24, addressed to the Attorney General, you desire to be advised whether or not it is the duty of

the county clerk to keep an account in the finance ledger against the tax collector of special taxes levied by common school districts or road districts, and if so, would such clerk be entitled to the compensation of $5 for each $1000 assessed as due such districts under Article 1405, R. S. 1911. In counties in which there is no county auditor it is made the duty under Article 1402 for the county clerk to open and keep in the finance ledger provided for in Article 1401 an account with each and every officer of the county, district or State who is now or may hereafter be authorized or required by law to receive or collect any money or other property for the use of, or belonging to, the county.

Article 1407, relating especially to accounts with the tax collector, is in the following language:

> "The accounts of the tax collector shall be kept as follows: A separate account shall be kept for each separate fund that may be upon the tax rolls; each account shall state the name of the collector, the character of the fund entered therein, and the year for which the same is assessed."

Article 1405 fixes the compensation of the clerk for the services performed in obedience to Articles 1402 and 1403 at the sum of $5 for each $1000 tax assessed as due the county to be paid quarterly on order of the commissioners court out of the general fund of the county, provided that such compensation shall not be less than $100 nor more than $250 per annum. It will be observed from a reading of the above article that the compensation allowed the clerk is based upon the amount of taxes assessed as due the county and not upon the amount of taxes assessed as due any subdivision of the county, such as school districts or road districts, and we are therefore of the opinion that the county clerk would not be entitled to an additional $5 upon the amount of taxes assessed in any particular special taxing district.

It will be noted, however, by the provisions of Article 1407, copied above, that it is made the duty of the county clerk to open a separate account with the tax collector for each separate fund that may be upon the tax roll. This would include, of course, all of the various items going to make up the total tax assessed, such as, for instance, road and bridge funds, county general and special tax levied and collected on behalf of the county or any district or subdivision of the county in which would be included special taxes levied by common school districts or road districts. It is therefore the duty of the county clerk to open an account in the finance ledger against the tax collector for all common school districts and road districts levying a special tax, but no compensation having been provided therefor, it would fall within those duties devolving upon the official for which the commissioners court allows an ex officio salary.

With respect, I am,

Very truly yours,

C. W. TAYLOR,
Assistant Attorney General.

COMMISSIONERS COURT—COUNTY HEALTH OFFICER—SALARIES—ASSISTANTS.

The commissioners court has no authority to fix the salary for county health officers.
The commissioners court has no authority to create the office of assistant health officer.
Article 4539, Revised Statutes, 1911.

December 20, 1916.

Hon. A. L. Bevil, County Attorney, Kountze, Texas.

DEAR SIR: The Attorney General has your letter of December 17, reading as follows:

"I desire to have your opinion construing articles 4538 and 4539 of the Revised Civil Statutes, respecting the qualification, appointment and compensation of county health officers.

"Hardin county has a population of less than fifteen thousand inhabitants, and no city within said county which has been incorporated or otherwise requiring the services of a city health officer.

"At the February term of the commissioners court an order was passed by said court appointing a health officer for said county, said order not designating any fee for any particular service, but fixing a general salary at one hundred dollars per month.

"On the 17th inst. said court passed another creating the office of assistant health officer, appointing another physician as assistant to said health officer, and fixed said assistant's salary at $50 per month.

"Please advise if above mentioned procedure is lawful."

Replying thereto, we beg to advise that this Department, in an opinion rendered March 21, 1913, addressed to Hon. O. H Radkey, advised that the commissioners court was without authority to fix a stipulated salary of a county health officer. I enclose herewith copy of this opinion, the same being Opinion No. 480 of this Department.*

Replying to that portion of your inquiry relating to the creation by the commissioners court of the office of assistant health officer, I beg to advise that, in the opinion of this Department, the commissioners court has no authority to create such office.

The commissioners court, in dealing with the appointment of a county health officer, is limited in its authority by the provisions of Article 4539, Revised Statutes, 1911, which is in the following language:

"It is hereby made the duty of the commissioners court by a majority vote in each organized county to appoint a proper person for the office of county health officer for his county, who shall hold office for two years and until his successor shall be appointed and qualify, unless sooner removed for cause. Said county health officer shall take and subscribe to the constitutional oath of office, and shall file a copy of such oath of office and a copy of his appointment with the Texas State Board of Health; and, until such copies are so filed, said officer shall not be deemed legally qualified. Compensation of said county health officer shall be fixed by the commissioners court; provided, that no compensation or salary shall be allowed, except for services actually rendered."

*29 Op. Atty. Gen., 199.

This is the only authority conferred upon the commissioners court with reference to the appointment of a county health officer, and nowhere does the statute authorize such a court to appoint an assistant health officer. The commissioners court may only exercise the authority conferred upon it by the Constitution and statutes, and no such authority having been conferred, then it was without power to create an office.

We therefore advise that the action of the commissioners court in creating the office of assistant county health officer is without effect.

With respect, I am

Yours very truly,
C. W. TAYLOR,
Assistant Attorney General.

COUNTY TREASURERS—DUTIES OF—AS TO PERMANENT COUNTY SCHOOL FUND.

Is custodian of the securities of the permanent school fund. His general bond covers the safe-keeping of these securities. It is his duty also to keep a separate account showing all transactions in relation to the permanent school fund and make reports as to the exact condition of such fund to the commissioners court at each regular meeting thereof.

The separate bond of the county depository required by Article 2768 is a bond to cover the available school fund and only such portion of the permanent county fund as may during the term of the depository be converted into money.

April 27, 1915.

Hon. E. R. Yellott, County Attorney, Lockhart, Texas.

DEAR SIR: We have a letter from you dated April 19, as follows:

"It is the duty of the county depository of a county to receive all money due the county as interest and principal from purchasers of county school lands and receipt for the same and to see that they are properly credited to the parties who make such payments. In other words, this county has sold its county school lands to a number of persons, who make payments of interest and principal. I want to know whose duty it is to keep account of this money so as to be able to show how each purchaser of such school land stands with the county."

The question of the duties of the county treasurer and of the county depository in respect to the permanent county school fund and the securities of such fund has arisen several times of late, and in reply to your letter we will review somewhat at length the legislation on this subject to make clear the reasons for the conclusions we have reached.

The respective duties of the county treasurer and of the county depository in respect to the permanent county school fund and the available county school fund are shown by the nature and character of the bond required of each.

In 1846 an act was passed which became Article 1096 of Paschal's Digest, Article 988 of the Revised Statutes of 1879, Article 920 of

the Revised Statutes of 1895, and is Article 1500 of the Revised Statutes of 1911. This article has never been amended and is now the law in reference to the general bond required of the county treasurer. It is as follows:

"The county treasurer, before entering upon the duties of his office, and within twenty days after he has received his certificate of election shall take the oath of office prescribed by the Constitution of this State and shall give a bond payable to the county judge of his county, with at least two good and sufficient sureties, to be approved by the commissioners court, in such sum as such court may deem necessary, conditioned that such treasurer shall faithfully execute the duties of his office and pay over according to law all moneys which shall come into his hands as county treasurer, and render a just and true account thereof to said court at each regular term of said court, which oath and bond shall be filed and recorded in the office of the clerk of the county court of such county and safely preserved."

A separate bond to cover any portion of the school fund was not required of the county treasurer until 1876. In that year an act was passed which became Article 989 of the Revised Statutes of 1879 and Article 921 of the Revised Statutes of 1895. This article, which has been superseded by the county auditor's law, is as follows:

"The county treasurer shall also give an additional bond to the one required in the preceding article, for the school fund of his county, payable to the county judge of such county, with two good and sufficient sureties, to be approved by such county judge, in a sum double the amount of such school fund, to be estimated by such county judge, conditioned that he will safely keep and faithfully disburse the school fund according to law, and pay such warrants as may be drawn on said fund by competent authority. Said bond shall be given within twenty days after such treasurer has received his certificate of election, and when given and approved, shall be filed and recorded in the office of the clerk of the county court of his county and there safely preserved."

In 1879 another act was passed, which became Articles 3728 and 3729 of the Revised Statutes of 1879, and appear under the head of "Duties of the County Treasurer Pertaining to the School Fund." These articles are as follows:

"Article 3728. Within twenty days after the receipt of his certificate of election, it shall be the duty of the county treasurer to execute a bond, with two or more good and sufficient sureties, for the faithful performance of his duties under this chapter."

"Article 3729. Such bond shall be in double the probable amount of the available school fund which may come into his hands, to be estimated by the county judge, and shall be made payable and conditioned as prescribed in Article 989."

In the case of Kempner vs. County of Galveston, 73 Texas, 226, counsel contended that the various articles hereinbefore referred to required of the county treasurer three separate bonds; that Article 988, R. S. 1879 (now Art. 1500, R. S. 1911), required a general bond; Article 989, R. S, 1879, a bond to cover the permanent school fund of the county; and Articles 3728 and 3729, a bond to cover the available school fund. Construing these articles, the Supreme Court held that Articles 989, 3728 and 3729 referred to one and the same bond, towit, a bond to cover the available school fund only and that Article 988

(now Art. 1500, R. S. 1911) required a general bond to cover the permanent school fund of the county; that the county treasurer is the custodian of the *securities* belonging to the school fund of the county and that his general bond given under Article 988, R. S. 1879 (now Art. 1500, R. S. 1911) covers the faithful performance of his duties in reference to such securities. On this subject, among other things, the court said:

"The proceeds of the sale of the public school lands belonging to a county are as much its property as any other property or funds held by it; * * * that the general bond required of county treasurers before the Revised Statutes went into effect was sufficient to have secured this fund there can be no doubt. It had the same conditions as the bond now required by Article 988. * * * The sureties on a bond so conditioned (the general bond), in the absence of some other statutory regulation, would have been liable for the conversion of the school fund *securities* as well as for the misappropriation of the moneys of the permanent school fund. * * * We have no doubt that the sureties on the general bond under that condition of the obligation which makes them responsible generally for the faithful performance by their principal as county treasurer are liable for his conversion of the *securities* belonging to the school fund. The language is sufficiently comprehensive to embrace this liability and under no possible construction of the statute is there any other bond that would cover a defalcation in reference to these securities. * * * A still further reason for concluding that the permanent school fund of the county was intended to be secured by the treasurer's general bond is found in the fact that that fund is subject to the control of the commissioners court (Constitution, Article 7, Section 6), and it is made their duty to fix the amount of and to approve that bond. Revised Statutes, Article 988 (1879). On the other hand, the county judge is given a supervision over the public schools of his county and he is required to approve the warrants drawn on the available school fund. Revised Statutes, Article 3744 (1879). It is made his duty alone to approve the bond required by Articles 989 and 3728 (1879). This is a circumstance tending to indicate that the bond required to be approved by him alone is that intended to secure that fund alone of which he has a limited control, namely, the available fund. * * *

"We have not found any express provision of the statutes which makes the county treasurer the custodian of the securities belonging to the permanent school fund. But he is required by Article 995 to keep an account of 'the debts due to and from his county,' and to direct prosecutions according to law for the recovery of all debts that may be due his county, and superintend the collection thereof.' Article 996 (1879) requires him to report the debts due to the county to the commissioners court. and the next succeeding article contains this language: 'He shall deliver the moneys, securities, and all other property of the county in his hands to his successor in office.' These articles are sufficient to show as we think that it was contemplated that the county treasurer should be the *custodian of the securities* belonging to the school fund of the county."

Article 995, Revised Statutes of 1879, in reference to the duties of the county treasurer to keep an account of the "debts due to and from his county" and Article 996 of the Revised Statutes of 1879 in reference to his duties to report the debts due to the county to the commissioners court, referred to in the last paragraph of the opinion quoted, have not been amended and are, respectively, Articles 1506 and 1507 of the Revised Statutes of 1911. Then, in determining who now is the proper custodian of the securities of the permanent county school fund, and who should keep an account of all transactions in relation thereto and make reports of the condition thereof,

these articles have the same weight they had at the time of the decision in the Kempner case, unless subsequent legislation has changed the situation.

The only legislation since that time which has affected the status of the county treasurer is that legislation known as the County Depository Law.

The portion of the County Depository Law which shows the property and the character of the property of the county to be placed in the keeping of the depository is the following provision of Article 2444, R. S. 1911:

"And, thereupon, it shall be the duty of the county treasurer of said county, immediately upon the making of such order (referring to the order of the commissioners court designating some banking corporation as the depository), 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."

The use of the word "funds" and "money" in their connection above shows that the only property of the county which the law contemplates shall come into the possession of the depository is money collected by taxation for the different funds of the county, all moneys on hand belonging to the county, and all moneys of every character which may, after the selection of the depository, come into the hands of the treasurer.

This view is strengthened by the fact that the law provides (Art. 2442, R. S. 1911) that "it shall be 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."

This view is also strengthened by the fact that Article 2443, Revised Statutes, 1911, in reference to the general bond or bonds required of the county depository, provides that "said bond or bonds 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 are made."

This view is further strengthened by the fact that the separate bond required by said law of the county depository in respect to the school fund (Article 2768, Revised Statutes, 1911) provides that:

"Said bond shall be in an amount equal to the probable amount of *available* school fund and of the permanent county fund, *which may come into his hands*, to be estimated by the county superintendent or county commissioners court, in a county having no superintendent, and shall be conditioned that the depository will safely keep and disburse the school fund according to law and *pay such warrants* as may be drawn on said *fund* by competent authority."

In other words, the separate bond required of the depository in respect to the school fund is one to cover (a) the *available* school fund, which is *money;* and also to cover (b) not *all* of the permanent county school fund, but only the portion of such fund, which *may* come into the hands of the depository, to be *estimated* by the county superintendent or the county commissioners court, as the case may be—that is, that portion of the permanent county school fund which

may, during the term of the county depository, be converted into *money,* such portion as during such time may be converted into money to be estimated by the county judge or the commissioners court, as the case may be. For instance, the permanent school fund of a county, as is the case in your county, may consist of vendors' lien notes on school lands sold by the county. In such a case the separate bond required of the depository is a bond merely to cover the available school fund and the interest on said notes and also the principle on such notes as may be collected during the term of the depository.

The following conclusions are inevitable:

The general bond required of the depository by Article 2443, Revised Statutes, 1911, is to cover merely "the total amount of revenue," meaning money of the county, and the separate bond required of it in respect of the school fund by Article 2768, Revised Statutes of 1911, is to cover the available school fund of the county and only so much of the permanent school fund of the county as may be converted into money during the term of the depository. The law requiring a general bond of the county treasurer passed in 1846, which was Article 988 of the Revised Statutes of 1879 and is Article 1500 of the Revised Statutes of 1911, has never been changed, amended or modified in any manner. The Supreme Court of Texas, after a careful consideration of said last named article and of other articles relating to the duties of the county treasurer, concluded that "the county treasurer should be the custodian of the securities belonging to the school fund of the county" and that they had "no doubt that sureties on the general bond (of the county treasurer) under that condition of the obligation which makes them responsible generally for the faithful performance by their principal as county treasurer are liable for his conversion of the securities belonging to the school fund." The law in reference to the general bond required of the county treasurer not having in any manner been changed since said decision was rendered, and no law having since been passed imposing upon any one else the duty of the safe-keeping of the securities of the county permanent school fund, it is the opinion of this Department that the county treasurer is now the proper custodian of such securities and that his general bond is for the safe-keeping of the same.

The duties imposed upon the county treasurer to keep an account "of the debts due to and from his county" and to "render a detailed report at every regular term of the commissioners court of his county * * * of all debts due to and from his county," as we have heretofore remarked, are prescribed by Articles 1506 and 1507 of the Revised Statutes of 1911, which articles were respectively 995 and 996 of the Revised Statutes of 1879 and received construction in the Kempner case, supra. These duties today are the same they were at the time of said decision, except that by an act passed in 1905 stricter duties have been imposed upon him in reference to the school fund, Article 2773, a portion of said act providing as follows:

"Each treasurer receiving or having control of any school funds shall keep a full and *separate* itemized account with each of the different classes of school funds coming into its hands, and shall, on or before the first day of October of each year, file with the State Superintendent of Public Instruc-

tion an itemized report in duplicate of the receipts and disbursements of the school funds for the preceding school year ending August 31, etc."

You are therefore advised that in the opinion of this Department the county treasurer is the proper custodian of all securities belonging to the permanent county school fund; that his general bond covers the faithful performance of his duties as the custodian of the same; that it is his duty to keep a full, accurate and separate account of all the transactions relating to the same and to render a detailed report of all such matters to the commissioners court at each regular term of such court.

Yours very truly,

JNO. C. WALL,
Assistant Attorney General.

TAX COLLECTOR—BOND OF—BONDING COMPANIES.

The bond of the tax collector may be executed by a bonding company, or by personal sureties, in the discretion of the collector, or the commissioners court.

Article 7608, Revised Statutes of 1911.
Chapter 124, Acts of 1915, amending Article 7508.
Chapter 66, Acts of Thirty-third Legislature, amending Article 4928, Revised Statutes, 1911.

November 2, 1915.

Hon H. B. Terrell, Comptroller, Building.

DEAR SIR: The Department is in receipt of your letter of recent date, reading as follows:

"S. B. No. 394, Chapter 124, passed at the Regular Session of the Thirty-fourth Legislature, provides that every collector of taxes shall give a bond based upon unencumbered real estate of the sureties, subject to execution, etc., and repealing all laws and parts of laws in conflict therewith.

"I would like to know whether or not the Comptroller would be authorized to approve bonds of tax collectors made by the surety or bonding companies since the above statute became effective."

In order to clearly express our views upon the question propounded by you, it will be necessary to quote the statutes of this State pertinent to the inquiry.

Article 7608 of the Revised Statutes of 1911, which was Section 3 of the Act of 1876, providing for the oath and bond of tax collectors, is in the following language:

"Article 7608. Bond and oath.—Every collector of taxes, within twenty days after he shall have received notice of his election or appointment, and before entering upon the duties of his office, shall give a bond based upon unincumbered real estate of the sureties subject to execution, payable to the Governor and his successors in office, in a sum which shall be equal to the whole amount of the State tax of the county as shown by the last preceding assessment, with at least three good and sufficient sureties, to be approved by the commissioners court of his county, which shall be further subject to the approval of the Comptroller, and shall take and subscribe the oath prescribed by the Constitution, which, together with said bonds, shall be recorded in the office of the clerk of the county court of said county and be forwarded by the county judge of the county to the Comptroller to be

deposited in his office. Said bond shall be conditioned for the faithful performance of the duties of his office as collector of taxes for and during the full term for which he was elected or appointed, and shall not become void upon the first recovery, but suit may be maintained thereon until the whole amount thereof be recovered."

From the time of the passage of this act until the amendment of Article 4928, Revised Statutes, 1911, by Chapter 66 of the Acts of the Thirty-third Legislature a bonding company could not be accepted as surety upon the bond of any official, for the reason that the act authorizing the creation of such companies did not authorize them to become sureties upon official bonds, nor did Article 7608, above quoted, contemplate that such companies should become sureties upon the bonds of officials.

Article 4928, providing for the incorporation of fidelity, guaranty and surety companies contained the following provision:

"Provided that nothing herein shall be construed to permit any corporation to go upon any bond of any State or county official in this State."

However, this article of the statute was amended by Chapter 66 of the Acts of the Thirty-third Legislature, and in lieu of that proviso quoted next above the following was inserted:

" * * * also, on any bond or bonds that may be required of any State official, district official, county official or official of any school district or of any municipality; provided that the commissioners court of each county shall have the right to reject any or all official bonds made by surety companies and in their discretion may require any or all officials to make their official bonds by personal sureties; provided, also, that any such bond may be accepted and approved by the officer charged by law with the duty of accepting and approving the same without being signed by other securities than such corporation, and provided further, that when any such bond shall exceed fifty thousand dollars in penal sum, the officer or officers charged by law with the duty of approving and accepting such bond, may require that such bond be signed by two or more surety companies, or by one surety company and two or more good and sufficient personal sureties, in the discretion of the principal or official of whom the bond is required, and any statute or law to the contrary, or requiring any such bond to be signed by two or more good and sufficient sureties, shall be governed and controlled by the provisions of this article."

By this act of the Legislature in so amending the statute relating to the incorporation of such concerns it was not intended to in any manner repeal, supersede or supplant Article 7608, with reference to the sureties on the bonds of tax collectors, but was intended to be in addition to and supplemental of such statute, in that it authorized the execution of a tax collector's bond by a surety company, as well as by personal sureties, at the discretion of the officer, or commissioners court. It did not deprive the officer of executing his bond by personal sureties, but merely gave him an opportunity, if he saw fit, to have the same executed by a company engaged in that character of business.

By Chapter 124, Acts of the Regular Session of the Thirty-fourth Legislature, Article 7608 of the Statutes of 1911, as above quoted, was so amended as to hereafter read as follows:

"Every collector of taxes, within twenty days after he shall have received notice of his election or appointment, and before entering upon the duties of his office. shall give a bond based upon unincumbered real estate of the sureties, subject to executions, payable to the Governor and his successors in office, in a sum which shall be equal to SIXTY PER CENT OF THE WHOLE AMOUNT OF THE STATE TAX OF THE COUNTY AS SHOWN BY THE LAST PRECEDING ASSESSMENT, PROVIDING SAID BOND SHALL NOT EXCEED ONE HUNDRED AND TWENTY-FIVE THOUSAND ($125,000) DOLLARS, with at least three good and sufficient sureties, to be approved by the commissioners court of his county, which shall be further subject to the approval of the Comptroller, and shall take and subscribe the oath prescribed by the Constitution, which, together with said bonds, shall be recorded in the office of the clerk of the county court of said county, and be forwarded by the county judge of the county to the Comptroller, to be deposited in his office. Said bond shall be conditioned for the faithful performance of the duties of his office as collector of taxes for and during the full term for which he was elected or appointed, and shall not become void upon first recovery, but suit may be maintained thereon until the whole amount thereof be recovered."

In copying Article 7608 of the Revised Statutes of 1911, as well as the amendment thereto by the Thirty-fourth Legislature we have capitalized in the original, as well as the amendment, that portion of such article so amended.

The only purpose of this amendment, as is manifest from a reading thereof, as well as from the caption of the act, in so far as this section is concerned, was to provide for a maximum bond of tax collectors. The only change in this article was to provide for a bond equal to sixty per cent of the whole amount of the State tax, such bond not to exceed $125,000, in lieu of a bond equal to the whole amount of the State tax, as in the original statute, while the wording of the remainder of this amendment is a verbatim copy of the original article.

There is nothing in this amendment indicative of an inclination on the part of the Legislature to repeal Article 4928, as amended by the Thirty-third Legislature, authorizing the execution of such bonds by surety companies, and if the re-enactment of the verbiage of Article 7608 could be held to repeal the act authorizing the execution of such bonds by a company then it must be by implication. Repeals by implication are not favored. This is a well established rule of construction, and unless there is an apparent intention on the part of the Legislature to repeal an act as evidenced by inconsistencies in the two then the courts will uphold the latter statute. Another rule of construction of equal force is that statutes in pari materia must be construed together, and apparent discrepancies reconciled so that if possible the two statutes may be allowed to stand. This rule is clearly expressed by Judge Brown in the opinion in Conley vs. Daughters of the Republic, 156 S. W., 197, in the following language:

"There is no express repeal of the former law; hence, if repealed, it must be by implication. which is not favored. The two laws relate to the same subject and should be considered as if incorporated into one act. If being so considered the two can be harmonized and effect given to each, there can be no repeal. Neill vs. Keese, 5 Texas, 23; 51 Am. Dec.. 746. These statutes, being in pari materia, and relating to the same subject, are to be taken together and so construed, in reference to each other, as that, if practicable, effect may be given to the entire provisions of each. * * * Thus con-

sidered, there is no repugnancy between the provisions of these statutes. They may stand together, and effect may be given to the entire provisions of each. And thus to construe and give effect to them, is in accordance with the established rule of construction." Brown vs. Chancellor, 61 Texas, 438.

What has been said above with reference to the amendment to Article 4928, permitting the execution of such bonds by surety companies as not affecting the former statute authorizing the same to be executed by personal sureties applies with equal force to the amendment to Article 7608, for the rule that the re-enactment of a statute in the identical language of the original act carried with it the construction placed on the latter would not have the effect to work an implied repeal of amended Article 4928, as the construction placed upon original Article 7608 was to the effect that such bonds could be executed in either manner, and therefore the construction to be placed upon this amended Article 7608 would be that such bonds might be executed either by individual sureties or by companies organized for that purpose.

It is true that Chapter 124 in Section 2 thereof provides as follows:

"All laws and parts of laws in conflict herewith are hereby repealed."

This is a broadcast assertion commonly inserted at the close of bills, which in effect has but very little meaning, and is substantially useless, for the reason that any laws in conflict with the act containing this clause are by implication repealed, as in conflict with the act.

Mr. Sutherland, in his work on statutory construction, has this to say with reference to such clauses:

"Section 256. Effect of clause repealing all acts and parts of acts inconsistent with new law.—Affirmative statutes which contain no reference to existing statutes, either to amend or repeal them, import that the lawmaker has no conscious purpose to affect them, unless by congruous addition. On the other hand, when there is inserted in a statute a provision declaring a repeal of all inconsistent acts or parts of acts, there is an assumption that the new rule to some extent is repugnant to some law enacted before. There is a repeal to the extent of any repugnancy in either case, but no farther. The insertion, therefore, of such a general repealing clause adds nothing to the repealing effect of the act. But some cases hold that the insertion of such a clause has a restraining effect on the repealing force of the new statute, and that a new statute intended as a substitute or revision of a former one, if it has this general repealing clause, will not repeal the provisions of the former law which are not inconsistent with the new. The clause repealing all inconsistent acts and parts of acts has sometimes been classed with express repeals, but it has been held not to be an express repeal within the meaning of a constitutional provision as to repeals. It is to be supposed that courts will be less inclined against recognizing repugnancy in applying such statutes, while, in dealing with those of the other class, they will, as principle and authority requires, be astute to find some reasonable mode of reconciling them with prior statutes, so as to avoid a repeal by implication."

In the case of the State vs. Yardley, 34 L. R. A., 656, the Supreme Court, in discussing a clause of this character, says:

"The words of the fourth section, 'that all laws and parts of laws in con-

flict with this act be, and the same are hereby, repealed,' do not make it an expressly repealing act. Really that section adds nothing of virtue or meaning to the act, and takes nothing from it. All prior conflicting laws and parts of laws were impliedly repealed by the former sections of the act, and, as a consequence, no such laws or parts of laws were left for the fourth section to operate upon. That section was, therefore, useless, and of no force or effect whatever. It had no office to perform and performed none. Its presence in the bill did not make the act a repealing law or a non-repealing law, and it will not be regarded for the purpose of vitiating the law, nor will it be permitted to have that effect."

Therefore Section 2 of the act amending Article 7608 has no more effect than the construction to be placed upon such amendment under the rules of statutory construction would have.

We are therefore of the opinion, and so advise you, that the statutes cited above, providing for the execution of bonds by tax collectors and those authorizing the execution of official bonds by surety companies being in pari materia should be construed together, and, when so construed, authorize the execution of bonds in either mode; that is, by personal securities or by surety companies, and answering your question specifically, we beg to advise that you would be authorized to approve bonds of tax collectors signed by surety or bonding companies.

With respect,

C. W. TAYLOR,
Assistant Attorney General.

OFFICIAL BONDS—SURETY—STOREKEEPER AND ACCOUNTANT.

The bond of the storekeeper and accountant for an eleemosynary institution may be executed by a surety company.

There would be no authority to pay the premium on a surety company bond of a storekeeper and accountant out of any fund of the institution arising either by appropriation of the Legislature or from any other source. Article 7327, Revised Statutes, as amended by the Thirty-fourth Legislature. Article 4928, Revised Statutes, as amended by the Thirty-third Legislature. Article 131, Revised Statutes.

October 18, 1915.

Mr. G. W. McKenna, Storekeeper and Accountant, State Epileptic Colony, Abilene, Texas.

DEAR SIR: The Attorney General is in receipt of your letter reading as follows:

"I am directed by the Board of Managers to write you with reference to the State paying for surety bond of storekeeper and accountant of this institution.

"Is there any law authorizing, or any law that has been interpreted as authorizing the Comptroller to accept surety bond for storekeeper and accountant, and if so, is there any provision of law which the board could use as authority in allowing and approving charge for the payment of surety bond of the storekeeper and accountant to be paid out of either the appropriation for support and maintenance or from junk fund account which is with the State Treasurer?"

Replying thereto, beg to advise that under Article 7327, Revised

Statutes, 1911, as amended by Chapter 126, Acts Thirty-fourth Legislature, the storekeeper and accountant for the eleemosynary institutions of this State before entering upon the performance of his duties shall make and file with the Comptroller of Public Accounts a bond in the sum of ten thousand dollars payable to the State of Texas to be approved by the Governor and signed by the Comptroller.

Article 4928 of the Revised Statutes of 1911, providing for the incorporation of fidelity, guaranty and surety companies contained the following provision:

"Provided that nothing herein shall be construed to permit any corporation to go on any bond of any State or county official in this State."

However, this article of the statutes was amended by Chapter 66, Acts Regular Session of the Thirty-third Legislature and in lieu of the provision quoted next above the following was inserted:

"Also, on any bond or bonds that may be required of any State official, district official, county official, or official of any school district of any municipality; provided that the commissioners court of each county shall have the right to reject any or all official bonds made by surety companies and in their discretion may require any or all officials to make their official bonds by personal sureties; provided, also, that any such bond may be accepted and approved by the officer charged by law with the duty of accepting and approving the same without being signed by other securities than such corporation. and provided further, that when any such bond shall exceed fifty thousand dollars in penal sum, the officer or officers charged by law with the duty of approving and accepting such bond, may require that such bond be signed by two or more surety companies, or by one surety company and two or more good and sufficient personal sureties, in the discretion of the principal or official of whom the bond is required, and any statute or law to the contrary, or requiring any such bond to be signed by two or more good and sufficient sureties."

The position occupied by you being provided for by statute should be classed as a State office and a person occupying the same as a State official. It, therefore, appears that the Governor would have authority to approve your bond executed by a surety company.

As to the payment of the premium on this bond, we beg to say that this is an obligation placed upon the storekeeper and accountant and not upon the State or the institution. You are required to give the bond and to meet any necessary expense incident thereto. If you see fit to execute a surety company bond rather than a personal bond that is your privilege, but there is no authority in law to charge the expense of the execution of this bond against the State or the institution, nor is there any appropriation out of which such premium could be paid.

The junk fund mentioned in your letter arises under Article 131, Revised Statutes, and while the superintendent with the approval of the president of the board of managers seems to have a wide latitude in the expenditure of such fund, yet he would not be authorized to expend same on any other account than that legally chargeable to the institution.

As above said, the premium on a bond executed by you in a surety company could not be charged against the institution, and therefore

the superintendent and president of the board would be without authority to pay the same from the junk fund.

You are, therefore, advised that your bond as storekeeper and accountant could be executed by a surety company, but that the premium on same would have to be paid by you and not from any funds belonging to the institution.

Yours truly,

C. W. TAYLOR,
Assistant Attorney General.

ELEEMOSYNARY INSTITUTIONS—STOREKEEPERS AND ACCOUNTANTS.

The term storekeepers and accountants used in connection with eleemosynary institutions contemplates one position and the boards of the respective institutions would have no authority to employ two persons, one as an accountant and one as a storekeeper. The duties of the accountant and storekeeper must be performed by one and the same person.

The salary of the person occupying the position of storekeeper or accountant of an eleemosynary institution is fixed by law at the sum of $900 per annum and such salary remains at the sum of $900 although the Legislature may appropriate more or less for the payment thereof.

Article 5227, Revised Statutes, amended First Called Session Thirty-third Legislature.

Article 7327, Revised Statutes, amended Regular Session Thirty-fourth Legislature.

August 19, 1915.

Hon. William L. Blanton, Member Board of Trustees, State Juvenile Training School, Gainesville, Texas.

DEAR SIR: The Attorney General has your favor of recent date in which you desire to be advised if under Article 7327, Revised Statutes, 1911, as amended by Chapter 126 of the Laws of the Regular Session of the Thirty-fourth Legislature, there may be appointed for the State Institution for the Training of Juveniles a storekeeper and also an accountant, or must the duties of accountant and storekeeper be performed by one and the same person. You state that the magnitude of the institution is such that it requires the accountant to give all of his time to keeping the books and therefore he cannot perform the services required of the storekeeper.

Replying to your inquiry, we beg to advise that Article 7327, Revised Statutes, as amended by the Act of the Thirty-fourth Legislature, provides for the appointment by the superintendent with the advice and consent of the Board, of a storekeeper and accountant for the institutions contemplated by the act. This article as amended is somewhat ambiguous for the reason that the term "storekeeper and accountant" is used in the beginning of the section and in other parts thereof the term "storekeeper or accountant," which latter expression might lead to the conclusion, if standing alone, that it was intended by the Legislature to create two positions, one a storekeeper and the other an accountant, but we take it from reading the entire article that the Legislature had in mind the creation of but one position and that the person filling such position should perform the duties not only

of an accountant for the institution, but also those of a storekeeper.

It will be noted that in this article the Legislature has abolished the office or position of steward, quartermaster or other similar positions heretofore existing in all eleemosynary institutions of the State and the duties theretofore performed by persons occupying such position are placed upon the storekeepers or accountants appointed under the provisions of the act.

Our construction of this article is that it is contemplated that there shall be but one position and that the person occupying this position shall perform the duties of an accountant and also those of storekeeper.

In your conversation with the writer you also desire to be advised whether such storekeeper and accountant would receive as a salary the sum of $900 per annum as provided by Article 7327, Revised Statutes, or would he receive $1000 per annum as provided in the appropriation bill enacted by the Thirty-fourth Legislature at its first called session which becomes effective September 1. In our opinion the salary of the storekeeper and accountant of all eleemosynary institutions is $900 per annum without regard to the amount that the Legislature may have appropriated for the payment of such salary. Article 7327 as amended provides that storekeepers or accountants shall receive a compensation of not to exceed the sum of $900 per annum to be charged and paid as a part of the current expenses of said institution. This act fixes the compensation of such employes, and unless the appropriation bill fixing a compensation different from that fixed in this act has within it language indicating an intention on the part of the Legislature to repeal this portion of Article 7327, then the salary to which such employe would be entitled would be the sum of $900 without reference to the amount of the appropriation therefor.

The courts of this State have decided that where the act creating a position fixes the salary therefor and the Legislature fails to appropriate a sufficient amount to pay the salary, that while the Comptroller would not be authorized to draw a warrant for more than the amount appropriated, yet the salary being fixed by law the officer or employe has a claim for the excess above the appropriation. In other words, that the appropriation bill appropriating a different amount from that fixed by the statute does not repeal the statute.

Pickle vs. Finley, 91 Texas, 484.

It is true that Article 5227, Revised Statutes, as amended by the First Called Session of the Thirty-third Legislature provides that the salaries and compensation of all subordinate officers, teachers and employes of this institution shall be fixed by the board of trustees not to exceed the amounts appropriated for same, but by amended Article 7327, being a subsequent act and dealing specifically with the employes in question, we can but conclude that it was the intention of the Legislature to in so far as this position is concerned, definitely fix and

establish the compensation attaching thereto, and we, therefore, advise you that the salary of the storekeeper and accountant of all institutions contemplated by Chapter 126, Regular Session of the Thirty-fourth Legislature was $900 per annum without regard to the amount appropriated therefor by the general Appropriation Bill.

Very truly yours,

C. W. TAYLOR,
Assistant Attorney General.

OFFICERS—STATE EXECUTIVE COMMITTEE—BOARD OF MANAGERS STATE EPILEPTIC COLONY.

Same party cannot hold both of such offices.

December 15, 1914.

Hon. B. L. Russell, Baird, Texas.

DEAR SIR: In your communication of the 7th instant, you wish to know if you can serve as a member of the State Democratic Executive Committee for the Twenty-eighth Senatorial District, and also continue to serve as a member of the board of managers of the State Epileptic Colony.

Replying thereto, beg to say:

Article 16, Section 40, State Constitution, provides:

"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."

However, Article 2922, Revised Statutes, 1911, as amended by Chapter 12, Acts Thirty-second Legislature, I think answers your inquiry. It is as follows:

"No one who holds an office of profit or trust under the United States or this State, or in any city or town in this State or within thirty days after resigning or being dismissed from any such office, except a notary public, or who is a candidate for office, or who has not paid his poll tax, shall act as judge, clerk or supervisor of any election, nor shall anyone act as chairman or as member of any executive committee of a political party, either for the State or any district, county or city, who has not paid his poll tax, or who is a candidate for office, or who holds any office of profit or trust under either the United States or this State, or in any city or town in this State; or anyone who may be enjoying gratuitous passage on street cars or on other public service corporations, by reason of his appointment as a special policeman, or anyone who has any connection whatever with the city, whereby the city is justified in issuing to any such person free transportation on the street cars, or franks entitling him to the free use of public service corporations, or any person who is regularly employed in any capacity by the city, for whose services a salary or wages is paid, except a notary public."

Under the provisions of the foregoing article of the statute, you are advised that in the opinion of this Department you cannot hold at the same time the office of State executive committeeman for the

Democratic party, and serve as a member of the board of managers of the State Epileptic Colony.

Yours truly,

B. F. LOONEY,
Attorney General.

LIEUTENANT GOVERNOR—VACANCY—STATE SENATE—LEGISLATURE—PRESIDENT PRO TEMPORE.

1. Duty of Senate to elect President pro tempore (a) at the beginning of each of the sessions, (b) at the close of each of the sessions, and (c) at such other times as the Senate may deem necessary.
2. Necessity for electing a President pro tempore must be determined by the Senate.
3. Two persons cannot hold the office of President pro tempore at the same time, and where the Senate elects a President pro tempore in the absence of the Senator formerly elected [the office of Lieutenant Governor being vacant] the person last elected continues in such office until the Senate elects another of its members to such office.

October 5, 1914.

To the Senate of Texas.

Your Secretary has transmitted to this Department the following simple resolution, adopted this afternoon:

"Whereas, when a vacancy occurs in the Lieutenant Governor's office, the President pro tempore of the Senate is authorized under the Constitution to perform the duties of the Lieutenant Governor, and

"Whereas, the Constitution provides that 'The Senate shall at the beginning and close of each session, and at such other times as may be necessary, elect one of its members President pro tempore, who shall perform the duties of the Lieutenant Governor in any case of absence or disability of that officer and whenever the said office of Lieutenant Governor shall be vacant," and

"Whereas, at the beginning of this Called Session, as provided by the Constitution, the Senate elected Hon. W. C. Morrow of Hill County as President pro tempore, and

"Whereas, on account of the absence of the President pro tempore, it has become necessary to elect another President pro tempore of this Senate, and the Senate, as the Constitution directs, has elected Hon. C. W. Taylor of Bell County President pro tempore of this Senate,

"Now, therefore, be it resolved by the Senate, that we respectfully request an opinion from the Attorney General's Department as to whether or not the said C. W. Taylor shall hold the office of President pro tempore of this Senate until the close of said session, or until it becomes necessary to elect another as President pro tempore, or whether or not upon his return to the Senate, the said W. C. Morrow, who was elected at the beginning of this session, shall continue his duties as President pro tempore of this Senate."

The provision of the Constitution that controls the question propounded in the resolution is Section 9 of Article 3 and is correctly quoted in the second paragraph of the resolution above.

This provision of the Constitution means that it is the duty of the Senate to elect a president pro tempore at the following times and under the following circumstances:

First: At the beginning of each of the sessions of the Senate.

Second: At the close of each of its sessions; and

Third: At such other times as the Senate may deem necessary.

The necessity for the election of a President pro tempore must be determined by the Senate itself, and there is and can be no more conclusive evidence of the existence of a necessity than arises from the fact of an election of a President pro tempore by the Senate.

The Constitution does not contemplate that there may be two persons holding the office of President pro tempore at the same time and hence as the Senate has elected Senator Taylor President pro tempore in the manner and under the circumstances set out in the resolution it is the opinion of this Department that it should be conclusively presumed that a necessity existed therefor, and that he is and will be President pro tempore until the Senate within its discretion deems proper to elect another of its members to this office.

Yours very truly,

B. F. LOONEY,
Attorney General.

LIEUTENANT GOVERNOR—STATE SENATE—PRESIDENT PRO TEMPORE—VACANCY—OFFICERS.

1. Senate shall at beginning and at closing of each session elect a President pro tempore from its membership.
2. When there is a temporary vacancy in the office of Lieutenant Governor the President pro tempore of the Senate is authorized to perform the duties of Lieutenant Governor.
3. Where a vacancy exists in the office of Lieutenant Governor the President pro tempore elected at the beginning of the session would succeed to the office of Lieutenant Governor; however, he would still be a State Senator, but the duties of Lieutenant Governor would come to him by reason of his election as President pro tempore, and in his official acts his signature should be "President Pro Tempore and Acting Lieutenant Governor."

August 25, 1914.

Hon. Robert L. Warren, President Pro Tem., Senate Chamber.

DEAR SIR: I am in receipt of your favor bearing date of the 23rd instant, but really should be the 25th instant, reading as follows:

"In view of the fact that Hon. Will H. Mayes, late Lieutenant Governor of Texas, resigned from said office prior to the beginning of the present Called Session of the Legislature, and in further view of the fact that the undersigned was elected at the opening of said Called Session on Monday, August 24, 1914, as the President pro tem. of the Senate, succeeding Hon. V. A. Collins, who had been elected as President pro tem. of the Senate at the First Called Session of the Thirty-third Legislature, I therefore request that you advise me what title I should use in the signing of bills and resolutions which may be passed during this special session. Whether I should only use the title, 'President pro tem,' or the title 'Acting Lieutenant Governor,' or the title 'President pro tem. and Acting Lieutenant Governor,' and thereby greatly oblige, etc."

The question you propound is as to your official status; that is to say, whether or not you are simply president pro tem. of the Senate, or president pro tem. of the Senate and Acting Lieutenant Governor.

The situation necessarily calls for a review of the following provisions of our Constitution, which must be read together and construed.

Section 9 of Article 3 of the Constitution, in so far as is material, reads as follows:

"The Senate shall, at the beginning and close of each session, and at such other times as may be necessary, elect one of its members President pro tempore, who shall perform the duties of the Lieutenant Governor in any case of absence or disability of that officer, and whenever the said office of Lieutenant Governor shall be vacant."

Section 16 of Article 4 of the Constitution in so far as material reads as follows:

" * * * In case of the death, resignation, removal from office, inability or refusal of the Governor to serve, or of his impeachment or absence from the State, the Lieutenant Governor shall exercise the powers and authority appertaining to the office of Governor until another be chosen at the periodical election, and be duly qualified; or until the Governor, impeached, absent or disabled, shall be acquitted, return, or his disability removed."

Section 17 of Article 4 of the Constitution reads as follows:

"If, during the vacancy in the office of Governor, the Lieutenant Governor should die, resign, refuse to serve, or be removed from office, or be unable to serve; or if he shall be impeached or absent from the State, the President of the Senate, for the time being, shall in like manner administer the Government until he shall be superseded by a Governor or Lieutenant Governor. The Lieutenant Governor shall, while he acts as President of the Senate, receive for his services the same compensation and mileage which shall be allowed to the members of the Senate, and no more; and during the time he administers the Government as Governor he shall receive in like manner the same compensation which the Governor would have received had he been employed in the duties of his office, and no more. The President, for the time being, of the Senate, shall, during the time he administers the Government, receive in like manner the same compensation, which the Governor would have received had he been employed in the duties of his office."

Section 18 of Article 4 of the Constitution is as follows:

"The Lieutenant Governor, or President of the Senate, succeeding to the office of Governor, shall, during the entire term to which he may succeed, be under all the restrictions and inhibitions imposed in this Constitution on the Governor."

These provisions of the Constitution mean, that the Senate shall at the beginning and at the close of each session of the Senate, and at such other times as that body may deem necessary, elect from its membership a president pro tem. who shall perform the duties of Lieutenant Governor in case of his absence or disability which may create a temporary vacancy or when, for any cause, a permanent vacancy is created; and if during any vacancy in the office of Governor, either temporary or permanent, the president pro tem. of the Senate shall, for the time being, in like manner, administer the government until he shall be superseded by a Governor or Lieutenant Governor.

Your question may be stated as follows: Where a senator is elected president pro tem. and a vacancy occurs in the office of Lieutenant Governor, does the president pro tem. become legally invested with the office and title of Lieutenant Governor and empowered to discharge the

duties of such office and enjoy its emoluments for the remainder of the term for which the Lieutenant Governor was elected, regardless of the fact that pending such vacancy the Senate may elect another senator president pro tem.; or rather, if pending such vacancy the Senate should elect another president pro tem., will the successor (and each successor with this successor) and each succeeding president pro tem. who may be elected during the time of the vacancy succeed to the powers, duties and emoluments of the office of Lieutenant Governor?

We are of the opinion that the latter presents the correct legal status of the president pro tem. under the circumstances named.

The language of the Constitution (Section 9, Article 3) is that the president pro tem. "shall perform the duties of Lieutenant Governor in any case of absence or disability of that officer and whenever the said office of Lieutenant Governor shall be vacant." The Constitution further provides: (Section 16, Article 4.)

> " * * * In case of the death, resignation, removal from office, inability or refusal of the Governor to serve, or of his impeachment or absence from the State, the Lieutenant Governor shall exercise the powers and authority appertaining to the office of Governor until another be chosen at the periodical election, and duly qualified; or until the Governor, impeached, absent or disabled, shall be acquittted, return, or his disability removed."

Also we read (Section 17, Article 4):

> "If, during the vacancy of the office of Governor, the Lieutenant Governor should die, resign, refuse to serve, or be removed from office, or be unable to serve; or if he shall be impeached or absent from the State, the President of the Senate, for the time being, shall, in like manner, administer the Government until he shall be superseded by a Governor or Lieutenant Governor."

From the above quoted provisions of the Constitution it is very apparent that both temporary and permanent vacancies are contemplated and may occur at any time in the office of Governor and Lieutenant Governor, and provision is made in either event for the vacancy to be filled, the powers and duties of the office exercised and the government administered.

In case of a temporary vacancy in the office of Governor the Lieutenant Governor or president pro tem. of the Senate, as the case may be, shall administer the government and shall exercise the powers and authority appertaining to the office of Governor; also the same provision is made where a permanent vacancy occurs. When there is a temporary vacancy in the office of Lieutenant Governor, the president pro tem. of the Senate is required and is authorized to perform the duties of Lieutenant Governor during such vacancy, and precisely the same provisions are made in case of the existence of a permanent vacancy. In no event, however, does the Lieutenant Governor become Governor or the president pro tem. become Lieutenant Governor. The Lieutenant Governor remains such and the president pro tem. remains a senator; each during the periods of vacancy which may occur, whether temporary or permanent, is clothed respectively with the additional powers and charged with the performance of added duties.

In the event of a permanent vacancy in the office of Governor the

Lieutenant Governor would according to the express provisions of the Constitution, "exercise the powers and authority appertaining to the office of Governor until another be chosen at the periodical election and be duly qualified."

Where there is a permanent vacancy in the office of Lieutenant Governor the president pro tem. of the Senat "shall perform the duties of Lieutenant Governor." He does not become invested with the title to the office of Lieutenant Governor and hence whenever such senator ceases to be president pro tem., which would be the case if another senator is elected to that position by the Senate, the power and duties of the office of Lieutenant Governor would pass to and be exercised by his successor in the office of president pro tem.

The Constitution with reference to the Lieutenant Governor's office makes precisely the same provisions for the filling of a temporary vacancy as it does for the filling of a permanent vacancy It will scarcely be contended by anyone that where a temporary vacancy exists and the president pro tem. of the Senate is called upon to exercise the powers and to discharge the duties of the office of Lieutenant Governor for the time being, that he thereby succeeds to the office and becomes Lieutenant Governor; and as the provisions are the same where the vacancy is permanent the same conclusion must follow: that is, that the president pro tem. does not succeed to the office but only while the senator is president pro tem. he is invested with this new power and charged with the performance of these new duties.

The question under investigation has not heretofore been passed upon by the courts of our State and I can find no evidence which this Department has ever been called upon to express an opinion thereon. We have been driven to seek guidance from the adjudicated cases of the courts of other states where similar constitutional provisions have been construed. The case of People vs. Cornforth, decided by the Supreme Court of Colorado, reported in Colorado Reports, Volume 34, page 108, is very much in point.

The proceeding was in the nature of a quo warranto, the information alleging that the respondent usurped the office of Lieutenant Governor and prayed for a judgment of ouster, and that the relator be declared entitled to discharge the duties and receive the emoluments of the office. The facts were as follows: March 17, 1905, James H. Peabody, Governor for the term which ended January, 1907, resigned the office and Jessie F. McDonald, Lieutenant Governor, qualified as Governor and has since acted as such. March 18, 1905, the respondent, a State senator for the term ending the first Wednesday in December, 1906, as president pro tem. of the Senate, qualified as Lieutenant Governor and since has acted as such. On April 3, at the close of the regular session of the Legislature, which began January 4, 1905, relator was elected president pro tem. to succeed respondent. Respondent remained a senator. There was no controversy but that respondent, as president pro tem. at the time the powers and duties of Governor, through the resignation of Governor Peabody, devolved upon Lieutenant Governor McDonald, was entitled to perform the duties of

Lieutenant Governor; the question is, whether such right ended with the election of relator as president pro tem.

The relator insists that the duties appertaining to the office of Lieutenant Governor legally attached to the holder of the office of president pro tem. of the Senate and that whenever the term of office of such president expired the duties passed to his successor in said office.

The respondent on the other hand contended that the holder of the office of president pro tem. at the time the Lieutenant Governor legally assumed the duties of Governor through the resignation of the legally elected Governor, becomes legally invested with the title of Lieutenant Governor and empowered to discharge the duties and receive the emoluments for the remainder of the term for which the Governor and Lieutenant Governor were respectively elected and that this was true regardless of the fact that his term of office as such president pro tem. as well as senator, may both expire before the termination of the residue of the gubernatorial term.

The solution of the question thus presented turned on the construction of several provisions of the Constitution of the State of Colorado very similar in fact to all intents and purposes identical in meaning with the provisions of the Constitution of this State hereinbefore quoted.

After setting out in the opinion the constitutional provisions, the court said:

"These sections read together provide that the Senate shall, at the beginning and close of each regular session. and at such other times as may be necessary, elect one of its members President pro tem., and that in case of the absence, impeachment, or disqualification from any cause of the Lieutenant Governor, or when the powers, duties and emoluments of the office of Governor devolve upon the Lieutenant Governor through death, impeachment or conviction of felony or infamous misdemeanor, failure to qualify, resignation, absence from the State, or disability of the Governor, the President pro tem. shall perform the duties of Lieutenant Governor until the cause preventing the Lieutenant Governor from discharging his official duties is removed.

"It thus appears that if the Lieutenant Governor fails to perform his duties for some temporary cause, as absence or sickness, the Constitution in terms provides that while such condition exists his duties shall be performed by the President pro tem. It is conceded by counsel for the respondent that in such temporary contingency the President pro tem. does not become Lieutenant Governor. The same language is used in devolving duties on the President pro tem. in the event the Lieutenant Governor is unable to perform his duties through those of the Governor devolving upon him from some permanent cause, as in this case, resignation of the Governor.

"If the framers of our Constitution had intended that the President pro tem. of the Senate should become Lieutenant Governor de jure in the contingency under consideration they could easily have said so. They have not so provided; they have simply said that if for some permanent cause, the Lieutenant Governor fails to discharge his official duties, that they shall be performed while such condition obtains by the President pro tem. of the Senate as such."

The Colorado court at this point in its opinion quotes from the case of State vs. Heller, 63 New Jersey Law, 105; 42 Atlantic 155; Lawyer's Reports Annotated, Volume 57, page 312. The facts of the New Jersey case are stated as follows:

Griggs, the Governor of New Jersey, resigned before the expiration of his term. Vorhees, the then President of the Senate, qualified as his successor. Later, before the expiration of the time for which Griggs had been elected, Vorhees resigned as a member of the State Senate. Immediately the Speaker of the House qualified as Governor, contending that the resignation of Vorhees as State Senator terminated his right to officiate as Governor. Vorhees claimed that having been the legal successor of Griggs as Governor at the time of the resignation, he thereby became the Governor de jure for the remainder of the unexpired term of Griggs as Governor, regardless of the expiration of his term as State Senator.

The question was determined by the construction of the following provision of the New Jersey constitution:

"In case of the * * * resignation * * * from office of the Governor, the powers, duties and emoluments of the office shall devolve upon the President of the Senate, and in case of his * * * resignation. * * * then upon the Speaker of the House of Assembly, for the time being, until another Governor shall be elected and qualified."

The court in ruling said:

"In my judgment the framers of the Constitution simply meant what they said—that in case the Governor resigned. the President of the Senate, as such, should have the power and perform the duties of the office. Foster M. Vorhees did not become Governor upon the resignation of Governor Griggs. He still continued to be a Senator and President of the Senate. He could not resign the office of Governor which he never held. When he resigned and vacated the office of Senator he ceased to be President of the Senate and could no longer exercise the functions pertaining to the Executive Department. Therefore upon his resignation as Senator the powers, duties and emoluments of the office devolved upon David O. Watkins. the Speaker of the House of Assembly. He is de jure the Speaker of the House and of right as such Speaker exercises the executive powers. He is not Governor de jure or de facto in the constitutional sense of that term."

The court further said:

"It (New Jersey Constitution) declares that the powers, duties and emoluments of the office (Governor) shall devolve on the President of the Senate. It does not confer upon him the title of the office. The President of the Senate exercises the powers of the Governor; the President of the Senate performs the duties of the Governor; the President of the Senate receives the emoluments of that office. He is still President of the Senate, with the added duties required of the chief executive of the State imposed upon him. There is no language in the Constitution from which it can be reasonably inferred that his office of President of the Senate was to be vacated. He retains his office of Senator, and as President of the Senate, and not as Governor, he exercises the added powers and performs the super-imposed duties."

The Colorado court came to the following conclusion:

"We conclude that respondent did not become Lieutenant Governor de jure by the duties of Governor devolving upon Lieutenant Governor MacDonald through the resignation of Governor Peabody, and that by the election of relator as President pro tem. respondent. being no longer President pro tem., lost his right to perform the duties of Lieutenant Governor, and relator by such election became entitled to perform the duties of such office."

In the case of State ex rel Marr vs. Stearns, decided by the Supreme Court of Minnesota, reported in 75 Northwestern, similar provisions of the constitution of that State were construed, the court reaching the same conclusion arrived at by the Supreme Court of New Jersey and the Supreme Court of Colorado, as shown by the two cases above referred to. The Minnesota court held that the president pro tempore of the State Senate does not cease to be a Senator when he becomes Lieutnant Governor, and a corresponding vacancy in the office of Lieutenant Governor. Among other things, the court said:

"It is clear that the vacancy in the office of Governor provided for by the Constitution may arise from a variety of causes, such as his death, resignation, impeachment, illness, or absence from the State, that it is necessarily permanent or temporary, according to the facts of each case, that the Lieutenant Governor is Governor only during such vacancy, and that in the case of a temporary vacancy he is Governor only for the time being, and, when the temporary vacancy ends, the Governor returns to his office and the Lieutenant Governor to his. A corollary of this proposition is that the vacancy in the office of Lieutenant Governor, upon the occurrence of which the President pro tempore of the Senate becomes Lieutenant Governor, is of the same character as the vacancy in the office of Governor. The vacancy in the office of Lieutenant Governor may be permanent or temporary, depending on the character, cause and duration of the vacancy in the office of Governor. Such being the case, the President pro tempore, when he becomes Lieutenant Governor for the time being, during such vacancy ought not to be held to be no longer a Senator, unless the express words of the Constitution imperatively require such a construction. There are no such words or provisions in the Constitution, and such a construction can not be given to it, and at the same time give effect to other provisions of that instrument. All of the reasons we have suggested why the office of Lieutenant Governor does not become absolutely and permanently vacant, as to that officer, as soon as he is called upon to act as Governor during a temporary vacancy, apply with greater force to the President pro tempore of the Senate; for if the senatorial office of the President pro tempore is rendered absolutely vacant, as to him, by his becoming Lieutenant Governor, then such a result follows upon the happening of the first vacancy in the office of Governor for any cause, or for any duration; and, in case such vacancy is only temporary, then at its termination the Governor resumes his office, the Lieutenant Governor his, and the President pro tempore will be out of office entirely, and the people of his district deprived of the right to be represented in the Senate until his successor can be elected. There is no language in the Constitution requiring or justifying the conclusion that the senatorial office of the President pro tempore becomes vacant when he becomes Lieutenant Governor by reason of and during a vacancy in the office of Governor. On the contrary, there is no escape from the conclusion that the President pro tempore does not cease to be a Senator when he becomes Lieutenant Governor by reason of a vacancy in the Governor's office."

The Supreme Court of the State of Nevada, in passing upon a similar question and construing similar provisions of the constitution of that State, held in the case of the State vs. Sadler, 23 Nevada, 356, under the provisions of their constitution, if a vacancy ocurrs in the office of Governor, the powers and duties of the office devolve upon the Lieutenant Governor, but that there is no vacancy created in the office of Lieutenant Governor thereby. The officer remains Lieutenant Governor, but, for the time being, is invested with the added powers and duties of Governor, and also where a vacancy exists in both the offices of Governor and Lieutenant Governor the

President pro tem. of the Senate becomes acting Governor until the vacancy can be filled or the disability ceases.

We are therefore of the opinion, and so advise, that you having been elected President pro tem. of the Senate, there has been devolved upon you the performance of the duties of the office of Lieutenant Governor, which powers and duties, under the Constitution, you would be authorized and required to perform so long as you hold the position of President pro tempore. You have not, however, succeeded to the office of Lieutenant Governor; you are still a State Senator, but these new duties have come to you by reason of your election as President pro tem.

We, therefore, think that in your official acts your signature should be "President Pro Tem. and Acting Lieutenant Governor."

Yours very truly,

B. F. LOONEY,
Attorney General.

OFFICERS—VACANCIES IN OFFICE.

A vacancy in office must be filled in the manner provided in the Constitution or statutes for filling of a vacancy in such office.

Where the Constitution or the statute merely provides in reference to the filling of a vacancy in the office of city marshall that "the mayor or acting mayor shall *fill such vacancy* by appointment to be confirmed by the city council," an appointment so made entitles the appointee to the office for the unexpired term and not merely until the next general election.

February 4, 1915.

Hon. E. M. Davis, County Attorney, Lampasas, Texas.

DEAR SIR: We are in receipt of the following letter from you:

"Last May, 1914, and only one month after his election for a two year term our city marshal resigned, and the city council appointed another person to fill the vacancy. We are incorporated under the general laws for cities and towns; and we have a general election in April of every year, though cur elective officers are elected for a term of two years, as is provided by general statute. Title 22, Chapter 2, Article 797, Revised Statutes, provides: '* * * In case of a vacancy in any other office in the city than mayor or alderman, by refusal to accept or failure to qualify, or by death, resignation or otherwise, the mayor or acting mayor, shall fill such vacancy by appointment to be confirmed by the city council.'

"Some of the city officials have asked me to certify the following question to your Department and ask for as early a reply as is possible.

"In the absence of an ordinance or any other specific law, is the above appointment for the remainder of the two year term, or only until the next general election, which will occur in April, 1915?"

The only provision in the Constitution which might have a bearing in determining this question is that contained in Secton 27 of Article 16, which is as follows:

"In all elections to fill vacancies of office in this State, it shall be to fill the unexpired term only."

We think, however, it is not necessary in deciding this question to

determine whether the foregoing provision relates merely to elections to fill vacancies and not to appointments to fill vacancies, because there is a provision in the statutes of the State for filling vacancies which occur in the office of city marshal, and the authority of the Legislature to pass such a law cannot be questioned.

This provision is contained in Article 797, Revised Statutes, and is as follows:

"In case of a vacancy in any other office in the city than mayor or alderman, by refusal to accept or failure to qualitfy, or by death, resignation, or otherwise, the mayor or acting mayor, shall fill such vacancy by appointment to be confirmed by the city council."

Another provision of the statutes which aids in a determination of the question, is the following contained in Article 812, Revised Statutes:

"The city council shall provide for filling vacancies in all offices, not herein provided for; and, in all cases of vacancy, the same shall be filled only for the unexpired term."

It is our opinion that even if in making the appointment to fill the vacancy the mayor had announced that it was to be "only until the next general election" and the council had so confirmed it, the appointee would still be entitled to the office for the balance of the unexpired term. This has been definitely decided by the Supreme Court of this State in the well considered opinion in the case of Shelby vs. Johnson, Dallam, 597.* That case arose from a contest for the office of district judge, the term of office of district judge being then fixed by the Constitution as follows:

"The judges of the Supreme and inferior courts shall hold their offices for four years, be eligible to re-election, etc."

A vacancy in that office having occurred by death, Shelby was by both Houses of Congress duly elected to fill the *unexpired* term. At the end of the unexpired term Johnson was, by a like resolution and vote of both Houses of Congress, elected to hold the same office for four years. Shelby claimed that under his election, although it was merely "to fill the unexpired term," he was entitled to the office for the full term of four years. The Supreme Court, passing upon the matter, held as follows:

"Let us proceed, then, to examine the action of Congress in the matter now before us, by the provisions of this fundamental rule. In Article 4, Section 1, it is laid down that 'the judges of the Supreme and inferior courts shall hold their office *for four years;* be eligible to re-election,' etc. This is the only reference which in express terms is made to the tenure of the judicial office, nor are there other expressions or terms used which by implication or construction can modify the plain and certain intendment of the foregoing declaration. The text of the Constitution on this subject is so clear and perspicuous that it cannot be elucidated by argument. Would any one contend that Congress could extend the tenure of office beyond the period

*The case of Shelby vs. Johnson was decided by the Supreme Court of the Republic of Texas, at the June term, 1844.

of four years? And do not the terms of the above limitation of power equally, by the simplest rules of construction, prohibit its abridgment to a more limited term? The inhibition could not have been, in our opinion, more strong, if the Congress had in express terms been forbidden to appoint the judges for a less time than four years. The tenure of the office being thus precisely limited and defined by the Constitution, the legislative body, deriving its authority from the same source, could not in the appointment of incumbent attach other and variant terms and conditions by which to affect the same. * * * The declarations of the Constitution being explicit on the subject, and the same not being repugnant to any other provisions of that instrument, nor changed nor modified by any justifiable rules of implication or construction, the conclusion is inevitable that the incumbent of the office of district judge is entitled to hold and exercise the same for the full period of four years.

"Nor is the argument valid that the claimant, Shelby, having accepted the office under the circumstances of his election, was bound to vacate the same at the expiration of the time pointed out in the proceedings of Congress. The length of time for which the office should be holden depended neither upon the Congress nor the claimant. It was prescribed and guaranteed by the Constitution, and was subject to no modification from the mistakes or misapprehensions of the appointing power, or of the individual applicant.

"When the election is finished, the will and power of the Legislature cease; the incumbent becomes a member of a co-ordinate and independent branch of the Government; his office is based upon the Constitution and is protected by all the immunities thrown around it by that instrument. The organic law furnishes the standard for the term of his office, and by that alone can it be measured or controlled.

"Nor can it be urged that the appointment of the claimant having been made for a less term than four years, the election was illegal and invalid, and the appointment itself null and void. * * * As to the terms on which the office should be holden; these they had no warrant to prescribe except as authorized by the Constitution; and their action in that particular was null, void and inoperative."

This case has been approved in Banton vs. Wilson, 4 Texas, 410; People vs. Weller, 11 Calif., 88; People vs. Langdon, 8 Calif., 13, and may be considered the established law of this State. The only other question which could arise under the state of facts contained in your letter is whether the appointee is entitled to the office for a full term of two years or for only that portion of such term which had not expired at the time of his appointment. A determination of this question will depend upon what construction should be given to that portion of Article 797, Revised Statutes, quoted in your letter.

It will be noted that the provision of the constitution which received construction by the Supreme Court in Shelby vs. Johnson, supra, was as follows:

"The judges of the Supreme court and inferior courts shall hold their office *for four years;* be eligible to re-election," etc.

Nothing being said therein about the occurrence or the filling of a vacancy in the office; whereas, the provision of Article 797, Revised Statutes, under consideration, is as follows:

"In case of a vacancy * * * the mayor or acting mayor shall *fill such vacancy* by appointment to be confirmed by the city council."

In construing a provision of the Constitution which is almost iden-

tical with that of Article 797, Revised Statutes, here under consideration, the Supreme Court of Texas in the case of Royston vs. Griffin, 42 Texas, 577, held:

"For example, Section 13, Article 3, of the Constitution, reads: 'When vacancies happen in either house, the Governor, "or the person exercising the power of Governor, shall issue writs of election to *fill such vacancies*," etc. That the office here is to be filled for the *unexpired term* is undoubted, because, by a former section, the term of office is fixed at two years from the general election. Indeed, counsel for appellee admit that if the law provides that the Governor, on a fixed day, as August 26, 1870, and every four years thereafter, should appoint a clerk who should hold for four years, and in case of vacancy, he should appoint to fill the vacancy, that it would be very clear that the appointee to fill such vacancy could only hold for the unexpired term.' * * *

"Admitting that the legislative intention is not free from doubt, I think the most reasonable interpretation is that they had in view the four-year term which they affixed to the office of judge and of district attorney and implicitly to the office of clerk; that the clause in question contemplated vacancies arising from death or removal, or other cause cutting short the term; and its most reasonable construction is, that in such cases the Governor shall fill the vacant office for the unexpired term. I think the motion for rehearing should be overruled."

In the case of Royston vs. Griffin, supra, the Supreme Court distinguishes the case of Shelby vs. Johnson, supra, saying in reference to the decision of the court in the last named case:

"The clause of the Constitution which the court was construing is unlike the statute in question, in that it contains nothing whatever on the subject of the *occurrence* or *filling of vacancies*."

You are, therefore, advised that it is the opinion of the Department that the appointee to the office of city marshal of Lampasas is entitled to such office for the balance of the unexpired term of two years.

Very truly yours,

JNO. C. WALL,
Assistant Attorney General.

TERMS OF COURT—SPECIAL JUDGE.

1. Article 1678, Revised Civil Statutes, 1911, applying to the election of special judges, is applicable to both regular and special terms of court.
2. When a special term of the court is called and the regular judge is not present on the day when the terms is to begin, but is away holding a regular term of his court in some other county of his district, the election of a special judge to preside at the special term is valid.

December 1, 1914.

Hon. J. R. Garnand, County Attorney, Jourdanton, Texas.

DEAR SIR: Under date of November 23, 1914, in a letter addressed to this Department you state that it may be necessary to have a special term of the district court held in your county sometime during the month of December, at which many criminal cases will likely be tried. You further state that some of the lawyers at your bar have expressed

some doubt as to the right of the practicing attorneys at the bar to elect a special judge to preside and hold such special term in the absence of the regular judge of said district, who we assume would be holding a regular term of his court in some other county of his district. You ask for an opinion of this Department upon this question.

Article 1678, Revised Civil Statutes, 1911, provides as follows:

"Whenever, on the day appointed for a term of the district court, or at any time before the expiration of the term, or the completion of all the business of the court, the judge thereof shall be absent, or shall be unable or unwilling to hold the court, there shall thereby be no failure of the term, and no failure to proceed with the business of the court, but the practicing lawyers of such court present thereat may proceed to elect from among their number a special judge of said court, who shall proceed to hold said court and conduct the business thereof, and shall have all the power and authority of the judge of said court, during such continued absence or inability, and until the completion of any business begun before such special judge."

The above statutory provision for the election of special judges has been held to be applicable to both regular and special terms of court. This question was directly passed upon and decided by the Court of Civil Appeals, in the case of the Missouri, Kansas & Texas Railway Company of Texas vs. Huff, 78 S. W., 249.

This case was tried at a special term of court called by the regular judge of the district. However, on the day the special term convened, the regular judge was absent in another county of his district holding a regular term of court; whereupon the bar elected a special judge to preside during the special term of court, or until such time as the regular judge might be present. The defendant was forced to try this case before the special judge so elected by the bar and duly objected to trying the cause before such special judge on the ground that in the absence of the regular judge, who was holding a term of court in another part of the district, no authority existed for electing a special judge by the practicing attorneys and that such a proceeding was void. The Court of Civil Appeals disposed of the question as follows:

"Our statutes provide for the holding of special terms as well as for the election of special judges when the district judge is absent or unable or unwilling to hold the court. This statute was construed by our Supreme Court in the case of Munzesheimer vs. Fairbanks, 82 Texas, 351; 18 S. W., 697, and it was there held that: 'When a special term is called in the manner provided for by the statutes on the subject and a judge qualified to hold it can be procured by observing such statutes as are applicable when the judge of the court is absent, we think it may and should be done without regard to the cause of the absence of the judge and the court so called and organized should be held notwithstanding another court may be lawfully in session in the same district.' It is true in that case the judge holding the special term was a regular judge of another district, but this, in our opinion, is not distinguishable in principle from the case under consideration, as the election of a special judge is specially provided for in the absence of the regular district judge. This is in accord with Article 5, Section 7, of the Constitution, which authorizes the Legislature to provide for holding special terms of the district court. The legislative provision for the election of special judges is within the power granted by the Constitution and is applicable to both regular and special terms. If it were not so, the provision for special terms would be practically ineffectual as the time of the regular

judges is so occupied by the regular terms that they could seldom find time to hold special sessions."

A writ of error was denied by the Supreme Court in this case and we find by consulting the digest that this case has been followed since that time and the rule announced has been adhered to.

We, therefore, advise you that in the opinion of this Department, the statute above quoted applies to the election of a special judge at a special term of the court, as well as to the election of a special judge at a regular term of the court.

Yours very truly,

C. A. SWEETON,
Assistant Attorney General.

JUDICIAL DISTRICTS—DISTRICT ATTORNEY—COUNTY ATTORNEY—FEES —HABEAS CORPUS CASES.

1. In a judicial district having no district attorney and no provision having been made in the Act creating the Court for the District Attorney of another district to represent to State therein, the duty devolves upon the county attorneys of the counties embraced in said district to represent the State in said court in their respective counties.
2. The county attorney who represents the State in the district court in a district having no district attorney in a habeas corpus case, where the defendant is charged with a felony, is entitled to the fee prescribed by statute for such service.

January 15 1915.

Hon. T. W. Thompson, County Attorney, Greenville, Texas.

DEAR SIR: Replying to your letter of December 23, 1914, beg to say that our delay in answering your inquiry has been occasioned by reason of the Department's inability to agree on the construction to be placed on the statutes involved. However, after giving the matter careful consideration, we have reached the conclusion that under the facts submitted by you your account for services rendered in representing the State in habeas corpus trials in the Sixty-second Judicial District Court should be allowed. Our reasons for this conclusion are as follows:

1st. The Sixty-second Judicial District Court, by reason of the Constitution and the statute, has jurisdiction to hear and determine criminal cases of the grade of felony. It has concurrent jurisdiction with the Eighth Judicial District Court throughout the limits of the county of Hunt of all matters, civil and criminal, of which jurisdiction is given to district courts by the Constitution and laws of the State of Texas.

2nd. There is no district attorney for the Sixty-second Judicial District Court. No such office has ever been created, and no provision was made in the act creating said court for the district attorney of the Eighth Judicial District to represent the State in felony prosecutions in said court. It is, therefore, the duty of the county attorney of Hunt county to represent the State in all criminal cases arising in said court in Hunt county.

Article 32, C. C. P., provides:

"It shall be the duty of the county attorney to attend the terms of the county and inferior courts of his county, and to represent the State in all criminal cases under examination or prosecution in said courts. He shall attend all criminal prosecutions before justices of the peace in his county when notified of the pendency of such prosecutions and when not prevented by other official duties. He shall conduct all prosecutions for crimes and offences cognizable in such county and inferior courts of his county, and shall prosecute and defend all other actions in such courts in which the State or the county is interested. He shall also attend the terms of the district court of his county and if there be a district attorney of the district including such county and such district attorney be in attendance upon such court, the county attorney shall aid him when so requested and when there is no such district attorney or when he is absent, the county attorney shall represent the State in such court and perform the duties required by law of district attorneys."

3rd. Article 1118, C. C. P., provides:

"The district or county attorney shall receive the following fees:
" * * * for representing the State in each case of habeas corpus where the defendant is charged with a felony, the sum of sixteen dollars."

There being no district attorney for the Sixty-second Judicial District, and no provision having been made in the act creating said court for the district attorney of the Eighth Judicial District to represent the State in said court, and the duty resting upon the county attorney to represent the State in said court in habeas corpus proceedings where the defendant is charged with a felony, we think the last quoted statute fixes the compensation of such officer for such services.

This opinion applies only to county attorneys who represent the State in district courts in districts having no district attorney, and the former opinions of this Department in conflict herewith are hereby withdrawn.

Yours very truly,

C. A. SWEETON,
Assistant Attorney General.

SHERIFF—COMMISSIONERS COURT—COURT HOUSE—COUNTIES.

The sheriff has care and control of the court house, subject to such regulations as the commissioners court may prescribe.

The official bond of the sheriff shall include the faithful performance of his duties as to the custodian of the court house.

Commissioners court cannot prohibit sheriff from having charge and control of court house, but can only regulate the same.

March 17, 1915.

Hon. A. B. Wilson, County Attorney, San Saba, Texas.

DEAR SIR: I have your favor of the 10th instant, in which you request a construction by this Department of Article 6393, Revised Statutes, 1911. This article reads:

"The sheriffs of the several counties shall have charge and control of the court house of their respective counties, subject to such regulations as the commissioners court may prescribe; and the official bonds of such sheriffs shall extend to and include the faithful performance of their duties under this article."

You state that the commissioners court of your county have assumed control of the court house, and the sheriff only has charge of his individual office; that the janitor has the keys of the house, including all jury rooms and other rooms outside of the offices of the county officers, and that this condition of affairs is not satisfactory to the sheriff.

In reply thereto we beg to state that after careful investigation we have as yet failed to find where the above article was ever construed by the courts of this State, or by this Department, and we must therefore depend upon the language of the statute, and the opinions of the courts of other States construing a similar law.

Section 18, Article 5, Constitution, provides that the county commissioners, "with the county judge, as presiding officer, shall compose the county commissioners court, which shall exercise such powers and jurisdiction over all county business, as is conferred" by law.

Section 23, Article 5, Constitution, provides that the duties of the sheriff "shall be prescribed by the Legislature."

Article 1397, Revised Statutes, 1911, declares that it is the duty of the commissioners court of each county to provide a court house and jail for the county, and offices for the different county officials at the county seat, and to keep the same in good repair.

Article 6393, supra, provides, as stated, that the sheriff has the care and control of the court house, subject to such regulations as the commissioners court may prescribe.

As stated above, we do not find that this question has been decided by the courts of this State, but in the case of Dahnke vs. People, 48 N. E., 137, 168 Ill., 102, 39 L. R. A., 197, the court held that the court house, as such, is in the custody of the sheriff, as an officer of the courts, and not under the control of the county board of commissioners. And in the case of the County of McDonough vs. Thomas, 84 Ill. App., 408, the court held:

"We are clearly of the opinion that the care and custody of the county court house and jail fall within the common law powers and duties of the sheriff. * * *"

The statute of Illinois, under discussion in the case last above mentioned, provided that the sheriff

"Shall have the custody and care of the court house and jail of his county, except as is otherwise provided." (Paragraph 14, Chapter 125, Revised Statutes, Ill., 1909.)

The Court of Appeals of Illinois, in the case of Hardin vs. Sangamon County, 71 Ill. App., 103, held that under the law "giving the sheriff custody and control of the court house and jail of his county, 'except as otherwise provided,' he is mere custodian, and, in whatever he does

touching the care of them, he is subject to the authority of the county board, except as to orders of the court when he is in attendance.' "

We think, therefore, that the court house of your county, as such, should be in the charge of, and under the control of the sheriff, subject, of course, "to such regulations as the commissioners court may prescribe"; that the sheriff is made liable on his official bond for the neglect of his duty in this respect; and that Article 6393 does not grant the care and custody of the court house to the commissioners court, but merely authorizes them to have general supervision of the same as real estate and property of the county, and to designate what office space shall be occupied by the different county officials and what room, or rooms, shall be used by the different courts of the county.

The sheriff has charge ("a duty or obligation imposed") and control ("superintendence or management") of the court house of his county, but his control and management of the same should be regulated, *but not prohibited*, by the commissioners court—that being one of the duties devolved upon that court as the governing body of the county business proper.

Very respectfully,

B. F. LOONEY,
Attorney General.

COURT HOUSE—SHERIFF—COMMISSIONERS COURT.

Commissioners court would not be authorized to contract for rental of office space in county court house.

Sheriff would have the right to evict any occupant not authorized to occupy same.

April 12, 1915.

Hon. J. J. Strickland, County Attorney, Palestine, Texas.

DEAR SIR: We are in receipt of your letter of the 7th instant, relative to the rental of office space in the court house of your county. It appears that parties are making up an abstract plant for their own personal use and profit and they stay in the court house and refuse to pay rent. It further appears that the commissioners court of Anderson county have passed an order to the effect "that hereafter all persons, firms, etc., occupying rooms in the court house building, or any space in any of the offices must pay rent to the said county; that said rent shall be reasonable and shall be agreed upon between said parties and the commissioners court."

Replying, will say:

It is a matter of common knowledge that a court house is designed for public use and no one should be allowed, or permitted, to occupy it except the public officials named in the statute.

Article 1397, Revised Statutes, 1911, reads:

"It shall be the duty of the county commissioners court of each county, as soon as practicable after the establishment of a 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 to keep the same in good repair."

Article 1399, Revised Statutes, 1911 provides as follows:

"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 of the several counties of this State shall keep their several offices at the county seats of their respective counties."

The only article of the statute on the subject of the control of court houses is Article 6393, Revised Statutes, 1911. It provides:

"The sheriffs of the several counties shall have charge and control of the court houses of their respective counties, subject to such regulations as the commissioners court may prescribe; and the official bonds of such sheriffs shall extend to and include the faithful performance of their duties under this article."

Construing this article this Department, in an opinion to the county attorney of San Saba county, on March 17, 1915, held that the sheriff has care and control of the court house, subject to such regulations as the commissioners court may prescribe, and that the commissioners court could not prohibit the sheriff from having charge and control of the court house, but could only regulate the same.

Article 1758, Revised Statutes, 1911, provided, in part, as follows:

"* * * all books and records and file papers, belonging to the office of county clerks in this State, shall at all reasonable times be open to the inspection and examination of any citizen, who shall have the right to make copies of the same."

The meaning of this article can readily be seen by first reading; that is, the records in the county clerk's office are public records, open to inspection by the public at all reasonable times. But the law never intended that any person should take possession of, or permanently occupy, the clerk's office to carry on a private business by copying public records.

We do not think, therefore, that any authority exists in the county commissioners court to contract for the rental of any offices, or office space, in the court house, and no person, except the officers named in the statute, can claim the right to occupy any rooms or space therein free of rent, or otherwise.

The sheriff of the county would have the right to institute a suit in the name of the county to evict any occupant from the court house not authorized to occupy the same, since he is the legal custodian of the court house as provided in Article 6393, subject to such regulations as the commissioners court may prescribe, but the commissioners court would have no authority to permit any one for personal and individual uses to become a tenant in a public court house.

Yours truly,

B. F. LOONEY,
Attorney General.

CONSTITUTIONAL LAW—POWER OF LEGISLATURE TO PRESCRIBE ADDITIONAL QUALIFICATIONS FOR COUNTY JUDGES.

The Legislature, in view of Section 15 of Article 5 of the Constitution, would not have the power to provide that county judges must be licensed attorneys, or to prescribe any other qualification with reference to knowledge and experience in the law than that fixed by Section 15 of Article 5 of the Constitution.

The Legislature has the power to prescribe reasonable and appropriate qualifications for county judges other than qualifications relating to their knowledge and experience in the law.

Section 15, Article 5, Constitution.

January 22, 1915.

Hon. W. C. Morrow, Senate Chamber, Capitol.

DEAR SIR: Replying to your letter of January the 19th, in which you ask "'is there anything in our State Constitution that would prohibit the Legislature from prescribing additional qualifications for county judges?'"

We have made a careful investigation of this question and have arrived at the conclusions hereinafter stated.

There is no general provision in our Constitution relating to the qualifications of officers in the State, except Section 14 of Article XVI, which provides, in substance, that all civil officers shall reside in and keep their offices in their district, or county. Many of the State constitutions provide, in substance, that any elector shall be eligible to any office in the State, but our Constitution contains no such provision.

An examination of the different sections of the Constitution relating to the qualifications of the judges of the different courts will be profitable.

Section 2 of Article V fixes the qualifications of the judges of the Supreme Court. They must be citizens of the United States and of this State. They must have attained the age of thirty years. They must have been practicing lawyers or judges of a court for at least seven years.

By Sections 4 and 5 of the same article, it is provided that the judges of the Court of Criminal Appeals and the judges of the Courts of Civil Appeals shall have the same qualifications as the judges of the Supreme Court.

Section 7 of Article V fixes the qualifications of district judges and requires that they shall be citizens of the United States and of this State; that they shall have been practicing lawyers of this State or a judge of a court of this State for four years next preceding their election; that they shall have resided in the district in which they are elected for two years next preceding the election.

Section 15 of Article V provides for the election in each county, by the qualified voters, of a county judge "who shall be well informed in the law of the State." The qualification that the county judge "shall be well informed in the law of the State" is the only qualification specified in the Constitution for that officer.

Section 21 of Article V, provides for the election of county attorneys

and district attorneys, but it does not undertake to fix their qualifications. By Article 352 of the Revised Civil Statutes it is provided that district and county attorneys shall be licensed lawyers.

The case of Little vs. State, 75 Texas, 616, is the only case which relates to the portion of Section 15, Article V of the Constitution, above quoted, that the county judge "shall be well informed in the law of the State." It was a quo warranto proceeding to try title to the office of county judge of Roberts county. During the progress of the trial, while one of the contestants for the office was being examined as a witness, certain questions were asked him with a view to determine whether or not he was well informed in the law of the State. Upon objection, the court refused to require the questions to be answered. The Supreme Court, in passing upon the question thus raised, said:

"*It is apparent that county judges were not required to be lawyers, because that qualification is expressly provided by the Constitution for judges of the higher courts.* In this State more than half the county judges who have been elected since the Constitution was adopted have been persons who have never devoted a day to the study of law, and probably there have been more lawyers elected to the position than was expected when the Constitution was framed. Was it contemplated that these lay judges should be held disqualified because they could not swear that they were well informed in the law, or could not define a mandamus or an injunction? These were the questions asked of relator, and it was not error to refuse to allow them to be answered. If it had been intended to inquire into the extent of the legal learning of a county judge in order to determine his qualifications to hold the office, it would seem some examining board or committee would have been provided for to decide the question. It was certainly never contemplated that a jury should determine an aspirant's qualifications upon listening to his examination upon questions of law. We think the requirement that the county judge should be well informed in the law was intended as a direction to the voters, and that a majority of the ballots settles the question."

This opinion, of course, does not settle the question under investigation, but it throws light upon it and appears to indicate that the provision of the Constitution, which has been quoted, manifested the intention of the people that persons other than licensed attorneys might be elected to the office of county judge, provided they were well informed in the law of the State, and that it was intended by the Constitution that the people, in voting for candidates for the office, should pass upon and determine the question whether or not the candidate was well informed in the law of the State.

It is well settled that where a constitution undertakes to prescribe what persons shall be eligible to offices in the State; or when the Constitution specifies the qualifications for the various officers in the State, the Legislature is without authority either to add to or to take from the qualifications for the office.

State vs. Williams, 20 S. C., 12;
Thomas vs. Owens, 4 Md., 189;
State vs. Holman, 58 Minn., 219; 59 N. W., 1006;
Block vs. Trower, 79 Va., 123;
Feibleman vs. State. 98 Ind., 516;
State vs. Dunn, 73 N. C., 595.

As to offices not created by the Constitution, where there is no general constitutional provision relating to all offices in the State, as to those instances where the constitution does not undertake at all to fix the qualifications for officers, and as to those instances in which the Constitution contains merely a general provision to the effect that no person except an elector shall be entitled to hold office, it is well settled that the Legislature has the authority to prescribe reasonable and appropriate qualifications for officers.

Sheehan vs. Scott, 145 Cal., 684; 79 Pac., 350;
State vs. Covington, 29 Ohio St., 102;
Mason vs. State, 58 Ohio St., 30; 41 L. R. A., 291;
State vs. Huegle, Iowa, 112; N. W., 234;
People vs. Transue, 132 N. Y. Sup., 497;
State vs. Goldthait, 172 Ind., 210; 87 N. E., 133;
State vs. Woodson, 41 Mo., 227;
State vs. McSpaden, 137 Mo., 628; 39 S. W., 81;
State vs. McAllister, 38 W. Va., 485; 24 L. R. A., 343.

In the case of the State vs. Woodson, above cited, the court said:

"The power of the State to declare in its fundamental law, or where that is silent on the subject by legislative enactment, what shall constitute the test of eligibility to office is as clear and unquestioned as is the power to fix the qualifications of voters."

In the case of Block vs. Trower, above cited, the court stated the rule as follows:

"It is a well established rule that when the Constitution defines the qualifications for office the specification is an implied prohibition against legislative interference to change or add to the qualifications thus defined."

On page 1376 of Cyc. the following statement of the law is made:
"Where the Constitution itself prescribes in detail the qualifications for office, the Legislature may not add to or diminish them."

This brief statement of the law is supported by all the authorities. As has been shown, our Constitution undertakes in detail to fix the qualifications for the judges of the Supreme Court, the Court of Criminal Appeals, the Courts of Civil Appeals and district courts, and, under the rules which have been stated, we think it follows that as to these officers the Legislature would not have the authority to require additional qualifications.

As to the offices of county attorney and district attorney, the Constitution has not undertaken at all to fix the qualifications, and the Legislature, years ago, required that county attorneys and district attorneys should be licensed lawyers. This statute, as far as we can learn, has never been called into question and it is undoubtedly constitutional under the authorities which have been cited.

As to the office of county judge, the Constitution is silent as to qualifications, except in the one particular—that he shall be well informed in the law of the State. By the Supreme Court, in the case which has been cited, this qualification has been treated as one to be passed upon by the voters at the election. In view of this con-

struction, in view of the fact that the Constitution is silent as to other qualifications for this office but has spoken on the one qualification relating to the knowledge and experience of the county judge in law, and in view of the fact that the Constitution has expressly provided that judges of the other courts of the State must have been practicing attorneys or judges of courts for certain periods, we believe that the people, in the adoption of Section 15 of Article V of the Constitution, manifested an intention that a person other than a practicing or licensed attorney, or one who has been judge of a court, should be eligible to hold the office of county judge, and that this section of the Constitution, by reasonable and, perhaps, necessary implication, prohibits the Legislature from imposing additional qualifications for county judges which relate to the knowledge and experience of such officers in the law.

Under the rules which have been stated, however, and since Section 15 of Article V does not undertake to specify in detail the qualifications for the office of county judge, but fixes the qualification in one respect only, we believe that the Legislature has the authority to prescribe additional qualifications for county judges, provided such qualifications are reasonable and appropriate, and do not relate to the knowledge and experience of such officers in the law.

Yours very truly,

G. B. SMEDLEY,
Assistant Attorney General.

SHERIFFS—DEPUTIES—INDEPENDENT SCHOOL DISTRICTS.

1. Territory contiguous to an independent school district created by a special act of the Legislature containing a provision that the general laws relating to independent districts are applicable thereto, can be taken into such district under the procedure set forth in Article 2865, Vernon's Sayles' Civil Statutes, 1914.

2. Article 7125, Revised Statutes, 1911, placing a limitation on the number of deputies a sheriff may appoint, and Article 3903, Revised Statutes, 1911, providing that certain county officers shall make application to the county judge for authority to appoint deputies and directing the county judge to authorize the appointment of such number of deputies as in his opinion may be necessary, being in pari materia should be construed together, and there being no irreconcilable conflict between the two each will stand, and the discretion of the county judge in permitting such number of deputy sheriffs as in his opinion may be necessary is limited by the provisions of Article 7125.

March 18, 1915.

Hon. N. P. Reid, County Attorney, Gonzales, Texas.

DEAR SIR: The Attorney General is in receipt of your letter of March 16, reading as follows:

"Please give me an opinion on the following:

"First: Where parties own land contiguous to an independent school district and want to be included within the boundaries of said district, how shall they proceed?

"Second: Did the act giving the county judge authority to recommend

the appointment of deputy sheriffs change the law in effect previous to that time as to the number of deputies a sheriff may appoint?

"Thanking you for your services, I am, etc."

Replying to your questions in the order named, we beg to advise:

First. In response to your inquiry relating to your first question you advise us under date of March 22 that the school district in question is the Nixon Independent School District created by special act of the Legislature, approved March 16, 1909. By reference to that act we find it contains the following clause:

"Section 5. The said independent school district and the said board of trustees thereof shall be vested with and have and exercise all the rights, powers and duties of independent school districts and the boards of trustees thereof, under the provisions of the general laws of the State of Texas governing independent school districts formed by the incorporation of towns and villages for free school purposes only, including especially the power and manner of taxation and the issuance of bonds for the purpose of purchasing or constructing free school buildings and sites therefor within the limits of the said independent school district" (pp. 374-5, Acts 1909).

Under the above section, the general laws of the State governing independent school districts, being made applicable to this particular district, in order to determine how contiguous territory may be taken into such district, we must refer to the general statutes upon this subject.

Chapter 16 of Title 48, Revised Statutes of 1911, provides for the creation and management of independent school districts, while Article 2865 in said chapter sets out the procedure for taking in contiguous territory, and this article should be followed in your case.

The question of annexing contiguous territory to municipal corporations has been before the courts of the country in numerous cases, and with one accord, so far as we have been able to determine, they have decided that the right of annexation must be exercised by some statutory provision and the procedure must be that laid down by the statute, either in the act creating the corporation or by general law applicable to such corporations. The effect of taking in contiguous territory is not an amendment to the special act creating such corporation and fixing its boundaries, but is a concession granted to the people living within the territory proposed to be annexed to bring themselves within the law and thereby obtain the benefits thereof.

It will be noted from a reading of Article 2865, permitting the annexation of contiguous territory to an independent school district, provided it does not increase the extent thereof to more than 25 square miles, that it does not contain any provision for segregating territory or contracting the boundaries of such district, and therefore the purpose of this act is merely, as is suggested above, to permit the people residing and owning territory contiguous to the lands of an independent school district to bring themselves and their property within the district and thereby secure the benefits to be derived in the way of additional facilities. It will be noted also from a reading of the act of the Legislature creating the Nixon Independent School District that after defining the boundaries of such district the act then places the

government of such district under the general laws and does not undertake to define the duties, powers and privileges of the board of trustees controlling the same. Formerly, special acts creating independent school districts contained all of the powers and authorities of such district, but of recent years it is the practice of the Legislature to merely define the boundaries of the district, provide for the appointment of trustees, and then place the district under the general laws.

Dillon on "Municipal Corporations," Secs. 352, 355, 323, 336 and 338;
Short vs. Gouger, 130 S. W., 267;
Yancy vs. Fairview, 66 S. W., 636;
Eagle Lake vs. Sugar Refining Co., 144 S. W., 709;
Ex Parte Cross, 71 S. W., 289;
People vs. Coronado, 100 Cal., 571;
People vs. Oakland, 123 Cal., 598;
Kelly vs. Meeks, 87 Mo., 396;
Willett vs. Beliville, 11 Lea (79 Tenn.), 1;
Foreman vs. Mariana, 43 Ark., 324;
People ex rel Kittredge vs. Mabie, 142 N. Y., 343.

Second. A solution of your second inquiry involves a proper construction of two articles of the statutes, namely: Article 3903, being a portion of what is known as the Fee Bill and relating to the manner in which deputies or assistants of certain county officers may be appointed, and also Article 7125, Revised Statutes, 1911, which limits the number of deputies a sheriff may appoint. For convenience, we copy the pertinent portions of the two articles named:

"Article 3903. Whenever an officer named in Articles 3881 to 3886 shall require the services of deputies or assistants in the performance of his duties, he shall apply to the county judge of his county for authority to appoint same and the county judge shall issue an order authorizing the appointment of such a number of deputies or assistants as in his opinion may be necessary for the efficient performance of the duties of said office. * * * The county judge in issuing his order granting authority to appoint deputies or assistants shall state in such order the number of deputies or assistants authorized. * * *"

"Article 7125. Sheriffs shall have power by writing to appoint one or more deputies for their respective counties * * * provided that the number of the deputies appointed by the sheriff of any one county shall be limited to not exceeding three in the justice precinct in which is located the county seat of such county * * * providing that any sheriff may appoint one deputy in addition to the above enumerated for each justice precinct in addition to the precinct where the county seat is situated, and all sheriffs having more deputies than are provided for in this law shall make the number of his deputies conform to the provisions of the same."

If the question you present should be answered by holding that the number of deputies a sheriff may appoint is limited only by the discretion of the county judge, as is set out in Article 3903, this would be tantamount to holding that by the enactment of Article 3903 the Legislature has repealed Article 7125 of the Revised Statutes. Article 3903 first found a place in the laws of this State as Section 12 of an act approved June 16, 1897, and while such act has been the subject of amendments by subsequent Legislatures, the language quoted above has not been changed, but the statute in this particular is a verbatim copy of the original act. Article 7125, limiting

the number of deputies a sheriff may appoint, was enacted in 1889. It will be noted that the act of 1897, above referred to, Section 26, provides that all laws and parts of laws in conflict with this act are thereby repealed, but a general clause such as this repealing all acts or parts of acts inconsistent therewith, while effective in repealing inconsistent enactments, extends only to those acts on the same subjects or parts of such act clearly inconsistent and irreconcilable with the repealing act, and only to the extent of the conflicting provisions. Perry vs. State, 626. However, by an inspection of the act approved June 16, 1897, it will be noted that Section 12, relating to the appointment of deputies or assistants was dealing with those officers named in Section 10 of that act, which Section 10 has become and is, with amendments, Articles 3881 to 3886, inclusive, of the Revised Civil Statutes of 1911. A reading of Section 10 (Act of 1897) or Articles 3881 to 3886, inclusive, Revised Statutes of 1911, discloses the fact that sheriffs are not enumerated among the officers whose fees are limited by the provisions of those articles. Consequently, the general repealing clause contained in the act of June 16, 1897, by reason of the fact that sheriffs are not included in Section 10 and therefore Section 12 has no application to such officers, has no effect whatever upon the provisions of Article 7125, Revised Statutes of 1911. Sheriffs were first included in the provisions of Articles 3881 to 3886 by the Act of April 3, 1913, which act became effective December 1, 1914. It is also to be observed that the Act of April 3, 1913, placing sheriffs under the provisions of Articles 3881 to 3886 and 3903 contains no general repealing clause.

Consequently, if Article 3903 repeals Article 7125, then such repeal is not by express act of the Legislature, but is by implication only, and repeal by implication is not favored. Davidson vs. Schmidt, 124 S. W., 552.

Repeals by implication are not favored, and the repugnancy between statutes must be plain and unavoidable in order to work a repeal by implication. Baldan vs. State, 127 S. W., 134.

Implied repeals are not favored, and there must be a positive repugnancy between the provisions of the new law and those of the old in order to affect the result. Sayles vs. Robison, 129 S. W., 346.

For a later statute to repeal an earlier one on the same subject by implication there must be such a repugnance or conflict between the two acts that they cannot stand together. Austin vs. State, 135 S. W., 1167.

To our minds, there is absolutely no repugnance whatever, nor is there any conflict, between these two statutes; nor is there any inconsistency between the two that would work a repeal by implication of the former statute.

Article 3903 is a general statute dealing with the manner of appointment of deputies of certain county officers, while Article 7125 is an express statute dealing solely and alone with the appointment of deputies by a sheriff, and in express words limits the number of deputies such officer may appoint. It is another well-known rule of construction that statutes relating to the same subject, being in pari materia, should be considered as if incorporated within one act and

construed together if possible so as to give effect to each, in which case one does not impliedly repeal the other.

Conley vs. Daughters of the Republic, 156 S. W., 197;
City of Marshall vs. State Board of Managers, 127 S. W., 1083;
Board vs. Raum, 132 S. W., 1019;
Berry vs. State, 156 S. W., 626.

In the case of Conley vs. Daughters of the Republic, supra, a late case on this question, Judge Brown of the Supreme Court of this State uses the following language:

"There is no express repeal of the former law. Hence if repealed it must be by implication, which is not favored. The new laws relate to the same subject and should be considered as if incorporated into one act. If, being so considered, the two can be harmonized and effect given to each, there can be no repeal. Neal vs. Keeze, 5 Texas, 23. 'These statutes being in pari materia and relating to the same subject, are to be taken together and so construed in reference to each other as that, if practicable, effect may be given to the entire provisions of each. Thus considered, there is no repugnancy between the provisions of these statutes. They may stand together and effect may be given to the entire provisions of each. And thus to construe and give effect to them is in accordance with the established rule of construction.' Brown vs. Chancellor, 61 Texas, 438."

In the Conley case the Supreme Court of this State was dealing with two statutes, one of which vested the control of what is known as the Alamo property in San Antonio in the Daughters of the Republic, while the other was a statute making an appropriation of $5000 for the improvement of such property, to be expended under the direction of the Superintendent of Public Buildings and Grounds upon the approval of the Governor. The question was raised of a conflict between these two statutes as to the control of the property, and the court held, as above indicated, that the two statutes, being in pari materia, should be construed together and harmonized so that both might stand.

Applying the rule laid down by Judge Brown in this case to the two statutes in question, let us see if there is any irreconcilable conflict between the two, and if possible to harmonize the two so that both may stand, as is the "established rule of construction."

Article 7125 places a limitation upon the number of deputies a sheriff may appoint, while Article 3903 does not in any manner attempt to limit the number of deputies the sheriff may appoint, but lodges the power in the county judge to, in his discretion, allow such a number as to him may appear necessary for an efficient discharge of the duties of the office. This article, in attempting to limit such number by general terms, must be read, therefore, in connection with Article 7125, which does in express language limit the number of deputies a sheriff may appoint, and when so read it becomes at once apparent that the discretion lodged in the county judge by 3903 is limited by the terms of 7125, and thus the two statutes are made to harmonize and each will stand.

There is certainly no indication from the terms of the article (3903) that an express repeal of the provisions of 7125 was intended by the Legislature.

In the case of Trannell vs. Shelton, 18 Civ. App., 367, the court, in speaking of the rule laid down in 7125, says:

"The statute does say that the sheriff shall not appoint exceeding three deputies in the justice precinct in which is located the county seat. This statute we think is directory, and that a violation of the same by the sheriff could not be taken advantage of in a proceeding of this kind."

We have no intention of writing an opinion at variance with the decisions of the Court of Civil Appeals, nor do we think that the holding in this opinion conflicts with Judge Bookhouts' decision above referred to. The case here under discussion was one of collateral attack upon the appointment of a deputy sheriff, but we are dealing directly with the subject of appointment in this opinion and not with the powers, duties, obligations and responsibilites of a deputy that might be appointed contrary to the views expressed herein.

The nearest approach to a decision on the direct point in question by the courts of this State is to be found in the opinion of the Court of Criminal Appeals in the case of Renson vs. State, 165 S. W., 932, wherein that court said:

"It further appears from the testimony of appellant that the sheriff of Fort Bend county had appointed two deputies in the justice precinct in which appellant lived and held his deputyship; that his brother was the active deputy, who made arrests and served process for the sheriff. If this is true, then under the provisions of Article 7125 of the Revised Statutes the appointment of appellant would be illegal, and he would not have the right under this appointment to carry a pistol in Fort Bend county much less in Harris county. The appointment of the sheriff in violation of the law, which only gives him authority to appoint one deputy and no more in justice precincts outside the precinct in which the county seat is situate, would confer no authority on appellant. A practice had grown up in some counties for the sheriff to appoint all his friends deputies who desired to carry pistols, and who never did and were never expected to perform any official act, and the Legislature to remedy this evil passed said article of the statute, and an officer has no more right under the provisions of the law than any other citizen has to violate the law of his State."

The above case was decided by the Court of Criminal Appeals on April 8, 1914, prior to the taking effect of the Act of April 3, 1913, and consequently there could have been no question before the court of the repeal of Article 7125 by the provisions of Article 3903 as made applicable to sheriffs by the insertion of such officers in the provisions of Articles 3881-3886. But this case is cited as authority that no repeal of Article 7125 had been effective at the date of such decision and to show further the regard of the Court of Criminal Appeals of this State for the provisions of such article, as is evidenced by the language quoted above.

It is also worthy of note in determining whether or not the Legislature has intended a repeal of Article 7125 that such article was amended by an act of the Thirty-third Legislature and that there is now pending in the Thirty-fourth Legislature a bill which has already passed the House of Representatives and is now pending before the Senate of Texas, a bill which amends such article, and that neither of such bills makes any mention whatsoever of Article 7125 and in

no manner repeals same. While we do not assert that the bringing forward in the Revised Statutes of 1911 of a repealed act would revitalize such act, yet when the Legislature at two sessions after the recodification of the Revised Statutes deals with the question of deputies and leaves said Article 7125 undisturbed when it is presumed to know of the existence of such article, this is in a sense a legislative construction of such articles to the effect that the latter does not repeal the former, and that it is the intention of the Legislature that the two articles shall be construed together and harmonized in the manner indicated in this opinion.

What is known as the Fee Bill is not an enlargement of the powers of the officers named therein, but, on the contrary, the general effect thereof is a limitation on the salaries to be retained by each of such officers and on the number of deputies that may be appointed by them.

Clark vs. Finley, 93 Texas, 171.

We are therefore of the opinion, and so advise you, that Article 7125, Revised Statutes of 1911, which limits the number of deputies a sheriff may appoint to three in the precinct wherein is located the county seat and one in each of the other justice precincts of the county is not repealed by the provisions of Article 3903, but that the same continues to be of full force and effect and is a limitation upon the number of deputies that may be appointed by a sheriff and upon the discretion of the county judge in allowing applications for the appointment of such deputies under the provisions of the latter article.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

OFFICIAL SHORTHAND REPORTER—FEES PAID BY THE STATE.

1. The official shorthand reporter can collect fees from the State for transcript only in case where counsel has been appointed to represent the defendant in capital felonies.
2. Article 558, providing that the court shall appoint attorney for defendant who is too poor to employ counsel, is mandatory only as to capital felonies.

Article 558, Court Criminal Procedure. Sections 8 and 15, Chapter 119, Acts of the Regular Session, Thirty-second Legislature.

February 8, 1915.

Hon. Frank L. Tiller, Chairman of Committee on Claims and Accounts, House of Representatives, Capitol.

MY DEAR SIR: Your communication of February 6th, has our attention, reading as follows:

"To govern this committee in passing upon the number of claims before it, providing for compensation of official court reporters; we desire the

written opinion of your Department on Sections 8 and 14, of Chapter 119, page 264 of the General Laws of the State of Texas, of the Thirty-second Legislature, at its Regular Session; which section deals with compensation of these reporters.

"This committee desires to know in what character of cases and the requisites under this character of cases, the official court reporters are entitled to receive, the extra compensation above the salary allowed by law. It appears to this committee that there is some inconsistency in Sections 8 and 14 of this chapter.

"An early reply will be appreciated by,

"Yours truly,

"FRANK L. TILLER.

"Chairman, Committee on Claims and Accounts."

We take it from your communication that the portions of Sections 8 and 14 pertinent to your inquiry are as follows:

"Provided, that when any criminal case is appealed and the defendant is not able to pay for a transcript as provided for in Section 5 of this Act, or to give security therefor, he may make affidavit of such fact, and upon the making and filing of such affidavit, the court shall order the stenographer to make such transcript in duplicate, and deliver them as herein provided in civil cases, but the stenographer shall receive no pay for same."

"Provided, that in all cases where the court is required to and does appoint an attorney to represent the defendant in a criminal action, that the official shorthand reporter shall be required to furnish the attorney for said defendant, if convicted, and where an appeal is prosecuted, with a transcript of his notes as provided in Section 5 of this act, for which said service he shall be paid by the State of Texas, upon the certificate of the district judge, one-half of the rate provided for herein in civil cases."

That portion of Section 8 above copied relates generally to criminal cases, but that portion of Section 14 copied above is dealing expressly with capital felonies, as will hereinafter appear, and provides in such cases that the official shorthand reporter shall be paid by the State for the transcript at one-half the rate provided by Section 5 of the act. It will be noted from that portion of Section 14 copied above that same applies only in cases where the court is required to and does appoint an attorney to represent the defendant in criminal actions. It then becomes necessary to determine in what cases it is mandatory upon the court to appoint an attorney for the defendant in a criminal case.

Article 558, Code Criminal Procedure, reads as follows:

"When the defendant is brought into court for the purpose of being arraigned, if it appear that he has no counsel and is too poor to employ counsel, the court shall appoint one or more practicing attorneys to defend him; and the counsel so appointed shall have at least one day to prepare for trial."

It will be noted in reading the above article that it applies only to those cases where the defendant is arraigned. Technically speaking a defendant is arraigned only upon indictment for a capital offense.

Article 555, Code Criminal Procedure, reads as follows:

"There shall be no arraignment of a defendant except upon an indictment for a capital offense."

Article 556, Code Criminal Procedure, sets out the purpose for which an arraignment is had.

Article 557 prescribes the time at which an arraignment may be had.

Then follows Article 558, above quoted, relating to the appointment of counsel upan an arraignment. This question was before the court in the case of Pennington vs. The State, 13 Texas Criminal Reports, 44, in which case the court said:

"The objection that the court did not appoint counsel to represent the defendant until his case was called for trial can not be maintained. While it is the usual practice with district judges, and one to be commended, too, to appoint counsel for indigent defendants in all felony cases, still it is a matter which rests in the discretion of the trial judge, except in *capital* felonies, in which cases the law requires it to be done. (Code Criminal Procedure, Article 571.) In this case counsel was appointed for the defendant, but time was not allowed such counsel to prepare for the trial. This action of the judge is not revisable by this court, and besides, in this case, the defendant has manifestly suffered no injury to his rights, for he was most ably and faithfully defended by the appointed counsel, as appears from the record."

The reference to the article of the Code in the above case is Article 571. This is evidently a misprint, as the article in the Code of '79, being the one referred to, as this case was cited in 1882, is Article 511.

Article 558, Code Criminal Procedure, 1911, follows verbatim Article 511, Code Criminal Procedure, 1879.

To the same effect as the holding in the Pennington case are the following authorities:

Brown vs. State, 52 Texas Criminal Rep., 267.
Burden vs. State, 156 S. W., 1196.

In the Burden case, supra, the question of the duty of the official court stenographer to furnish a transcript in that case, which was a capital felony, was discussed, and the court said:

"Chapter 119 of the Acts of the Thirty-second Legislature (page 264) provides for the appointment of official court stenographers, and places some duties on them. In section 14 of this act it is provided: 'In all cases where the court is required to and does appoint an attorney to represent the defendant in a criminal action, the official shorthand reporter shall be required to furnish the attorneys for said defendant, if convicted, and where an appeal is prosecuted, with a transcript of his notes as provided in Section 5 of this act, for which said service he shall be paid by the State of Texas, upon the certificate of the district judge, one-half of the rate provided for herein in civil cases.' Section 5 reads as follows: 'In case an appeal is perfected from the judgment rendered in any case, the official shorthand reporter shall transcribe the testimony and other proceedings recorded by him in said case in the form of questions and answers, certifying that such transcript is true and correct, and shall file the same in the office of the clerk of the court within such reasonable time as may be fixed by written order of the court. Said transcript shall be made in duplicate; for which said transcript the official shorthand reporter shall be paid the sum of fifteen cents per folio of one hundred words for the original copy and no charge shall be made for the duplicate copy, said transcript to be paid for by the party ordering the same on delivery, and the amount so paid shall be taxed as costs.'

"This case is one where the court was required by law to appoint an attorney

to represent the defendant in the trial of the case, and the attorneys so appointed have been faithfully discharging their duties without pay or hope of reward, other than of a duty well performed. It may seem hard for the stenographer to have to perform his duty on half pay, yet the lawyer is required to perform his duty and receive no pay. Each is an officer of the court, and the law has been more genorous to the stenographer than it has to the attorney, yet we find him who receives nothing for performing his duty doing so, and urging the other official to do his duty, but the latter neglects to do it. It was the duty of the district judge to have seen that this official did his duty and complied with the order by him made, yet it seems he has not done so.

"Under the provisions of the law this appellant is entitled to have a statement of facts made out by the stenographer in question and answer form, and delivered to his attorney, Mr. F. G. Harmon, or filed with the clerk of the district court of Dallas County.

"It seems it resolves itself into a question of whether we will compel the stenographer to perform his official duty and give to the defendant those rights which the Code accords. To do otherwise would permit any court stenographer to deprive any defendant too poor to employ counsel and pay for the stenographer report all right to be heard on appeal." (156 S. W., page 1198.)

See, also, Jackson vs. State, 156 S. W., 1183.

We are of the opinion, and so advise you, that the State should pay to official shorthand reporters transcript fees only in cases where the indictment is for a capital felony, where the court is required to appoint and does appoint under Article 558, Code Criminal Procedure, an attorney or attorneys to represent the defendant and the amount allowed should be at one-half the rate provided for in civil cases, as set out in Section 5 of the act.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

DISTRICT ATTORNEYS.

1. A district attorney, in districts composed of two or more counties, where he is so notified to appear and represent the State on an examining trial, is entitled to his per diem, although such examination be waived.

2. A district attorney, in districts composed of two or more counties, is entitled to his per diem where he represents the State on examining trials, although the grand jury may afterwards fail to return an indictment.

Articles 1119-1120, Code of Criminal Procedure.

January 26, 1915.

Hon. Walter U. Early, District Attorney, Brownwood, Texas.

DEAR SIR: The Department is in receipt of your favor of recent date reading as follows:

"In judicial districts composed of five counties, when district attorney is notified to appear in justice court to represent State in examining trial of a felony charge, and does appear, but the defendant waives examining trial and bond is agreed upon, is district attorney allowed the fee of $15 per day as provided in Gen. Law Act 1907, page 326, Article 1081a, where no testimony is reduced to writing?

"In examining trials in justice court where district attorney represents the State in felony matters, but grand jury fails to indict after defendant has been bound over to await action of grand jury, is district attorney allowed his fee of $15 per day?"

Replying thereto, we beg to advise you that in the opinion of this Department a district attorney, in districts composed of two or more counties and therefore operating on a salary basis, where he is notified to appear and does appear in an examining trial on a felony charge, would be entitled to his per diem of $15, although such examining trial may have been waived by the defendant and no such trial was held. We are likewise of the opinion that, where an examining trial is held and the district attorney represents the State, it is not essential to the right of the district attorney to receive his per diem that the grand jury shall return an indictment against the defendant.

Under Article 1119 of the Code of Criminal Procedure district and county attorneys, for attending and prosecuting felony cases before the examining court, shall be entitled to a fee of five dolars ($5.00) to be paid by the State in each case, but it is further provided that such fees shall not be paid, except in cases where the testimony of the material witnesses shall be reduced to writing and sworn to by said witnesses.

It is also provided in this article that such fees shall become due and payable only after the indictment of the defendant for the offense of which he was charged in the examining court.

Subsequent to the enactment of the statute above referred to, the Legislature, by the Act of April 29, 1907, as amended by the Act of April 7, 1909, placed district attorneys in districts composed of two or more counties upon a salary basis. This amended act now appears as Article 1120, Code Criminal Procedure. Such article provides that the district attorney shall receive from the State as compensation for his services the sum of $15 for each day he attends the session of the district court in his district, in the necessary discharge of his official duties, and $15 per day for each day he represents the State at examining trials, inquest proceedings and habeas corpus proceedings in vacation. The number of days for which a district attorney in such districts is entited to $15 each is limited to one hundred and thirty-three. The aggregate of this amount, plus the $500 allowed by statute, constitutes the salary of the district attorney.

The effect of this amendment is to take the district attorney in such districts from the list of officers who are paid by fees and compensate him by a salary of so much per day for the days actually engaged.

While Article 1119 provides that the right of the district attorney to fees in examining trials shall depend upon a condition subsequent, it will be noted that no such provision is contained in Article 1120; that is to say, Article 1120 does not make the per diem of the district attorney dependent upon the reduction of the testimony of material witnesses to writing, nor does it provide that the district attorney shall not be entitled to his per diem unless the grand jury shall return an indictment.

Our opinion is, that when the district attorney attends court for

the purpose of conducting an examining trial that he is performing the services required of him by law entitling him to his per diem, and that it is immaterial whether the examining trial is actually held or the defendant waives same, and that it is also immaterial whether the grand jury afterwards returns an indictment. The service for which the district attorney is paid $15 per day is for representing the State at examining trials, and if the district attorney appears and is ready to represent the State upon a trial actually held and the defendant exercises his right to waive the trial, then we are of the opinion that the district attorney has represented the State within the meaning of the statute and that he is entitled to his per diem for such services.

Article 1120, Code of Criminal Procedure, as the same now stands, supersedes Article 1181 in so far as the compensation of a district attorney in districts composed of two or more counties is concerned, and we therefore advise you that the district attorney in districts composed of two or more counties would be entitled to his per diem where he is notified and represents the State in examining trials, even though the defendant waives examining trial, and that he would also be entitled to his per diem although the grand jury should fail to return an indictment, as the services required of him by statute have been performed.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

PRESIDING OFFICER—BOARDS OF MANAGERS—ASYLUMS.

The chairman of the board, being a member of such board, is entitled to vote upon all questions arising before the board.

January 12, 1915.

Hon. Jno. Bowyer, President Board of Managers of Epileptic Colony, Abilene, Texas.

DEAR SIR: Replying to your favor of recent date wherein you desire to be advised as to whether or not you as chairman of the board have a right to vote upon all questions coming before the board, we beg to advise that in the opinion of this Department you have such a right, and it is your privilege to vote upon all questions arising for determination of the board.

Under the authority of Article 109 of Revised Statutes, as amended, the Governor appoints a board composed of six members as managers of the various asylums of this State. The Governor does not appoint the president of the board, nor is any distinction whatsoever made in the members so appointed. Under the authority of Article 111, Revised Statutes, the board chooses one of its members as president, but does not extend to him any additional authority. He is therefore merely a presiding officer of the board at its meeting, and

his rights as a member of such board have been in no way limited.

The contention urged that you would have a right to vote only in case of a tie we think is untenable, for the reason that the right of a presiding officer to vote only in case of a tie and to give the casting vote is a right conferred by statute, and is in those cases only where the presiding officer of the body is not a member of that body except as a presiding officer, and where his duties and powers are expressly provided by the statute. We have been unable to find a single precedent for the proposition that a member of a deliberative body who is chosen by such body as its presiding officer is deprived of his vote except in case of a tie. On the contrary, there is authority holding that where a presiding officer is selected from the membership of the body and is by statute given the casting vote that such presiding officer may vote upon any proposition before the body, and if a tie should result then the presiding officer by reason of the statute has the casting vote and is thereby entited to a double vote.

The People vs. The Rector, etc., of Church of the Atonement, 48 Barb. (N. Y.), 603.

However, the rule announced above could not be applicable in the instant case for the reason that the statute does not confer upon the President of the Board of Managers of the Epileptic Colony or other asylums of this State the right to give a casting vote in the case of a tie.

In questions like that presented by you, where the statute is silent, it is proper to look to rules and precedents established for the government of bodies of this character. In Cushing's Manual of Parliamentary Practice, we find the following rule laid down in discussing the conduct of a presiding officer:

"If, as is usual, he is a member of the assembly, he may vote like any other member, but should not do so except when the voting is by ballot, unless his vote would change the result. Thus he may decide a question in the case of a tie vote or defeat a motion by creating a tie, but it must not be inferred from this that the chairman can in any case vote on a question twice—by first creating a tie and then giving the casting vote. When, as in the United States Senate, he is not a member of the assembly over which he presides, he possesses no right to vote except such as may be conferred by the assembly itself or by some higher authority." (Cusing's Manual, Section 15.)

Again, in Section 225 of the same work, we find the following:

"The president (if a member) may vote whenever his vote will make or break a tie, but not otherwise except in cases of ballot when he must cast his vote in the usual manner and must vote before the ballot is closed. He is in no case entitled to a double vote (as a member and as chairman).

We therefore beg to advise you that as you are a member of the board, you are entitled to vote upon all questions arising before the board whenever in your judgment you think wise for you to cast your vote, and you have a right to so cast your vote and make a tie upon any question, or if a tie appears without your vote being cast, then you have a right to vote and break the tie.

Trusting this opinion will be of service to you in the discharge of your official duties, I am

Yours truly,

C. W. TAYLOR,

Assistant Attorney General.

OPINIONS ON PUBLIC SCHOOL LAND LAW.

PUBLIC SCHOOL LANDS—TAXES ON FORFEITED LANDS—TAXATION OF NOTES IN THIS STATE BELONGING TO A FOREIGN CORPORATION.

Public school land forfeited to the State in the year 1913 for non-payment of interest and repurchased by the former owner after January 1, 1914, by virtue of Chapter 160, Acts of the Regular Session of the Thirty-third Legislature, is not subject to taxation for the year 1914.

Notes belonging to a foreign corporation, but held in this State for collection, or for other purposes, are taxable in this State.

February 5, 1915.

Hon. H. B. Terrell, Comptroller Public Accounts, Capitol.

DEAR SIR: In your letter of February the 2nd you desire to know whether land that has been forfeited to the State in 1913, re-appraised and re-awarded to the owner at the time of forfeiture, or to others during the year 1914, is subject to taxes during the year 1914.

We assume, from this question, that the land was forfeited for non-payment of interest and was re-purchased under the provisions of Chapter 160 of the laws of the Regular Session of the Thirty-third Legislature. This chapter gives to the owner, at the time of forfeiture, a prior right to purchase the land at the re-appraised price within a certain time after the re-appraisement. It does not itself provide for forfeiture but gives the right when land is forfeited for non-payment of interest, under the existing laws. When school land is lawfully forfeited for non-payment of interest, the State has elected, through its proper officers, to rescind the contract, and the land, by virtue of this action on the part of the State, becomes the property of the State.

It is a general rule that a purchase of school land is effected by the filing in the General Land Office of the application to purchase. Under the facts stated in your letter, therefore, if the application was not filed until after January 1, 1914, the land was the property of the State at that time and therefore not subject to taxes for the year 1914, and this is true whether the land was afterwards purchased by the owner at the time of forfeiture, or by some other person.

It is true that on January 1, 1914, the former owner had a preference right to purchase the land, but to exercise this right, he was obliged, under the law, to pay to the State the re-appraised price which, under the law, is required to be the reasonable value of the land. It has not been the practice in this State to tax a preference right, and we do not believe that our laws provide for its taxation.

In the same letter, you ask whether a corporation, whose principal office is in some other State but who has a branch office in this State which is conducting business for the corporation, making sales, receiving money, taking and collecting notes, etc., is liable for taxes in this State on notes handled through the branch office in this State.

The question of the right of this State to tax notes in the State,

and owned by non-resident or foreign corporations, has been fully discussed by our courts in the cases of

Hall vs. Miller, 102 Texas, 289.
Jesse French Piano Co. vs. Dallas, 61 S. W., 942.
State vs. Fidelity Deposit Co., 80 S. W., 544.

In the case of Hall vs. Miller, *supra,* the notes in question were owned by a non-resident, but were held in this State by agents for collection; the agents who held the notes had no authority to re-invest the money when collected, but remitted it after collection to the owner of the notes; the Supreme Court held that the notes, nevertheless, by being held in this State for collection, had acquired such a situs as to subject them to the taxing power of the State. The decision indicates that the State has no authority to levy taxes upon the personal property of a non-resident when such personal property is only *temporarily* within the borders of the State. It is necessary that such property be held or used in the State for a sufficient time to acquire a situs in the State and to enjoy the protection of the laws of the State. The other two cases cited are to the same effect.

We therefore advise you that if in the instance referred to in your letter the notes are held in the branch office in this State for collection for any considerable time, or if the notes are used in any way in connection with the business transacted in this State, and thus enjoy the protection of the laws of this State, they are taxable. If, however, the notes are only temporarily in the State, they are not taxable.

Yours very truly,
G. B. SMEDLEY,
Assistant Attorney General.

PUBLIC SCHOOL LAND.

The Act of April 5, 1915, construed as follows:

1. The act relates primarily to the sale of surveyed public school land.
2. Unsurveyed school land is sold in accordance with the provisions of Section 8 of the Act of April 15, 1905, except when subsequent laws have expressly changed the method of the sale of such land.
3. Section 5 of the Act of April 5, 1915, is the only portion of the act that expressly changes the method of the sale of unsurveyed land.
4. The fixing of three sale dates each year by the Act of April 5, 1915, has no application to unsurveyed land.
5. Section 8, of the Act of 1905, except that portion of the same, as amended by Section 6e of the Act of 1907, requiring unsurveyed school land not exceeding six hundred and forty acres to be sold as a whole, does not fix the quantity of unsurveyed land that may be sold to one person, and the quantity of such land must be determined by the law fixing the amount of surveyed land which can be sold.

October 7, 1915.

Hon. J. H. Walker, Acting Commissioner of the General Land Office, Austin, Texas.

DEAR SIR: In a recent letter you state that one D. B. Gardner on

June 26, 1915, filed with the county surveyor of King county his application for the survey of a tract of land under Section 8 of the Act of 1905, that the survey was made and contains 376 acres and it is less than 400 varas wide at any point. You desire to know on what terms and conditions and when this land may be sold, if it is subject to sale. In this connection you refer to the act approved April 5, 1915, and desire to know what change, if any, have been made by this act, in the terms of Section 8 of the Act of 1905.

The Act of April 5, 1915, does not undertake to revise the whole of the method of the sale of public school lands, but undertakes only to make certain changes. The first section of the act expressly provides that public school lands shall be sold on the same terms and conditions as already provided by law, except as changed by the act. The principal changes made by the new law appear to be three. First, the law undertakes to fix three sale dates each year for public school land, instead of permitting land to be sold at any or at various times during the year, as under the former law. Second, changes are made in the quantity of land that can be purchased by one person. Third, changes are made as to the requirements of settlement and occupancy in certain of the counties in the State.

Section 8 of the Act of April 15, 1905, is generally known as the "Scrap Act." It is the last act of the Legislature which undertakes expressly to provide the method and steps whereby unsurveyed land may be acquired from the State. It has never been repealed, nor has it been amended, except by Section 6e of the Act of May 16, 1907, which expressly made certain changes in the regulations for the sale of unsurveyed land and which repealed certain preference rights theretofore existing to purchase unsurveyed school land, and except, of course, in so far as the terms of said Section 8 may have been changed or affected by the Act of 1915.

The Act of 1915 very apparently was not drawn with care and it does not clearly express the intention of the Legislature. After a careful consideration of the act we have concluded that its primary purpose was to make changes in the terms and conditions of the sale of surveyed school land, and that it has no application to unsurveyed school land, except in those portions of the act which expressly refer to unsurveyed land, and except in so far as the changes in the terms and conditions of the sale of surveyed land may operate to effect changes in the terms and conditions of the sale of unsurveyed land, by reason of the provision in Section 8 of the Act of 1905 to the effect that except where otherwise provided the unsurveyed land shall be sold on the same terms and conditions as surveyed land.

A number of reasons conduce to this conclusion. One reason is that whenever the Legislature has undertaken to change the law with reference to the sale of unsurveyed school land it has made specific reference to such land. An illustration of this practice and its recognition by the courts is found in the case of McGrady vs. Terrell, 98 Texas, 428, 84 S. W., 641. In that case the court held that Section 7 of the Act of April 19, 1901, which provided that "*all lands* which are now or which may hereafter become detached shall be sold to

actual settlers only," did not apply to unsurveyed land, for the reason that the act in question was dealing with lands that had been surveyed. This conclusion was reached in spite of the fact that the section above quoted from refers to "all lands" and in spite of the fact that the entire act of April 19, 1901, refers in general terms to public school lands without expressly specifying surveyed land. Judge Brown in the opinion said that surveyed school lands "required entirely different regulations from those that were unsurveyed."

The case of Meador vs. Robison, 103 Texas, 206, 125 S. W., 564, is another example of the construction by the Supreme Court of general language apparently referring to all public school land, as relating only to surveyed land.

Another reason for our construction is that one of the primary purposes of the act is to fix three sale dates each year for public school land, on which the land may be sold by competitive bidding. That part of the act clearly could not be intended to refer to unsurveyed land. It is not to be presumed that the Legislature intended to do an unnecessary or foolish thing. Unsurveyed land is not sold on competitive bidding. When the prospective purchaser finds the land he makes application to the county surveyor to survey it for him. The filing of this application fixes his right to the land, and he is entitled to purchase it as a matter of right at the price fixed by the Commissioner, in the event he follows up his application by taking the other steps required by the law.

See Pence vs. Robison, 102 Texas, 489; 119 S. W., 1145.
Jumbo Cattle Co. vs. Bacon & Graves, 79 Texas, 5.

Under the former law surveyed public school land when on the market was for sale to any person offering the appraised price or more, and if to come on the market at some future date fixed by the Commissioner, it was for sale on that date to the one offering the highest price, equal to or above the appraised price. The new act undertakes to provide for the sale of all surveyed land on competitive bidding on three days of each year. There can be no bargain day or bidding day for unsurveyed land, if the person who first applies for its survey has the right to purchase it at the appraised price. The new law does not undertake to fix a new method for the purchase of unsurveyed land and it certainly shows no purpose to change entirely the policy of the State with reference to the sale of such land or to deprive the person who makes the application for the survey of his right to purchase the land. It is true that the first section of the new law provides that:

"On the first day of September, 1915, and on the first day of each January, May and September of each year thereafter, the surveyed lands and portions of surveyed and unsurveyed land shall be sold under the terms, conditions, limitations and regulations as is now provided by law, except as changed herein."

If this is literally interpreted it appears to mean that the unsurveyed land shall be sold on the first day of January, May and Sep-

tember of each year, but the peculiar language of the section indicates that it is but a preliminary or introductory section, meaning in substance that the land shall be sold on the terms and conditions now provided by law, except as changed in the subsequent sections of the act. Section 7 of the act, which specifies the method of the opening of the applications on the three sale dates clearly relates to land sold on competitive bidding, and therefore, for the reasons above stated, to surveyed and not unsurveyed land.

The emergency clause also shows that the act relates primarily to surveyed land. It recites that the emergency is "the necessity of putting the land herein described on the market." It is only surveyed and not unsurveyed land that is placed on the market. As said by Judge Williams in the case of Meador vs. Robison, 103 Texas, 206, 125 S. W., 264:

> "Unsurveyed land does not so come on the market by the mere termination of a lease—in fact, never comes on the market—for the reason that no provision is made for the sale of it in the unsurveyed state."

Unsurveyed land neither comes on the market nor is it placed on the market for sale as such. It is surveyed under the application of the prospective purchaser and then sold to him after the survey. It is not advertised by the Commissioner for sale, but it is for sale to him who finds it.

Our construction is also in harmony with the general rule that a law relating to a particular class of a subject will not be repealed or changed by a law referring in general terms to the entire subject. The unsurveyed land in the State is one class and a very small class of the public school land of the State. Section 8 of the Act of 1905 undertakes to outline a particular method for the acquisition of this class of school land, and a law relating in general terms to public school land ought not to be construed to change the law as to this particular class, unless the intention to do so clearly appears.

Following the construction above referred to we find that the only express reference to unsurveyed land in the act is contained in Section 5, which is as follows:

> "All tracts of land, in whatsoever county, and whether surveyed or unsurveyed, which contain less than eighty acres, and also all unsurveyed tracts which are less than eighty acres, and also all unsurveyed tracts which are less than 400 varas wide at any point, and whatever acreage, shall be sold for cash and without condition of settlement and residence."

This section is in conflict with certain portions of Section 8 of the Act of 1905 and also in conflict with the amendment of said section contained in Section 6e of the Act of 1907, providing that tracts containing 100 acres or less shall be sold for cash, and without condition of settlement. Since the enactment then of Section 5, above quoted, all tracts of unsurveyed land, whether disclosed by the maps of the Land Office or not disclosed, and of whatever character, which contain less than 80 acres and also all tracts of unsurveyed school land of whatever character which are less than 400 varas wide at any point

must be sold for cash and without condition of settlement and residence.

Except for these changes the terms and conditions of the sale of unsurveyed public school land are found in Section 8 of the Act of 1905 and in that portion of Section 6e of the Act of 1907 which relates to unsurveyed land. Because the land referred to in your letter is less than 400 varas wide it must be sold for cash and without condition of settlement and residence. Because that portion of the recent act which fixes three sale dates each year for land has no application to unsurveyed land, the land referred to in your letter (or that portion of it which the applicant is entitled to purchase) may be awarded at any time on the application of Mr. Gardner, if filed within sixty days from the date of the notice of approval of the survey.

The question remains as to the quantity of land which may be purchased under the application in question. Section 8 of the Act of 1905, with one exception, makes no reference to the quantity of unsurveyed school land that may be purchased by one person. The one exception is the provision to the effect that unsurveyed tracts not exceeding 640 acres and which are disclosed by the official maps in the Land Office and which are entirely surrounded by valid surveys or sold school surveys shall be sold as a whole. The provision was changed or amended by a portion of Section 6e, Act of 1907, expressly relating to unsurveyed land, and which reads as follows: "All unsurveyed tracts of 640 acres or less shall be sold as a whole." The natural and reasonable implication from this provision as thus amended is that one person may purchase as much as 640 acres of unsurveyed land in one tract, in whatever county situated and whether disclosed or not by the Land Office maps. It follows that since the land referred to in your letter is in one tract containing less than 640 acres, Mr. Gardner is entitled to purchase all of the tract.

A different question would be presented if the unsurveyed school land sought to be purchased were in a tract exceeding 640 acres or in more than one tract. In addition to the portion of Section 6e above quoted, the same section contains the provision that "all tracts (evidently referring to tracts of unsurveyed land) of more than 640 acres shall be sold in such tracts as may be required or approved by the Commissioner." This portion of the section does not have to do, even by implication, with the quantity of land that one person may purchase, but relates rather to the form and size of the tracts to be cut out of the land.

Section 8 of the Act of 1905 contains the general clause that the price and terms of the sale of unsurveyed school land "shall be the same as that for surveyed lands, except as herein provided."

In view of this provision the Supreme Court, in the case of Houston vs. Koonce, 156 S. W., 202, held that in order to determine the quantity of unsurveyed land which could be purchased by one person resort should be had to the statute limiting the amount of surveyed land. It follows from this decision that when there is no express provision as to the quantity of unsurveyed land that may be purchased by one person the limitations in the law as to surveyed land apply.

In an opinion to Hon. J. T. Robison, written by this Department on July 24, 1913, the Department held that the provision of Section 8

of the Act of 1905, last above quoted, had reference not to the terms and conditions of the sale of surveyed land at the time the law of 1905 went into effect, but had reference to the terms and conditions as provided by the law at the time the application for the survey was made. It follows from this construction that the limitations as to quantity of land contained in the Act of April 5, 1915, apply to unsurveyed land with the one exception which has been noted.

If, therefore, the unsurveyed land applied for is situated in any of the counties named in Section 2 of the Act of April 5, 1915, one person may purchase as much as two sections of 640 acres each, more or less. If the unsurveyed land is situated in any of the counties named in Section 3, one person may purchase as much as eight sections of 640 acres each. If the unsurveyed land is situated in a county other than those named in said two sections, one person may purchase, as above shown, as much as 640 acres provided the land is in one tract. If the land is not in one tract, or if it is a tract containing more than 640 acres, the limitations as to quantity specified in Section 4 of the Act of 1915 apply. Of course, the applicant, in case the land is a tract containing more than 640 acres, can obtain the maximum quantity of land by having a tract of 640 acres only surveyed out of the vacant land which he discovers.

To summarize our conclusions, we are of the opinion:

1. That the portion of the Act of April 5, 1915, fixing three sale dates, has no application to unsurveyed land.

2. That by the new law the following express changes in the sale of unsurveyed land have been made, towit: All tracts containing less than 80 acres shall be sold for cash and without condition of settlement and residence, and all tracts less than 400 varas wide at any point shall be sold for cash and without condition of settlement and residence.

3. Except for the above changes Section 8 of the Act of 1905, as amended by the Act of 1907, fixes the method, terms, etc., by which unsurveyed school land is sold.

4. When the terms and conditions of the sale of unsurveyed school land are not fixed by Section 8 of the Act of 1905 or by its amendments contained in the Act of 1907 and those in the Act of 1915, above specified, the terms and conditions of the sale of surveyed land control. The law to be looked to for these terms and conditions is the law in force at the time the right to the land is first fixed, that is, when the application for the survey is filed with the county surveyor.

It may be well to add that, in our opinion, if any applications for the survey of unsurveyed lands have been filed with the county surveyors before the Act of April 5, 1915, went into effect, the applicants have thereby fixed their rights to buy the land applied for under the terms and conditions of the law as it existed before the new law went into effect. See

Pence vs. Robison, 102 Texas, 489; 119 S. W., 1145.
Jumbo Cattle Co. vs. Bacon & Graves, 79 Texas, 5.

Yours very truly,

G. B. SMEDLEY,
Assistant Attorney General.

OPINIONS RELATIVE TO SCHOOLS AND SCHOOL DISTRICTS.

SCHOOLS AND SCHOOL DISTRICTS—CONSOLIDATION OF COMMON SCHOOL DISTRICTS.

The county school trustees cannot, on their own motion, consolidate two or more common school districts. Such power may be exercised only upon the presentation of petitions signed by a majority of the qualified electors of each common school district to be affected.

Article 2816, Revised Statutes of 1911, Chapter 36, Acts of the Thirty-fourth Legislature.

March 14, 1916.

Hon. W. F. Doughty, State Superintendent, Capitol.

DEAR SIR: In your favor addressed to the Attorney General under date of March 11, you enclose a communication addressed to you by Mr. J. L. Goggans, desiring to be advised upon the following:

"I wish that you would advise me as to whether or not the county school trustees have the authority and power to consolidate two common school districts, without having such a petition before it, whenever it deems it to the best interests of the people affected to make such consolidation. In other words, is the petition, signed by a majority of the qualified electors, as hereinbefore mentioned, a necessary prerequisite to the authority of the board to make such consolidation?"

By the opening sentence of Chapter 36 of the General Laws of the Regular Session of the Thirty-fourth Legislature "the county school trustees are authorized to exercise the authority heretofore vested in the county commissioners court with respect to subdividing the county into school districts and to making changes in school district lines."

At the date of the passage of the act from which the above is quoted the authority of the commissioners court over common school districts was, as is contained in Article 2816, Revised Statutes, 1911, as follows:

"It shall be the duty of the commissioners court, at any time they deem necessary, to redistrict a part or all of said county, and they may at any time consolidate two or more adjacent school districts, or may subdivide any school district or districts."

Under the last quoted article of the statute it was held in the case of Tomlinson, et al., vs. Hunnicutt, county judge, 147 S. W., 612, that the commissioners court had authority to consolidate school districts upon its own motion and without the consent of the voters of the districts affected.

The opinion in the case above cited reviews the history of this statute and bases its decision of the question upon the amendments of the school laws.

By the act of the Twenty-ninth Legislature in 1905, Article 3938 of the Revised Statutes was so amended as to include the following proviso:

"That when districts are once established they shall not be changed without the consent of the majority of the legal voters in all districts affected by such change."

The same Legislature on a subsequent date passed an act providing for a complete system of public free schools in this State and with reference to the power of the commissioners court over the formation and change of common school districts used the precise language of the former enactment, but eliminated therefrom the proviso above quoted, thereby leaving the commissioners court with a free hand upon its own motion with the power to change the lines of and to consolidate common school districts. If the beginning portion of Section 4 of the Act of the Thirty-fourth Legislature above quoted was the only reference in the act to the power of the commissioners court, then we would hold that such board of trustees could of its own motion consolidate two common school districts without the consent of the voters of such district, but we find in the succeeding portion of such section the following language:

"The county school trustees shall have authority to consolidate two or more common school districts into a larger common school district where a majority of the qualified electors of each common school district at interest shall petition the county school trustees for consolidation in order that a high school may be established for the children of high school advancement in the common school district so consolidated."

It seems that in so far as the consolidation of the two districts is concerned the Legislature has reverted to the idea expressed in 1905 that such consolidation shall not be had except upon an expression from a majority of the qualified electors of each district favoring such consolidation. In our opinion this expression is a limitation upon the general powers of the county school trustees over common school districts and controls the general authority given in the opening sentence of Section 4. It is dealing with the expressed subject of the consolidation of the district and its provisions will control the general authority above referred to.

We therefore advise you that in our opinion the county board of trustees has no authority on its own motion to consolidate two or more common school districts and that the power can be conferred upon the court only upon petition of a majority of the qualified electors of each district to be affected.

We are returning herewith the letter of Mr. Goggans.

Very truly yours,

C. W. TAYLOR,

Assistant Attorney General.

SCHOOLS AND SCHOOL DISTRICTS—ANNEXATION OF TERRITORY—APPEALS.

An appeal will not lie from the action of the board of trustees of an independent school district annexing territory upon a legal petition of the voters in such territory.

The action of the board of trustees in matters of this character can be reviewed only by the civil courts.

June 16, 1916.

Hon. W. F. Doughty, State Superintendent, Capitol.

DEAR SIR: In your letter of June 7, you transmitted to this Department a communication addressed to you by Mr. J. B. Hammer, secretary, county board of trustees of Shelby county, from which it appears as follows:

"First: The Joaquin Independent School District and Fellowship Common School District lay adjacent to each other in this county.

"Second: On or about the 13th day of March, 1916, a petition was circulated in the Fellowship District, in a portion of the district which has been surveyed out. to which petition eight names were secured, asking that this particular part of the territory be taken from Fellowship District and placed in the Joaquin Independent School District.

"Third: In this segregated territory there is a dispute between the citizens of Fellowship community and the Joaquin Independent School District. Only eight citizens of this segregated territory have paid their poll tax, so as to qualify them to vote for this year. Of these eight as claimed by Fellowship four signed the petition for segregation and four refused to sign it. Fellowship contends that of the eight names on the petition presented to the Joaquin Independent School District only four of them have paid their taxes.

"Fourth. On this petition, which was duly presented to the board of the Joaquin Independent School District on the 16th day of March, the Joaquin Independent School District, through its board of trustees, made the orders provided for in Article 2865, Revised Statutes of Texas, and for the purposes of this letter we will assume that these orders were in proper form.

"Fifth: The county surveyor of Shelby county has surveyed Fellowship District, and, after taking out of the district the segregated territory, the district is reduced to an area below nine square miles.

"Fellowship District is contesting the right and authority of the Joaquin Independent School District to annex this territory, and the matter is now before the county board of trustees of Shelby county. When the matter was called the question was raised as to whether or not this board has authority to pass on and determine the legality of the action of the Joaquin Independent School District. And, as secretary of the board, I have been requested to submit to you the following questions."

You desire an opinion from this Department upon the following questions:

"First: Can the county board of trustees of Shelby county determine the legality of the action of the Joaquin Independent School District?

"Second: Can the county board of trustees determine whether or not the petition presented to the Joaquin Independent School District was signed by a majority of the taxpaying voters of the segregated territory, and who are qualified voters? Does the failure to pay poll tax disqualify the votes?

"Third: Can the county board of trustees pass on the qualifications as voters of the men whose names are signed to the petition?

"Fourth: Can the county board of trustees determine whether or not the Fellowship School District has been reduced in area below nine square miles?"

In our opinion the appeal from the board of trustees to the county

superintendent, county board of trustees, etc., contemplated by the school laws will not lie in a case where the trustees of an independent district have granted or refused the petition for the annexation of adjacent territory. It is a fundamental principle well sustained by the courts of the various States of the Union that the right of appeal is a statutory right and does not exist except where expressly given, and cannot be extended to cases not within the statute. The right of appeal in school matters while expressly given by the school laws, is not very well defined and the procedure thereunder is somewhat indefinite. We will review briefly those sections of the school law authorizing appeals in such matters.

Article 2752, Revised Statutes, 1911, being embodied in compilation of school laws as Section 41, reads in part as follows:

> "All appeals in such independent school districts shall lie to the county superintendent and county board of education, and from the decisions of the county superintendent and county board of education to the State Superintendent of Public Instruction and to the Board of Education."

It is provided in Article 4509, Revised Statutes, 1911, Section 21 of the school laws, as follows:

> "Appeal shall always lie from rulings of the State Superintendent to the State Board of Education."

Article 2814, being Section 113 of the compiled school law, provides in part that when the State Superintendent shall have canceled the certificate of a teacher the appeal shall be to the State Board of Education.

Section 10 of Chapter 36, Acts of Regular Session of the Thirty-fourth Legislature, creating the board of county school trustees, is in the following language:

> "All appeals from the decisions of the county superintendent of public instruction shall lie to the county school trustees, and from the said county trustees to the State Superintendent of Public Instruction, and thence to the State Board of Education."

It will be observed by a reading of the entire articles and sections above referred to that in none of them is a reference made to the creation of school districts, the change of the lines thereof, nor to adding territory thereto.

Each of said articles and sections has to do with the internal management of the schools of the various districts and not to the creation of the district or the boundaries thereof.

The authority to extend the boundaries of an independent district is expressly conferred upon the board of trustees by Article 2865, wherein it is provided that jurisdiction to so extend the line is conferred upon such board by the presentation to it of a petition signed by a majority of the qualified voters residing within the territory to be added. Upon a consideration of the petition by the board should the requirements of the above mentioned article be met, then by a resolution entered upon the minutes of the board the territory may

be received and thereupon become a part of the corporate limits of such town or village. The only other procedure laid down is that a copy of such resolution shall be filed for record in the county clerk's office of the county in which such town or village is situated, after which the territory so received shall be a part of such incorporated town or village and the inhabitants thereof shall thenceforth be entitled to all the rights and privileges as other citizens, etc.

It will be noted that no right of appeal, as contemplated by the schools laws, is given in this article.

By Article 2866, Revised Statutes, 1911, the commissioners court was given the authority to change the boundaries of any independent district when in the judgment of said court the public good demands such change. Section 4 of Chapter 36 of the Acts of the Thirty-fourth Legislature above referred to, transferred the power given the comsioners court by Article 2866 to the county school trustees in respect to subdividing the county into school districts and making changes in school district lines.

Following Section 4 the Legislature inserted Section 4a in the following language:

"The district court shall have general supervisory control of the actions of the county board of trustees in creating, changing and modifying school districts."

This latter section, it appears to us, is a legislative interpretation of the former school laws to the effect that in all matters relating to the creation of school districts and the changing of the lines thereof, the usual procedure of appeal in school matters does not obtain, and that the action of the various authorities authorized to deal with such matters can be reviewed only by the civil courts. We are not unmindful of the fact that our courts have uniformly held that until the various appeals provided in school matters have been prosecuted the courts will not entertain jurisdiction of cases arising under the school law. See:

Trustees of Chillicothe Ind. School Dist. vs. Dudney, 142 S. W., 1007.
Cochran vs. Patillo et al., 41 S. W., 537.
McCollum vs. Adams, 110 S. W., 526.
Caswell vs. Funderberger, 105 S. W., 1017.
Nance vs. Johnson, 84 Texas, 401.
Adkins vs. Heard, 163 S. W., 127.

However, in none of the above cases did any question arise as to the creation of nor the change in lines of districts.

In the case of Crabb vs. Celeste Independent School District, reported in 132 S. W., 890, there was involved the action of the board of trustees in annexing adjacent territory. It is true the question of pursuing the various appeals prescribed by the school laws did not arise in this case The district court of Hunt county entertained jurisdiction and adjudicated the matter therein involved. In this case a writ of error was granted by the Supreme Court, but upon a hearing the latter court held that the Court of Civil Appeals had correctly decided the question relating to the extension of the territory. We

take it that although the question may not have been raised, yet as it goes to the jurisdiction of the court, the appellate courts would have themselves raised it and refused to entertain jurisdiction of the appeal if it had been necessary that the various steps of appeal had been pursued, as prescribed by the school laws.

The case of Crabb vs. Celeste Independent School District, supra, is authority for answering the second, third and fourth questions presented in the affirmative as applied to the board of trustees of the independent district, but as the county board of trustees has no jurisdiction in the matter, of course it is not applicable to that board.

Upon the reason above set out, we advise you that in our opinion the county board of trustees has no jurisdiction to determine the action of the Jacquin Independent School District in admitting adjacent territory formerly a part of the Fellowship Common School District.

Very truly yours,

C. W. TAYLOR,
Assistant Attorney General.

SCHOOLS AND SCHOOL DISTRICTS—BONDS—TAX RATE.

1. The tax levied in a common school district or independent school district for bond purposes shall never exceed twenty-five cents on the one hundred dollars valuation of property in the district.

2. The trustees of a school district would have no authority to use any portion of the local maintenance tax in liquidating the outstanding bonds of the district or to pay interest on such bonds.

Articles 2841 and 2857, Revised Statutes of 1911.

July 10, 1916.

Hon. W. F. Doughty, State Superintendent, Capitol.

DEAR SIR: In your favor of July 7, addressed to the Attorney General, you ask an opinion from this Department upon two questions, as follows:

"First: May a tax exceeding twenty-five cents on the one hundred dollars valuation of property be levied and collected in the common school districts and the independent school districts of the State for the purpose of liquidating outstanding bonds of the district.

"Second: In case a district having voted bonds desires to redeem the bonds before the time specified in the bond order, may the board of trustees of the district use any portion of the local maintenance tax in liquidating the bonds or for paying interest on the bonds?"

In our opinion each of your questions should be answered in the negative, for the following reasons:

First: The statutes of this State relating to the issuance of bonds by common school districts, being Article 2841, Revised Statutes, 1911, provides in substance that the commissioners court during the life of such bond shall levy a tax to exceed twenty-five cents on the one hundred dollars valuation of taxable property sufficient to pay

the interest on the bonds and to produce a sinking fund, which together with the interest thereon when placed at interest shall be sufficient to pay the principal on said bonds at maturity. It is further provided by this article that the bond tax together with the maintenance tax shall never exceed fifty cents on the one hundred dollars valuation and that if the rate of bond tax together with the rate of maintenance tax previously voted in the district shall at any time exceed fifty cents on the one hundred dollars the bond tax shall operate to reduce the maintenance tax to the difference between the bond tax and fifty cents. In other words, the aggregate of the two shall never exceed fifty cents on the one hundred dollars valuation of property in the district. The rate of tax for bonding purposes being expressly limited to twenty-five cents the necessary amount to pay the interest and create a sinking fund to pay such bonds at maturity must be deducted from the fifty cent rate if such a rate has been voted in the district. The amount of the bond tax automatically operates to reduce the maintenance tax.

Similar language is found in Article 3857 relating to the issuance of bonds and the levying of a maintenance tax by independent districts. You find in this article almost the identical language limiting the rate of bond tax to twenty-five cents on the one hundred dollars. It provides that the trustees of the district shall have power to levy and collect an annual ad valorem tax not to exceed fifty cents on the one hundred dollars valuation on the taxable property of the district "for the maintenance of schools therein and a tax not to exceed twenty-five cents on the one hundred dollars for the purchase of sites and the purchasing, construction, repairing or equipping public free school buildings within the limits of such incorporated districts. There is a proviso in this article to the effect that the amount of maintenance tax together with the amount of bond tax of the district shall never exceed fifty cents on the hundred dollars valuation.

There is a further provision in this article dealing with independent districts that indicates conclusively that it was the purpose of the Legislature to limit the amount of bond tax to twenty-five cents upon the one hundred dollars. This language is as follows:

> "Provided that the aggregate amount of bonds issued for the above named purpose shall never reach such an amount that the tax of twenty-five cents on the one hundred dollars valuation of property in the district will not pay current interest and provide a sinking fund sufficient to pay the principal at maturity."

The exact question has never been determined by the courts of this State. Indeed, we doubt if the language is susceptible of a construction that would permit the levying of a tax in excess of twenty-five cents. It appears to us that such language is plain and unambiguous and is an expressed limitation upon the rate of tax that may be levied for bond purposes.

In the case of Itasca Independent School District vs. McElroy, 124 S. W., 1011, in discussing the amount of tax authorized to be levied by school districts, the court says:

"We think that under the provisions of the present Constitution and statute relating to the subject the authority of the voters for the levy of the tax and issuance of the bonds by the trustees is to be secured by the election, and the specific rate for maintenance and bond purposes, respectively, is to be fixed by the trustees within the limits allowed to pay first the interest on the bonds and provide the sinking fund for their retirement at maturity, and then such an amount fixed for maintenance as the prescribed maximum rate will permit."

The above case could hardly be cited as authority in the proposition under discussion, yet the language quoted is an indication that the court had in its mind the idea that the Constitution and statutes of this State had expressly limited the amount of tax for each purpose; that is to say, that the aggregate tax should never exceed fifty cents on the one hundred dollars valuation and the amount of the bond tax should never exceed twenty-five cents as fixed by the statute.

We therefore answer your first question by saying that the statute expressly limits the amount of bond tax in both common and independent school districts to an amount not to exceed twenty-five cents on the one hundred dollars valuation of property in the district, and there would be no authority in the commissioners court on the one hand and the trustees of an independent district on the other to levy a tax in excess of such rate.

Second: We answer your second question in the negative and say that the board of trustees of the school district would have no authority to use any portion of the local maintenance tax in the liquidation of bonds.

The doctrine is too well established to need citation of authorities that where a tax is levied and collected for a specific purpose it cannot be diverted from that purpose. In addition to this rule it is also well established by the courts that where a limitation is placed upon the amount of tax that may be collected for one purpose such an amount cannot be supplemented by levying a tax for a different purpose and adding the amount thus collected to that collected for the original purpose. Each of these rules is applicable in the case you present; that is to say, a tax levied and collected under the statute for maintenance purposes could not be diverted from that purpose and used for another purpose for which the law authorized the levying and collection of a tax. A limitation having been expressly placed upon the amount of tax to be levied for bonding purposes such limit could not be exceeded indirectly by the levy and collection of a tax for a different purpose with the intention of placing the amount so collected to the credit of the first named fund. See Williams vs. Carroll, 182, S. W.. 29.

We therefore advise that the trustees of a school district would have no authority to use any portion of the local maintenance tax in liquidating outstanding bonds of the district and for paying the interest on such bonds.

Very truly yours,

C. W. TAYLOR,
Assistant Attorney General

SCHOOLS AND SCHOOL DISTRICTS—TAXATION.

Where a district incorporated for school purposes only has voted a maintenance tax, there is no authority in law for an election to abrogate or diminish the tax theretofore voted.

Chapter 124, Acts of the Twenty-ninth Legislature, Articles 2827, 2833, 2857, 2864a, 2877.

June 20, 1916.

Hon. W. F. Doughty, State Superintendent, Capitol.

DEAR SIR: The Attorney General is in receipt of your recent favor in which you ask an opinion from this Department upon the following questions, towit:

"First: May a local maintenance tax voted by the legally qualified voters of an independent school district incorporated for school purposes only be abrogated or diminished?

"Second: If the first question is answered in the affirmative, kindly outline the method of procedure whereby this may be done, including description of the petition upon which such an election is ordered."

A careful consideration of the school laws of this State leads us to the conclusion that there is no authority given in law for an election to determine whether or not a school tax theretofore voted may be abrogated or diminished in an independent district incorporated for school purposes only.

This is not the case, as suggested in your letter, in common school districts or in towns having assumed control of the schools, for the authority is expressly granted by the statutes by an election, to abrogate or diminish the taxes in such last named district.

It is provided by Article 2827, Revised Statutes, 1911, that the Commissioners Court of any county in this State shall have power to levy a special tax for the further maintenance of public free schools and the erection within each school district of a school house or school houses, provided a majority of the qualified property tax paying voters of the district voting at an election to be held for the purpose, shall vote such tax, etc.

It is further provided by Article 2833 that an election may be held to abrogate, increase or diminish such tax, which article is in the following language:

"At any time after the expiration of two years after any district has levied a school tax on itself, twenty property taxpaying qualified voters, or a majority of such voters of the district, may have an election held, upon the proper petition to the county judge, to determine whether such tax shall be abrogated, increased or diminished. Such election shall be held and conducted as elections provided for in Article 2829, and persons entitled to vote at such elections shall possess the qualifications prescribed in Article 2831."

The two articles last above referred to and quoted from are found in the Revised Statutes of this State in Chapter 15, Title 48, which chapter is entitled *Common School Districts.* This subdivision of the school law under the title of common school districts is brought for-

ward in the statutes from the compiled school laws enacted by the Twenty-ninth Legislature to be found as Chapter 124 of the printed acts thereof, and the procedure set out in the various sections and articles under this heading has been held by the courts of this State to apply to common school districts only. See G. C. & S. F. Ry. Co. vs. Blum Independent School District, 143 S. W., 353.

As to the school tax voted in cities and towns having assumed control of the schools, Article 2877, Revised Statutes, 1911, providing for the levy and collection of a tax not to exceed one-half of one per cent advalorem upon an election in which property tax payers only may participate contains the further provision in substance that one election, and no more, shall be held thereafter in any one calendar year to ascertain whether a school tax shall be levied, and that if the proposition is carried the school tax shall continue to be annually levied and collected for at least two years and thereafter, unless it be discontinued at an election held to determine whether the tax shall be continued or discontinued. This article contains the further provision that when the tax is continued no election to discontinue it shall be held for two years and that when the tax is discontinued no election to levy a tax shall be held during the same year.

It will be seen therefore that there is ample statutory authority for the calling of an election to determine whether or not in the classes of districts above referred to a tax theretofore voted shall be discontinued.

Coming now to those independent districts authorized and incorporated for free school purposes only, we find the provisions relating thereto incorporated in Title 48, Chapter 16 of the Revised Statutes, which chapter is entitled *Independent Districts.*

This subdivisitn of the school laws, like that for common school districts and cities and towns having assumed control of their schools, is brought forward into the Revised Statutes from the compiled school laws of 1905 and begins in the original act with Section 149 thereof, under the heading, "*Towns and Villages Incorporated for School Purposes Only,*" and therefore school districts organized and operating under this subdivision are limited in their authority by its provisions.

In this chapter will be found Article 2857, being Section 154 of the original act authorizing, upon a majority vote of the tax paying voters, a levy of a tax not to exceed fifty cents on the one hundred dollars valuation of the taxable property within such district. There is no provision in this title under which an election could be called to determine whether or not such tax might be discontinued or diminished, as is the case in the other class of districts heretofore referred to.

The only provision relating to the reduction of a tax under the heading of "cities and towns incorporated for school purposes only" as found in Chapter 16, Title 48, is Article 2864a of Vernon's Sayles' Civil Statutes, being Chapter 5 of the Acts of 1911, which provides in substance that where a fifty cents maintenance tax is voted and subsequently a bond issue is voted by the people, the necessary tax upon

the bond issue shall operate to reduce the maintenance tax theretofore voted, but this article has no application to the questions presented by you. It is simply an automatic reduction of the maintenance tax in an amount necessary to take care of the interest and sinking fund on the bonds voted.

We find nothing in the entire act indicating that the provisions with reference to common school districts and those cities and towns having assumed control of their schools was intended to apply to that character of district now under discussion, nor can we by any rule of construction hold that such provisions are applicable to cities and towns incorporated for school purposes only.

The control of districts incorporated for school purpses only is vested in a board of trustees for such districts. Elections are ordered by such board and taxes are levied by it, as is provided in Article 2857. In common school districts, however, such elections are ordered and taxes levied by the commissioners court, while in cities and towns having assumed control of the schools such elections are ordered and taxes levied by the city council thereof, and those articles of the statute dealing with the ordering of elections and the levy of taxes vests such power in the commissioners court and the city council, respectively.

As above said, we find nothing in these articles upon which we could base a construction that they apply to the board of trustees in a city or town incorporated for school purposes only. It is true that while taxing statutes have been variously construed, the great weight of authority is to the effect that laws imposing taxes are strictly construed and doubts are resolved in favor of the tax payers. Lewis' Sutherland Statutory Construction, 537.

As we see it, however, there is in this case no room for construction, as there is no authority given in the statute for the calling of an election to determine whether a tax may be abrogated or diminished.

The authority to hold an election is thus stated in 15 Cyc., 316:

"In the final analysis under all popular forms of government the controlling political power rests with the people who are makers of the Constitution and the institutions which exist under them; but they must exercise this power in an orderly manner; consequently there can be no valid election without some lawful authority behind it. The right to hold an election cannot exist or be lawfully exercised without an expressed grant of power by the Constitution or by the Legislature acting under constitutional authority; and no case has been found where a volunteer election has been held valid even though the term of the incumbent has expired."

In a foot note to this section we find the following:

"If an election be held without warrant of law or if it be ordered by a person or tribunal having no authority, there can be no doubt but that the whole proceedings will be absolutely void."
Stephens vs. People, 89 Ill., 337.
Force vs. Batavia, 61 Ill., 99.
Clark vs. Hancock County, 27 Ill., 305.

We therefore advise you that in our opinion there is no authority

vested by law in the board of trustees of an independent school district to order an election to determine whether or not a maintenance tax theretofore voted may be abrogated or diminished.

We would, in view of this peculiar condition of the law, make the following suggestion:

In a district in which there has been voted a tax not to exceed fifty cents on the one hundred dollars, should such an amount not be necessary for the maintenance of the school and the interest and sinking fund on the bonds, if any, then the board of trustees would have the authority to levy such a rate within the fifty cents as may be necessary for such purposes.

Itasca Ind. School Dist. vs. McElroy, 124 S. W., 1011.
Chambers vs. Cook, 132 S. W., 865.
Wilbern vs. Cone, 148 S. W., 118.

This would be a practical solution of the problem in event the total tax voted is an unnecessary burden on the taxpayers.

Yours truly,

C. W. TAYLOR,
Assistant Attorney General.

SCHOOL DISTRICTS—THEIR STATUS—SCHOOL BUILDINGS—THEIR USE FOR LODGE PURPOSES.

A school district is a quasi-public corporation and the district trustees would be unauthorized to sell the upper story of the school building to a lodge, or to permit the school property to be jointly owned.

Trustees would be authorized to lease to the lodge a portion of the school building in so far as the uses to which such property is put would not conflict with its use as school property.

October 28, 1915.

Hon. D. M. Maynor, County Attorney, Quitman, Texas.

DEAR SIR: The Department acknowledges receipt of your letter of several days ago enclosing copy of a letter from Hon. W. W. Campbell of Alba, Texas, in which the question is asked the Department whether or not a lodge (W. O. W.) would be permitted under the law to own and use exclusively for its purposes the upper story of a school building, or a portion of such upper story, such building to be constructed from the proceeds of sale of bonds issued by the school district for that purpose, that part of the building to be owned and used by the lodge to be paid for by it to the extent of one-sixth of the cost of the building.

We regret that great pressure of official work upon the Department has delayed our answer to your letter and it will at this time prevent us from giving your inquiry the consideration we would like to give it.

In determining the power of the trustees of school districts to make contracts, and to what extent they may make contracts, it is necessary to look to the statute which fixes such powers, and to determine the status of a school district.

We think that a school district could not be properly denominated "a municipal corporation" under the laws of this State, but only a "quasi public corporation."

Dillon's work on Municipal Corporations, 5 Edition, Volume 1, Section 31, defines a municipal corporation as follows:

"A municipal corporation, in its strict and proper sense, is the body politic and corporate constituted by the incorporation of the inhabitants of a city or town for the purposes of local government thereof. Municipal corporations as they exist in this country are bodies politic and corporate of the general character above described, established by law partly as an agency of the State to assist in the civil government of the country, but chiefly to regulate and administer the local or internal affairs of the city, town or district which is incorporated."

By way of distinguishing between a municipal corporation and a quasi public corporation in Section 32 of the same volume he says:

"We may, therefore, define a municipal corporation in its historical and strict sense to be the incorporation, by the authority of the government, of the inhabitants of a particular place or district, and authorizing them in their corporate capacity to exercise subordinate specified powers of legislation and regulation with respect to their local and internal concerns. This power of local government is the distinctive purpose and the distinguishing feature of a municipal corporation proper. The phrase 'municipal corporation' is used with us in general in the strict and proper sense just mentioned; but sometimes it is used in a broader sense that includes also public or quasi corporations, the principal purpose of whose creation is as an instrumentality of the State, and not for the regulation of the local and special affairs of a compact community."

On the same subject in Section 34, same volume, he further says:

"Corporations intended to assist in the conduct of local civil government are sometimes styled political, sometimes public, sometimes civil, and sometimes municipal, and certain kinds of them with very restricted powers, quasi corporations,—all these by way of distinction from private corporations. All corporations intended as agencies in the administration of civil government are public, as distinguished from private corporations. Thus an incorporated school district, or county, as well as city, is a public corporation; but the school district or county, properly speaking, is not, while the city is, a municipal corporation. All municipal corporations are public bodies, created for civil or political purposes; but all civil, political or public corporations are not, in the proper use of language, municipal corporations."

Section 36 of the same volume reads:

"An incorporated city or town sometimes embraces by legislative provision two distinct corporations, as, for example, the municipal and the school corporation existing within the same territory. It is in such cases a distinct corporation for school purposes, and under the statute or charter may be bound as such for the contract price of materials furnished and labor performed by another in the erection of a school building for such corporation. More generally, however, school districts are organized under the general laws of the State, and fall within the class of corporations known as quasi corporations."

In Arkansas school districts are by statute quasi corporations.

School District vs. Williams, 38 Ark., 454.

In Illinois, Indiana and Iowa a school district has been held to be a municipal corporation.

School Trustees vs. Douglass, 17 Ill., 209.
Davis vs. School Township, 19 Ind. App., 694.
Curry vs. Sioux City District Township, 62 Iowa, 102.

In Kansas, Minnesota, New Hampshire, New Jersey, New York and Pennsylvania school districts have been held to be quasi public corporations. See:

Beach vs. Lehey, 11 Kan., 23.
State vs. Pawnee County, 12 Kan., 426.
School District vs. Thompson, 5 Minn., 280.
Harris vs. School District, 28 N. H., 58.
Wilson vs. School District, 32 N. H., 118.
State vs. Troth, 34 N. J. L., 379.
Bassett vs. Fish, 75 N. Y., 303.
Wharton vs. Cass Township School Directors, 42 Pa., 358.

We think that the above authorities establish and fix the status of a school district as that of a quasi public corporation.

It is a fundamental principle of law and well settled that a municipal or other public corporation cannot engage in a partnership business with individuals or associations of individuals.

Therefore all persons contracting with a municipal corporation or public corporation must at their peril inquire into the statutory power of the corporation or of its officers to make the contract; and a contract beyond the scope of its power granted or conferred expressly, or by fair implication, is void.

Revised Statutes of Texas, 1911, Article 2845, provides that no mechanic, contractor, materialman or other person, can contract for, or in any other manner have or acquire any lien upon the house so erected or the land upon which same is situated; and all contracts with such parties shall expressly stipulate for a waiver of such lien.

Revised Statutes, Article 2847 provides that all school houses erected, grounds purchased or leased for a school district, and all other property belonging thereto, shall be under the control of the district trustees. While the above statutes do not expressly do so, we think they impliedly require that the exclusive ownership and control of the school building or school buildings of the school district shall be in the trustees thereof.

In the case of Martin vs. Brooklyn, 1 Hill (N. Y.), 545, it was held that a contract by a city to the extent that it waived its right to go on with the laying out of a street or not and a surrender of its legislative discretion, was void. For a like reason, it would appear that a contract made by school trustees involving the surrender by them of the exclusive control of the school building or buildings, would be void.

It is our opinion that a quasi public corporation (such as a school district) which owes special duties to the public, cannot enter into any contract not expressly authorized by law, and a contract entered into between the trustees of a school district and the lodge, the observance of which would operate as a surrender by the trustees of the exclusive control of the school building would be void as being contrary to public policy, and therefore illegal. In the case of Royse Independent School District vs. Reinhardt, 159 S. W., 1010, the Court of Civil Appeals for the Dallas district held that since a board of trustees is the creature of the statute, that it has only such powers as are conferred upon it and such implied powers as are necessary to execute such express powers.

The last above mentioned case, however, holds that an independent school district, which is a quasi public corporation with its administrative powers vested in the board of trustees who are given exclusive management and control of the school property may permit property which is not needed for school purposes to be used for private purposes which do not conflict with its use as school property; and under the authority of this case we will state that it is our opinion that the trustees of the school district referred to would be authorized to *lease* to the lodge a portion of the school building, in so far as the uses to which such property is put would not interfere or conflict with its use as school property; but said trustees would not be authorized to sell any portion of such building or permit joint ownership of the school property.

Very truly yours,
W. M. HARRIS,
Assistant Attorney General.

SCHOOLS—TEACHERS' CONTRACTS—APPROVAL BY COUNTY SUPERINTENDENT—STATUTORY CONSTRUCTION.

The county superintendent would have authority to approve teacher's contract after the school has been taught.

Statutes specifying time within which officers are to perform duties are generally directory.

Revised Statutes, Articles 2752, 2784, 2825.

February 2, 1916.

Hon. H. D. Garrett, County Attorney, Emory, Texas.

DEAR SIR: The Attorney General has your favor desiring to be advised if the county superintendent could legally approve teachers contract and vouchers, after the close of the school and consequently after the services of the teachers have been rendered.

It is provided by Article 2756, Revised Statutes, 1911, in substance, that the county superintendent shall approve all vouchers legally drawn against school funds, and that he shall examine all teachers contracts, and if in his judgment they are proper, approve them. It is further provided by Article 2825, Revised Statutes, 1911, that the

compensation under such contracts shall be approved by the county superintendent "before the school is taught."

The Court of Civil Appeals, considering the last named article in Bayless vs. Potter County, et al., 177 S. W., 210, held that a teacher could not recover for services in teaching a school under a contract the county superintendent had refused to approve, saying "until a written contract has been duly executed and approved, the services performed, appellant as teacher were without authority of law and she cannot recover."

From the facts presented by you, however, it does not appear there was any refusal on the part of your county superintendent to approve the contract. Among the duties of the county superintendent enumerated by Article 2752 is that he shall confer with teachers and trustees, giving them advice when needed, and if possible for him to do so spend as much as four days in each week visiting the schools while they are in session. Article 2784, Revised Statutes, 1911, requires teachers to make and file with the county superintendent monthly and term reports. We assume that in the discharge of the duties imposed by the above statutes the county superintendent became fully advised of the fact that the teacher in question was engaged in teaching the school and acquiesced therein.

The purpose of the statute in requiring the approval of the contract as to compensation before the school is taught, is to prevent the making of a contract for salary in excess of the available fund for such district. Therefore if when the contract is presented to the county superintendent it appears the amount thereof may be liquidated from the funds of the district, we are of the opinion he would be within his authority under the statutes in approving same and thereafter approving the vouchers.

The general rule of construction of statutes stipulating the time within which officers shall perform certain duties is that same are directory only. In Lewis' Sutherland Statutory Construction. Section 612, the rule is thus stated:

> "Provisions regulating the duties of public officers and specifying the time for their performance are in that regard generally directory. Though a statute directs a thing to be done at a particular time, it does not necessarily follow that it may not be done afterwards. In other words, as the cases universally hold, a statute specifying a time within which a public officer is to perform an official act regarding the rights and duties of others is directory, unless the nature of the act to be performed, or the phraseology of the statute, is such that the designation of time must be considered as a limitation of the power of the officer."

Considering Article 2825 in the light of the above rule of construction and in view of the general supervision over matters pertaining to public education conferred by Article 2752 upon the county superintendent, we are of the opinion and so advise you that if in the judgment of the superintendent the contract is a proper one, he could legally approve same together with the vouchers for salary.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

SCHOOLS—TEACHERS' CONTRACTS—COMMON SCHOOL DISTRICT.

A contract entered into by and between the trustees of a common school district and the teacher is invalid for any purpose until the same is approved by the county superintendent, and neither party is bound thereby until such approval.

November 5, 1915.

Hon. W. F. Doughty, State Superintendent, Capitol.

DEAR SIR: The Attorney General is in receipt of your letter of recent date making inquiry as to the validity of contracts made between the trustees of a common school district and a teacher prior to the classification of schools and apportionment of school funds. You have so clearly set forth the laws governing such matters, as well as a statement of the difficulties arising, that we take the liberty of copying your letter in full upon which to base the opinion of this Department. Your letter is as follows:

"Kindly give the following statement of facts your early attention and render me your opinion in answer to questions herein contained:

"Trustees' elections in common school districts are held on the first Saturday in April of each year. The scholastic enumeration is taken by the census trustees in the common school districts during the month of May, compiled by the county superintendent during the month of June, and reported to this Department during the month of July. This Department completes compilation and reports same to the State Board of Education as basis for fixing the State per capita apportionment about the first of August each year. After the State apportionment is made official notice is sent to county superintendents of public instruction, after which the county boards of education fix the State and county apportionment for the various counties of the State. As will be seen, no county board of education can fix the county apportionment before the first of August, and, as a matter of fact, most of them do not fix the county apportionment until after the first of September.

"County boards of education, otherwise known as county school trustees, fix the classification of the schools of the various counties each year and designate the number of classes or grades which may be taught in each school. Under the new Rural School Law, this classification cannot be made until after August 1. See Section 4, Chapter 36, General Laws of Texas, Acts of the Thirty-fourth Legislature. Teachers holding only second-grade certificates or permanent primary certificates are ineligible to contract to teach in schools classified by the county board of education as high schools, or as schools offering work above the seventh grade. See Section 110a, Chapter 96, Acts of the Thirty-second Legislature.

"Teachers' salaries in common school districts which do not levy a local maintenance tax are based on the following maximum rates of tuition: 'Trustees in making contracts with teachers shall determine the salary to be allowed or wages to be paid upon the following rates of tuition: To teachers holding first-grade certificates, not more than $2.50; to those holding second-grade certificates, not more than $2; and to such as hold third-grade certificates, not more than $1.50 per month per capita, shall be allowed for pupils within the scholastic age.' See article 2781, Revised Statutes of 1911.

"Under Acts of the Twenty-ninth Legislature, Chapter 124, Section 39, providing that the county superintendent or county judge as ex officio county superintendent, 'shall examine all contracts between the trustees and teachers, * * * and if in his judgment such contracts are proper, he shall approve the same, * * * and shall be authorized to consider the

amount of salary promised to the teacher,' the Court of Civil Appeals at San Antonio, Judge Fly presiding, held that 'the superintendent's power as to such contracts is not confined merely to a revision of the matter of salary, but he has full discretion to examine and decide as to the propriety of every such contract, and to approve or reject the same, as his sound judgment may direct.'

"It frequently happens that boards of trustees in common school districts during the close of the school term and before the election of a new board of trustees will undertake to elect a teacher for the ensuing scholastic year, which begins, of course, on the first of September following. This is sometimes done because the old board of trustees fears it will not be re-elected and that the teacher whom they want will not be elected by the new board of trustees to be elected by the people at the ensuing election to be held on the first Saturday in April. When an old board elects a teacher just prior to a trustee's election and the old board itself is unsuccessful in the trustees' election, it frequently happens that the newly elected board of trustees desires to ignore the election of the teacher selected by the old board. The question arises as to whether or not the old board of trustees in a common school district is authorized under the law to enter into valid and binding contract with the teacher for the ensuing scholastic year. It occurs to me that a larger question, which includes the one just stated, is whether or not any board of trustees can enter into a legal and binding contract with a teacher before the county board of education makes the county apportionment and before the county superintendent attaches his signature of approval to the teacher's contract. It is admitted that old boards of trustees in independent school districts may enter into legal and binding contracts with teachers for the ensuing scholastic year prior to the regular trustees' election in such districts, which is also held in April. The matter of the authority of trustees in common school districts, however, is believed to be of a different nature. The main point of difference in the election of teachers in common school districts and the election of teachers in independent school districts are found in the following statement of facts:

"1. A teacher's contract in a common school district must state (a) the amount of salary to be received by the teacher per month, (b) the length of time the school is to run, (c) the classification given the school by the county board of education, etc. See blank form herewith attached and required by the State Superintendent of Public Instruction to be used in all common school districts of the State.

"2. No teacher's contract is valid and binding until after it has met the approval of the county superintendent, which approval cannot be given until after the apportionment is made, which apportionment cannot be made until after the first of August each year.

"3. The salary of the teacher cannot be determined nor can the length of term of school be determined until after the apportionment is made. The classification under which the teacher is to teach cannot be specified in the contract until after the county board of education makes its classification of the school, which classification cannot be made until after August 1 each year.

"Question 1: Under the above statement of facts and sections of law indicated, is it possible for the old board of trustees of a common school district to enter into legal and binding contract with a teacher for the ensuing year just prior to a trustees' election?

"Question 2: Is it possible for any board of trustees to bind itself in contract with a teacher before the classification of the schools has been effected by the county board of education and before the county apportionment of the State and county available fund has been made?

"Question 3: Is it possible for any board of trustees to bind itself in contract with a teacher prior to the approval of the contract by the county superintendent? In other words, is it possible for a board of trustees having entered into tentative contract with a teacher to withdraw its assent

to the contract at its pleasure any time prior to approval by the county superintendent and to enter into a second contract with another teacher?"

All of the questions propounded by you may be answered by determining the status of the tentative contract entered into between the trustees of common school districts and the teacher prior to its approval by the county superintendent. If such a contract is valid and binding then it is immaterial as to when the same may be entered into and the old board would have an equal right with the new to make such a contract and the same could not be rescinded or set aside and another entered into with a different teacher. If, on the other hand, such contract is not binding until approved by the county superintendent, then as we see it the new board of trustees would have a right to rescind the action of the old board and select a different teacher, and it would rest with the county superintendent to approve such of the contracts so entered into as in his discretion would be for the best interest of the school.

This question is settled by the case of Boyles vs. Potter County, et al., 177 S. W., 210.

The plaintiff in the above case entered suit to recover $385 and interest for services rendered in teaching the Cliff Side School, alleging that she had entered into a valid contract with the trustees but that the county judge upon such contract being presented to him had arbitrarily refused to approve it. The court in deciding that appellant could not recover based its opinion upon the ground that until the contract between the trustees and the teacher is approved by the county judge, who in this case we assume is ex officio county superintendent, is void and of no effect. In discussing this question the court said:

"Article 2825, Vernon's Sayles' Civil Statutes, requires that contracts made with teachers of public schools shall be in writing and shall be approved by the county superintendent before the school is taught. No effort was made by plaintiff, after she had exhausted her remedy by appeal to the State Superintendent and State Board of Education, to resort to the courts in order to obtain the approval of her contract by Judge Jeter. Her failure to apply for a mandamus must be construed as an acquiescence on her part in the correctness of the position taken by Jeter in refusing to approve the contract when presented to him. The existence of a valid contract between the trustees and the teacher is a condition precedent to the right of the trustees to issue vouchers and of the county treasurer to pay them. Until a written contract has been duly executed and approved, the services performed by appellant as teacher were without authority of law, and she cannot recover."

The approval of the county superintendent being essential to the validity of the contract attempted to be entered into between the trustees and teacher fixes the inchoate character of such contract. It is a well established doctrine that a contract which purports to be tripartite and is executed by only two of the parties is incomplete and no one is bound by it. Emory vs. Neighbour, 11 Amer. Dec., 541. From what has been said above it appears that neither party, that is, the trustees nor the teacher, are bound by the attempted contract until

the same is approved by the county superintendent, and it follows that either party may disregard the tentative contract and the trustees on one hand may select another teacher or the teacher on the other hand may seek a new school and upon so doing the party should notify the county superintendent in order that the copy of the contract filed with him may be disregarded.

There are other reasons we might assign for our opinion that such tentative contract is not binding. For instance, until the school funds belonging to the county are apportioned one essential element of all contracts can not be determined; that is, the amount of salary to be paid the teacher can not be stipulated. Another is that until the school is classified by the county board it cannot be determined that the prospective teacher is eligible for the reason that schools in which high school work is taught cannot be presided over by a teacher holding less than a first grade certificate and it might be that in the case presented by you the county board would of necessity class such school as a high school and that the teacher making the application or entering into a contract with the trustees was possessed of only a permanent primary certificate or a second grade certificate, in either of which cases she would be disqualified to teach a school of that classification.

In event the trustees and the teacher should attempt to enter into a contract and stipulate the amount of salary to be paid therein as well as the length of the term of school to be taught and the grade of certificate held by the teacher, same could have no binding force and effect for the reason that the amount to be paid the teacher cannot be determined. Neither can the length of term to be taught be ascertained nor can it be known whether or not the teacher is eligible, and for this additional reason such a contract would be void for uncertainty. 9 Cyc., 248, and the cases cited.

What has been said above as applicable to common school districts does not apply in the case of an independent district. It has been decided in Texas that the outgoing board of trustees in an independent district may elect teachers for the ensuing term. Pearsall vs. Woods, 50 S. W., 959.

The Supreme Court of Kentucky likewise entered its decision to this effect. Wheeler vs. Burke, 192 S. W., 91.

Decisions of other states are to the same effect, and while there are some authorities holding to the contrary as above said, the weight of authority is to the effect that such course may be pursued.

From what has been said above it will be observed that in the opinion of this Department no contract entered into between boards of trustees and teachers in common school districts has any binding force or effect until the approval thereof by the county superintendent which approval of course cannot be attached until the amount of money to which the district is entitled has been ascertained and the school has been classified.

Believing that what has been said above answers all of your inquiries, I am, with respect,

Yours truly,

C. W. TAYLOR,
Assistant Attorney General.

SCHOOL FUNDS—PERMANENT COUNTY—INVESTMENT.

The permanent school funds of the county may be invested only in bonds of the United States, or of the State of Texas or counties in said State, and therefore cannot be invested in road district bonds.
Section 6, Article 7, of the Constitution.
Article 5402, Revised Statutes.

October 1, 1915.

Hon. H. S. Lilley, County Attorney, Cold Springs, Texas.

DEAR SIR: The Attorney General has your letter of recent date, reading as follows:

"The question arises here as to whether or not the commissioners court of this county has the authority, under the law, to invest the permanent school fund belonging to this county, of which fund there is a small sum on hand, in certain road district bonds of District No. 1 of San Jacinto county recently approved by your Department.

"Under Chapter 124, Section 3, of the Acts of the Twenty-ninth Legislature, as amended by Chapter 110 of the Thirty-first Legislature, I understand that such investment can be made, but my position and opinion is not concurred in and I would be pleased to have your opinion on the question."

Replying thereto I beg to say that the Constitution of this State has provided for the investment of funds received from the sale of county school lands in the following language:

"Said lands and proceeds thereof when sold shall be held by said counties alone as a trust for the benefit of public schools therein; said proceeds to be invested in bonds of the United States, the State of Texas, or counties in said State, or in such other securities and under such restrictions as may be prescribed by law, and the county shall be responsible for all investments, and the interest thereon and other revenue, except the principal, shall be the available fund."

The Legislature of this State has not seen fit to go beyond the wording of the Constitution and has not prescribed any other securities than those named in the Constitution in which the permanent county funds may be invested. In fact, the statute upon this question is not so broad as the Constitution, prescribing only bonds of the State of Texas or of the United States as the securities in which said bonds may be invested.

Article 5402, Revised Statutes, 1911, is in the following language:

"Each county may sell or dispose of the lands granted to it for educational purposes in such manner as may be provided by the commissioners court of such county; and the proceeds of any such sale shall be invested in bonds of the State of Texas, or of the United States, and held by such county alone as a trust for the benefit of public free schools therein, only the interest thereon to be used and expended annually."

It will be noted that the Legislature has not included county bonds in those enumerated, in which such funds may be invested. However,

this omission of the Legislature could not control the constitutional provision.

The express authority is not given to the commissioners court either by the Constitution or the statute to invest such permanent county funds, but such right is assumed by the legislation upon the subject.

Boydston vs. Rockwall County, 86 Texas. 234.
Delta County vs. Blackburn, 100 Texas, 51.

In the Boydston case, above cited, discussing Article 4036 of the Revised Statutes of 1879, which is identical with Article 5402 of the Revised Statutes of 1911, the court said:

"Article 4036 of the Revised Statutes directs that the school lands belonging to the counties of the State may be sold in such manner as the commissioners courts of such counties may provide, and that the proceeds of the sales should be invested in the bonds of the United States or of the State. This was in pursuance of original Section 6 of Article 7 of the Constitution. Indeed, that section makes the same provision. It was, however, amended in 1883,. so that it now reads, in part, as follows: 'Said lands, and the proceeds thereof when sold, shall be held by said counties alone as a trust for the benefit of the public schools therein; said proceeds to be invested in the bonds of the United States, the State of Texas, or counties of said State, or in such other securities and under such restrictions as may be prescribed by law.' Neither original Section 6 nor the amended section, nor Article 4036, expressly say that the investment of the permanent school fund shall be made by the commissioners court, but that such was the legislative construction is shown by Section 1 of the Act of April 23, 1879 (Laws 1879, page 150); and we think it clear that such courts should exercise that authority. There is nothing to indicate that the power was intended to be granted to any officer or other body; and we think it was contemplated that the court which was intrusted with the sale of the lands should execute the law as to the investment of the proceeds. We are of opinion, therefore, that the amended section was intended to confer authority upon these courts to invest the fund in county bonds."

Boydston vs. Rockwall County, 86 Texas, 238-239.

In the Blackburn case, cited above. the court in affirming the Boydston case, said:

"There are some expressions in the opinion of the Court of Civil Appeals in Waggoner vs. Wise County, concerning the power of investment possessed by the court, which were not essential to the decision and which are not to be regarded as its true basis. They seem to be based upon a misconception of the language of the opinion of this court in Boydston vs. Rockwall County (86 Texas, 238), which case is also relied on by defendants in error to sustain their defense in this case. One of the questions there was whether or not an investment of funds of the county in the bonds of another county was governed by the general rule authorizing and prescribing the mode of the conversion of investments in one kind of securities into investments in other securities, and it was held that the general rule and not the special statute governed under the facts of that case. It was of the special statute the court said: 'The statute does not restrict the general power of the court over the investment of the school fund. It was intended to confer a special authority to do a particular thing in a certain contingency.' It was not intimated in that case that the commissioners court has power to invest the funds in securities other than those prescribed by the Constitution and statute, in one kind of which securities the investment there in question had been made."

It is therefore apparent that in investment of the county permanent fund the commissioners court has authority to invest the same only in bonds of the United States or of the State of Texas or of counties.

You refer to Chapter 110 of the Acts of the Thirty-first Legislature, amending Chapter 124 of the Acts of the Twenty-ninth Legislature, as being a possible authority for the investment of such funds in the bonds of road district, but it will be noted that this act of the Legislature, as amended, is dealing only with the investment of the State permanent school fund. By this act the Legislature is exercising the power conferred upon it by Section 4 of Article 7 of the Constitution, wherein the Board of Education is authorized and directed to invest the State permanent fund 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. The language used in the above mentioned section of the Constitution relating to the investment of the State permanent fund is almost identical with that used with reference to the investment of the county fund, but in the case of the State fund the Legislature has exercised the authority conferred upon it by the Constitution to designate other securities, whereas it has not done so with reference to the investment and disposition of the county permanent fund.

With respect, I am,

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

SCHOOL FUNDS—TREASURER'S BOND—CONSTRUCTION OF STATUTES.

1. A general statute repeals provision of city charter on same subject.
2. Treasurers of independent school districts, as well as treasurers of the school funds of cities which have assumed control of the schools within their limits, must give bond in double the amount of the estimated receipts coming annually into their hands, as provided by General Law, Section 154a, Chapter 12, Acts of 1909.

December 17, 1914.

Hon. W. F. Doughty, State Superintendent of Public Instruction, Capitol.

MY DEAR SIR: This Department acknowledges receipt of your letter of the 5th instant, which reads as follows:

"The General Laws of the State of Texas require that the treasurer of an independent school district shall be required to give bond in double the estimated amount of the receipts coming annually into his hands. (See Article 2771, Revised Statutes.)

"The Houston city charter, Acts of the Twenty-ninth Legislature, 1905, provides that the custodian of other city funds shall be the custodian of all public school funds upon the same terms and conditions as other funds and that his bond shall cover said school funds. And the said charter provides further that the city council shall require all officers of the city to give bond

in such sum as may be prescribed by ordinance, which sum shall always be of sufficient amount amply to protect the city. (See pages 136 and 161, Special Laws of the Twenty-ninth Legislature, 1905.)

"Will the provision of the special charter relating to the bond of the city treasurer as specified in the special charter of the city of Houston supplant the general law in this particular requiring that the treasurer or depository of the public school funds be required to give bond in double the estimated amount of the receipts coming annually into his hands; and if so, would the State Superintendent of Public Instruction be authorized to send the said treasurer warrants for monthly apportionment due the city of Houston for school purposes without requiring copy of additional bond made to comply with the general law as above referred to?"

A reply to your communication requires a construction of Revised Civil Statutes, Article 2771, and of Section 14 of Article 2 and Section 8 of Article 7 of the city charter of the city of Houston.

Where there is a seeming or apparent variance or conflict between two statutes, that construction should be given which will leave both statutes effective and render them harmonious, if it is possible to do so.

The general law of the State governing the amount of bond which shall be given by the treasurers of the school funds of independent school district, or cities which have assumed control of the school within their limits, is Article 2771, Revised Statutes, 1911, which reads as follows:

"In an independent district of more than one hundred and fifty scholastics, whether it be a city which has assumed control of the schools within its limits, or a corporation for school purposes only, the treasurer of the school fund shall be that person or corpration who offers satisfactory bond and the best bid of interest on the average daily balances for the privilege of acting as such treasurer. The treasurer shall be required to give bond in double the estimated amount of the receipts coming annually into his hands. Said bond shall be made payable to the president of the board and his successors in office, conditioned for the faithful discharge of the treasurer's duties and the payment of the funds received by him upon the draft of the president, drawn upon order, duly entered, of the board of trustees. It shall be approved by the school board, and the State Department of Education shall be notified of the treasurer by the president of the school board filing a copy of said bond in said department."

The only provisions of the city charter of the city of Houston bearing upon the subject, and which are referred to in your letter, are as follows:

"Article 2, Section 14. The custodian of other city funds, as provided by this act, shall be the custodian of all public school funds, upon the same terms and conditions as other funds, and his bond shall cover said school funds."

"Article 7, Section 8. The council shall require all officers of the city to give bond in such sum as may be prescribed by ordinance, which sum shall always be of sufficient amount amply to protect the city."

The city charter of the city of Houston was enacted at the Regular Session of the Twenty-ninth Legislature, 1905, and became effective March 18, 1905.

The above article of the Revised Statutes (Article 2771), which

was Section 165 of the School Law of 1905 was also enacted at the same session of the Legislature, became effective on the 15th day of July, 1905. So much of said Section 165 of the School Law enacted in 1905, as is material to the question before us, reads as follows:

"Section 165. The trustees chosen under this act shall meet within twenty days after the election, or as soon thereafter as possible, for the purpose of organizing. A majority of said board shall constitute a quorum to do business; and they shall choose from their number a president; and they shall choose a secretary, a treasurer, assessor and collector of taxes, and other necessary officers and committees. The treasurer shall be required to give bond in double the estimated amount of the receipts coming annually into his hands. Said bond shall be made payable to the president of the board, or his successor in office, and be approved by the board of trustees, conditioned for the faithful discharge of his duties and the payment of the funds received by him upon the draft of the president, drawn upon order, duly entered of the board of trustees; and he shall be entitled to retain as commission for his services as such treasurer not exceeding one per cent of all funds coming into his hands, so ordered by the board; provided, that in cities having more than ten thousand population the board shall appoint as treasurer the person or corporation who offers satisfactory bonds as herein provided, and the best bid of interest on average daily balance for the privilege of acting as such treasurer, and provided further, that no commission shall be allowed in such cases for services as treasurer"; * * * "The provisions of this act shall not be applicable to cities of ten thousand inhabitants or more which have been granted special charters by the State, by the terms of which charters the treasurer of the city is ex officio treasurer of the school board, in so far as conflicting with the terms of said charters."

The Legislature, in our opinion was authorized to provide as it did in the charter of the city of Houston to the effect that (1) "The council shall require all officers of the city to give bond in such sum as may be prescribed by ordinance, which sum shall always be of sufficient amount amply to protect the city," without the necessity of fixing the amount of bond which shall be given, leaving the amount of the bond to the city council; and, (2) "The custodian of other city funds, as provided in this act, shall be the custodian of all public school funds, upon the same terms and conditions as other funds, and his bond shall cover said school funds."

The provisions of the city charter, last above quoted, should be treated as an exception to the general law governing the same subject, and therefore must be accepted as the law governing the question as to amount of bond required of a treasurer of the city funds and school funds at the time of its enactment.

The Constitution, at the time of the adoption of the Houston City Charter, provided that cities having more than ten thousand inhabitants may have their charters granted or amended by special act of the Legislature.

Constitution, Article 11, Section 5.

It was within the power of the Legislature to engraft upon a city charter any provision of law that it might enact by general law.

Investment Association vs. Heirs of Pierre, 31 S. W., 426.

The exception in this article of the Constitution with reference to cities of more than ten thousand inhabitants, took such cities out of the purview of the general law whenever and wherever their charters provided a different rule or conferred a greater power than that given by the general law.

Ex parte Wilson, 14 Criminal Appeals, 593.
Investment Association vs. Heirs of Pierre, 51 S. W., 426.
City of Dallas vs. Western Electric Company, 83 Texas, 243, 18 S. W., 552.
See also Cravens vs. State, 57 Criminal Appeals, 127, 122 S. W., 29.
Arroyo vs. State, 69 S. W., 505.

Therefore, taking these laws as enacted in 1905—both the general law on the subject and the special city charter of the city of Houston—in our opinion the provisions of the charter of the city of Houston would govern, and the amount of the bond which the treasurer of the city and school funds would be required to give would have to be fixed by the city council.

However, the Thirty-first Legislature, at its Regular Session in 1909, enacted Section 154a of Chapter 12 of that session's acts, which, added to Section 165 of the School Laws of 1905, with respect to treasurers of school funds and the amount of bond to be given, constitutes Article 2771, Revised Statutes, 1911.

Said Section 154a reads:

"All school districts heretofore provided for by special act of the Legislature are hereby placed under the general laws relating to incorporated school districts, and all provisions of any and all such special acts in conflict with the general laws are hereby specifically repealed, except in so far as those acts relate to the boundaries established by the acts incorporating such districts." * * * "And in incorporated districts of more than 150 scholastics, whether they be cities which have assumed control of the schools within their limits or corporations for school purposes only, the treasurer of the school funds shall be that person or corporation who offers satisfactory bond as provided by law and the best bid of interest on the average daily balances for the privilege of acting as such treasurer, and the State Department of Education shall be notified of the treasurers of the school funds in the respective counties and independent district by the commissioners courts and presidents of school boards filing in said department copies of the bonds of said depositories to cover school funds; provided, that no commission shall hereafter be paid for receiving and disbursing school funds."

If the provisions of the charter of the city of Houston with reference to the election of a city depository and the manner in which the amount of bond he shall be required to give can be repealed in the manner attempted to be done by said Section 154a, then, certainly, that part of the city charter of the city of Houston has been repealed.

That general words of repeal, without a reference to the particular statute or statutes sought to be repealed, will operate a repeal, seems to be the established rule.

See Lewis' Sutherland on Statutory Construction, Vol. 1, Sec. 276 et seq.

In the case of Chalfant vs. Edwards, 176 Pa. St., 67, 34 Atl., 922, the Supreme Court of Pennsylvania said:

"Ordinarily it is true that a law will not operate to repeal a previous local act without some words indicative of such an intention. But when it is the duty of the Legislature to change an existing system because of some constitutional provision on the subject, and the law is passed for this purpose, introducing a new system which is general in its terms and evidently intended to provide a uniform system for all subjects to which it relates, no repealing words are necessary."

In the case of State vs. Slover, 134 Mo., 10, 31 S. W., 1054, 34 S. W., 1102, the Supreme Court of the State of Missouri said:

"The provision for a general law was not intended to repeal special local acts then in existence. Unquestionably it was and is the design of the Constitution to rid the State of the evil of a multitude of local and special laws and to adopt general laws whenever it is feasible, but general subsequent laws have not heretofore been construed as repealing the various special laws and charters of this State, unless appropriate language has been used for that purpose."

See Lewis' Sutherland on Statutory Construction, Vol. 1, sec. 278.

There is no rule of law which prohibits the repeal of a special act by a general one, nor is there any principle forbidding such repeal without the use of words declarative of that intent. The question is always one of intention, and the purpose to abrogate the particular enactment by a later general statute is sufficiently manifested when the provisions of both cannot stand together.

Lewis' Sutherland on Statutory Construction, Vol. 1, Sec. 276.

A special and local law provided that certain property should be subject to taxation; a subsequent general one, that all such property should be exempt, held to repeal all local or special acts inconsistent with its provisions. It was held that the special act was repealed.

New Brunswick vs. Williamson, 44 N. J. L., 165.
See also Paush vs. Guerrard, 67 Ga., 319.
Mechanics and Traders Bank vs. Bridges, 30 N. J. L., 112.

Special or local laws will be repealed by general laws when the intention to do so is manifest, as where the latter are intended to establish uniform rules for the whole State.

State vs. Pearcy. 44 Mo., 159.
People vs. Miner, 47 Ill., 33.
People vs. Furman, 85 Mich., 110, 48 N. W., 169.
Buffalo vs. Neal, 86 Hun., 76, 33 N. Y. S., 346.
People vs. Brady, 49 Appeals Div., 238, 63 N. Y. S., 145.
Barker vs. Floyd, 61 Appeals Div., 92, 60 N. Y. S., 1109.
Frain vs. Lancaster County, 171 Pa. St., 436, 33 Atl., 339.
Hadwin vs. Hurley, 10 Pa. Supr. Ct., 104.
People vs. Dalton, 158 N. Y., 175, 52 N. E., 1113.

The ordinary rule of construction is that where there is an irreconcilable conflict between two statutes on the same subject, effect will be given to that which was the last declaration of the will of the Legislature on the particular subject of legislation.

It would be difficult to conceive of words more indicative of the intention of the Legislature to repeal than the repealing language used in Section 154a, enacted by the Thirty-first Legislature, 1909.

We, therefore, conclude that the manner of the selection of the city treasurer or depository, as well as the determination of the amount of bond which shall be given by such treasurer or depository, should be and is controlled by the general law—the method of the selection of the treasurer or depository to be governed as prescribed by Section 154a of Chapter 12 of Acts of 1909, and the amount of bond which shall be required to be governed by Article 2771, Revised Statutes, 1911, that is in double the estimated amount of the receipts coming annually into his hands, which, of course, would include the State apportionment transmitted by the State Department, as well as funds derived from local taxation for school purposes.

While the general statute does not seem to require that the State Superintendent approve the bonds of the treasurers or depositories of independent school districts or of the treasurers of cities having assumed control of their schools, it does require that the State Superintendent shall be furnished with a copy of said bond by the president of the school board, the purpose of such provision being evidently and conclusively to enable the State Superintendent to determine that the funds transmitted shall be amply protected in accordance with said State law. You should, therefore, in our opinion, withhold the transmission of the State apportionment until such time as a city treasurer or city depository has been selected in the manner, and has given bond in the amount, required by the General Laws of the State.

Where the statute fixes the amount of bond a treasurer shall be required to give, no authority, State or local, could nullify such requirement, regardless of the amount of funds such treasurer may have on hand at any one time.

Yours very truly,

W. M. HARRIS,

Assistant Attorney General.

PUBLIC SCHOOL FUNDS—COUNTY TREASURERS—WORDS AND PHRASES—COUNTY DEPOSITORY.

Revised Civil Statutes, Articles 2745 and 2755, 2767 and 2773.

1. The amount of money which a school district shall receive, whether independent or otherwise, is apportioned to it by the proper authorities under the laws of this State.

2. The entire school money belonging to a district, whether it arises from the State or from the county or whether the district be common school district or be an independent school district must be apportioned to the district, and when *once apportioned becomes the property of the district to be expended* only for that district's obligations.

3. A county depository has no authority to pay the obligations of one district out of the funds belonging to another district and if it does do so

it becomes responsible to the district whose funds it has thus converted and may be made to respond for the conversion of such.

4. "Apportion" means to divide and assign in just proportion or according to some rule.

February 10, 1916.

Hon. H. D. Garrett, County Attorney, Emory, Texas.

MY DEAR SIR: Your letter of the 7th instant is in substance as follows:

"On October 25th your Department rendered an opinion to Hon. John L. Wroe, Secretary to the Governor, in the second part of which you held that a county depository for school funds can not pay out money that has been apportioned to one district on vouchers or warrants for salaries of school teachers for another district.

"Now what I desire to know does this ruling apply to county and State apportionment.

"Is the county depository authorized to pay school teachers vouchers drawn against one district out of funds that may be on hand to the credit of and apportioned to another district?

"As I understand your former ruling above referred to it holds that this can not be done, am I correct in the construction of this ruling? If so, has the ruling been overruled?"

We beg to advise you that your construction of the opinion referred to is the correct one and that the opinion has not been in any respect overruled. The ruling as made applies to both county and State apportionment, and the county depository is not authorized to pay school teachers vouchers drawn against one district out of funds that may be on hand to the credit of and apportioned to another district. It is unnecessary for us to reiterate the ruling made in the opinion to which you refer, which is Departmental Opinion No. 1544, and I enclose you a copy of that opinion, rather than to reincorporate its terms in this communication.

If you will refer to Article 2755, Vernon's Sayles' Revised Civil Statutes, you will find the following provision:

"The county superintendent or county judge who is ex officio county superintendent upon receipt of the certificate issued by the board of education for the State fund belonging to the county shall apportion the same to the several school districts, not including the independent school districts, making a pro rata distribution as per the scholastic census, and shall at the same time apportion the income arising from the county school fund to all the school districts, including the independent school districts of the county, making a pro rata distribution as per scholastic census."

Under Article 2745 the State fund belonging to independent school districts is given to them by vouchers or warrants on the State Treasurer and therefore it is not necessary that the apportionment be made by the local authorities, hence the exception of independent school districts from the provisions of Article 2755, but by reference to the above quotation from Article 2755 you will observe that the general State fund going to other districts is apportioned by the local authorities and at the same time all other school funds owned by the county arising from income from the county's school fund is appor-

tioned to all school districts, including the independent school districts. So, taking the two articles together, it is entirely clear that the amount of money which each school district shall receive, whether independent or otherwise, is apportioned to it by the proper authority.

In construing the statute referred to the Court of Civil Appeals in the case of Oge vs. Froeboese, 66 S. W., 688, said:

"It was his (the county superintendent's) duty undoubtedly under the above law to apportion a pro rata share of the income arising from the county school fund to the independent school district for the city of San Antonio and when he failed and refused to so apportion said income he could in a proper proceeding by the proper parties have been compelled to comply with the law."

In the case of Lawhon vs. Hawes, 65 S. W., 48, the Court of Civil Appeals, in referring to what is now Article 2755, as amended, said:

"In Article 3934 it is made the duty of the county judge when he receives the certificate from the board of education for the State fund belonging to his county to apportion it to the several school districts of the county. The law is mandatory on the subject, no discretion being lodged in the county superintendent."

From these authorities and statutes it is settled beyond cavil or debate that the entire school money belonging to a district, whether it arises from the State or from the county, and whether the district be a common school district or an independent school district must be apportioned to the district. The word "apportion" means to divide and assign in just proportion or according to some rule.

Century Dictionary Encyclopedia, Vol. 1, 275.

This definition has been adopted by the courts generally as a correct one.

Fisher vs. Charter Oak Life Insurance Co., 14, Abbott, N. C., 32.
Robbins vs. Smith, 73 N. E., 151.
G. C. & F. Ry. Co. vs. Cushney, 95 Texas, 309.

This meaning and the purpose of the apportionment is made clear, however, by reference to other statutes which we have referred to in the copy of opinion enclosed you. For example, it is made the duty of the treasurer to keep a separate account of each district, showing the amount apportioned to it and the amount paid out.

Article 2773 makes it the duty of the treasurer having charge of the school funds to keep a full, separate and itemized account of each of the different classes of school funds and file with the State Superintendent an itemized account of the receipts and disbursements. Other articles of the statute provide for what purpose school funds may be expended. We may say that Article 2767 makes those terms of law which are made to apply to the treasurers of school funds apply to depositories also.

Considering all the statutes together and following their plain, common sense meaning, it is too clear for argument that the entire

fund belonging to a district, from whatever source it may arise, must be apportioned to it and when once apportioned become the property of that district, to be expended only for that district's obligations; it is equally clear that a county depository has no authority to pay the obligations of one district out of the funds belonging to another district. If it does do so it becomes responsible to the district whose funds it thus converted, and may be made to respond for the conversion by suit.

We desire that this opinion be read in connection with the copy of opinion No. 1544 enclosed herewith.*

Yours very truly,

C. M. CURETON,

First Assistant Attorney General.

SCHOOLS—TEACHERS' APPOINTMENT COMMITTEE—CONSTRUCTION OF STATUTE.

1. Act of Thirty-fourth Legislature (Chapter 108, page 163) has no application to the teachers' committee and it is not compelled to pay the license fee or obtain a license and execute the bond or in any other way comply with provisions of the act.

July 16, 1915.

Dr. W. J. Battle, Acting President State University, Austin, Texas.

DEAR SIR: In your letter of the 14th instant, addressed to this Department, you state that for some years the University has maintained a Teachers' Appointment Committee whose function is to assist students of the University in securing positions as teachers; in other words, as stated in the *Bulletin* issued by the University, at page 362, it acts as an intermediary between school authorities in search of teachers and students in search of positions, helping each to find the other. The expense of the committee is paid from the general appropriation for the support and maintenance of the University, except a charge of $1.50 for registration (this charge being found necessary in order to insure good faith on the part of the applicant and to prevent the committee from being overrun with unnecessary and idle applications).

You call our attention to an act of the Thirty-fourth Legislature, found at page 163 of the General Laws, and ask whether or not this Teachers' Appointment Committee of the University is a private employment agency, such as is comprehended by this act.

I do not think so, and I will state my reosons for this view.

The University of Texas is essentially a part of the State Government and its every activity is of a public nature, is governmental and is in no sense of a private or personal nature. This particular department of the University work, that is, the creation of a commit-

*See opinion to Hon. Jno. L. Wroe, Secretary to the Governor, on page 613.

tee to act as intermediary between students of the University and the various school authorities desiring competent teachers, seems to have evolved from the very necessities and proprieties of the situation, and was evidently in response to a demand for the extension to the general public of the benefits of University education beyond the mere acquisition of knowledge on the part of its students.

The Thirty-fourth Legislature, in its appropriation for the support and maintenance of the University, recognized the benefits of the work of this committee and its public nature by making a special appropriation for its support as a part of the general appropriation for the support and maintenance of the University. I find the following item among the items for current expenses for the Main University: $900 for each of the two years, 1916-1917, for "Committee on Teachers."

The situation may be simplified by stating that the State of Texas, through its Teachers' Appointment Committee, undertakes, under the terms of its operation, to bring those students who desire to teach, in touch with school authorities who desire the services of teachers. This work is public. It is governmental in its nature, and not for private profit. It is limited in its scope, in that its work is confined to the giving of aid to students of the University, and is in no sense an agency serving the general public.

Section 1 of the act in question, being Chapter 108 of the Acts of the Regular Session of the Thirty-fourth Legislature, page 163, reads as follows:

"No person, firm or corporation in this State shall open, operate or maintain a private employment agency for hire, or where a fee is charged to either applicant for employment or for help, without first obtaining a license for the same from the Commissioner of Labor Statistics, and such license fee shall be $25 (twenty-five dollars). Such license shall be of force for one year, but may be renewed from year to year upon the payment of a fee of $25 (twenty-five dollars) for each renewal. Every license shall contain a designation of the city, street and number of the building in which the licensed party conducts said employment agencies. The license, together with a copy of this act, shall be posted in a conspicuous place in each and every employment agency. The Commissioner of Labor Statistics shall require with each application for a license a good and sufficient bond in the penal, sum of five hundred ($500) dollars, to be approved by said Commissioner, and conditioned that the obligor will not violate any of the duties, terms, conditions, provisions or requirements of this act. The said Commissioner of Labor Statistics is authorized to cause an action to be brought on said bond in the name of the State for any violation of any of its conditions, and may revoke, upon a full hearing, any license whenever, in his judgment, the party licensed shall have violated any of the provisions of this act."

It will be seen that the act applies to persons, firms and corporations who operate a private employment agency for hire. A private employment agency comprehended by this act is one for private profit, serving, generally persons in whatever avenue or activity of life, who may seek employment, and can have no application whatever to an arm of the State government such as the Teachers' Appointment Committee of the University.

It will be seen further that a license fee of $25 per annum is required to be paid and a license is required to be issued as authority for any person, firm or corporation to pursue the business of a private employment agency.

If the Teachers' Appointment Committee of the University is compelled to pay this license fee, we have the rather absurd procedure of the State appropriating money to this committee to be paid to the Commissioner of Labor Statistics for a license to be authorized to act at all, and the money in turn to be paid by the Commissioner of Labor Statistics back into the treasury. Certainly, such useless and needless circumlocution was never contemplated.

Again, it is provided that the Commissioner of Labor Statistics shall require of each applicant for license a good and sufficient bond in the sum of $500, and authorizes suit to be brought on said bond in the name of the State for any violation of its conditions. It cannot be said that this is an official bond. The Teachers' Committee is performing a public function, acting for the State and has no authority to pledge the credit of the State in the execution of such a bond; again the anomalous situation would be presented if a suit is brought by the State on this bond to all intents and purposes of the State bringing suit against itself.

We believe these different considerations clearly illustrate the correctness of the proposition, that the act in question has no application to the Teachers' Appointment Committee of the University.

We therefore express it as our opinion, and advise you accordingly, that the act in question has no application to the Teachers' Committee and that it is not compelled to pay the license fee or obtain a license and execute the bond or in any other way to comply with the provisions of the act.

Yours very truly,

B. F. LOONEY,
Attorney General.

SCHOOLS—STATE NORMAL COLLEGES—TEACHERS' CERTIFICATES.

The State Normal Colleges of this State have no authority to issue State normal freshman certificates. State normal sophomore certificates, State normal junior certificates, and State normal permanent professional certificates, but such institutions are limited in the issuance of certificates to second grade certificates, first grade certificates and diplomas which rank as State permanent certificates.

Articles 2797, 2799 and 2805 of the Revised Statutes of 1911.

Articles 2690g, 2690i and 2804a of Vernon's Sayles' Texas Civil Statutes.

March 23, 1915.

Hon. W. H. Bruce, President North Texas State Normal College, Denton, Texas.

DEAR SIR: The Attorney General is in receipt of a letter from Mr. A. B. Martin, of the firm of Martin, Kinder, Russell & Zimmer-

man, attorneys of Plainview, Texas, relative to the recommendations by the four presidents of the State normal schools to the State Normal School Board of Regents as to the character of certificates to be issued by such schools. Mr. Martin encloses a letter written by you to the Hon. Sam Sparks bearing upon this subject and also a copy of each of the four certificates proposed to be issued by the normals, and also a copy of the minutes of the meeting of the Board of Regents held at Austin, Texas, March 3, 1915, embodying the recommendations of the presidents. Mr. Martin's letter is as follows:

"At a recent meeting of the State Normal School Board of Regents held at Austin, Texas, at the request of Prof. Bruce of the North Texas State Normal College, the Board of Regents passed an order under Article 2690i, Vernon's Sayles' Statutes authorizing the issuance of four classes of certificates by the four normal schools of the State to be known respectively as State Normal Freshman Certificate, State Normal Sophomore Certificate, State Normal Junior Certificate and State Normal Permanent Professional Certificate to be effective when an opinion by you was filed, advising that this would not in any manner conflict with any State law upon the subject and would not in any manner jeopardize the rights of the holders of such certificates.

"In this connection we beg to call your attention to Articles 2804a and 2805 especially, and to the further fact that the law in limiting and defining the rights of the holders of the different certificates does not refer *eo nomine* to the certificates hereinabove mentioned. The question that occurred to the writer was, that since the different classes of certificates had been designated by statutes and the rights and duties of the holders of same being regulated by statute with reference to these certificates only, that the issuance of another and different certificate from that designated and named in the general law upon the subject, having for its basis other and different subjects and conditions, would in some manner, abridge the rights of the holders of same and, at least, lead to confusion and uncertainty.

"We are acompanying this letter with a copy of the minutes of said meeting with the subjects properly underscored that pertain to this inquiry along with a form of such certificates as made out by Professor Bruce, together with the original letter of request for this order, all of which may be of service to you in making up your opinion. If this request for an opinion is not full enough, advise in what particular and we will supplement same with any additional information requested. It might expedite matters to write direct to Professor W. H. Bruce, Denton, Texas, who has all the needed data at hand."

The recommendation's of the presidents of the normals, as copied from their minutes, are as follows:

"We recommend to the Board of Regents that the certificates issued hereafter by the State normal schools be designated according to the order of the year or course of study completed by a student in the school as follows:

State Normal Freshman Certificate.
State Normal Sophomore Certificate.
State Normal Junior Certificate.
State Normal Permanent Professional Certificate.

"The Junior Certificate and the Permanent Professional Certificate will also state which one of the seven courses the student pursued or completed in the school.

"We recommend also that the certificates issued by the State Normal Schools be signed by the president of the normal school from which the student receives it, and by the Superintendent of Public Instruction and the certificate to have the seal of the Department of Education thereon. We

recommend also that the diploma issued to those graduating at the end of the four years course be signed by the president of the State Normal Board of Regents, the president of the normal school from which the student graduates, and that such diploma shall have the seal of its school thereon.

"It was moved, seconded and adopted, that the recommendations of the presidents as submitted be adopted, subject to an approving opinion from the Attorney General to the effect that said recommendations were in conformity with the State laws, said recommendations to become effective when Attorney General approved same as being in conformity with the State laws."

For convenience, we also copy the proposed certificates to be issued by the normal schools, which are as follows:

"STATE DEPARTMENT OF EDUCATION, AUSTIN, TEXAS.
"State Normal Freshman Certificate.

"The Holder Hereof,——————, having furnished satisfactory evidence of good moral character, having completed the Course of Study prescribed for the First Year, or Freshman Class, in the North Texas State Normal College, located at Denton, Texas, and having given evidence of professional ability, is granted this

"State Normal Freshman Certificate

and is authorized to contract to teach in the elementary grades of the public schools in Texas.

"This certificate is valid from the date of issuance until August 31, 192—, the sixth anniversary of the thirty-first day of August of the calendar year in which it was issued, unless canceled by lawful authority.

"Witness our hands, and the seal of the State Department of Education, at Austin, Texas, this———day of——————, A. D. 19—.

"..
"State Superintendent of Public Instruction.
"..
"President North Texas State Normal College."

"STATE DEPARTMENT OF EDUCATION, AUSTIN, TEXAS.
"State Normal Sophomore Certificate.

"The Holder Hereof,——————, having furnished satisfactory evidence of good moral character, having completed the Course of Study prescribed for the Second Year, or Sophomore Class, in the North Texas State Normal College, located at Denton, Texas, and having given evidence of professional ability, is granted this

"State Normal Sophomore Certificate

and is authorized to contract to teach in any of the grades of the public schools of Texas.

"This certificate is valid from the date of issuance until August 31, 192—, the sixth anniversary of the thirty-first day of August of the calendar year in which it was issued, unless canceled by lawful authority.

"Witness our hands, and the seal of the State Department of Education, at Austin, Texas, this———day of——————, A. D. 19—.

"..
"State Superintendent of Public Instruction.
"..
"President North Texas State Normal College."

"STATE DEPARTMENT OF EDUCATION, AUSTIN, TEXAS.
"State Normal Junior Certificate.

"The Holder Hereof,——————, having furnished satisfactory evi-

dence of good moral character, having completed the Course of Study prescribed for the Third Year, or Junior Class in the————Course in the North Texas State Normal College, located at Denton, Texas, and having given evidence of professional ability, is granted this

"State Normal Junior Certificate

and is authorized to contract to teach in any of the grades of the public schools of Texas.

"This certificate is valid from the date of issuance until August 31, 192—, the seventh anniversary of the thirty-first day of August of the calendar year in which it was issued, unless canceled by lawful authority.

"Witness our hands, and the seal of the State Department of Education, at Austin, Texas, this———day of—————, A. D. 19—.

"..

"State Superintendent of Public Instruction.

"..

"President North Texas State Normal College."

"STATE DEPARTMENT OF EDUCATION, AUSTIN, TEXAS.

"State Normal Permanent Professional Certificate.

"The Holder Hereof,——————, having furnished satisfactory evidence of good moral character, having completed the Course of Study prescribed for the Fourth Year or Senior Class, in the————Course in the North Texas State Normal College, located at Denton, Texas, and having given evidence of professional ability, is granted this

"State Normal Permanent Professional Certificate

and is authorized to contract to teach in any of the grades of the public schools of Texas.

"This certificate is valid in the State of Texas during the life of the holder unless canceled by lawful authority.

"Witness our hands, and the seal of the State Department of Education, at Austin, Texas, this———day of—————, A. D. 19—.

"..

"State Superintendent of Public Instruction.

"..

"President North Texas State Normal College."

To determine the validity of the certificates proposed to be issued, it is necessary to consider all the statutes of this State applicable to the issuance of certificates authorizing the holders thereof to teach in the public schools of this State, and also to determine whether or not the powers given to the State Normal School Board of Regents over the issuance of certificates supersede or are paramount to the statutes of this State fixing the standards of proficiency, classifying certificates and describing what classes of certificates may be issued by the various authorities authorized by statute to issue same.

It may become necessary in the discussion of this subject, for convenience, to quote largely from the statutes, but in this we will endeavor to quote as briefly as possible, having in view a full understanding of the subject without reference to the statute in reading the opinion.

The authority vested in the State Normal School Board of Regents, which, for brevity, will hereinafter be styled "Board of Regents," is found in Sections 7 and 9 of Chapter 5, Acts of 1911, and are brought

forward in Vernon's Sayles' Civil Statutes as Articles 2690g and 2690i and are as follows:

"Article 2690g. The Board of Regents herein provided for shall have authority to determine what departments of instruction shall be maintained in the State normal schools for white teachers, and what subjects of study shall be pursued in each departments providing that said board shall not change departments of instruction provided by law; provided, that no department shall be established for the support of which no provision has been made by the Legislature. The board shall also have authority to fix the rate of incidental fees to be paid by students attending the State normal schools for white teachers, and to prescribe rules for the collection of such fees and for the disbursement of such funds.

"Article 2690i. The Board of Regents shall have authority to determine the conditions on which students may be admitted to the State normal schools, and what grades of certificates may be issued to students attending said schools, and on what conditions certificates and diplomas may be issued to students, and by what authority said certificates and diplomas shall be signed."

It will be noted that under Section 9 the Board of Regents is given power to determine what grades of certificates may be issued to students and on what conditions they may be issued. It will also be noted that the Act of 1911 creating and prescribing the duties of the Board of Regents nowhere defines the grades of certificates to be issued, nor does it prescribe the standards of proficiency for same.

Under the statutes relating to the various normals of the State, it is provided that diplomas and teachers' certificates of such normal colleges shall authorize the holders to teach in the public schools of Texas, as provided in Chapter 14 of this title, being Title 48 of the Revised Civil Statutes of this State.

By reference to Chapter 14, above referred to, we find the rights and privileges accruing to those holding diplomas or certificates from normal colleges to be set out in Article 2805 contained therein, which article reads as follows:

"A teacher holding a diploma from a Texas State normal college may teach in the public schools of this State during good behavior and such diploma shall rank as a State permanent certificate. A teacher holding a first grade certificate from a Texas State normal college may teach in the public schools of this State until the sixth anniversary of the thirty-first day of August of the calendar year in which the certificate was issued, and a teacher holding a second grade certificate from a Texas State normal college may teach in the public schools of this State until the fourth anniversary of the thirty-first day of August of the calendar year in which the certificate was issued. A teacher holding a diploma from the Peabody Normal College, at Nashville, Tennessee, shall be entitled upon recording the diploma in the State Department of Education, to receive therefrom a State permanent certificate valid during the life of the holder, unless canceled by lawful authority."

This article does not undertake to define a first grade certificate nor a second grade certificate, and we must therefore look elsewhere in the statute to determine the standards of proficiency and the subjects necessary to be taken by the applicant before he is entitled to receive either grade. Certificates authorizing the holders thereof to

teach in the public schools of this State, other than city and kindergarten certificates, which it is not necessary here to discuss, are of four classes, as fixed by Article 2797 of the Resived Civil Statutes as follows:

PERMANENT CERTIFICATES.

(a) A State permanent certificate.
(b) A State permanent primary certificate.

TEMPORARY CERTIFICATES.

(a) A second grade certificate.
(b) A first grade certificate.

Article 2799 prescribes the subjects in which the applicant must be examined and the grade that he must make therein in order that he may be granted a certificate of the first or second grades. Then follows other articles relating to the building to higher grade certificates.

Article 2804a provides as follows:

"Article 2804a. The holder of a second grade certificate or of a permanent primary certificate shall be eligible to contract to teach in only the elementary grades of the public schools of Texas; that is, the grades below the high school. The holder of a State first grade certificate, or a State permanent certificate shall be eligible to contract to teach in any public free school in Texas."

It is a general rule of construction that statutes in *pari materia* should be construed together and as though they were one and the same Act of the Legislature.

Conley vs. Daughters of the Republic, 156 S. W., 197.
City of Marshall vs. Board of Managers, 127 S. W., 1086.

Applying this rule we are of the opinion that Article 2690g and 2690i should be read in connection with and construed as though they were a part of Articles 2805 and 2797 et seq. of the Revised Statutes, and when so done we reach the conclusion that the authority granted the Board of Regents in Article 2690i is to determine upon what conditions and under what circumstances the grades of certificates authorized by the articles last named may be issued to students of the State normal schools, and therefore that the only certificates authorized to be issued by such normal schools are first and second grade certificates. together with the diploma upon the completion of the course prescribed that shall rank as a State permanent certificate.

To hold otherwise would be tc grant to the Board of Regents the authority to enact rules paramount to the statutes of this State, which would be, in effect, legislation on the part of such Board, the right to enact which, to our minds, has not been, if indeed it could be, delegated to such Board by the Legislature of this State.

Mitchell vs. Winnek et al., 49 Pac., 579.

From the various certificates copied above, proposed to be issued by the normals, we note that the lives thereof are as follows:

State Normal Freshman Certificate valid from date of issuance until the sixth anniversary of the thirty-first day of August of the year in which it was issued;

State Normal Sophomore Certificate valid until the sixth anniversary of the thirty-first day of August of the year in which it was issued;

State Normal Junior Certificate valid until the seventh anniversary of the thirty-first day of August of the year in which it was issued; and,

State Normal Permanent Professional Certificate valid during the life of the holder.

If we are correct in the conclusion above reached, that the certificates issued by the normal schools of this State must be confined to those authorized by Article 2805, then the lives of such certificates must conform to the provisions of that article; that is to say, the life of a first grade certificate is until the sixth anniversary of the thirty-first day of August of the year in which it was issued, and the life of a second grade certificate is until the fourth anniversary of the thirty-first day of August of the year in which it was issued.

We are not familiar with, nor have we before us, any publication giving the curricula of the various State normal schools of Texas, but we assume, from the statement in the State Normal Freshman Certificate that the authority granted therein is to teach only in the elementary grades, that the course prescribed for the freshman year in the normal covers only those subjects required to be examined for a second grade certificate, and, likewise, from a reading of the remaining three certificates, that the subjects for the sophomore and junior years cover all those prescribed for first grade certificates, and, of course, those for the senior year cover those prescribed for a permanent certificate. Therefore, the life of the freshman certificate would be limited to four years, and the lives of the sophomore and junior certificates would be limited to six years.

We are therefore of the opinion, and so advise you, that the only certificates authorized to be issued by the State normal colleges are first and second grade certificates, together with the diploma which shall rank as a State Permanent Certificate, and that the Board of Regents would have no authority to issue the certificate contemplated by the resolution adopted and quoted hereinabove.

With respect, I am

Yours very truly,

C. W. TAYLOR,

Assistant Attorney General.

SCHOOL TRUSTEE—SCHOOL DISTRICTS—DEPOSITORIES—SCHOOL TEACHERS—INTEREST.

Vernon's Sayles' Revised Statutes, Articles 2824, 2745, 2755, 2769, 2773, 2772, 2770 and 2826.

1. School trustees have no authority to pay a teacher for this year's service out of next year's funds.

2. The depository cannot pay the vouchers of one school district out of funds apportioned to another district.

3. Vouchers or warrants for salaries of school teachers cannot lawfully be made interest bearing.

4. A depository is liable for paying out funds apportioned to one district, or checks issued for services in another district.

October 25, 1916.

Hon. John L. Wroe, Secretary to the Governor, Capitol.

MY DEAR SIR: The questions in answer to which you request the opinion of this Department are contained in the letter from Mr. J. P. Banks of Kirbyville. So much thereof as it is necessary for us to consider is as follows:

"I am asking you for some information pertaining to the school funds and whether any part of the apportionment, can be applied to a private school. To make it plain, we have a public school for a period of eight months, and then decide to have one month private school and the collections do not pay the salaries of the teachers for the last month, have the trustees in a common district the power to give voucher covering same to be paid out of the next year's apportionment, drawn by the retiring board, and I refuse to recognize the legality of the payment.

"And I will appreciate, also, if you will advise me if the county superintendent, or the depository has the right to use the money apportioned to the children in one school district for the payment of the teachers in another. For instance the last two dollars, apportioned for district No. 14 was used to pay the per capita of eight dollars in other districts and the vouchers in No. 14, for this apportionment is not paid and is interest bearing. And I want to know if the trustees should pay this interest, and the one dollar that has not been received by District No. 14, or is the depository responsible for paying out funds belonging to this district."

The interrogatories propounded in this letter are in substance as follows:

1. Have the trustees of a common school district authority to give a voucher to a teacher on this year's service or salary to be paid out of next year's fund?

2. Has the depository authority to use the money apportioned for one school district in the payment of vouchers of the teacher in another school district?

3. May school vouchers or warrants be made interest bearing?

4. Is a depository responsible for paying out funds belonging to one district in payment of vouchers issued to teachers in another district?

We will consider these questions in the order shown.

Vernon's Sayles' Revised Statutes, Article 2824, after setting forth the authority and powers of school trustees concludes with this sentence:

"Provided that trustees in making contracts with teachers shall not create a deficiency against the district."

In the case of Collier vs. Peacock, 93 Texas, 255; 54 S. W., 1025, the Supreme Court of this State held that school trustees cannot contracts debts in the employment of teachers to an amount greater than the school fund apportioned the district for each particular year, that any debt contracted greater than that is a violation of the law and constitutes no claim against the district; that trustees can expend the part set apart to the district, but cannot contract a debt against the funds for future years, and that the school fund for one year cannot be used to pay off the debt of another year.

Collier vs. Peacock, supra.
Collier vs. Peacock, 65 S. W., 756.

The case just cited was passed upon by the Supreme Court of the State and by the Court of Civil Appeals, in harmony with the Supreme Court. The facts briefly were as follows:

Wesley Peacock sued W. W. Collier, county treasurer, in the District court of Uvalde County, alleging in substance that on the fourth day of September, 1893, he held a first grade certificate as a teacher in the free schools of Texas and on that date entered into a written contract with the school trustees of District No. 1, Uvalde County, by which he agreed to teach the school in that district for nine months, at a salary of $125.00 a month. The plaintiff taught the school for eight months and was paid his salary for each month except the last month, for which he received a voucher only. This voucher was duly issued by the trustees and approved by the county judge, as then provided by law. The approval of the county judge was as follows:

"Approved for $125 to be paid out of any funds in the county treasury belonging to school District No. 1, Uvalde County, Texas, for the current year, 1893-94."

Afterwards in 1899 this voucher was approved by the then county judge, as follows:

"Approved, and the country treasurer of Uvalde county is hereby ordered to pay this voucher out of any funds in his hands apportioned to School District No. 1, Uvalde County."

The issue made, as stated by the Court of Civil Appeals in certifying the same to the Supreme Court, was as follows:

"It appears from the evidence that the trustees of School District No. 1, Uvalde County, had entered into a contract with appellee to pay him $125 more than the school funds for the years 1893 and 1894 proved to be; and he now seeks to subject to his claim the surplus of the school funds of said district for the years 1898 and 1899."

The Supreme Court of the State and the Court of Civil Appeals on

authority of the action of the Supreme Court, held that this could not be done. The Supreme Court, among other things, said:

"But the trustees were not authorized to contract any debt which would cause a deficiency in the school fund of the district. In other words, they could not contract debts in the employment of teachers to an amount greater than the school fund apportioned to that district for that scholastic year. This limitation upon the power of the trustees in making the contract with the teachers necessarily limits the payment of the debts that might be contracted to the amount of the fund which belongs to the district for that year, and any debt contracted greater than that would be a violation of the law and constitute no claim against the district," etc.

In answer to the first question, therefore, you are advised that the school trustees have no authority to give a voucher payable out of next year's funds to a teacher for doing this year's work, and any such voucher under the authority of the Supreme Court of this State is void.

The next question we answer in the negative and advise you that neither the county superintendent nor the depository have the right to use the money apportioned to one school district for the payment of teachers in another district. The authorities we have already cited settle the question, for the reason that the only money which the school trustees or superintendent are authorized to spend for the district is the money apportioned to that district. The school depositories are required to keep separate accounts with each district. So far as the State funds are concerned the warrants are drawn in favor of each particular district when the fund is remitted to them.

Revised Statutes, Article 2745.

The proper county officers are required to apportion the funds among the several districts according to provisions of law.

Revised Statutes, Article 2755.

This requirement of the statute is mandatory and must be performed.

Lawhon vs. Haas, 65 S. W., 49.
Webb County vs. Board of School Trustees, 95 Texas, 131.
Oge vs. Froebese, 66 S. W., 689.
Wester vs. Oge, 68 S. W., 1005.

Revised Statutes, Article 2769, makes it the duty of the treasurer to keep a separate account of each district showing the amount apportioned to and the amount paid out to each school district.

Revised Statutes, Article 2773, makes it the duty of the treasurer having charge of school funds to keep a full and separate and itemized account with each of the different classes of school funds and file with the State Superintendent an itemized report of the receipts and disbursements. We merely direct attention to this last named statute for the purpose of showing the care the Legislature has taken

to segregate and safeguard the individual school fund of each particular district.

Revised Statutes, Article 2772, sets forth in detail those things for which funds may be expended, and no mention is made therein of the right of one district to pay the salary of a teacher in another district.

Article 2770 declares that the balance unexpended to the credit of any district shall be credited over to the credit of such district for the next year; provided, however, that if any such balance shall exceed $5 per capita then the excess may be reapportioned to the school districts of the county. These several statutes taken and considered in connection with the authorities which we have cited in the previous portion of this opinion make it plain, we think, that neither county superintendent nor the depository have the right to use the money apportioned to one school district for the payment of teachers in another district and that in so doing they become personally liable for a misuse and misapplication of the funds and may be recovered against in a proper action.

In reply to the third question we beg to advise that neither a school district nor the trustees acting for it have the right to agree to or to pay interest on a teacher's voucher or to issue or pay an interest bearing voucher or certificate.

Revised Statutes, Article 2826. provides how a school teacher shall be paid for his services. The provision is as follows:

"The amount contracted by trustees to be paid a teacher shall be paid on a check drawn by a majority of the trustees on the county treasurer and approved by the county superintendent. The check shall in all instances be accompanied by the affidavit of the teacher that he is entitled to the amount specified in the check as compensation under his contract as teacher."

No authority is found in this statute nor in the other articles of the statute authorizing the trustees or the superintendent to make these checks interest bearing, or to agree to give an interest bearing voucher or check. It is elementary in this State that a board of school trustees is a creature of the statute and has only such powers as are conferred upon it and such implied powers as are necessary to execute the express powers.

Royse Independent School District vs. Reinhart, 159 S. W., 1010.
25 Amer. and Eng. Encyc. of Law, p. 56.

There being nothing in the statute authorizing school trustees to issue interest bearing checks or warrants in favor of teachers they are totally without that authority.

Auditorial Board vs. Arles, 15 Texas, 73.

This last case cited is exactly in point and conclusive of the question.

School districts are only quasi corporations and have limited power and authority, as suggested above.

25 Amer. and Eng. Encyc. of Law, p. 31.
Stratton vs. Commissioners Court, 137 S. W., 1177.

This class of quasi corporations, such as counties and townships, and in which we include school districts, under the authority cited, has no implied power to borrow money and issue negotiable securities.

Stratton vs. Commissioners Court, supra.

The rule is stated by a leading authority, as follows:

"In the absence of statutory authority the board has no power to issue warrants payable at a future date and bearing interest and warrants so issued are void and not enforcible. * * * School orders which by an endorsement on the back are made payable one year after date are orders to pay out of the funds which necessarily cannot be in the treasurer's hands until after the next levy, and in anticipation of the revenues of the school district for the ensuing year, and as such are prohibited by statute. * * * The officers of a school district have no power to borrow money, except by issuing bonds and selling the same in the manner provided by statute, and the officers cannot circumvent the statute by issuing warrants and selling them and investing the proceeds.

30 Am. and Eng. Ency. of Law, p. 95.
District No. 2 vs. Stough, 4 Neb., 357.
Markey vs. School District No. 18, 58 Neb.. 479.
Kellogg vs. School District No. 10, 13 Okla., 285.
Coler vs. Sterling, 15 S. Dak., 415.
Scott vs. School Directors, 103 Wis., 280.
Glidden vs. Hopkins, 47 Ill., 525.

The mere fact that the money may not have been collected at the time the check or voucher is issued in favor of the teacher does not entitled the teacher to interest between that date and the time when the check may be cashed. The school district does not contract to pay money, but to deliver a check or voucher for the services, which will in due course of time be paid by the treasurer or depository, and in the absence of a statute such check or voucher will not bear and cannot be made to bear interest.

The State of Texas vs. Wilson, 71 Texas, 291.

The fourth question we have already answered, to the effect that if the depository pays out funds belonging to one district upon vouchers issued in favor of one who teaches in another district, or under any other circumstances which amount to a misapplication or misuse of the funds then such depository is liable at the suit of the district whose funds have been thus dissipated.

Yours very truly.

C. M. CURETON,
First Assistant Attorney General.

OPINIONS ON TAXATION.

TAXATION—BANK DEPOSITS—WORDS AND PHRASES.

October 15, 1914.

Hon. Robert L. Warren, State Senator, Capitol.

DEAR SIR: In your communication of even date you submit the following and request this Department's opinion thereon:

"A party has in bank on January 1, $5000 in money to his credit, and owes $5,000 in taxes which are then due. The bank has instructions from him which were received early in December to pay said taxes during the absence of said party, and the bank having failed to pay same with said money before the first day of January, 1914, said money was therefore to his credit on said date, and the same was not paid in liquidation of said taxes until after January 1, 1914, but was paid during said month of January.

"* * * Is said money or not subject to taxation for the year 1914?"

We answer your inquiry in the affirmative.

Article 7506, Revised Civil Statutes, 1911, provides, in part, as follows:

"The term 'money,' or, 'moneys,' wherever used in this title shall, besides money or moneys, include *every deposit* which any person owning the same or holding in trust and residing in this State, is *entitled to withdraw* in money on demand."

The $5,000 referred to was in the bank on January 1 to the credit of the depositor, and subject to any disposition he desired to make of the same, and his check therefor would have been honored by the bank subsequent to January 1. In the case of Campbell vs. Wiggins, 20 S. W. 733, the court held:

"Although a deposit subject to the sight check of the depositor is usually held to be nothing more than a debt against the bank, still it is regarded by the law of this State providing for the rendition of property for taxation as cash, and as such it is not subject to the set off by the liabilities of the taxpayer. This cannot be disproved by showing that as a matter of fact the bank did not have so much money in its vaults at the time, because sufficient funds of the bank may be on deposit in other banks to meet its draft for the entire amount, and under well known banking rules a percentage of the deposits is usually loaned to customers. Still, whenever the sight check of the depositor is presented, it must be paid, and, in ordinary business affairs, such deposits are treated as money; and the statute defines money as including "every deposit which any person owning the same or holding in trust, and residing in this State, is entitled to withdraw in money on demand. * * *"

It is, therefore, the opinion of this Department, and you are so advised, that the $5,000 being to the depositor's credit subsequent to January 1, is subject to taxation for the year 1914.

Yours truly,

B. F. LOONEY,
Attorney General.

TAXATION—INSTITUTIONS OF PUBLIC CHARITY.

EXEMPTIONS FROM TAXATION.

An act of the Legislature which attempts to define institutions of purely public charity as one which dispenses its 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 placed 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 provide homes for its helpless and dependent members and to educate and maintain the orphan of its deceased members or other persons, is an unwarranted attempt on the part of the Legislature to construe and alter the provisions of the Constitution, and is void.

The subsequent adoption of the constitutional provision does not validate or make operative an unconstitutional statute.

Section 2, Article 8, Constitution.

Section 6, Article 7507, Revised Statutes of 1911.

October 15, 1914.

Hon. W. P. Lane, Comptroller, Building.

DEAR SIR: You transmit to this Department a communication directed to you by Hon. R. L. Stennis, of Dallas, Texas, wherein the contention is made that by reason of the adoption in 1906 of an amendment to Section 2 of Article 8 of the Constitution, Subdivision 6 of Article 7507 of the Revised Civil Statutes of 1911 is made valid and operative and therefore the property belonging to the Masonic Lodge at Weatherford, Texas, is exempt from taxation, which contention, if correct, would of course involve the exemption from taxation of property belonging to all lodges within this State coming within the definition set out in the such Subdivision 6 of Article 7507 Revised Statutes of 1911. Mr. Stennis' letter is quite lengthy, and we will not set it out in full in this opinion.

It has been the ruling of this Department continuously, copies of which opinions you have, as they have been rendered to you in a majority of the cases. that property belonging to lodges in this State is not exempt from taxation under our laws for the reason that it does not belong to institutions of *purely public charity*. In this connection, we will quote a paragraph from Mr. Stennis' letter as follows:

"It is my understanding that neither your department nor the Attorney General's Department has ever contended that our lodge, under the above conditions, does not come within the definitions of an 'institution of purely public charity' as defined by the Legislature in the above section, but that it is contended that this part of the statute is unconstitutional. Such a construction would, in my opinion, be correct if it were not for the fact that the above amendment to the Constitution was adopted by the people under a law putting a particular construction on one of its provisions and under conditions that unquestionably show that the people intended this provision of the Constitution to mean just what the Legislature had declared that it should mean."

As seen from the above quotation from Mr. Stennis' letter, he would agree with the construction of this Department were it not for the fact that Section 2 of Article 8 of the Constiuion was amended

by a vote of the people, adopting such amendment in 1906, a date subsequent to the enactment by the Legislature of an amendment to Article 7507 by which amendment the Legislature undertook to define a *purely public charity*. So that the necessity of a discussion of whether or not organizations of like nature as that of Masonic bodies are purely public charities is obviated, and we will confine ourselves in this opinion to the question of whether or not the Act of the Legislature of 1905, attempting to define purely public charities, is made vital and operative by a subsequent amendment and ratification thereof by the people to the constitutional provision authorizing the Legislature to exempt certain property from taxation

Section 2 of Article 8 of the Constitution of 1876, prior to its amendment, read as follows:

"All occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax; but the Legislature, may, by general laws, exempt from taxation public property used for public purposes; actual places of religious worship; places of burial not held for private or corporate profit; all buildings used exclusively and owned by persons or associations or persons for school purposes (and the necessary furniture of all schools) and institutions of purely public charity; and all laws exempting property from taxation other than the property above mentioned, shall be void."

The amendment adopted to this section in 1906 and declared adopted January 7, 1907, reads as follows:

"All occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax; but the Legislature may, by general laws, exempt from taxation public property used for public purposes; actual places of religious worship; places of burial not held for private or corporate profit; all buildings used exclusively and owned by persons or associations of persons for school purposes and the necessary furniture of all schools, also the endowment funds of such institutions of learning and religion not used with a view to profit and when the same are invested in bonds or mortgages, or in land or other property which has been or shall hereafter be bought in by such institutions under foreclosure sales made to satisfy or protect such bonds or mortgages; that such exemption of such land and property shall continue only for two years after the purchase of the same at such sale by such institutions and no longer, and *institutions of purely public charity;* and all laws exempting property from taxation other than the property above mentioned shall be null and void."

It will be noted that the change made in this section by the amendment is confined to the insertion therein of the following:

"* * * also the endowment funds of such institutions of learning and religion not used with a view to profit and when the same are invested in bonds or mortgages, or in land or other property which has been and shall hereafter be bought in by such institutions under foreclosure sales made to satisfy or protect such bonds or mortgages; that such exemption of such land and property shall continue for only two years after the purchase of the same at such sale by such institutions and no longer. * * *"

And no alterations whatever was made in the clause in the Constitution of 1876 authorizing the Legislature to exempt from taxation institutions of purely public charity, so that, in our opinion, the force

of the contention made by Mr Stennis, if such contention be tenable at all, is weakened by the fact that the amendment to the Constitution adopted subsequent to the act of the Legislature, is not the authority for the Legislature to enact a statute exempting property belonging to *institutions of purely public charity.* Such authority existed before the amendment of 1906, and the ratification of such amendment, in our opinion, would not be a ratification of the acts of the Legislature passed in pursuance of this provision of the Constitution as it existed prior to the amendment. and particularly under those provisions thereof that were not amended.

Subsection 6 of Article 5065, Revised Statutes of 1895, (now Articles 7507 Revised Statutes of 1911). read as follows:

"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, and all moneys and credits appropriated solely to sustaining such institutions."

As amended (Chapter 127, Acts of 1905) such subsection reads as follows:

"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 institutions 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. An institution of purely public charity under this act is one which dispenses its 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 placed 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 will thus be seen that the Legislature by this amendment undertook to define and construe the term "purely public charity," and to that extent undertook to enlarge upon the provisions of the Constitution and to construe a limitation placed upon that body by the Constitution, and we will cite here some additional authorities and rules of construction in support of our former opinion as to the unconstitutionality of this provision.

During the First Called Session of the Thirty-third Legislature, this Department had before it for determination the constitutionality of the rule adopted by the House of Representatives wherein it undertook to define "an imperative public necessity" authorizing the suspension by a four-fifths vote of the rule that bills shall be read on three several days, under the provisions of Section 32 of Article 3 of the Constitution. The Legislature undertook by this rule to define *an imperative public necessity* to be *"only such condition or state of affairs which, if not immediately remedied, will cause great loss of life or property, and the Speaker shall entertain a motion to suspend the constitutional rule requiring bills to be read on three several*

days, unless it shall affirmatively appear that such condition or state of affairs do actually exist."

In holding that the Legislature was without authority to adopt such a ruling and that the same would be violative of the Constitution, this Department invoked the following rules of constitutional construction, based upon the authorities cited, and we quote from that opinion as follows:

"The general rule is that constitutional provisions are to be construed with reference to the ordinary meaning of the words used, and no forced or unnatural construction shall be put upon the words used by the framers of the Constitution.

Henry vs. Beacon, 52 Texas, 59.
Railway Co. vs. Houston Ry. Co., 90 Texas, 340.
Houston, etc., Ry. vs. State, 95 Texas, 507.

"It is also an elementary rule that the framers of the Constitution must be understood to have employed the words used in their natural sense and to have intended what they said, and we must therefore take and apply the plain language of the Constitution as we find it, and cannot add to the same words restricting the powers of the Legislature in order to prevent a fancied or real mischief.

Stockton vs. Montgomery, Dallam, 473.
Morton vs. Gordon, Dallam, 396.
Lindsey vs. State, 96 Texas, 586.
Keller vs. State, 87 S. W., 669.

"From the foregoing it follows that the Legislature has no authority by statutory enactment, rule or otherwise to alter, abridge or contrue any part or clause of the Constitution except when there is express authority so to do."

Davis vs. Davis, 34 Texas, 15.
Willis vs. Owens, 43 Texas, 41.
State vs. Moore, 57 Texas. 307.
Higgins vs. Bordages, 88 Texas, 458.
Snyder vs. B. Ind. Dist., 102 Texas, 4.

"It follows from the general rules suggested above, which are well sustained by authorities, that it is not within the power of the Legislature, through the rules governing its deliberations, to add to or take from or in any manner by express language or otherwise define what is meant by an imperative public necessity in such a manner that the general meaning of these terms will be in any way limited from the meaning intended to be expressed by the makers of the Constitution when it was written and by the voters of the State when they adopted the same."

And in the instant case, we adhere to the rules there invoked upon the authorities therein cited.

The provisions of Section 2 of Article 8 of the Constitution come more clearly, if possible, than any other provisions of the Constitution within the rule that a State Constitution is a limitation of the powers of the Legislature, for herein it is expressly provided that the Legislature may, by general laws, exempt certain property from taxation. The theory of our Constitution is that all property shall bear its just proportion of the burdens of government and any exemption therefrom must be strictly construed and any legislative construction of such constitutional limitation can be of little or no value for the reason that if such was permitted, then the Legislature could place its own construction upon any limitation placed on it by the Constitution, and the effect would be that the Legislature would have authority,

if it saw fit, to construe away the provisions of the Constitution and make its laws the sole authority in the State.

This question was before the court in the case of Maize vs. the State, 4 Ind., 342, in which case the court held:

"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, could not be entitled to much weight. 'To admit such an exposition as binding,' says a late writer, 'would be to permit the department restricted to do away with the very restriction imposed.' Smith's Comm., 441. Under our political economy and written Constitution, Blackstone's omnipotence of parliament is comparatively an empty figure of speech. Marbury vs. Madison, 1 Cranch, 137, 1 Kent's Comm., 426. The general assembly is a mere agent of the people intrusted with certain delegated powers. The Constitution is the letter of agency. In its action the assembly is governed *sub modo* by the same rules as other agents; whenever it transcends its authority, its acts are void."

Coming now directly to the point raised by Mr. Stennis, that the subsequent adoption of this amendment of the Constitution ratified, made valid and brought into effect by the act of the Legislature defining institutions of purely public charity, we are of the opinion, based upon the authorities hereinafter cited, that an act of the Legislature, unconstitutional at the time of its enactment, cannot be brought to life and made valid by the subsequent adoption of an amendment to the Constitution authorizing such enactment, and we cite, in support of this, the following cases:

The Mayor, etc., vs. Blacburn, 27 La. Ann., 544.
Dewar vs. The People, 29 Am. Reps., 545.
Village of Mt. Pleasant vs. Vansice, 38 Am. Reps., 193.
Dullam vs. Willson, 51 Am. Reps., 128.
State vs. Tufly, 19 Am. St. Reps.. 374.
Comstock Mill and Min. Co. vs. Allen, 31 Pac., 434.

The case of State vs. Tufly, above cited, is so clearly in point and so decisive of the proposition herein announced, and being very brief, we will quote the entire opinion as follows:

"Application by relators. constituting the board of education. for *mandamus* to compel respondent, as State Treasurer, to invest the sum of fifty thousand dollars of the State irreducible school fund in interest bearing bonds of other states, pursuant to the provisions of an amendatory act providing for the safe keeping of the securities of the State school fund (approved January 18, 1887). Stats., 1887, 17.

"The application must be denied, because there is no law authorizing such an investment to be made. The amendatory act upon which the application is based was passed under the belief that a proposed amendment to the Constitution, authorizing such investment, had been legally adopted; but owing to certain omissions of the Legislature to make the necessary entries upon the journals of the respective houses, as required by the Constitution, this court, in State vs. Tufly, 19 Nev., 391, 3 Am. St. Rep., 895, decided that 'the amendment was not constitutionally adopted,' and that 'the statute enacted for the purpose of executing its provisions is unconstitutional.' There is, therefore, no law upon which this application is based. An act of the Legislature which is not authorized by the State Constitution at the time of its passage is absolutely null and void. It is a misnomer to call such an act a law. It has no binding authority, no vitality, no existence. It is

as if it had never been enacted, and it is to be regarded as never having been possessed of any legal force or effect: Meagher vs. County of Storey, 5 Nev., 251; State vs. Rogers, 10 Nev., 250, 21 Am. Reps., 738; Cooley's Const. Limitations, 227. The act being void, no subsequent adoption of amendment to the Constitution, authorizing the Legislature to provide for such investment, would have the effect to infuse life into a thing that never had any existence; and as the Legislature failed to enact any law authorizing the investment of the school fund in the bonds of other states, after the vote was taken upon the constitutional amendment at the special election held February 11, 1889, there is nothing before us which requires or authorizes us to express any opinion upon the validity of that amendment. The only statute which authorizes any investment of the money in the school fund is that approved February 21, 1871, the fourth section of which was attempted to be amended by the unconstitutional act of 1887, and no investment of said fund can be made in any other manner than is provided for in that act: Stats., 1871, 66. Gen. Stats., 1368."

While legislative construction of constitutional provisions are of little or no value, particularly where an attempt is made to construe or define a limitation placed upon the legislative authority by the provisions of the Constitution, and while the readoption of the constitutional provision subsequent to a legislative construction can have little force or effect as adopting the legislative construction, unless the same has been of long practical application, yet it is a well established rule, supported by abundance of authority, that where a Constitution after having been once construed by a court of final jurisdiction has been re-enacted without material change, such construction becomes a part of the Constitution.

Ennis vs. Crump, 6 Texas, 34.
Munson vs. Hallowell, 26 Texas, 475.
Trigg vs. State, 49 Texas, 643.
Timmins vs. Bonner, 58 Texas, 554.
Morgan vs. Davenport, 60 Texas, 230.
Brothers vs. Mundell, etc., Co., 60 Texas, 240.
G. C. & S. F. R. R. Co. vs. Fuller, 63 Texas, 467.
Axer vs. Bassett, 63 Texas, 545.
Inge vs. Cain, 65 Texas, 75.
Galveston, etc., R. R. Co. vs. Dowe, 70 Texas, 1, 6 Southwestern, 790.
Rowe vs. Spencer, 70 Texas, 78, 8 S. W., 60.
Galveston, etc., R. Co. vs. State, 77 Texas, 367, 12 S. W., 988, 13 S. W., 619.
Travis Co. vs. Trogdon, 88 Texas, 302, 306, 309, 31 S. W., 358, affirming 29 S. W., 405.
Bahn vs. Starcke, 89 Texas, 203, 206, 34 S. W., 103.
Stallings vs. Hullum, 89 Texas, 431, 433, 35 S. W., 2, reversing 33 S. W., 1033.
Daniel vs. Hutcheson, 4 Texas Civ. App., 239, 22 S. W., 278, affirmed in 86 Texas, 51.
Scott vs. State, 6 Texas Civ. App., 343, 345, 25 S. W., 337, reversed in 86 Texas, 321.

It is also well established that where a constitutional provision has been adopted from another state, it is to be construed in accordance with the construction placed upon it in such other state prior to its adoption. Mellinger vs. Houston, 68 Texas, 37.

The authority granted to the Legislature by Section 2 of Article 8 of the Constitution to exempt from taxation *institutions of purely*

public charity is contained in the constitutions of a great many of the States of the Union. Acts of the Legislature based upon this authority have been before the courts for construction, and by a great weight of authority it is held that charitable and benevolent associations whose acts of charity are restricted to their own sick and needy members and families and widows and orphans of the members are not *institutions of purely public charity.*

In the case of John Fitterer et al., Trustees of Trenton Lodge No. 111, Ancient Free and Accepted Masons, vs. E. M. Crawford (50 L. R. A., 191), the authorities are collated upon that point. In this case, there was involved a construction of Section 6 of Article 10 of the Constitution of the State of Missouri, which authorized the Legislature to exempt from taxation property used exclusively for purposes purely charitable, while in our Constitution the authorized exemption is of institutions of purely public charity. In discussing this case, the court said:

"It is generally held by the courts of last resort in states whose Constitutions exempt from taxation institutions of 'purely public charity' that charitable or benevolent associations whose acts of charity are restricted to their own sick and needy members and their families, and the widows and orphans of their members, are not institutions of purely public charity, and that the property of such institutions is not exempt from taxation, because a charity is not a public charity. Phil. vs. Masonic Home, 160 Pa., 572, 23 L. R. A., 545, 28 Atl., 954; Morning Star Lodge, No. 26, I. O. O. F. vs. Hayslip, 23 Ohio St., 144; Bangor vs. Rising Virtue Lodge No. 10, F. and A. Masons, 73 Me., 428, 40 Am. Rep., 369; Swift vs. Beneficial Soc., 73 Pa., 362; Delaware Co. Inst. of Science vs. Deleware County, 94 Pa., 163; Donohough's Appeal, 86 Pa., 306; Mitchell vs. Franklin County Tres., 25 Ohio St., 144; Babb vs. Reed, 5 Rawls, 150, 28 Am. Dec., 650; Burd Orphan Asylum vs. Upper Darby School Dist., 90 Pa., 21; Young Mens' Protestant Temperance and Benev. Soc. vs. Fall River, 160 Mass., 409, 36 N. E., 57; Hennepin Co. vs. Brotherhood of Church of Gethsemane, 27 Minn., 460, 38 Am. Reps., 298, 8 N. Y., 595; Newport vs. Masonic Temple Asso., 21 Ky. L. Rep., 1785, 49 L. R. A., 252, 56 S. W., 405. But there is a very material difference between what is denominated a public charity and what is meant by the words 'used for purposes purely charitable.' In Deleaware County Inst. of Science vs. Del. County, 94 Pa., 163, it is said that 'no corporation or institution is a purely public charity which is not under the control of the public authorities, or at least subject to public visitation; or is founded or endowed so as to give the general public, under reasonable restrictions, an absolute right to receive its benefits, and, in case of failure of its managers to carry out the founder's will, to compel compliance therewith by an application to the courts. In case of a dissolution of such a charity, its property must rest in the public authorities for charitable uses.' An institution may be used for purposes 'purely charitable' by distributing alms to the poor, needy and the afflicted of certain sects or nationalities, or the members of certain organizations, their widows and children."

One of the cases cited above is that of Donohugh's Appeal, 86 Pa., 306, and we will quote from that case as follows:

" 'Next, and last, we have to consider the force to be given to the word "purely" in the constitutional phrase "purely public charity." In this connection, and in its ordinary sense, the word purely means completely, entirely, unqualifiedly, and this is the meaning we must presume the people to have intended in adopting it in their Constitution. Plainly, then the charities authorized to be exempted are those that are completely and entirely

public. The phrase is intended to exclude those charities which are private or only *quasi* public, such as many religious aid societies, and also those which, though public to some extent as for some purposes, have, like Masonic lodges and similar charities, some mixture of private with their public character. The true test is to be found in the objects of the institution. Are they entirely for the accomplishment of the public purpose, or have they some intermixture of private or individual gain? We get a clear and strong light on this subject from the words of the same clause of the Constitution descriptive of burial places which may be exempted, to-wit, those "not used or held for private or corporate profit." Such places are unquestionably public charities and in specification of them might have been omitted without impairing the force of the provision. But, as we have seen, the exemption of cemeteries had been recently abused by including some that were for wholly private profit, and the Constitution was made to emphasize its prohibition of such acts by specifically naming those burial places which alone might be exempted. Having done this, it passed on to name concisely and collectively all other institutions of purely public charity. The phrase might have been expressed, "places of burial and other institutions of public charity, not for private or corporate profit." The language used, taken as a consistent and consecutive whole, shows that this is its plain meaning.'"

The Texas courts, so far as we have been able to determine, have not passed directly upon the question of what is a purely public charity, within the meaning of that phrase as used in our Constitution. In the case of Morris vs. Masons, 68 Texas, 698, the question before the court for decision was whether or not a lodge building, partly occupied by the lodge and partly rented, was an institution of purely public charity. The court in that case held that it was not, using this language:

"The counsel for appellee has produced a strong array of authority upon the proposition that appellee is an institution of purely public charity; but we hardly think he is sustained by a case which has been cited, upon the question we now have under consideration. This is because, as we think, the authorities upon that side of the question do not exist.

"The property in controversy having been leased for purposes of profit, we think the court below erred in holding it exempt from taxation. This is decisive of the litigation and renders it unnecessary that we should pass upon the question, whether appellee is an institution of *purely public charity within the meaning of the Constitution.*"

We are therefore left to the construction placed upon this clause by the decisions of the courts of other states upon identical provisions in their constitutions, and almost without dissent the decisions are to the effect that institutions of the character in question are not institutions of purely public charity, and therefore the readoption of the constitutional provision, authorizing the Legislature to exempt institutions of purely public charity, can be but an adoption of the rule laid down by the courts.

We therefore advise you, in the opinion of this Department, that not only the vacant lot owned by the Masonic Lodge at Weatherford, Texas, but the lodge building itself and the lot upon which it stands, is subject to taxation.

In closing this opinion, we cannot overlook the expression in Mr. Stennis' communication to the effect that he believes that you, and

the Attorney General and each of his assistants, are earnestly and conscientiously following their duty as they see it, and the writer of this opinion, knowing Mr. Stennis as he does, cannot refrain from expressing here his belief that the views held by Mr. Stennis are prompted solely and alone by views honestly and sincerely entertained, but for the reasons and authorities hereinabove set out, we are forced to disagree with him.

With respect, I am

Yours very truly,

C. W. TAYLOR,

Assistant Attorney General.

OCCUPATION TAXES.

Occupation tax contemplated by Article 7355, Revised Statutes 1911, levied by the State, must be paid annually in advance and cannot be paid for any fractional part of the year, except in those particular instances expressly provided for by the terms of the statute.

Arts. 7355-7361, 7362, Revised Civil Statutes, 1911.

October 29, 1914.

Hon. L. J. Truett, County Attorney, McKinney, Texas.

DEAR SIR: The Department is in receipt of your communication, reading as follows:

"Article 7355, Revised Civil Statutes, 1911, provides:

" 'There shall be levied on and collected from every person, firm, company or association of persons pursuing any of the occupations named in the following numbered subdivisions of this article, *an annual occupation tax, which shall be paid annually in advance. except where herein otherwise provided.* on every such occupation or separate establishment, as follows:' (Then follows a list of the occupations taxed.)

"Article 7361 provides as follows:

" 'The payment of the specific tax herein provided for shall be required by the collector of taxes to be made before any person, firm or association of persons shall be allowed to engage in any occupation requiring a license under the provisions of this law, *this payment to be made for a period of not less than three months.*'

"Article 7362 provides as follows:

" 'The Comptroller shall issue occupation tax receipts for each occupation to be printed, with his signature, for all occupations payable to the collectors, *annual receipts for those that are paid annually and quarterly receipts for all that can be paid quarterly;' etc.*

"The Comptroller has furnished the county tax collector only annual occupation tax receipts. Parties here desire to take out occupation tax as peddlers, under Section 11 of said Article 7355, for a period of six months only.

"Question: Is the tax collector authorized to issue receipt for three months or six months or any other period less than one year, and to collect an occupation tax for such part of the year only?"

A correct solution of the question involved in your inquiry will necessitate a review of some of the earlier acts of the Legislature upon the subject of general occupation taxes. The general occupation taxes now levied by the State upon certain occupations, upon which the counties are also authorized by statute to levy a tax, is found in Article 7355 of the Revised Statutes, a copy of the first paragraph of which is contained in your letter quoted above. Taxes have been levied upon occupations by various acts of the Legislature, but it will be unnecessary in this discussion to go back beyond the Act of 1879, which amended certain articles of the Revised Statutes of 1870.

Articles 7361 and 7362 of our present statutes first found a place in the laws of this State in the Act of 1879 referred to. Article 7361 was Section 8 of the Act of 1879, while Article 7362 was Section 9 of the same act. These two sections contain the underscored portion in your communication in reference to the payment of occupation taxes quarterly; that is to say, Section 8 contains the clause "this payment to be made for a period of not less than three months," and Section 9 contains the statement "annual receipts for those that are paid annually and quarterly receipts for all that can be paid quarterly." The Act of 1879 provided that certain taxes therein levied might be paid quarterly, for instance, the tax upon theaters or dramatic representation, for which pay for admission is demanded or received, is fixed at $5.00 for each day or $125 per quarter.

Section 4 of the act, which consolidated Articles 4666 and 4668 of the Revised Statutes of 1879, containing the following language:

. "That Articles 4666 and 4668 of the above recited act shall hereafter read as follows: 'The commissioners courts of the several counties of this State, shall have the power to levy taxes equal to one-half of the State tax herein levied, except on occupations in which there is a specific rate of taxation payable to the county as fixed in this act; provided, that any one wishing to pursue any of the vocations named in this act, upon which the annual State tax is more than ten dollars, for less period than one year, may do so by paying pro rata of such occupation for the period he may desire; provided further, that no such occupation license shall issue for a less period than three months."

It is clear from the provisions of Sections 8 and 9 that the language therein used with reference to the payment of occupation taxes by the quarter related to those occupations, the tax for which might be paid by the quarter and it is by no means clear but that under the language of Section 4, above quoted, that all occupation taxes might not be paid quarterly, for it is provided that "any one wishing to pursue any of the vocations named in this act upon which the annual State tax is more than ten dollars for a less period than one year, may do so by paying pro rata of such occupation for the period he may desire." It might be said that this provision related only to those occupation taxes levied by the county, but whether such provision was intended to apply to State occupation taxes or those levied by the county, this question is set at rest by an amendment to Article 4666 and 4668 by the Act approved March 31, 1885, which reads, in part, as follows:

"Provided any one wishing to pursue any of the vocations named in this

chapter, upon which a county occupation tax may be levied, may do so by paying the same quarterly."

This eliminates any question of the payment of the State occupation tax quarterly, and so far as the Act of 1879 is now concerned, it leaves the provisions of Section 8 and Section 9 applicable only to those taxes which are expressly provided may be paid quarterly.

It appears that the last general revision of the general occupation tax statute was made by the Acts of the First Called Session of the Twenty-fifth Legislature, page 49. From a general reading of this act, which is now Article 7355, we do not find any of the taxes therein levied may be paid quarterly, and certainly Section 11 relating to peddlers, does not provide that the tax may be paid quarterly. So that those provisions of Sections 8 and 9 of the Act of 1879 limiting the minimum period for which taxes may be paid to three months and directing the Comptroller to furnish receipts for quarterly payments, while it might not be said they have been repealed by implication, yet by the elimination of those provisions of the payment of taxes quarterly, they have been rendered inoperative, in so far as the taxes levied by Article 7355 are concerned.

We might also, in support of our position herein, refer to Article 7357 authorizing the commissioners courts of the various counties of the State to levy an occupation tax for county purposes. It is provided "any one wishing to pursue any of the vocations named in this chapter upon which a county tax may be levied, may do so by paying the same quarterly." We take this to be a legislative construction of the former act levying the occupation taxes for State purposes. The occupation taxes for State purposes, as set out in paragraph 1 of Article 7355, are levied annually, with certain exceptions; whereas, in order to distinguish the county occupation tax from that of the State tax it is provided that same may be paid quarterly. Again, it is expressly provided in the first paragraph of Article 7355 that there shall be levied and collected an annual occupation tax, which shall be paid annually in advance, except where herein otherwise provided. This being a subsequent act to that of 1879, of which Articles 7361 and 7362 are a portion, if there should be any question of the authority to pay occupation taxes quarterly, then the latter act would control, and thereby all occupation taxes would be payable annually in advance, unless otherwise expressly provided in the act.

We are, therefore, of the opinion and so advise you, that under the provisions of Article 7355, sub-section 11, thereof, a peddler must pay in advance an annual occupation tax of such an amount as is applicable to the particular manner in which he applies his vocation and that the same cannot be paid quarterly nor semi-annually.

Assuring you of the desire of this office to at all times aid you in the discharge of your duties when it may do so under the law, I am, with respect,

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

POLL TAX.

1. A poll tax receipt issued on Sunday is legal.
2. While a tax collector may attend at his office on Sunday and receive payment of poll taxes and issue receipts therefor, yet such action on his part is purely within his discretion and he cannot be compelled to attend and issue poll tax receipts.
3. An officer who is not a candidate to succeed himself or for any other office may act as agent of another in the payment of poll taxes.

Penal Code, Articles 299, 301, 302 et seq.
Revised Civil Statutes, Articles 1816 and 4606.

January 22, 1915.

Hon. Joe Y. McNutt, County Attorney, Franklin, Texas.

DEAR SIR: This Department is in receipt of your letter of January 16, asking an opinion on the two following questions:

"1. The thirty-first day of January, the last day for paying poll taxes, coming on Sunday, would it be lawful to issue poll tax receipts on that day?
"2. Can an office holder be an agent for a taxpayer?"

Replying to your questions in the order named we beg to advise you that there is no statute in this State which would invalidate a poll tax receipt where the payment was made on Sunday and receipt issued on that day. We do not find in the statutes of this State that Sunday is declared to be a legal holiday for all purposes. There are statutes prohibiting the transaction of certain business and the pursuit of certain occupations upon Sunday, and also a statute which prohibits the filing of certain character of suits and the issuance or service of process on Sunday.

For illustration, Article 299 of Penal Code, prohibits working on Sunday, the exception to this statute appearing in Article 300, Penal Code, among other exceptions being works of necessity or charity, etc.

Article 301 prohibits horse-racing, farming, etc., on Sunday; while Article 302 prohibits the selling of goods on Sunday. Certain exceptions to Article 302 are contained in Article 303. Article 1816 of the Revised Civil Statutes provides that no civil suits shall be commenced nor any process be issued or served on Sunday or on any legal holiday, except in cases of injunction, attachment, sequestration or distress proceedings.

The statutes of this State bearing upon Sunday or the Christian Sabbath, do not treat of that day as being a legal holiday, in the sense that the statutes prescribing certain days as legal holidays treat thereof, but are directed against the pursuit of certain occupations and the transaction of certain businesses upon such day and the prohibition thereof, to the end that such day may be fittingly observed, or as is said in the case of Schneider vs. Sansom, 62 Texas, 201, "promote a proper respect for the sanctity of that day, dedicated as it should be to rest, contemplation and worship." So it is only those things that the law forbids that are illegal if transacted on Sunday. A contract made in violation of the Sunday statutes would be illegal and incapable of enforcement, but there is no law which makes a contract

illegal and void or even voidable merely because made on Sunday, when such contract is in regard to a matter not made unlawful by statute. Markle vs. Scott, 2 Appeal Civil Cases, Section 674.

Article 4606 of the Revised Civil Statutes of 1911, enumerates certain days of the year which are declared to be holidays, upon which all public offices of the State may be closed, and it further provides that such days shall be treated and considered as Sunday, or the Christian Sabbath, for all purposes regarding the presentation for payment or acceptance and of protesting for and giving notice of the dishonor of bills of exchange, bank checks and promissory notes placed by the law upon the footing of bills of exchange. This statute does not declare the Christian Sabbath to be a holiday in this State, but merely provides that for the purposes therein indicated the days declared to be holidays shall be treated as Sunday or the Christian Sabbath. There is no statute in this State upon the procedure where the due date or the last day of grace upon commercial paper falls upon Sunday, but by the law merchant and by the decisions of this State the rule is established that the due date or last day of grace shall be postponed until the following Monday, the rule being that Sunday not being a legal day for exacting payment on account of the fact that all banking business being suspended by law payment could not be enforced upon such date. Hirschfield vs. Bank, 83 Texas, 452.

Formerly our statutes provided that where a legal holiday fell on Sunday the next day thereafter should be observed as such holiday, but that bills of exchange or other paper might be presented for payment or acceptance on the Saturday preceding. Article 2837, Revised Civil Statutes, 1879. This article was dropped from the Statutes of 1895, neither does it appear in the Revised States of 1911. Our conclusion is that Sunday is made a legal holiday only in the sense that certain occupations and pursuits are prohibited on that day and that certain suits and process may not be instituted or issued on that day by reason of the inhibition of the statute.

The rule as to public officers keeping their offices open and performing their duties upon legal holidays is laid down in Houston E. & W. T. Ry. Co. vs. Harding, 63 Texas, 162, which involved the validity of a judgment by default rendered upon January 3, after hearing the proof on January 1, which was a legal holiday. The court after referring to the statutes designating holidays and forbidding the institution of suits, with certain exceptions, upon such day, said:

"It will be seen that these articles mention certain acts which are expressly forbidden to be performed on a legal holiday, and others are left within the discretion of those to whom their performance is intrusted. They declare that bills and notes shall not be presented or protested, nor shall process in ordinary suits be issued or served, nor shall the suits themselves be commenced on one of these days; but the public offices are not ordered to be closed, nor are the courts prohibited from doing business upon legal holidays. The statute further declares that the exemptions and requirements usual upon legal holidays may be observed. The word 'may' as used in these articles of the statute is not equivalent to 'shall,' as is apparent from a reading of their language. The change of phraseology from 'may' to 'shall', and then again to 'may', clearly evidences an intention on the part of the Legislature to use the one word in a different sense from the other; to make the provisions as to notes and bills, and as to the commencement of suits and

issuance and service of process, imperative, and to leave the observance of legal holidays in all other respects to the discretion of those for whose benefit the statute was enacted. Had the Revised Statutes merely declared these days to be legal holidays, without saying in what respects they might or should be observed as such, there might be some show of reason for contending that no judicial business could be transacted on these days. Lampe vs. Manning, 38 Wis., 673.

"But when they enumerate what things are positively forbidden to be done on holidays, and leave all others discretionary, we can but conclude that, in reference to the latter, a holiday is not necessarily a *dies non juridicus*. and a judicial act performed on that day is not void. Dunlap vs. State, 9 Tex. Ct. of App., 179.

"We think, therefore, that the fact that the court below received evidence upon a writ of inquiry on the first of January, deciding the case on the third of that month, does not render the judgment void." (63 Texas, pages 163-164.)

In Ex parte Millsap, 39 Texas Criminal Reports, page 93, the court in discussing the validity of a convict bond executed on Sunday said:

"It is not necessary for the court in this case to hold that the execution and approval of the bond on Sunday was a work of 'necessity,' because there is no statute prohibiting the performance of such acts as the execution and approval of a convict bond on Sunday."

In the case of Lindsey vs. The State, 39 Texas Criminal Reports, 468, in discussing a similar question the court said :

"But admitting that the bond was in fact taken on the fifth day of November, 1893, and that said day was Sunday, yet that fact would not vitiate the bond. Our statutes on the subject of Sunday do not invalidate the execution of bail bonds taken on that day, and the very fact that it inhibits certain acts to be done on Sunday would appear to negative the idea that it intended to inhibit other acts not mentioned. See Revised Statutes, Article 2939; Penal Code, Articles 196 and 200. Verdicts of jury rendered on Sunday have invariably been upheld. See Powers vs. State, 23 Texas Criminal Appeals, 42. And we held in Webb vs. State, 40 S. W., 989, that the impanelment of a grand jury on a legal holiday, which appears to be put on the same plan as our Sunday was legal. It will certainly not be seriously contended that process authorizing the arrest of persons charged with offences could not be executed on Sunday. See Code of Crimiual Procedure, Article 275. And it occurs to us that the right to arrest embraces the right to take bail."

There is abundant authority from the courts of practically every State in the Union to the effect that unless a statute expressly prohibits an act to be performed upon Sunday or a holiday that an act so performed on Sunday or a holiday is legal. See Case Note to State of Louisiana vs. Ben Duncan, 10 L. R. A. (N. S.), 791.

There appears, however, in the decisions of this State to be a distinction between judicial and ministerial acts as to the validity thereof if performed on Sunday.

In the case of Hanover Fire Insurance Co. vs. Shrader and Rogers. 89 Texas, 35, which involved the filing of a petition for writ of error on Sunday, which was the last day upon which such petition could be legally filed, the court said:

"Sunday at common law is *dies non juridicus*. (Swan vs. Broome, 1 W. Bl., 496 and 526.) When the point was first raised in the case cited, Lord Mansfield was evidently in great doubt whether a court could not render a valid

judgment upon a Sunday, but after full consideration the question was resolved in the negative. That a judgment rendered on that day is void, may not be regarded as settled law. It was so held by the Court of Appeals in Shearman vs. State, 1 Texas Ct. App., 215. But it was also recognized that, while a judgment could not be pronounced, a verdict might be returned on Sunday. (See also Hoghtaling vs. Seborne, 15 John., 118). A distinction is made between judicial acts and those of a ministerial character, and it seems to be generally held that in the absence of a statute ministerial acts performed on Sunday are valid. The service of process on Sunday was forbidden by the statute of 29 Charles II, and we think that the English cases which held the ministerial acts of officers of the court void because performed on Sunday are referable to that act. Expressions of opinions may be found in the books to the effect that the statute was merely declaratory of the common law. Early decisions of the courts of Westminster hold to the contrary. (Mackalley's case, 9 Coke, 66b; Bodee vs. Alps, Sir W. Jones. 156; Swan vs. Broome, supra; see also Sayles vs. Smith, 12 Wend., 59.) But we have not found it necessary to determine that question.

"In 1846 our Legislature provided 'No civil suit shall be instituted nor shall any process be had on Sundays, except in cases of attachment or sequestration.' Pasch. Dig., Art. 1424. The substance of this provision is found in Article 1184 of the Revised Statutes, which reads as follows: 'No civil suit shall be commenced, nor shall any process be issued or served on Sunday or any legal holiday, except in cases of injunction, attachment, or sequestration.' The prohibition against the filing of a petition (which is the commencement of a suit under our law), and against the issue and service of process, clearly implies that the filing of papers during the progress of the suit was to be allowed. (See Railway vs. Harding, 63 Texas, 162; Crabtree vs. Whitesolle, 65 Texas. 111). The statute does not refer to judicial acts, and they are left as at common law. The filing of an application for a writ of error in the Court of Civil Appeals is the continuation of a suit and not its commencement. In Bodee vs. Alpe, cited above, the information was filed on a Sunday and it was held that the filing was valid. We conclude from these considerations that an application for a writ of error may be lawfully filed on a Sunday; but do not hold that the clerk is bound to do an official act of that character on that day. We think he may lawfully refuse to act when a paper is tendered to him to be placed upon the file; but that if he does act, his act is valid. Sunday being regarded by our people generally as a day of rest, and by many as a day of religious observance, in our opinion, save in exceptional cases, the officers of the court are not required to perform any official functions on such a day, and it is their privilege to refuse their performance should they elect to do so. We may imagine cases in which it may be proper to hold that a ministerial duty, performed on a Sunday, would be voidable if not void.—such, for example, as a sale by a sheriff of personal property under judicial process. But should it be so held in regard to such a sale, we think the ruling would rest upon the ground that it would be unjust to the defendant in execution that his property should be sold on a day which is usually devoted to a cessation of business and on which the conscientious scruples of many persons would forbid their attendance upon and bidding at the sale. (But see Sayles vs. Smith, supra.)

"It follows from what we have said, that we think the file mark put upon the paper on Monday was too late; and it remains therefore to consider the effect of the clerk's endorsement as to its receipt upon Sunday. The just inference from the endorsement is that the application was delivered to the clerk for the purpose of filing it. and that the clerk received it, but being doubtful as to his power to place it upon the file upon that day, noted the fact and date of its receipt, and marked it filed upon the next day. Where a paper is deposited with the clerk of a court for the purpose of making it a part of the records in the case it is filed. The evidence which is looked to by the court in determining whether the paper has been filed or not is the clerk's endorsement of the fact upon the paper itself. The form of that endorsement is usually the word 'filed,' with the date. We think, however, if the endorsement shows the fact in other words it is sufficient.

"We conclude that the application was lawfully filed on Sunday, and that

the clerk's endorsement is evidence of the fact of its filing, and therefore that we have jurisdiction of the application; but having examined it we also conclude that it shows no error, and it is therefore refused." (89 Texas, pages 40-42).

The issuing of a poll tax receipt being purely a ministerial act and there being no prohibition in the statutes of this State against the issuance of such poll tax receipt on Sunday we are of the opinion that a receipt so issued would be entirely legal and valid, but we further advise you that it is a matter resting entirely within the discretion of the tax collector as to whether or not he shall attend at his office upon Sunday and receive payment of poll taxes and issue receipts therefor.

Answering your second question we beg to advise you that there is no law prohibiting an office holder from acting as an agent of another in the payment of poll taxes. This Department has ruled, however, that neither the tax collector nor any of his deputies could act as the agent of a taxpayer for the very good reason that the tax collector and his deputies are the agents of the State in the collection of taxes due the State and therefore could not act in the capacity of agent of the taxpayer, for the duties of agent of the State and as agent of the taxpayer would be incompatible, conflicting and could not be exercised by the same person. Of course, if such officer should be a candidate for office. Article 2946 of the Revised Statutes would prohibit him from acting as such agent. The question of whether or not an incumbent of an office is a candidate to succeed himself or for another office must depend upon the facts in each case, but we answer your question as you propound it and say that the statute does not prohibit an officer from acting as the agent of a taxpayer, and that officers other than the tax collector and his deputies may so act if they are not candidates for office.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

POLL TAX—CITY OF TEN THOUSAND INHABITANTS.

1. Persons residing in a city of ten thousand inhabitants must pay their poll tax in person.
2. If exempt from poll tax they must personally appear before tax collector prior to February 1, and secure exemption certificates.

May 18, 1915.

Hon. Marvin Scurlock, County Attorney, Beaumont, Texas.

DEAR SIR: In your communication of the 14th instant you request to be advised whether a corporation, firm, partnership or person, "employing a number of men, say twenty or twenty-five be entitled to retain sufficient amount of these men's wages each month or week, taking a list of them, and then turn over the list of names together with the amount of money sufficient to pay all of their poll taxes

to the tax collector; these men of course remaining in the town where they were subject to poll tax all the time, and going to the tax collector, from time to time, giving him the data as to name, age, residence, etc.''

Replying thereto, I beg to answer your question in the negative.

Persons not residing in a city of ten thousand inhabitants must either pay their poll tax in person or specially authorize *in writing* an agent to pay such tax for them, and the written appointment must be signed *in person by* the party desiring to pay his poll tax, and information as to name, age, residence, etc., must appear in such written notice.

In a former opinion this Department held, with reference to persons residing in cities of 10,000 inhabitants:

"Persons who reside in cities of 10,000 inhabitants must pay their poll tax in person. If they are exempt from the payment of poll tax, they must appear in person before the tax collector prior to February 1, and secure a certificate of exemption."

Yours truly,
W. P. DUMAS,
Chief Clerk to Attorney General.

TAXATION—BANK STOCK.

1. A State or national banking corporation is not liable for taxes on its capital stock.
2. The individual stockholders of a banking corporation are liable for taxes on the shares of stock held by them.
3. Owners of bank stock should render the same for taxation at the place where such banking corporation is located, without regard to the residence of the owner, and such stock is liable for all taxes levied and assessed at the place of location of the bank, including State, county, city and school taxes.

September 13, 1915.

Hon. J. L. Cearley, County Attorney, Anson, Texas.

DEAR SIR: The Attorney General is in receipt of your letter reading as follows:

"The city and independent school tax assessor of this place wants an opinion as to whether bank stock owned by parties outside of the city and school district, is subject to city and independent school taxes, or whether by reason of the owners of such stock residing outside the city and district, they are exempt from such taxes? The owners claim that by reason of being nonresidents they are not subject to city or school taxes. There are two (2) banks here that have nonresident stock owners, one of them renders for taxes all stock whether resident or not and the other refuses to render or pay on stock of nonresident owners and owners do likewise."

Replying thereto, I beg to say that Article 7521, Revised Statutes, 1911, prescribes the duties of banks in making rendition of the property thereof for taxation. Sub-section 1 of this article places the duty upon the president or some other officer of a national bank to furnish

to the assessor of the county in which such bank is located a list of the names of all shareholders of the stock, together with the number and amount of the shares of each stockholder in said bank, and the shareholders of the stock in national banks shall render to the tax assessor of the county in which said bank is located the number of their shares and the true and full value thereof; and further provides that all shares of stock not rendered to the assessor in the county where such bank is located within the time prescribed by law shall be assessed by the assessor as unrendered property.

Section 5219 of the Compiled Statutes of the United States, 1901, is as follows:

"Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the association is located; but the Legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by nonresidents of any State shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property or associations from either State, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed."

In 1885 the Legislature of this State enacted what is now Article 7522, Revised Statutes of 1911, reading as follows:

"Every banking corporation, State or national, doing business in this State shall, in the city or town in which it is located, render its real estate to the assessor of taxes at the time and in the manner required of individuals. At the time of making such rendition the president or some other officer of said bank shall file with said assessor a sworn statement showing the number and amount of the shares of said bank, the name and residence of each shareholder, and the number and amount of shares owned by him. Every shareholder of said bank shall, in the city or town where said bank is located, render at their actual value to the assessor of taxes all shares owned by him in such bank; and in case of his failure so to do, the assessor shall assess such unrendered shares as other unrendered property. Each share in such bank shall be taxed only for the difference between its actual cash value and the proportionate amount per share at which its real estate is assessed. The taxes due upon the shares of banking corporations shall be a lien thereon, and no banking corporation shall pay any dividend to any shareholder who is in default in the payment of taxes due on his shares; nor shall any banking corporation permit the transfer upon its books of any share, the owner of which is in default in the payment of his taxes upon the same. Nothing herein shall be so construed as to tax national or State banks or the shareholders thereof, at a greater rate than is assessed against other moneyed capital in the hands of individuals."

The object of Article 7522 was to incorporate in the law of this State a provision of the Federal statute for the protection of national banks, adding thereto so much as was necessary to accord the same protection to State banks.

Primm vs. Courts, 57 S. W., 972.

It will be noted from a reading of the above statute that each share in such bank shall be taxed only for the difference between its actual cash value and the proportionate amount per share at which its real estate is assessed. This provision of the statute was inserted to meet the objection that to tax the property of the bank and also the shares of stock at their full value would be in effect double taxation.

Gillespie vs. Gaston, 4 S. W., 248.

It therefore appears that neither a national or a State bank is liable for a tax upon its capital stock, but in the language of Article 7522 "every shareholder of said bank shall in the city or town where said bank is located render at their actual value to the assessor of taxes all shares owned by him in such bank," with the further limitation, however, that shares in such bank shall be taxed only for the difference between the actual cash value and the proportionate amount per share at which its real estate is assessed.

In the case of City of Marshall vs. State Bank of Marshall, 127 S. W., 1083, the court held that Article 5080 (which is now Article 7522, Revised Statutes, 1911) operated to except incorporated State banks from the provisions of Article 5079, which is now Article 7521. above referred to, in so far as the latter article provided a basis of assessing the personal property of banks and that an assessment against such a bank by the city of a personal tax on its stock surplus and undivided profits was unauthorized. The court said:

"A bank as a corporate institution is not liable for any taxes except those assessed against its real estate," citing First National Bank vs. City of Lampasas, 78 S. W., 42; Engelke vs. Schlender, 12 S. W., 999.

An assessment such as is here shown to have been made against the appellee cannot form the basis of an action to enforce the collection of any taxes on property involved, for the reason that the law has imposed no such liability.

It is a general rule that intangible personal property, such as notes, mortgages, stocks and bonds are taxable only at the place of residence of the owner, but the statute above quoted makes an exception in the case of bank stock and makes the same subject to taxation at the location of the bank.

We, therefore, advise you that a bank, whether State or national, is not liable for tax on its capital stock, but that the respective holders of shares of stock, without regard to their residence, are liable for taxes thereon for all State, county, city and school district purposes at the place of the location of the bank.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

TAXATION—DELINQUENT TAXES.

Where purchasers of school lands have defaulted where county school lands by reason of default in payment by the purchasers have revested in the county, the tax liens thereon have been destroyed. The purchasers remain personally liable for all taxes due thereon prior to forfeiture.

It would be the duty of the county attorney in event judgment could be collected to institute suit to recover judgment against the delinquent tax payers.

August 23, 1915.

Hon. N. R. Morgan, County Attorney, Seminole, Texas.

DEAR SIR: The Attorney General has your favor of August 19, in which you state that several counties have their school lands located in Gaines county. Texas; that such counties have sold these lands and in several instances the purchasers have defaulted in their payment and the lands have reverted to the respective counties. That during the time the title of such lands were in the respective purchasers taxes were allowed to go delinquent. You also state that similar conditions obtain with reference to State school land, and you desire to know if it would be your duty as county attorney to institute suit against the delinquent taxpayers for recovery of such taxes, stating that in your opinion the liens had doubtless been lost by reason of the reversion of the lands to the county and State.

Replying thereto I beg to advise that this Department on March 14, 1913, rendered an opinion wherein it was held as to State school land that by reason of the forfeiture and the revesting in the State of the title to the land that all liens thereon were destroyed and that a subsequent purchaser of such lands from the State would take the property free from liens which existed against it prior to the forfeiture. Clark vs. Altizer. 145 S. W., 1041. In this opinion it was held, however, that the above rule would not apply in case the original purchaser of the land repurchased the same after such forfeiture in which case the lien for delinquent taxes still attached.

So in the case presented by you in the event of a purchaser there would be no lien for the taxes, but in the event of repurchase by the original purchaser the lien would remain

While the lien may have been lost by reason of the forfeiture and recision of the former award, yet the personal liability for the tax remains and it would be your duty as county attorney to institute suit for the collection thereof. Kahler vs. Betterson, 51 S. W., 289 However, you should use your discretion and in event there could be no possibility of the collection of the judgment it would be useless to institute suit, but if a judgment could be collected then we think unquestionably that you should file suit for all delinquent taxes on such lands.

Yours truly,

C. W. TAYLOR,
Assistant Attorney General

TAXATION—FEES OF OFFICERS

The fee of $1.00 allowed the sheriff for selling and making a deed to purchaser of land under a judgment for taxes is in lieu of commissions allowed to a sheriff for the sale of land under the general fee bill and is not intended to be a limitation upon the amount of costs a sheriff may be entitled to in a tax suit, but the sheriff is allowed such other fees as he may be entitled to under the general fee bill as in other suits. Article 7691, R. S. 1911.

July 29, 1915.

Hon. John B. McNamara, County Attorney, Waco, Texas.

DEAR SIR: The Attorney General has your favor of recent date reading as follows:

"Our tax collector, Mr. Lee R. Davis, has submitted to me the following question: Is the sheriff ever entitled in a tax suit, to a fee of more than one dollar, except in case he sells the property under foreclosure and makes deed thereto, in which event he is entitled to one dollar additional? The law, as you know, requires that all parties owning or claiming an interest in the delinquent property shall be made parties defendant and it frequently happens that there are two or more parties upon whom service must be had. The question has arisen here whether the sheriff is entitled to full compensation for service of these citations, including mileage, and sometimes other items, as he would be in ordinary civil suits, or is he restricted by Article 7691 to the amounts stated above. This article makes mention of the sheriff in two instances, the first in reference to his fee of one dollar for selling and making deed thereto to the purchaser of land that he sells under judgment for taxes, and the second, under the provision reducing the fees of officers where the taxes, etc., are paid pending the suit, which provides that the sheriff shall then receive only one dollar. There is no express provision that I can see limiting his fees after judgment is taken but it seems to me the clear intent of the law is to restrict his fees, as it does the fees of all the other officers, to not more than one dollar except where he makes sale under foreclosure, and in that event to a total of two dollars. However, there is probably room for a difference of opinion on this point and it may possibly have been the intent of the Legislature to permit the sheriff to charge his usual civil fees for services rendered except when payment is made during the pendency of the suit. The sheriff frequently has to do considerable work in locating and serving the defendants and where there are five or six defendants, some of them residing in foreign counties, the limited amount is not only incommensurate with the labor performed, but when divided up among several sheriffs in effect requires them to do the work at a loss of time and money. As this question arises almost every day with us, and as the question has never been decided by the courts. so far as I can ascertain, I am referring it to you and will greatly appreciate your opinion."

Article 7691, Revised Statutes, 1911, fixes the fees to be allowed to officers of court in suits against delinquent taxpayers. The collector of taxes for performing the services enumerated in this article is entitled to a fee of $1.00 for each assessment. The county attorney is entitled to a fee of $3.00 for the first tract and $1.00 for each additional tract. The district clerk is entitled to a fee of $1.50 in each case. The county clerk in the event he performs the services required of him is entitled to $1.00 in each case. The sheriff is entitled to a fee of $1.00 for selling and making deed thereto for each purchaser of land, all of which fees are taxed as cost against the land to be sold, and it is expressly provided that the State nor county shall not be

liable for such fees. It will be noted that the language used in prescribing the fees for each of the officers other than the sheriff is susceptible of the construction only that it is a limitation upon the amount of fees such officers may receive and they receive such fees in lieu of fees that would be otherwise allowable under the general fee bill. Such is not the case with reference to the fee allowed the sheriff for it is expressly provided that the fee of $1.00 he is entitled to receive is compensation for selling the land and making deed thereto to the purchaser thereof.

Under Chapter 3, Title 58, Revised Statutes, 1911, the fees of all county officers are set out and prescribed and were it not for the provisions of Article 7961 relating to suits for the collection of delinquent taxes the officers of court for the services performed by them would receive fees as under the provisions of Chapter 3, Title 58, aforesaid, but the provisions of this article deals with the particular subject and the fees therein prescribed are to the exclusion of other fees prescribed by Chapter 3 of Article 58 except as we view it the fee allowed to the sheriff which is in lieu of the fees allowed by the sheriff for the collection of money on an execution or order of sale as are fixed by Article 3864, Revised Statutes, 1911. If this had not been the intention of the Legislature then the language in prescribing the fee to which a sheriff is entitled in a tax sale would have been similar to the language used in prescribing the fee for the clerk of the district court, but as to the sheriff it is expressly provided that the fee fixed by this article is to be his compensation for selling and making deed to the purchaser and is not intended to be in full compensation for all of his services such as the service of citation and such other services as he might render in the case for which Article 3864 prescribes a fee.

We are strengthened in the conclusion reached herein by the concluding proviso to Article 7691, which is as follows:

"That where suits have been brought by the State against delinquents to recover tax due by them to the State and county, the said delinquent may pay the amount of the tax, interest, penalties and all accrued costs to the county collector during the pendency of such suit; and the county attorney shall receive as compensation therefor two dollars for the first tract and one dollar for each additional tract embraced in said suit; and the district clerk shall receive only one dollar, and the sheriff only one dollar in each case; but these fees shall be in lieu of the fees provided for such officers where suits are brought as hereinbefore provided."

It is clear that the portion of Article 7691 just above quoted is intended as an inducement to the delinquent to pay his taxes and the recognition that the officers are not entitled to receive as much cost in event of settlement of the afore judgment as they would be if the case was allowed to proceed to judgment and a sale of the land had thereunder. The fees of the county attorney under this proviso are reduced from three dollars to two dollars for the first tract. The fees of the district clerk are reduced from one dollar and fifty cents to one dollar in each case; whereas the sheriff receives one dollar in each case, which if we consider the fee of one dollar to which he is entitled for selling and making deed is to be all the fees he receives, would be no reduction at all. If the purpose, therefore,

of this proviso is to be carried out to reduce the fees of officers, then we cannot escape the conclusion that the sheriff is entitled to more than one dollar as cost in the case in event it goes to judgment and a sale is had thereunder

We are, therefore, of the opinion, and so advise you, that the sheriff in a tax suit is entitled to fees for services he may render therein to be fixed by Article 3864, Revised Statutes of 1911, with the exception that he is entitled to one dollar only for making the sale and executing the deed which is in lieu of the commission allowed by the article last named, with the limitation of course as provided in the article mentioned that such fees are taxed as costs against the land and the State and county cannot be made liable therefor, and except, of course, in event the delinquent pays the amount of tax, interest, penalties and costs during the pending of the suit, the fees of the sheriff are limited to one dollar by the express terms of the proviso to Article 7691 as being in lieu of fees otherwise provided.

With respect, I am,

Very truly yours,
C. W. TAYLOR,
Assistant Attorney General.

TAXATION—HOMESTEADS.

The homestead is subject to ten per cent penalty on delinquent taxes due upon such homestead.

Constitution, Section 50, Article 16; Section 15, Article 8.
Revised Statutes, Article 7692.

June 15, 1915.

Hon. H. B. Terrell, Comptroller, Capitol.

Attention of *Hon. L. W. Tittle, Acting Comptroller.*

MY DEAR SIR: The Attorney General is in receipt of your letter of this date reading as follows:

"We herewith enclose letter of Marvin Jones and request that you advise us in regard to the question raised therein, that is, is a homestead liable for the ten (10%) per cent penalty on the taxes assessed, and returned delinquent against the homestead."

The letter you enclose written you by Mr. Marvin Jones of Amarillo cites in support of the proposition that the ten per cent penalty may not be enforced against homestead property the case of the City of Marlin vs. Green, 78 S. W., 704, and also the case of Toepperwein vs. City of San Antonio, 124 S. W., 701.

The case of Marlin vs. Green, supra, dismissed the proposition with the statement merely:

"There was no error in refusing to foreclose the lien for the ten per cent penalty prescribed by the Act of 1897."

The Toepperwein case referred to by Mr. Jones disposed of the question upon the Marlin case, saying:

"We concur in the ruling made in the City of Marlin vs. Green, 78 S. W., 704, that a penalty cannot under the Constitution be imposed upon a homestead in addition to the taxes due thereon."

So neither of these cases contain any discussion of the question or any indication that the courts gave serious consideration to the same. The Toepperwein case was carried to the Supreme Court upon a writ of error and the court after discussing the various provisions of the Constitution relating to the levy and collection of taxes, in an opinion rendered by Chief Justice Brown, reversed the Court of Civil Appeals in its holding that the homestead was not subject to the ten per cent penalty, using the following language:

"We therefore conclude that the provisions of Section 50 of Article 16 do not limit the operation of Section 15 of Article 8, and that the homestead is liable not only for the taxes which are assessed upon it, but also for the penalties which the law prescribes in case of failure to make payment of such taxes. The district court and the Court of Civil Appeals erred in holding that the lots sought to be subjected were not liable to sale for the penalties and we hold that the City of San Antonio was entitled to enforce its lien against the said lots for the penalties, as well as for taxes."

City of San Antonio vs. Toepperwien, 133 S. W., 1416.

The above case is the last expression of the courts of this State upon the subject and is therefore the law upon the question you propound and we advise, upon authority of this case, that a homestead is subject to the ten per cent penalty under Article 7692, Revised Statutes, 1911.

Yours very truly,
C. W. TAYLOR,
Assistant Attorney General.

TAXATION—MERCHANTS—ASSIGNMENT FOR CREDITORS.

Where a merchant makes an assignment for the benefit of creditors, the statute fixes a lien against his stock of goods for taxes due thereon, which lien follows the property into whosesoever hands it may pass.

The trust funds in the hands of the assignee,—the proceeds of the stock of goods,—are subject to the lien for taxes.

It being made the duty of the assignee or trustee to pay all taxes due, in the event of his failure so to do he would be liable upon his bond for the amount of taxes.

A purchaser at an assignee's sale would not be personally liable for the taxes due upon the goods.

The statute giving a special lien upon goods assigned is merely an aid in the collection of taxes and does not relieve the original owner from the obligation. He is still liable and any other property that he may own, other than homestead, which is subject only to the tax against it, may be sold for taxes.

June 9, 1915.

Hon. R. B. Cross, County Attorney, Gatesville, Texas.

DEAR SIR: The Attorney General is in receipt of your letter reading as follows:

"A merchant makes an assignment for the benefit of his creditors. His stock of goods, etc., are assessed against him for taxes and his taxes thereon are now on the tax rolls delinquent. He refuses to pay on the property thus assigned. It has all been disposed of. Would the tax collector be authorized to make levy on other property now in the possession of assignor for said taxes or would he look to the assignee for payment.

"Article 7627 of Vernon's Sayles' Civil Statutes seems to convey the idea that the assignee should pay same, but it further states that if same are not so paid that the collector may cause levy to be made upon same in whomsoever's hands it may be found, but if said property is not found what is the course to pursue and can the party in whose name same was assessed be forced to pay them?"

Article 7627 of the Revised Civil Statutes of 1911, cited by you, reads 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 creditors, by writs of attachment or otherwise, or where the estate of a decedent is or becomes insolvent, and the taxes assessed against such person or party, or against any of his estate remains unpaid in part or in whole the amount of such unpaid taxes shall be a first lien upon all such property; provided, that, when taxes are due by an estate of a deceased person, the lien herein provided for shall be subject to the allowances to widows and minors, funeral expenses and expenses of last sickness; and such unpaid taxes shall be paid by the assignee, when said property has been asigned by the sheriff out of the proceeds of sale in case such property has been seized under attachment or other writ, and by the administrator or other legal representative of decedents; and, if said taxes shall not be paid, all said property may be levied on by the tax collector, and sold for such taxes in whomsoever's hands it may be found."

The purpose of this statute is to give a lien upon the personal property thus assigned for the taxes due thereon, for, in the absence of such a statute, no lien would exist for such taxes upon the stock of goods. "Article 5175a (7627) creates a lien upon the personal property of a taxpayer when the conditions therein named exist. Such a lien does not exist independent of this article." (People's National Bank vs. The City of Ennis, 50 S. W., 634.)

The stock of goods disposed of by the trustee or assignee would be subject to the lien for taxes created by the article above named, no matter into whose hands it may have passed, so long as the same had not become dissipated and could be identified. However, a purchaser of such goods would not become personally liable though the assignor remains so, the obligation being merely a lien against the property. "As between the sovereignties and the purchaser of the property at the sheriff's sale, the lien for the taxes continued upon the land, and it could be sold for the taxes. The purchaser did not become personally bound for the payment of the taxes, but his property was bound. Appellants were personally bound, and it was for their obligation to the State, county and city that the liens attached to the land." (Kahler vs. Betterton, 51 S. W., 289.)

The article under discussion was enacted by the Legislature in aid of the collection of taxes, for, as above said, prior to the enactment of this statute no lien existed against personal property for the taxes thereon.

In the case of State vs. Jordan, 60 S. W., 1008, the court, in discussing this statute, used the following language:

"Its evident purpose was to aid the State in the collection of her taxes, and it was not enacted for the benefit of individuals. It should be borne in mind that, until the last-named article was enacted, the State in no event had a lien on personal property for taxes, nor upon real estate except for the taxes due upon each separate piece. The effect of the article was to give the State a lien upon all the property of an estate or individual (under the circumstances named in the article), so that all the property should be under a preference lien for all the taxes due by the individual or estate, without reference to the particular property against which it was assessed."

The funds in the hands of the trustee, being the trust fund for the benefit of the creditors of the assignee and being the proceeds of the goods converted by him into cash, under the express stipulation of the deed of assignment for the benefit of the creditors, are subject to the claims of such creditors, and the tax collector without pursuing the goods into the hands of the purchaser could enforce collection of the proceeds in the hands of the trustee. (Rose vs. Taylor, 44 S. W., 326.)

It is said in the above case:

"Where the trustee converts the trust estate, the proceeds that arise therefrom are held by him subject to the trust; and the beneficiary can, if he so desires, elect to pursue the proceeds, so long as they may be identified, notwithstanding a purchaser from the trustee may have had notice of the trust and the rights of the beneficiary. Especially is this true where the trustee retains the proceeds in his own hands, such as was the case here with Taylor. This principle is fully recognized in 2 Perry, Trusts (third edition), Sections 828-844, inclusive."

In the event the property assigned has been sold and passed beyond the reach of the collector, and dissipated to the extent that the lien cannot be enforced against same and the proceeds thereof have been disbursed, and therefore cannot be identified, we are of the opinion that, if the collector under such assignment, as above set out in this opinion, does not relieve the person owing the tax from his personal liability and obligation to the State, and the tax collector would have the right to pursue any other property remaining in the hands of the assignor for the taxes due upon the stock of goods.

State vs. Jordan, 59 S. W., 826.

Under the law of assignment, it is incumbent upon the assignor to transfer to his trustee all of his property not exempt from forced sale, and therefore the tax collector, in event of the failure to collect the tax in any of the ways hereinbefore pointed out, would be compelled to pursue exempted property withheld by the assignor from his deed of assignment. This, of course, is not intended to relate to homesteads, which are liable only for the taxes due thereon.

Article 7637, Revised Statutes of 1911.

However, by Article 7630 all real and personal property is made liable for all State and county taxes due by the owner thereof. The effect of this latter statute is to take all real and personal property, except homesteads, out of the exemption statute and subject them to forced sale for taxes.

We, therefore, advise you that the assignor remains liable, and any property in his hands, except the homestead, which is liable for the taxes against it only, may be subjected to payment of any tax due by the assignor.

Yours very truly,
C. W. TAYLOR,
Assistant Attorney General.

TAXATION—INHERITANCE TAX—WILLS—DEGREES OF RELATIONSHIP.

When a person dies, leaving a lawful will, all of his estate, devised or bequeathed by such will, shall vest immediately in the devisee or legatee, and all the estate of such person not devised or bequeathed shall vest immediately in his heirs at law, but all of such estate, except such as may be exempt by law, shall be subject to the debts of the deceased.

The right of the State to an inheritance tax accrues at the moment of death and is measured as to any beneficiary by the value at the time such property passes to him. Subsequent appreciation or depreciation is immaterial.

The common law rule of computing relationship being in force in this State, first cousins are related in the second degree.

Where a testator bequeathed to his kindred by blood within the first and second degrees the sum of $5000 each, the relatives of the deceased commonly known as first cousins would take under the will and an inheritance tax accrued in favor of the State at the moment of the death of the testator, and the State would be entitled thereto. although such distributees compromised litigation and received from the estate only the sum of $3000 each.

Revised Civil Statutes of 1911, Articles 3235 and 7487.

June, 8, 1915.

Hon. E. S. Briant, County Judge, Sonora, Texas.

DEAR SIR: The Attorney General is in receipt of your letter of recent date, reading as follows:

"I am in receipt of your favor of recent date enclosing letter from Mr. Wade H. Lail of Cynthianna, Ky., regarding the inheritance tax collected from distributees of the estate of E. R. Jackson, deceased.

"The parties collected from are first cousins of E. R. Jackson and one clause of his will bequeathed to each of his kindred by blood within the first and second degree, the sum of $5000.

"Judge Meeks of Dallas construed the clause to mean first cousins and decreed that each was entitled to $5000. The estate of E. R. Jackson was solvent then and yet, but on account of an appeal from the judgment of Judge Meeks, the first cousins thought it wise to compromise with the residue owners of the estate for the sum of $3000.

"The cousins were paid the sum of $1500 cash and two notes of $750 each due in one and two years in settlement of their claim against the estate, with the provision that if the notes were not paid promptly when due then in that event each was to receive the original sum of $5000.

"Under the conditions, above set out, when I came to calculate the inheritance tax due the State I concluded that they should pay the tax on the amount that the courts had said that they were entitled to. Certainly, I could not think that the heirs could compromise the State out of the tax due by an act of their own. Please advise me at your earliest convenience your opinion in the case. Others who are in the same class will be called upon to pay the tax soon."

After a careful consideration of the facts submitted by you and the application of the law relative to inheritance taxes, we are of the opinion that you are correct in your judgment that the distributees under the will of E. R. Jackson, deceased, are due the State of Texas an inheritance tax, to be computed upon the $5000 bequeathed to them by the will. We base this conclusion upon the fact that, under the laws of this State the distributees to whom the testator bequeathed the sum of $5000 each, that is, the kindred by blood within the first and second degrees, include those relatives of the deceased commonly known as first cousins. The judgment of the Federal Court at Dallas, in construing this clause of the will, correctly held first cousins to be related to the testator in the second degree, for the reason that in computing degrees of relationship the common law rule must be followed as to collateral relationship, that rule being to begin with the common ancestor and count downward to the party in question most remote, which would establish the degree of relationship between the second parties.

In the case in question, beginning with the common ancestor of the testator and the first cousin and counting down the father or mother, as the case might be, of the testator would be one degree and the testator himself would be two degrees; then counting down the collateral line, the father or mother of the distributees would be one degree and the distributees would be two degrees. Therefore, the testator and the distributees each being two degrees removed from the common ancestor would establish a relationship between the two as that of the second degree.

Tyler Tap R. R. Co. vs. Overton, W. & W. Secs., 534-5-6; Baker vs. McRimmon, 48 S. W., 742; G. C. & S. F. R. R. Co. vs. Looney, 95 S. W., 691.

By the provisions of Article 7487, Revised Statutes, 1911, all property within the jurisdiction of this State, real or personal, corporeal or incorporeal, and any interest therein, shall, upon passing to or for the use of certain persons therein enumerated, be subject to a tax for the benefit of the State, as therein specified. By Subdivision 2 of this article, it is provided that if such property passes to or for the use of an uncle or aunt, or a lineal descendant of an uncle or aunt of the decedent, the tax shall be three per cent on any value in excess of $1000.

Assuming that the distributees of the estate of E. R. Jackson, deceased, had received the full sum of $5000, then, under the provisions of Subdivision 2, above cited, the tax would be computed upon the amount received less $1000, or three per cent of $4000, which would amount to $120 due by each of the distributees.

Under the statutes of this State, when a person dies, testate or intestate, leaving an estate, the title thereto vests immediately in those entitled thereto under the will or by the law of descent and distribution, as the case might be.

Article 3235, Revised Statutes, 1911, reads as follows:

"When a person dies, leaving a lawful will, all of his estate devised or bequeathed by such will shall vest immediately in the devisees or legatees; and all the estate of such person, not devised or bequeathed, shall vest imme-

diately in his heirs at law; but all of such estate, whether devised or bequeathed or not, except such as may be exempted by law from the payment of debts, shall still be liable and subject in their hands to the payment of the debts of such testator or intestate; and, whenever a person dies intestate, all of his estate shall vest immediately in his heirs at law, but with the exceptions aforesaid shall still be liable and subject in their hands to the payment of the debts of the intestate; but, upon the issuance of letters testamentary or of administration upon any such estate, the executor or administrator shall have the right to the possession of the estate as it existed at the death of the testator or intestate, with the exception aforesaid; and it shall be the duty of such executor or administrator to recover possession of and hold such estate in trust to be disposed of in accordance with law."

Melton vs. Beasley, 121 S. W., 574.

The inheritance tax law being in fact a tax upon collateral succession and the statute prescribing that the title to property shall vest immediately upon death, therefore, the State is entitled to its tax upon the value of the estate at the time of the passing of the title.

In Ross on "Inheritance Taxation," Section 52, we find the following:

"The right of the State to an inheritance tax accrues at the moment of death, and hence is ordinarily measured as to any beneficiary by the value at the time such property passes to him. Subsequent appreciation or depreciation is immaterial."

The author cites as authority in support of the above rule the following:

Estate of Hite, 113 Pac., 1072;
Estate of VanPelt, 118 N. Y. (Supp.), 655;
Estate of Nivanti, 122 N. Y. (Supp.), 954.

In the same footnote we find the following:

"The value of the estate is not to be diminished for purposes of taxation by the expense of litigation among the distributors (Estate of Sanford, 123 N. Y. (Supp.), 284, or by losses due to misappropriation by the executor." (Estate of Hite, supra).

We, therefore, can reach no other conclusion but that immediately upon the death of E. R. Jackson those persons related to him within the second degree, being first cousins, were vested with the title to $5000 of his estate each, and that immediately upon the vesting of such title the right of the State to an inheritance tax accrued. The fact that such distributees may have compromised litigation with other distributees or devisees and agreed on $3000 from the estate can in no way affect the right of the State to the inheritance tax upon the five thousand dollars ($5000), the amount to which they were lawfully entitled. If these distributees saw fit *to buy their peace* and avoid what appeared to them expensive and vexatious litigation, it was their affair, in which the State had no interest and by which the State is in no way bound. They can no more claim a reduction of the inheritance tax to exclude the $2000 waived than they could exclude the State from the tax upon such amount of costs, expenses and attorneys fees that may have accrued in securing the $3000 they received.

We, therefore, advise you that you are correct in computing the inheritance tax due by these parties upon the $4000, or $120.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

TAXATION—DELINQUENT TAXES.

House Bill 40: Fees and costs in collection of delinquent taxes by suit or otherwise.

March 1, 1916.

Hon. G. J. Henshaw, County Attorney, Sanderson, Texas.

DEAR SIR: We have a letter from you in which you cite the case of Typer & Knudson vs. Tom, et al., 132 S. W., 850, and Article 7691, Revised Statutes. Then your letter proceeds as follows:

"House Bill 40, Chapter 147, of the Acts of the Thirty-fourth Legislature, in Section 3, provides that the county attorney's fee for filing and instituting suits to collect delinquent taxes shall be five dollars for the first tract and one dollar for each additional tract and does not provide for a different fee where the tax is paid before judgment.

"Please advise me what costs should be collected where a delinquent taxpayer desires to pay his taxes before suit."

Replying thereto, we beg to state that in reference to the fees of a county attorney for the collection of delinquent taxes Article 7691, Revised Statutes, contains the following provisions:

"The county attorney, or district attorney in counties where there is no county attorney, shall represent the State and county in all *suits* against delinquent taxpayers that are provided for in this Act, and all sums collected shall be paid immediately to the county collector. In no case shall the compensation of said county attorney be greater than three dollars for the first tract in one suit and one dollar for each additional tract, if more than one tract is embraced in the same suit to recover taxes, interest, penalty and costs; provided that those county attorneys who may have heretofore and may hereafter institute said suits, shall be entitled to an equal division with their successors in office of the fees allowed herein on all suits instituted by them, where the judgment has not been obtained prior to the vacation of their office. * * * Provided that in no case shall the State or county be liable for such fees, but in each case they shall be taxed as costs against the land to be sold under judgment for taxes and paid out of the proceeds of sale of same after the taxes, penalty and interest due thereon to the State are paid * * * and provided, further, that where suits have been brought by the State against delinquents to recover taxes due by them to the State and county, the said delinquents may pay the amount of the tax, interest, penalties and all accrued costs to the county collector during the pendency of such suit; and the county attorney shall receive as compensation therefor two dollars for the first tract and one dollar for each additional tract embraced in said suit * * *; but these fees shall be in lieu of the fees provided by such officers where suits are brought as hereinbefore provided."

Prior to the passage of House Bill 40 the above article was the only statute which provided any fee to county and district attorneys for services in connection with the collection of delinquent taxes. The

language of the statute clearly shows that no right to any of the fees mentioned arises until suit has been filed for the collection of delinquent taxes. A very good reason for not making provision for fees to county attorneys in delinquent tax matters until suits have been filed is, that the district or county attorney does not perform any services in connection with the collection of delinquent taxes until suits are filed. In fact the statute nowhere imposes any duty upon district or county attorneys in reference to the collection of delinquent taxes, except to "represent the State and county in all suits against delinquent taxpayers."

The law in this respect is in no manner changed by House Bill 40, which is Chapter 147 of the General Laws of the Thirty-fourth Legislature. In Section 1 of said act it is provided that "the county or district attorney will institute suits not later than January first next (meaning after the notices provided for have been mailed to the delinquent owners) for the collection of such moneys, and for the foreclosure of the constitutional lien existing against such lands and lots."

In Section 3 of said act it is provided that

"Not later than January 1, 1917, in counties of less than fifty thousand inhabitants, and not later than January 1, 1918, in counties of more than fifty thousand inhabitants, and not later than June 1 of each year thereafter, it shall be the duty of the county attorney, or the district attorney if there be no county attorney, to file and institute suits as otherwise provided by law for the collection of all delinquent taxes due at the time of filing such suit on lands or lots situated in such county, together with interest, penalties and costs then due as otherwise provided by law; provided, that for the work of filing such suits, the county or district attorney shall receive a fee of five dollars for the first tract of land included in each suit, and one dollar for each additional tract included therein; provided, that where unimproved town lots are sued upon or included in a suit with other land or improved town lots in the same town, only one such additional fee shall be added for each twenty lots or any number less than twenty; and provided further, that in counties containing over fifty thousand inhabitants such attorney's fee shall be two dollars and a half for the first tract and fifty cents for additional fees as above provided."

It will thus be seen that House Bill 40 places no duty upon county or district attorneys which was not theretofore imposed upon them by law and that the fees provided for therein accrue only upon the filing of suit. It is the opinion of this Department, however, that it was the intention of the Legislature by the provision made in House Bill 40 for fees of county and district attorneys "for the work of filing * * * suits" to repeal the provisions on this subject contained in Article 7691, which have been quoted hereinabove, or rather to substitute the fees mentioned in House Bill 40 for the fees theretofore provided in said Article 7691. You are also advised that it is the opinion of this Department that the fees provided for county and district attorneys in House Bill 40 accrue upon the filing of the suit and are intended to compensate him "for the work of filing such suits" and he is entitled to collect these fees whether the suit is prosecuted to judgment or whether payment of taxes, interest, penalties and costs was made during the pendency of the suit.

If the taxes, penalty, interest and costs are paid before the notices

provided for in House Bill 40 are sent out or after they are sent and before suit is filed, the county or district attorney would be entitled to no fees whatever.

As to Fees of Tax Collector.

They are the same they were prior to the passage of House Bill 40, except that since said act went into effect collectors of taxes are entitled to five per cent commission in addition to the commission theretofore allowed by law, provided they perform all the additional duties imposed upon them by House Bill 40 in reference to the preparation of delinquent tax records and sending out notices.

The tax collector is still entitled to the fee provided for in Article 7691, after he has performed the services enumerated therein. The provision relating to this fee is plain and unambiguous and clearly sets forth the services that must be performed before the fee accrues. This provision is as follows:

> "The collector of taxes, (1) for preparing the delinquent list (meaning the yearly delinquent list), and (2) separating the property previously sold to the State from that reported to be sold as delinquent for the preceding year, and (3) certifying the same to the commissioners court, shall be entitled to a fee of one dollar for each correct assessment of the land to be sold, said fee to be taxed as costs against the delinquent."

After the performance of all the duties mentioned he is entitled to this fee whether suit has been filed or not.

As to the Fees of County Clerks.

House Bill 40 makes no change in reference to the fees of county clerks. The services to be performed by county clerks in reference to delinquent tax matters and the fees they are to receive upon the performance of such services are shown by the following provisions of Article 7691:

> "And the county clerk (1) for making out and recording the data of each delinquent assessment, and (2) for certifying the same to the commissioners court for correction, and (3) for noting the same in the minutes of the commissioners court, and (4) for certifying the same, with corrections, to the Comptroller, and noting the same on his delinquent tax record, shall receive the sum of one dollar to be taxed as costs against the land in each suit."

He is entitled to these fees only when he has performed all of the services enumerated. whether the taxes are collected before judgment is rendered or afterwards. We are of opinion that he is entitled to this fee whenever these services are renderd whether a suit has been filed or not, but the fee can only be collected from the delinquent. In other words, we think the meaning of the phrase "to be taxed as costs against the land in each suit" is merely that if a suit is filed this fee shall be taxed as a part of the costs. The services enumerated in the provisions of Article 7691 include the services he is to perform under the provisions of Article 7686 in reference to the keeping of the delinquent tax record in a book provided for that purpose. Before

he is entitled to such fee he should be required to record in such a book the "complete list of the lands and lots that have been reported delinquent or sold to the State for taxes for any year or number of years since January 1, 1885" and the data and information in reference to same required by Article 7663 and such record should be arranged numerically as to abstract numbers and accompanied by an index of the names of delinquents in alphabetical order. If there is a foreclosure and the land is bid off to the State, according to the provisions of Article 7639 it is the duty of the county clerk to record the deed which the sheriff executes to the State and for this service he is entitled to an additional fee of one dollar "to be taxed as other costs."

As to the Fees of District Clerk.

The fees of district clerks are in no way affected by House Bill 40. The services they are to perform and the fees they become entitled to after the performance of such services are shown by the following provisions of Article 7691, Revised Statutes:

"The district clerk shall be entitled to a fee of one dollar and a half in each case, to be taxed as costs of suit * * * provided that in no case shall the State or county be liable for such fees, but in each case they shall be taxed as costs against the land to be sold under judgment for taxes and paid out of the proceeds of sale of same after the taxes, penalty and interest due thereon to the State are paid; * * * provided, further, that where suits have been brought by the State against delinquents to recover tax due by them to the State and county, said delinquents may pay the amount of the tax, interest, penalties and all accrued costs to the county collector during the pendency of such suit; * * * and the district clerk shall receive only one dollar * * * but these fees shall be in lieu of the fees provided for such officers where suits are brought as hereinbefore provided."

Clearly no fee accrues to district clerks until the tax suit has been filed. The law imposes upon him no duty in reference to the collection of delinquent taxes prior to that time and he is called upon to perform no service whatever until suit is filed. The services he is to perform are such services as are imposed by law upon him in reference to any suit filed in his court and for all such services he is to receive as full compensation merely the fee of $1.50 in each case which is prosecuted to final judgment. If the taxes, penalty, interest and costs are paid during the pendency of the suit, then he is entitled only to a fee of $1.00 for all the services he as district clerk must render in reference to such suit.

As to the Fees of Sheriffs.

The fees of sheriffs are in no manner affected by the provisions of House Bill 40. The services which must be performed by a sheriff in reference to delinquent tax matters are shown by various articles of the statute. Of course, when suit is filed he is to perform all the services imposed by law upon him in reference to suits in district courts. Thus, in Article 7689 it is provided that—

"The proper persons shall be made parties defendant in such suits, and

shall be served with process and other proceedings had therein as provided by law for suits of like character in the district courts of this State; and, in case of foreclosure, an order of sale shall issue, and the lands sold thereunder as in other cases of foreclosure * * * and (in case of a sale) in the absence of the county attorney, the sheriff is authorized to bid to the State when there are no bidders * * *, and, in all such cases where the property is bid off to the State, it shall be the duty of the sheriff to make and execute deeds to the State, using forms to be prescribed and furnished by the Comptroller, showing in each case the amount of taxes, interest, penalty and costs for which sold, and the clerk's fee for recording deeds as hereinafter provided."

The only specific fees mentioned by the statute for sheriffs as compensation for their services in connection with the collection of delinquent taxes are as follows:

Article 7691 provides:

"The sheriff shall be entitled to a fee of one dollar for selling and making deed thereto to each purchaser of land that he sells under judgment for taxes, which fee shall be taxed as costs of suit * * * provided that in no case shall the State or county be liable for such fees, etc. * * * provided, further, that where suits have been brought by the State against delinquents to recover tax due by them to the State and county, the said delinquents may pay the amount of the tax, interest, penalties and all accrued costs to the county collector during the pendency of such suit; and * * * the sheriff (shall receive) only one dollar in each case; but these fees shall be in lieu of the fees provided for such officers where the suits are brought as hereinbefore provided."

This Department is of opinion that the proper construction to be placed upon the foregoing provisions is, that where suit to collect delinquent taxes has been filed and prosecuted to judgment, the sheriff would be entitled to receive for his services the fees provided by law for such services in connection with other suits in the district court to be taxed as costs in the case, and that if there is a foreclosure and he makes deed to the State or to a private purchaser, he would in addition be entitled to "a fee of $1.00 for selling and making deed thereto to each purchaser of land that he sells under judgment for taxes," which fee also is to be taxed as costs. The Department is of opinion, however, that if the taxes, penalty, interest and costs are paid during the pendency of the suit, and there is no sale and the sheriff is not called upon to make deed to the land, the sheriff shall as compensation for all of his services in connection with the tax suit receive "only $1.00 in each case."

Very truly yours,

JNO. C. WALL,
Assistant Attorney General.

TAXATION—RAILROADS—INTANGIBLE ASSETS.

1. Railroad company cannot be prevented from tendering and paying into court all taxes not in dispute and involved in the litigation.
2. Tax on tangible properties of railway company can be accurately segregated from the tax on its intangible assets.

3. Where State should receive or refuse to receive the money when tendered no penalty or interest will accrue.
4. This opinion does not waive the rule that tax collectors should not receive and receipt for merely a portion of the taxes assessed against the property of an owner.

January 14, 1916.

Hon. John E. Shelton, County Attorney, Austin, Texas.

DEAR SIR: We have your letter of January 14th, advising that there had been filed in the District Court of Travis County a suit entitled Jas. A. Baker and Cecil Lyon, Receivers of the International & Great Northern Railway Company, et al., against Robert Maud, Collector of Taxes, asking an injunction against the collection of taxes levied in Travis county on the intangible assets of said railway company. In your letter you also state that the receivers of said railway company are now offering to pay the taxes levied upon the physical properties of said company in Travis county, and you ask the opinion of this Department as to whether the tax collector would be authorized to accept a receipt for the same.

We have examined the petition in this case and note that the injunction is asked on the following grounds: (1) That the valuation on the intangible assets of said railway company was illegally made; and (2) that there has been a discrimination in the valuation placed upon the intangible assets of the railway company in Travis county. We are also advised that it is the intention of the attorneys of said railway company to file a similar suit in each of the counties in the State through which its road runs.

The amount of the taxes so offered to be paid on physical properties in Travis is $5164.88 and the aggregate amount in all the counties is $211,640.64.

After an examination of the authorities upon this question we have reached the conclusion that the railway company cannot be prevented from tendering and paying into court all taxes which are not in dispute and involved in the litigation.

See: Railway Co. vs. Scanlan, 44 Texas, 651.
Harrison vs. Vines, 46 Texas, 20.
Rosenberg et al. vs. Weekes, 67 Texas, 584.
Blanc vs. Meyer, 59 Texas, 92.

The tax on the tangible properties of the railway company can be accurately segregated from the tax on its intangible assets.

The State will be compelled to receive the tax on the tangible properties when the same is legally tendered, or the money will have to remain with the clerks of the various district courts, without interest, until the litigation is terminated. The amount which will be tendered in Harris county is about $17,000. The amount in Anderson county is something more than $15,000, and the amount in each county is considerable.

Whether the State should receive or refuse to receive the money when tendered, no penalty or interest will accrue.

Under these circumstances, it occurs to us that the tax collector of each county would be authorized to receive the tax on the physical

properties when the same is tendered and to issue a receipt for such tax.

This receipt should clearly show that it is a receipt for the tax on the physical properties only.

When it comes to a settlement with the Comptroller, the collectors of these counties should be given credit for the unpaid taxes on the intangible properties of said railway company, and said tax should be carried forward on the delinquent rolls.

It is not intended by this opinion to in any manner waive the rule heretofore made by this and the Comptroller's Department that tax collectors should not receive and receipt for merely a portion of the taxes assessed against the property of an owner. This ruling is correct and is not subject to modification except where the legality of some particular tax which can be segregated from the whole is in litigation.

Very truly yours,

JNO. C. WALL,
Assistant Attorney General.

TAXATION—DRAINAGE DISTRICT—DELINQUENT TAX LIST—FEES OF OFFICE.

Delinquent tax lists may be published in a newspaper of the county published outside the district.

Section 34, Chapter 118, Acts Regular Session, Thirty-second Legislature.
Chapter, 33, Acts Regular Session, Thirty-fourth Legislature.
Articles 7687 and 7692, Revised Statutes, 1911.

October 20, 1915.

Hon. W. E. Devant, County Attorney, Bay City, Texas.

DEAR SIR: Replying to the four inquiries in your letter of October 8, in their order, we beg to advise:

First: This Department has ruled that all counties, without regard to population, are under the fee bill.

Second: In the ruling referred to above it is also held that all officers are required to keep accounts and report.*

Third: This Department has ruled fees for assessing and collecting taxes in special district must be accounted for. However, this question is now pending in the Supreme Court on certified questions from the Court of Civil Appeals at Galveston in the case of Nichols et al. vs. Galveston County, the latter court holding such fees to be ex officio. Under this status of the question this Department will refrain from expressing any further opinion thereon.

Fourth: You ask if publication of delinquent tax lists of drainage districts in newspapers published outside the district would be legal. Replying to this question we beg to say that Section 34, Chapter 118, Acts Regular Session of Thirty-second Legislature provided for collection of delinquent taxes in such districts in the following language:

"It shall be the duty of the tax collector to make a certified list of all

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*See opinions on subject of "Fees" on pages —— et seq.

delinquent property upon which the drainage tax has not been paid and return the same to the county commissioners court, which shall proceed to have the same collected by the sale of such delinquent property in the same manner as is now provided for the sale of property for the collection of State, county taxes, and at the sale of any property for any delinquent drainage tax the drainage commissioners may become the purchasers of the same for the benefit of the drainage district."

The latter paragraph of Section 31a of said act, as amended by Chapter 33, Acts Regular Session of Thirty-fourth Legislature, provides as follows:

"The taxes authorized to be levied and collected under the provisions of this Act shall be a lien upon all property against which the same are or may be assessed, and it shall be the duty of the county commissioners court and said court shall have the authority to fix the time and determine the date when such taxes shall become due and payable, otherwise such taxes shall become due and payable, at the same time as State and county taxes mature and fall due. And upon the failure to pay such taxes when due the penalty provided by the laws of Texas for failure to pay State and county taxes at maturity shall in every respect apply to the taxes herein authorized to be levied, assessed and collected."

From the above excerpts from the statute applicable to such districts it is apparent that the legislative intent was to place the collection of delinquent taxes due thereto under the laws applicable to the collection of like taxes due the State and county.

Under the terms of Articles 7687 and 7692, Revised Statutes, 1911, it is made the duty of the commissioners court to cause the delinquent tax lists for State and county taxes to be published in some newspaper published in the county for three consecutive weeks.

From what is said above we are of the opinion and so advise you a publication of the delinquent tax list of a drainage district in a newspaper published in the county wherein the district is located would be a legal publication, although such paper was not published in the district.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

TAXATION—INHERITANCE TAX—FEES.

The procedure incident to the collections of inheritance tax upon an estate being administered by an independent executor is not such an administration of the estate as would authorize the county judge to charge the legal commission of one half of one per cent upon the cash receipts of the estate.

The procedure necessary for the collection of an inheritance tax is ancillary to and dependent upon the main administration and in this sense is an administration of the estate to the extent that the county judge would be authorized to charge the fees allowed by law for such orders, decrees, etc., as it may be necessary for him to make.

The costs expressly enumerated in the inheritance tax statute are chargeable to and deducted from the amount of the tax collected, under which

established policy of the act, the statutory fees of the county judge should be deducted from the amount of the tax.

Articles 3840, R. S., 1911, and 3850, R. S., 1911, Chapter 10, Title 126, R. S., 1911.

February 8, 1916.

Hon. C. C. Hines, County Attorney, Jefferson, Texas.

DEAR SIR: You handed to the Attorney General a letter addressed to you by your county judge, Hon. P. G. Henderson, wherein he desires to be advised by you if the procedure in the probate court for the collection of an inheritance tax upon property passing under an independent administration would entitle the county judge to a commission of one-half of one per cent as in administration of an estate by the court.

Replying thereto we beg to advise you that in our opinion the county judge would not be entitled to a commission upon the cash receipts as is provided by Article 3850, Revised Statutes, for the reason that there is no such administration of the estate conducted through the probate court as is contemplated by this statute for his services in which the county judge is entitled to one-half of one per cent of the cash receipts. The procedure set forth in Chapter 10, Title 126, Revised Statutes, 1911, whereby a tax is levied and collected against collateral inheritances is not in a strict sense a probate procedure but is an ancillary procedure subject to and growing out of the administration of the estate. It is not such an administration carrying with it the responsibility devolving upon the county judge as in the regular procedure in the appointment of executors or administrators, the approval of claims, orders of sale, collection of accounts, approval of exhibits and final accounts for all of which the county judge in addition to such fees as may be prescribed is allowed a compensation of one-half of one per cent of the cash receipts.

It is provided in this act that certain costs are allowable. Article 7492 provides that each appraiser appointed by the county judge shall be paid the sum of $2.00 for each day employed in such appraisal together with his actual necessary expenses which payment shall be made by the collector of taxes out of any moneys in his hands received under this chapter.

It is also provided in Article 7491 that in the event the county attorney reports the liability for inheritance tax to the county judge he shall be entitled to compensation of ten per cent of the tax payable not to exceed $20 in any one estate. This fee is likewise paid by the collector of taxes out of taxes paid him on property belonging to such estate.

Under Article 7498 the collector of taxes upon payment of the tax collected into the State Treasury is authorized to deduct therefrom his compensation at the rate of one per cent of all taxes collected together with all lawful disbursements made by him under the act.

It therefore seems to be the policy of this act that all costs accruing in the procedure incident to its collection shall be paid from the amount of the tax collected. We think that the county judge in a case of this character would be entitled to such fees as are prescribed by Article 3849 for county judge in probate matters, this procedure being

in the nature of an ancillary probate procedure in which, in our opinion, the county judge would be entitled to charge the usual probate fees for such orders and judgment as he may enter in the matter, and that following the policy of the act generally such fees should be charged against and deducted from the amount of tax collected.

We advise you, however, that in our opinion the county judge would not be entitled to a commission upon the cash receipts of the estate and that his fees indicated above are the only compensation he is to receive.

Some time since this Department had occasion to render an opinion upon the question of whether or not the county judge would be entitled to commissions upon the probate of a will appointing an independent executor. We held that he would not. It gives me pleasure to hand you herewith copy of that opinion, being addressed to Hon. Sewall Myer, County Attorney of Harris County, under date of December 20, 1915, and being No. 1567. As this opinion bears upon the question submitted by you on behalf of your county judge I take it that it will be of interest to you.

With respect, I am,

Very truly yours,

C. W. TAYLOR,
Assistant Attorney General.

TAXATION—IRRIGATION DISTRICTS.

Property of an irrigation district organized by the commissioners court is exempt from taxation. Constitution, Sections 1 and 2, Article 3; and Chapter 172, Acts of the Thirty-third Legislature.

May 24, 1916.

Hon. J. A. Drane, County Attorney, Pecos, Texas.

DEAR SIR: The Attorney General has your letter of May 20, wherein you ask to be advised as to whether property such as reservoirs, canals, laterals and ditches, etc., belonging to an irrigation district created by order of the commissioners court under Act of 1913, is subject to taxation.

Replying thereto, we beg to advise that in our opinion such property is not subject to a tax for the following reasons:

Section 1 of Article 8 of the Constitution provides in part that "all property in this State whether owned by natural persons or corporations, other than municipal, shall be taxed in proportion to its value * * *."

Section 2 of Article 8 of the Constitution provides in part that the Legislature may by general laws exempt from taxation public property used for public purposes.

Under the authority of the last section of the Constitution quoted above the Legislature enacted what is now Article 7507 of the Revised Civil Statutes exempting certain property from taxation, Section 3 of which reads in part as follows:

"All property, whether real or personal, belonging exclusively to this State or any political subdivision thereof or the United States," etc.

An irrigation district created by the commissioners court under the authority of Chapter 172 of the Acts of the Thirty-third Legislature could not properly be called a municipal corporation, but in our opinion it is a political subdivision of the State within the meaning of Article 7507 of the Revised Statutes and the property belonging to such district would be exempt from taxation.

In Allison vs. Corker, 60 L. R. A., 564, the court defines political divisions, as follows:

"That they embrace a certain territory and its inhabitants organized for the public advantage and not in the interest of particular individuals or classes; that their chief design is the exercise of governmental function and that to the electors residing within each is to some extent committed the power of local government, to be wielded either mediately or immediately within their territory for the pecuniary benefit of the people there residing."

It is also said in Smith vs. Howell, 38 Atl., 180:

"A district composed of all or part of the township with its inhabitants set off for the purpose of lighting its public streets is a political division in the exercise of a governmental function to which the power to raise money by a general tax may be granted by the Legislature."

In the case of Directors of Middle Kittitas Irr. District vs. Peterson, 29 Pac., 995, the court uses this language:

"Irrigation districts are not municipal corporations, within the strict and better use of that term. Every public corporation formed by the State for the purpose of carrying out any of the duties which the State owes to any locality, and which by its terms is made obligatory to all the inhabitants of the district or locality affected thereby, must be held to be included in the words 'either municipal corporation,' as used in the Constitution, Article 8, Section 6, relating to the incurring of indebtedness by a county, town, city, school district or other municipal corporation. It does not follow, however, that every corporation which may be created by the State as an agency for the performance of some public or quasi public duty comes within such definition. One of the essentials of a municipal corporation is that for the purpose for which it was organized it must affect all within its boundaries alike; and this is true, although such corporation is constituted for a single purpose. For instance, a school district, though organized only for the purpose of facilitating the education of its children, affects all the taxpayers of the district alike. The same may be said of a county. It has only limited powers, but these powers are to be exercised for the benefit of all the inhabitants alike. Such is not the case of an irrigation district; for, while it is true that its powers and privileges are subject to the will of the majority of the electors therein, yet when it acts thereunder it does not equally affect all of its inhabitants. It will thus be seen that, if we are to hold that every corporation which the Legislature sees fit to make use of for the purpose of aiding in the government of any district or locality, or providing for the inhabitants therein any right or privilege common to all, is a municipal corporation within the inhibition of the Constitution, yet it will not follow that the corporations of the kind contemplated by the irrigation act are also municipal corporations. Directors of Middle Kittitas Irr. Dist. vs. Peterson, 29 Pac., 995, 996, Wash., 147."

In irrigation districts organized under this act the directors of the district may be elected by the people and the officers thereof chosen as is provided in the act. Taxes are levied and collected for the purposes therein set forth which facts bring the district within the meaning of a political subdivision of the State and the property of such district is public property used for public purposes within the meaning of the constitutional provisions under which our exemption laws have been enacted.

Yours truly,
C. W. TAYLOR,
Assistant Attorney General.

TAXATION—GROSS RECEIPTS—BEGINNING QUARTER TAX.

Where an individual company, corporation or association is engaged in a business subject to a gross receipt tax upon which business the gross receipt tax has been paid, makes a sale of such business, the purchaser thereof is not subject to the beginning quarter tax.

Chapter 2, Title 126, Vernon's Sayles' Civil Statutes; Articles 7364, 7365 and 7385, Vernon's Sayles' Civil Statutes.

November 16, 1915.

Hon. H. B. Terrell, Comptroller, Capitol.

DEAR SIR: The Attorney General is in receipt of your letter, reading as follows:

"The Comptroller's Department desires an opinion from your Department on the following question: After an individual, firm or corporation has paid their beginning tax and continued to pay their gross receipts tax for a period of time and sell their business to another party, who continues the business in the same name or in another name, would the party buying said business be liable for a beginning tax as provided by Article 7385, Revised Civil Statutes of 1911?"

The various provisions of the stautes of this State authorizing the taxation based upon gross receipts are to be found in Chapter 2 of Ttitle 126, Vernon's Sayes' Civil Statutes. In all of the various subdivisions of this chapter, which was Chapter 18 of the General Laws of the First Called Session of the Thirtieth Legislature, the tax therein levied upon the gross receipts of the occupation therein defined is based upon a percentage of the gross receipts of such individual, company, corporation or association for the preceding quarter according to report filed with the Comptroller of Public Accounts. The beginning quarter tax referred to in your letter is to be paid upon the commencement of a business on or after the beginning day of the quarter as is provided in Article 7385, which is in the following language:

"If any individual, company, corporation, firm or association in this chapter mentioned shall begin and engage in any business for which there is an occupation tax herein imposed, on or after the beginning day of the quarter for which said tax is imposed, then, and in all such cases, the amount of such tax for said beginning quarter shall be and is hereby fixed at the sum of fifty dollars, payable to the treasurer of the State of Texas

in advance, but for the next succeeding quarter, and all other succeeding quarters, the tax shall be determined by reports to the Comptroller of Public Accounts of the business for the preceding quarter, or part thereof, as herein otherwise in this chapter provided; and reports and payments of such tax shall be made subject to all other provisions of this chapter."

As all taxes upon gross receipts under the various subdivisions of this act are based upon the amount of business done for the preceding quarter, it is manifest that at the beginning of the business, there being no gross receipts for the preceding quarter, no tax could be based thereon and as such tax is for the privilege of engaging in the occupation for the succeeding quarter it necessarily follows that there must be fixed by statute some arbitrary amount to be paid as a privilege for engaging in the occupation for the beginning quarter.

The courts of this State, as well as the weight of authority in other States, have determined that taxation based upon the amount of gross receipts is an occupation tax and not an ad valorem tax upon the property.

Producers Oil Co. vs. Stephens, 99 S. W., 157.
The Texas Co. vs. Stephens, 103 S. W., 481; 100 Texas, 628.
State vs. G. H. & S. A. Ry. Co., 97 S. W., 71.
Maine vs. Grand Trunk Ry. Co., 142 U. S., 217.
State Tax on Railway Gross Receipts, 15 Wallace, 284.
Henderson Bridge Co. vs. Kentucky, 166 U. S., 150.
New York, Lake Erie & Western Ry. Co. vs. Pennsylvania, 168 U. S., 431.
McHenry vs. Alford, 168 U. S., 651.
Wisconsin & Michigan Ry. Co. vs. Powers, 191 U. S., 387.
State vs. Houston Belt & Terminal Ry. Co., 166 S. W., 83.

In the case of the Texas Company vs. Stephens, supra, which was a suit by the State to enforce the collection of gross receipts taxes against the Texas Company under Sections 9, 11, 12 and 13 of the Act of the Twenty-ninth Legislature which was substantially the same as the Act of the Thirtieth Legislature under which gross receipt taxes are now collected, the invalidity of the act was urged for the reason that it alleged that the tax sought to be collected was an ad valorem tax upon the value of the property. The court in overruling this contention and in holding the tax to be an occupation tax and not an ad valorem tax, said:

"In its attack upon the validity of the statute the plaintiff has invoked many provisions of the State and Federal Constitutions and urged many propositions which have so little relevancy that they require no further notice. We shall confine our attention to those which seem to us to present real questions. One of them is that the sections before referred to, which are the ones applying to the business in which plaintiff has been engaged, levy an ad valorem tax upon the value of its property in excess of the rate allowed by the Constitution. This contention has been made with reference to a number of like statutes in this State and has invariably been overruled. (Stephens vs. State, 4 Texas, 137; Albrecht vs. the State, 3 Texas Ct. App., 216; the State vs. Galveston, H. & S. A. R. R. Co., 16 Texas Ct. Rep., 909; 2 Cooley on Taxation, pp. 1094, 1095, 1105, 1106, 1107, 1109 and authorities cited.) In the case of Producers Oil Company vs. the State, in which this court recently refused a writ of error, the point was made that the tax levied by Section 13 of the act under consideration upon producers of oil was a tax upon property. But the courts below held

otherwise, and this court, in refusing the writ of error, approved the holding. The taxes in the act are levied because the persons specified are engaged in particular, defined businesses, and are laid upon the carrying on of those businesses. The amounts of the taxes to be paid by those engaged in the businesses are to be ascertained by various standards, depending upon the characters of such businesses, but in no instance is a tax laid upon all or any of the property owned by such persons. Had the statute simply defined the business and imposed a tax of a fixed sum upon each, no one would have questioned that it was a tax upon the doing of the businesses; in other words, an occupation tax. The fact that the amount of the tax is to be determined, in prescribed methods, from the value, or extent, or magnitude of the businesses done cannot convert it into an ad valorem tax upon the property of the persons conducting them. We could only hold that it does by disregarding not only the nature of the provisions themselves and the language in which they are expressed, but the course of judicial decision here and elsewhere and of former legislation in this State, by which such laws have been treated as imposing occupation taxes."

In the case of State vs. Houston Belt & Terminal Railway Company, supra, wherein the State sought to collect the gross receipt tax levied by Article 7384, the same question arose and the court in holding the same to be an occupation tax and not an ad valorem tax, said:

"As to the second ruling, we have reached a conclusion at variance with that reached by the trial court, and the reasons for that conclusion will now be stated. On account of that provision of the Federal Constitution which confers upon Congress exclusive power to regulate commerce between the several States and foreign countries, the Suprem Court of the United States, in a long line of decisions, has held that it is not within the power of a State to levy any tax the direct effect of which is to impose a burden upon interstate or foreign commerce. Within that class of cases are several striking down and declaring void certain State enactments held by the Supreme Court to constitute a direct tax upon the gross receipts of interstate carriers, among which may be mentioned G. H. & S. A. Ry. Co. vs. Texas, 210 U. S., 217; 23 Sup. Ct., 638; 52 L. Ed., 1031; and Meyer vs. Wells Fargo Express Co., 283 U. S., 298; 32 Sup. Ct., 218; 56 L. Ed., 445. On the other hand, and parallel with that line of decisions, is a class of cases decided by the same high authority and holding that it is no violation of any provision of the Federal Constitution for a State to levy and collect an excise or occupation tax upon a carrier engaged in domestic commerce, even though the legislation fixing the tax prescribes that the amount thereof shall be equal to a given per centum of the gross receipts of the carrier, and notwithstanding the fact that a portion of such receipts may be derived from transportation which constitutes interstate commerce. The leading case in support of that doctrine is Maine vs. Grand T. Ry. Co., 142 U. S., 217; 12 Sup. Ct., 121, 163; 35 L. Ed., 994; and in the more recent case of United States Express Co. vs. Minnesota, 223 U. S., 355; 32 Sup. Ct., 215; 56 L. Ed., 459, the court said: 'The right of the State to tax property, although it is used in interstate commerce, is thoroughly well settled. Postal Tel. Cable Co. vs. Adams, 155 U. S., 688; 15 Sup. Ct., 268, 360; 39 L. Ed., 311; 5 Interst. Com. R. 1; Pullman Palace Car Co. vs. Pennsylvania, 141 U. S., 18; 11 Sup. Ct., 876; 35 L. Ed., 613; 3 Interst. Com. R., 595; Ficklen vs. Taxing District, 145 U. S., 1, 22; 12 Sup. Ct., 810; 36 L. Ed., 601, 606; 4 Interst. Com. R. 79. The difficulty has been, and is, to distinguish between legitimate attempts to exert the taxing power of the State and those laws which, though in the guise of taxation, impose real burdens upon interstate commerce as such."

The tax based upon gross receipts for the preceding quarter, being

an occupation tax, and the fact that the beginning quarter tax of fifty dollars is levied as an arbitrary amount for the reason there were no gross receipts to form the basis for such tax for a preceding quarter, we think would be sufficient grounds for a ruling that a purchaser of a business upon which the tax has been paid would succeed to the rights of his vendor to pursue the business without the payment of a beginning quarter tax. However, we find in Article 7364, Revised Statutes, 1911, dealing with the occupation taxes levied by Article 7355 the authority to convey the unexpired portion of an occupation license, such article being in the following language:

"Any person, firm, corporation or association of persons who shall be the legal owners or holders of any unexpired occupation license issued in accordance with the laws of this State, shall be and are hereby authorized to transfer the same on the books of the officer by whom the same was issued."

Article 7365 authorizes the assignee or purchaser of an unexpired occupation license to pursue such occupation upon the condition therein named.

The gross receipt tax levied by the articles of statute under discussion, being an occupation tax, the receipt issued upon the payment thereof while not in the form of a license, is in fact the authority and license granted by the State to pursue the occupation for the succeeding quarter. While the two articles last named were enacted in 1885 long prior to the enactment of the gross receipt tax statute, yet as the character of taxation under the gross receipts law is the same as that under what is known as the occupation tax statute, we think the two latter articles quoted have application and that the right acquired by the payment of the gross receipt tax is transferable under these articles.

We therefore advise you that in our opinion the purchaser of a business subject to a gross receipt tax upon which all taxes have been paid would not be subject to a beginning quarter tax; that he would acquire the right to pursue the occupation under the payment of the tax by his vendor, and that at the beginning of the ensuing quarter after the purchase he would report to the Comptroller the gross receipts of the business for the past quarter including the business done by his predecessor and that done by the purchaser after the purchase and upon such total gross receipts would pay the tax entitling him to pursue the business for the following quarter.

Yours truly,

C. W. TAYLOR,
Assistant Attorney General.

OPINIONS RELATING TO WAREHOUSE LAW.

WAREHOUSE COMPANIES.

Chapter 37, Acts First Called Session, Thirty-third Legislature.
All warehousemen who qualify under this act must use the form or receipts prescribed by the Commissioner of Insurance and Banking.

November 23, 1914.

Hon. D. M. Cameron, Chief Clerk Warehouse Addition, Department of Insurance and Banking, Capitol.

DEAR SIR: In reply to your communication of the 21st, we beg to advise you that where a warehouseman gives bond and is issued a certificate under the terms and provisions of Chapter 37, Acts of the First Called Session of the Thirty-third Legislature, which is now Title 131 of Vernon's Sayles' Statutes of Texas, then that such warehouseman must use the form of reecipts prescribed by the Commissioner of Insurance and Banking and that he is not permitted to issue a different receipt or a receipt containing the words stamped thereon "Not a Public Warehouse Receipt." In an opinion rendered your Department on March 19, 1914, we made it plain, we think, that one engaged in the warehouse business was not compelled to come under the law and operate a bonded warehouse but when he does so then he becomes subject to all the provisions of the Act and must use the form of receipts prescribed by the Commissioner of Insurance and Banking, for otherwise the Act would be purposeless. All persons engaged in the warehouse business for the public generally are in the larger meaning of the terms "Public Warehousemen"; but by this is meant only that their liabilities are those of a public warehouseman. A warehouseman of course may be a public warehouseman in the sense just suggested without complying with the terms of the Act, for he is such by virtue of the fact that he engages in that business. This sort of public warehouseman may, of course, stamp across the face of his receipts "Not a Public Warehouse Receipt." However, where a public warehouseman has placed himself under the terms and provisions of this law, then he must transact business in accordance with its terms and provisions and he will not be permitted to issue receipts other than in the form prescribed by the Commissioner of Insurance and Banking, nor can he place on his receipts the phrase referred to, to-wit: "Not a Public Warehouse Receipt."

Article 7827, Vernon's Sayles' Statutes, which is Section 9 of Chapter 37 referred to, clearly shows within itself that the intention of the Legislature was that receipts upon which were stampel "Not a Public Warehouse Receipt," were to be issued only by Warehouses which were in fact not public warehouses under the Act; that is to say were in fact not public warehouses which had qualified as bonded

warehouses under the Act, for this article provides that where private warehouse receipts are issued by public warehousemen, that they shall never be written on a form or blank indicating that they are "*issued from a public warehouse*"; but on the contrary shall bear on their face in large characters the words "not a public warehouse receipt."

You are, therefore, advised that warehousemen who qualify under the terms of Chapter 37 by giving bond and receiving a certificate, etc., must use the form of receipts prescribed by the Commissioner of Insurance and Banking, and that they are not authorized to issue receipts containing the phrase "not a public warehouse receipt."

Yours very truly,
C. M. CURETON,
First Assistant Attorney General.

CORPORATIONS—WAREHOUSE AND MARKETING ACT—COTTON SEED OIL MILLS.

Chapter 5, General Laws, Second Called Session, Thirty-third Legislature.

1. A cottonseed oil mill corporation cannot be chartered or operated under the Permanent Warehouse and Marketing Act of this State.
2. A corporation chartered under this act would not have authority to manufacture rope, twine, etc., from cotton.
3. Corporations chartered under this law would have no authority to deal in lands or to act as agents in the sale of lands nor to own lands except for their corporate use, nor could they maintain a land sales department.
4. If in the sale of stock for the purpose of promoting corporations under this Act of the Legislature a promotion fee is charged then the chartering of the company would be governed by the Blue Sky Law, in so far as the sale of its stock is concerned.

February 10, 1916.

Messrs. F. C. Weinert and Peter Radford, Managers Warehouse and Marketing Department, Capitol.

GENTLEMEN: Your communication presents the questions stated in the letter from Mr. E. M. Riley to your Mr. Radford, as much of which as is necessary to be here considered is as follows:

"Pursuant to our conversation some time since, I am writing you relative to the organizing of a warehouse and marketing system for Texas. I want to ask you to get for us the opinion of the Attorney General on the following points:

"(1) We own and control the Progressive Cotton Oil System, under patent from the United States Patent Office. We are handing you herewith copy of patent, also statement of facts as to what it will do. You will note the great saving over the old system, a large per cent of which should accrue to the farmer. What we want to know is, can we install this system and operate same in an incorporated warehouse and marketing company?

"(2) Can we install machinery for the manufacture of cotton cordage, that is rope, twine, etc?

"There is no mill for such purpose in Texas, for that matter, none west of the Mississippi river. We can take low grade cotton and make it into twine and it is worth 25 cents to 32 cents per pound. I think the law is perfectly plain on this, as it says we can use any means or instrumentalities for pre-

serving or marketing. This would be a means of making a quick seller of a slow seller. It would assist in taking a weight from cotton that is a great hamper to it.

"(3) The law makes no provision for paying the expense of organizing, only such expense as can be incurred in your office. Is there anything in this law or the general laws of the State to prevent the people who buy this stock from paying a reasonable fee in addition to the $5.00 per share for the stock, for the purpose of defraying the expense of organizing?

"(4) After we are organized, can we have a department of land sales? There is nothing in any regular or special law that prevents any individual or corporation from selling land, at least they most all do it, and we want to be absolutely in the clear on everything, and as we want to have a land sales department, we want an opinion on that point."

In reply to the first question above we beg to advise that a corporation chartered under the general Warehouse and Marketing Act could not install and operate an oil mill.

In reply to the second inquiry our opinion is that a corporation chartered under this Act would not have authority to manufacture rope, twine, etc., from cotton.

The operation of an oil mill, as well as the manufacture of rope, twine, etc., from cotton, are manufacturing enterprises or businesses, in the proper meaning of those terms, and do not come within any of the implied powers of a warehouse and marketing corporation, the purpose of which is to prepare for market and market the raw materials produced on farm and ranch. The process of manufacture is to produce from some raw material, by application of skill and labor, a new article of commerce. In re Niagara Contracting Company, 127 Federal, 782; State vs. Ticheno Antiseptic Company, 43 Southern, 277; Chattanooga Plow Company vs. Hayes, 140 S. W., 1068.

It has been repeatedly decided that cotton goods are manufactured goods. Herzog vs. United States, 135 Federal, 919.

The refining of oil has been held to be the manufacturing of oil. U. S. vs. Oriental-American Co., 129 Federal, 249.

On the other hand, it has been held that the re-baling of cotton is not a manufacturing business. (City of Memphis vs. Ry. Co., 183 Fed. 529.)

Nor is a business the effect and purpose of which is to prepare the cotton for transportation and market a manufacturing business. We have heretofore held that the ginning and bailing of cotton may be conducted by a corporation chartered under this act, because the Act expressly authorizes the use of such instrumentalities as may be necessary for the purpose of marketing agricultural products. Corporations chartered under this law have two essential characteristics, they may store for market and prepare for market and market the same on commission. In other words, they are in an essential sense warehouse corporations and in a limited sense mercantile corporations, having the right to sell products for their customer. But corporations authorized to buy and sell goods in commerce are essentially different from those which are authorized to manufacture and a manufacturing corporation is not a mercantile corporation, and vice versa. It has been held that the charter of a corporation

granting it power to manufacture implies power to sell the article thus produced, but not the power to buy and sell goods habitually as a business.

Commonwealth vs. Thackara Mfg. Co., 27 Atl., 13.
Nicolette National Bank vs. Frick-Turner Co., 70 Am. St. Rep., 334.

On the other hand a warehouse company is not engaged in a manufacturing business, but only in the business of receiving goods in storage for hire.

In re Rohrer, 186 Federal, 997.
Franklin National Bank vs. Whitehead, 29 L. R. A., 725.

We have cited these authorities merely to show that the business authorized by the Permanent Warehouse and Marketing Act is essentially different from a manufacturing business, in which class oil mills and those engaged in the making of rope, twine, etc., belong, and that, therefore corporations chartered under the permanent warehouse and marketing act cannot operate a cotton seed oil mill or a factory for the purpose of making rope, twine, etc., from cotton.

In reply to the fourth question, we beg to say that a corporation chartered under this Act would have no authority to deal in lands or to act as agent in the sale of lands nor to own lands except for its corporate use, and that therefore a Land Sales Department could not be maintained.

The powers of a corporation, express and implied, have been discussed by us and the authorities cited in the general opinion prepared by the writer for the Department, which has been published and distributed generally throughout the State. However, since it is appropriate that these rules should be shown in this opinion we will copy the same from the general opinion referred to, as follows:

"The ordinary rule is, that the powers of corporations are strictly limited to those granted in their charters or the statutes under which they are organized. Or, as was said by the Supreme Court of the United States, in the Dartmouth College case, 'a corporation being a mere creature of the law, possesses only those properties which the charter confers upon it, either expressly or as incidental to its very existence."

Revised Statutes, Arts. 1164 and 1167.
Revised Statutes, Art. 1140.
Ry. Co. vs. Morris et al., 67 Texas, 699.
Fort Worth Ry. Co. vs. Rosedale Ry. Co., 68 Texas, 176.
Irrigation Co. vs. Vivian, 74 Texas, 173.
Sabine Tram Co. vs. Bancroft, 40 S. W., 839.
Lyons-Thomas Hardware Co. vs. Perry Stove Co., 24 S. W., 16.
Rue vs. Mo. Pac. Ry. Co., 74 Texas, 479.
Thomas vs. Ry. Co., 101 U. S., 81.

Article 1140 of the Revised Statutes gives the general powers of a corporation, which are:

"(1) To have succession by its corporate name for the period limited in its charter, not to exceed fifty years, and when no period is limited, for twenty years.

"(2) To maintain and defend judicial proceedings.

"(3) To make and use a common seal.

"(4) To purchase, hold, sell, mortgage or otherwise convey such real and personal estate as the purpose of the corporation shall require, and also to take, hold and convey such other property, real, personal, or mixed, as shall be requisite for such corporation to acquire in order to obtain or secure the payment of any indebtedness or liability due or belonging to the corporation.

"(5) To appoint and remove such subordinate officers and agents as the business of the corporation shall require, and to allow them a suitable compensation.

"(6) To make by-laws not inconsistent with the existing laws for the management of its property, the regulation of its affairs and the transfer of its stock.

"(7) To enter into any obligation or contract essential to the transaction of its authorized business."

Article 1164 of the Revised Statutes, provides:

"No corporation, domestic or foreign, doing business in this State, shall employ or use its stock, means, assets or other property, directly or indirectly, for any other purpose whatever than to accomplish the legitimate objects of its creation or those permitted by law."

Article 1167 reads:

"Any corporation which shall violate any of the provisions of either of the three last preceding articles shall on proof thereof in any court of competent jurisdiction forfeit its charter, permit or license, as the case may be, and all rights and franchises which it holds under, from or by virtue of the laws of this State. Whenever it appears that the money, assets, property or funds of a corporation have been issued, paid out or used in violation of any of the provisions of either of the three last preceding articles by any agent, attorney, director or officer of such corporation, it shall be held and considered the act of the corporation, etc."

In the case of Railway Company vs. Morris, supra, the Supreme Court of the State, said:

"The rule that a corporation has power to do only such acts as its charter, considered in relation with the general law authorities it to be, applies to every class of corporation."

"The law requires articles of incorporation to be adopted, signed and filed in the office of the Secretary of State, and these are required to give information on specified subjects, and, among others, to state the identical thing the contemplated corporation proposes to do."

"When the articles of incorporation have been filed and recorded, as herein provided, the persons named as corporators therein shall thereupon become and be deemed a body corporate and be authorized to proceed to carry into effect the objects set forth in such articles in accordance with the provisions of this title." (The latter quotation being from the Revised Statutes as quoted in the opinion referred to.)

In the case of Fort Worth Railway Company vs. Rosedale, cited above, the Supreme Court of this State, among other things, stated:

"Through its act of incorporation the appellant acquired simply a corporate existence, through which it might conduct the business specified in its articles of incorporation. This being such as the general law, under which its incorporation was effected, contemplates. This is the extent of the right and power acquired by the appellant through its articles of incorporation."

"The statute specifies the purposes for which, under it, corporations may be created by the voluntary act of the incorporators, and it declares the general powers which such corporations may exercise. One of these purposes is the construction and maintenance of street railways, but a compliance with the statute gives no right other than a corporate existence and no power other than such as the law itself declares the corporation, when created, may exercise, or such as may be fairly implied from the powers expressly conferred or the nature of the business to be carried on by the corporation."

The Court of Civil Appeals, in the case of the Sabine Tram Co. vs. Bancroft, cited above, says:

"A corporation has no more powers than are granted expressly or by implication from its charter, which is dependent upon the law of the State authorizing the creation of corporations and prescribing their powers, duties and liabilities. * * *

"The law authorizing the organization of corporations in Texas details the objects for which they may be created, gives the limit of their duration, makes a specific grant of their powers and prescribes their duties, naming the officers through whom and by whom they shall be controlled and governed and provides that no corporation shall employ its stock, means, assets or other property, directly or indirectly, for any other purpose whatever than to accomplish the legitimate objects of its creation."

"It is true that in prescribing the powers of corporations the power is given 'to enter into any obligation or contract essential to the transaction of its authorized business,' but that power does not confer the right to enter into any contract contrary to public policy and inconsistent with the object of the creation of the corporation. The contracts into which it may enter are those 'essential to the transaction of its authorized business,' not all contracts that may advance its interests or add to its prosperity or wealth—for contracts entirely foreign to the nature of its creation might accomplish these things—but to enter into all contracts necessary to carry on the business and further the enterprise for which it was chartered by the means and machinery provided by the law for its existence."

In the case of Thomas vs. Railway Co., supra, the Supreme Court of the United States, said:

"We take the general doctrine to be in this country, though there may be exceptional cases and some authorities to the contrary, that the powers of corporations organized under legislative statutes are such, and such only, as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers and the enumeration of these powers implies the exclusion of others."

In this same case the court quoted with approval from an English case, in which the following language was used:

"They cannot, said the court, engage in a new trade, because they are incorporated only for the purpose of making and maintaining the Eastern Counties Railway. What additional power do they acquire from the fact that the undertaking in some way benefited their line? Whatever be their object or prospect of success, they are still but a corporation for the purpose only of making and maintaining the Eastern Counties Railway; if they cannot embark in new trades because they have only limited authority, for the same reason they can do nothing not authorized by their act and not within the scope of their authority."

IMPLIED POWERS.

While there is no exception to the general rule, that a corporation can exercise only such powers as are conferred by its charter, the strict letter of the rule is modified to the extent that a corporation has the implied power to do whatever is necessary or reasonably appropriate to the exercise of the authority expressly conferred, which powers are such as are usually incidental in practice to the prosecution of its business; it may foster it by the usual means, but it cannot go beyond this. It may not under the pretext of fostering entangle itself in proceedings with which it has no legitimate concern. If the means be such as are usually resorted to and constitute a direct method of accomplishing the purposes of the incorporation, they will be regarded as within the corporation's powers, but if they are unusual and tend only in an indirect manner to promote its interests, they are beyond its corporate powers.

North Side Ry. Co. vs. Worthington, 88 Texas, 562.
Indianola vs. Gulf Ry. Co., 56 Texas, 594.
Ency. of Law, Vol. 7, p. 700.
People vs. Chicago Gas Co., 17 Am. St. Rep., 319.
Franklin vs. Lewiston Inst., 28 Amer. Rep., 9.
Buffet vs. Troy Ry. Co., 40 N. Y., 176.

In the case of the North Side Railway Company vs. Worthington, the Supreme Court of this State, through Judge Gaines, has laid down the general rule for determining the implied powers of a corporation, quoting with approval from another authority on the question. The court in the case referred to, says:

"Corporations are the creatures of the law, and they can only exercise such powers as are granted by the law of their creation. An express grant, however, is not necessary. In every express grant there is implied power to do whatever is necessary or reasonably appropriate to the exercise of the authority expressly conferred. The difficulty arises, in any particular case, whenever we attempt to determine whether the power of a corporation to do an act can be implied or not. The question has given rise to much litigous controversy and to much conflict of decision. It is not easy to lay down a rule by which the question may be determined, but the following, as announced by a well-known text writer, commends itself not only as being reasonable in itself, but also as being in accord with the great weight of authority:

" 'Whatever be a company's legitimate business, the company may foster it by all the usual means; but it may not go beyond this. It may not, under the pretext of fostering, entangle itself in proceedings with which it has no legitimate concern. In the next place, the courts have, however, determined that such means shall be direct, not indirect; i. e., that a company shall not enter into engagements as the rendering of assistance to other undertakings from which it anticipates a benefit to itself, not immediately, but immediately by reaction, as it were, from the success of the operations thus encouraged—all such proceedings inevitably tending to breaches of duty on part of the directors, to abandonment of its peculiar objects on part of the corporation.' Green's Brice's Ultra Vires, 88.

"In short, if the means be such as are usually resorted to and a direct method of accomplishing the purposes of the incorporation, they are within

its powers; if they be unusual and tend in an indirect manner only to promote its interest, they are held to be ultra vires." (pp. 568-569.)

In the case of the People vs. Chicago Gas Company, cited above, it appears that the facts were that it was contended that the Chicago Gas Company being a corporation authorized to manufacture and sell gas, did not have the authority under its charter, by implication, to purchase and hold the stocks of another gas company. The Supreme Court of Illinois, in passing upon the question, among other things, said:

"Corporations can only exercise such powers as may be conferred by the legislative body creating them, either in express terms or by necessary implication; and the implied powers are presumed to exist to enable such bodies to carry out the express purposes granted and to accomplish the purposes of their creation. An incidental power is one that is directory and immediately appropriate to the exclusion of the specific power granted and not one that has a slight or remote relation to it, citing Hood vs. N. Y. & New Hamp. R. R., 22 Conn.; Franklin Co. vs. Lewiston Savings Inst., 28 Amer. Rep., 9."

"Where a charter in express terms confers upon a corporation the power to maintain and operate works for the manufacture and sale of goods, it is not a necessary implication therefrom that the power to purchase stock in other gas companies should also exist. There is no necessary connection between manufacturing gas and buying stocks. If the purpose for which a gas company has been created is to make and sell gas and operate gas works, the purchase of stock in other gas companies is not necessary to accomplish such purpose, etc."

'The cases quoted and others cited lay down the general rule which they illustrate in various particulars and from various angles, that the implied powers of a corporation are only such as are necessary to the direct and exclusive business of the corporation; that they are such as exist by virtue of the business of the corporation itself; that they are incidental powers which might afford a profit to the corporation, but they are limited to such powers as are necessary to the enjoyment of the privileges of the charter. They are to the corporation what air and sunshine and water are to the life of the individual, that though incidental to life itself, they are necessary to its continued virile and active existence."

It is unnecessary for us to discuss the subject further, for it is plain that the right to manufacture or the right to sell land are not within either the express or implied powers of a corporation chartered under the general Warehouse and Marketing Act.

It may be that the right to pursue these occupations could be of advantage to a corporation, but since the Legislature has not granted these additional rights they cannot be exercised.

In answer to the third inquiry, I beg to say that if in the sale of stock a promotion fee is charged then the chartering of the company would be governed by the Blue Sky law, of which we enclose you, for the information of Mr. Riley, a printed copy. We also enclose you an extra copy of the previous opinions rendered by us with reference to chartering corporations with authority to operate a gin, which you may, if you desire, forward to Mr. Riley also.

Yours very truly,

C. M. CURETON,
First Assistant Attorney General.

CORPORATIONS—POWERS OF—WAREHOUSE AND MARKETING LAW—PUBLIC WAREHOUSEMEN.

Chapter 5, Acts of the Second Called Session, Thirty-third Legislature.

1. Corporations chartered under the permanent warehouse and marketing law of this State may, as incident to their business of preparing, storing and marketing their customers' products, operate a gin.
2. But the principal purpose of such corporation must be the storing and marketing of farm and ranch products, and the operation of the gin merely incidental to this main purpose; this does not mean that the ginning of cotton could not be one of the large endeavors and sources of revenue of the corporation; on the contrary, it might be, but the erection of a gin by such corporation must be in good faith to carry out the purposes of the act and not in mere evasion for the purpose of doing a ginning business under this measure.
3. Such corporations may also operate cold storage plants for the purpose of preserving and keeping for market the products of their customers.

February 3, 1916.

Messrs. F. C. Weinert and Peter Radford, Managers Warehouse and Marketing Department, Capitol.

GENTLEMEN: In reply to the request from your department as to whether or not corporations chartered under the permanent warehouse and marketing law of this State may operate gins in connection therewith and in aid of their main purpose, we beg to advise you as follows:

The purpose of this Act as set forth in Section 1 thereof appears to be a broad general purpose to provide a system of co-operative marketing for those engaged in the production of farm and land products. Section 19 of the law declares that corporations chartered thereunder shall have the right to erect, purchase or lease, and to operate warehouses, buildings, elevators, storage tanks, silos, and such other places of storage and security as may be necessary for the storage, grading, weighing and classification of cotton, wool, wheat, corn, rice, alfalfa, fruit, silage, and other farm, orchard and ranch products. This provision of the law is broad enough in its terms and by necessary implication authorizes, for example, such a corporation to operate machinery for the purpose of reducing its products of the farm usually stored in silos to such a state as they may be so stored; that is, as soon as the corporation chartered under the act would be authorized to store farm products in silos it would seem to follow necessarily that they might operate the necessary machinery for cutting farm products into shape for storage into silos; the same thing applies to the storage of, for example, corn, by these corporations. The company would undoubtedly have the right to operate shelling machinery for the purpose of storing corn or rather placing it into a shape for storage. We see no reason why the same rule will not apply with equal force in the case of cotton when the broad general purpose of the act is taken into consideration; it being considered that the warehousing of products is one of the minor or incidental purposes of this law; that is under the general

purposes of the law as a guide by which this section is to be interpreted we believe that it would not be a forced construction to say that corporations chartered for this purpose, for the purpose of preparing for marketing and storing farm products, would have the right to operate cotton gins in order to reduce this product to a suitable state for storage and marketing. However, if there should be any doubt about this proposition the doubt appears to be removed by that portion of Section 21, which reads in part as follows:

> "Corporations chartered hereunder shall have the right to act as warehousemen and charge for their services as such and do and perform generally all things which may be done or performed by warehousemen."

That clause is sufficient to confer upon corporations incorporated under this law the right to exercise all the usual rights of warehousemen, but the act does not end at this point. It continues:

> "Such corporations shall also have the right to sell in the market all products of the ranch, orchard and farm on a commission basis or such other basis as may be agreed upon by them with their customers."

This language is sufficient to, and clearly confers upon corporations formed under this measure the right to act as commission merchants in the sale of all products of the ranch, orchard and farm, and necessarily would confer the right to do anything incidental to this main purpose. But the law does not end at this point. It continues:

> "Corporations chartered hereunder shall have the right to purchase or construct or lease all such warehouses, landings and buildings as may be necessary for their business."

This phrase may be considered as rather a statement of the necessary powers of the corporation implied from previous sections, but the next provision of the law is not of such character and confers upon these corporations a distinct right not to be impiled from the mere fact that these companies may act as warehousemen and commission merchants. The language referred to is as follows:

> "They shall have the right to employ such other instrumentalities and agencies as may be necessary for the storing, preserving and marketing of farm, orchard and ranch products to the best advantage of their members and customers."

We think this phrase interpreted in the light of the general purpose of the law and in view of the evident meaning of Section 19, clearly comprehends within its terms the purpose to confer upon these marketing companies the right to operate gins in connection with and as a part of their general business. Is it not true that a gin is an instrumentality and an agency necessary for the storing, preserving and marketing of cotton? The question answers itself. Cotton is never stored and marketed with a commission merchant unless it is ginned and prepared for the market. When this law

made the provision above referred to its purpose was to give to these corporations the right not ordinarily exercised by warehousemen and commission merchants and to make plain that these corporations had a right to prepare for market farm and ranch products. In the preparation of cotton for market the gin is a necessary instrumentality. It only separates the cotton and seed and places them in such shape as they are usually placed upon the market. It would not follow from this law nor a construction of it, that a corporation whose principal purpose is to gin cotton could be incorporated under this law, for it could not be. But the principal purpose of the law must be the storing and marketing of farm and ranch products and the operation of the gin merely incidental to this main purpose. We do not mean to suggest that the ginning of cotton might not be one of the large endeavors and sources of revenue of this class of corporation. On the contrary it might be, but what we desire to be understood as saying that the erection of a gin by corporations chartered under this act must be in good faith to carry out the purposes of the act and not in mere evasion for the purpose of doing only a ginning business under this measure. We may say in passing that the act is necessarily broad enough to authorize corporations of this character to maintain a cold storage plant for a cold storage plant is necessary in the storage and preserving and keeping for market all orchard products and many of the products of the farm and garden. Cold storage plants are not named as one of the statutory rights of the corporation, but we assume that it is not a debatable question that corporations of this character have the implied right to conduct a cold storage plant for the purpose of preserving and preparing for market the products in which they are authorized to deal. We have heretofore held that corporations chartered for the purpose only of ginning cotton under the general corporation laws have the implied authority to operate a cold press cotton seed oil system for the purpose of pressing the seed of their customers on the theory that this is incidental to the business of ginning. We believe we are correct in that conclusion, and some gin corporations in the State do operate the cold press system for the purpose of preparing the seed of their customers.

We are convinced that the general warehouse and marketing law of this State should be given the same character of a broad and liberal construction so far as the exercise of powers to be implied from the general corporate purposes as stated.

Yours very truly,

C. M. CURETON,
First Assistant Attorney General.

WAREHOUSEMEN, PUBLIC—INSURANCE.

Chapter 37, Acts of the First Called Session, Thirty-third Legislature.

1. There is nothing in the warehouse law which fixes the liability of

a public warehouseman at anything other than the ordinary liability of public warehouses.

2. That portion of the language in Section 4 which requires the warehouseman's receipt to state the amount of charges for insurance merely means that if there are charges for insurance it must be stated.

3. If the warehouseman makes a charge for insurance, he must insure the property and is liable for its loss, but in order to hold him liable for a loss of this character the contract to insure must be proved.

4. A warehouseman has an insurable interest in the goods deposited with him to their full value and is liable to the depositor for moneys collected on policies covering the goods.

5. The question as to whether or not the property placed in a warehouse shall be insured is purely a matter of private contract between the warehouseman and his customer, and this matter the law does not attempt to regulate in any way except to say that if a charge is made for insurance that charge must appear in the face of the receipt.

6. The warehouseman has the right to insure property deposited with him regardless of the wishes of the owner, because he has an insurable interest in the property, but he cannot compel the owner to pay for the insurance except upon contract.

7. In such instances the warehouseman has the right to carry his insurance in any company he may select.

October 19, 1915.

Hon. J. R. Duran, County Attorney, Carthage, Texas.

DEAR SIR: That portion of your letter presenting the question for determination in this opinion reads as follows:

"Under Section 4, Chapter 37. of the Acts of the First Called Session of the Thirty-third Legislature of Texas referring to the issuance of a receipt by the warehouseman, says, 'which receipt shall purport to be issued by a public warehouse. shall bear date of its issue' etc. It further provides that on return of receipt properly endorsed, etc., and on payment of all charges for storage and insurance, which charges shall be stated on the face of the receipt, etc. Now, what I wish to know—from your construction of this statute, has the warehouseman the right to insure the cotton regardless of the wishes of the owner of the cotton and to do so with whatever insurance agency he may choose, regardless of the choice of agencies by the owner. We now have bonded warehouse here. The stockholders have selected a warehouse manager and weigher and he claims the right under the law to insure all cotton deposited in said warehouse."

The exact question is whether or not a public warehouseman under Chapter 37, Acts First Called Session, Thirty-third Legislature, is compelled by law to insure the property stored with him and in turn charge for this insurance.

Replying to this, we beg to advise you that there is nothing in this law which fixes the liability of a public warehouseman at anything other than that of the ordinary public warehouseman, and that this common law liability or statutory liability for that matter, does not embrace any liability as an insurer. That portion of the language referred to in Section 4, which requires the receipt to state the amount of charges for insurance merely means that if there are charges for insurance it must be stated. If there are no charges for insurance then that fact should be stated. If the warehouseman makes a charge for insurance then he must insure the property and

he is liable for its loss, but in order to hold him liable for a loss of this character the contract to insure must be proved.

30 Amer. & Eng. Encyc. of Law, 79, citing:
Dawson vs. Waldheim, 80 Mo. App., 52.
Keller vs. Smith, 59 Minn., 203.
Pittman vs. Harris, 24 Texas Civ. App., 503.

It is a well recognized principle that a warehouseman has an insurable interest in the goods deposited with him to their full value and is liable to the depositor for moneys collected on policies covering his goods.

30 Amer. & Eng. Encyc. of Law, 79.

But in a case where the general policy issued in favor of the warehouseman is not sufficient in amount to cover the loss of the warehousemen personally on its contents his customers whose property is destroyed in the same fire cannot claim any benefit under the policy unless they show an election to adopt the acts of the warehousemen in procuring insurance on their property.

Pittman & Harrison vs. Harris, 24 Tex. Civ. App., 503.

An examination of the law and the authorities above cited will be sufficient to show that the question as to whether or not the property placed in a warehouse shall be insured is purely a matter of private contract between the warehouseman and his customer. The warehouseman has the right to say to the public "I will not accept for storage any property except that I be authorized to keep the same insured at the owner's expense." On the other hand, he has the right to accept the property without anyone carrying insurance upon same. It is purely a matter of private contract and which the law does not attempt to regulate in any respect except to say to the warehouseman that if a charge is made for insurance that charge must appear in the face of the receipt. The warehouseman of course has the right to insure the cotton regardless of the wishes of the owner because he has an insurable interest in the cotton, but he cannot compel the owner to pay for the insurance except by special contract, which contract might arise out of a custom known to both contracting parties or might be an expressed contract, or might be an implied contract or contract by estoppel. Necessarily the warehouseman has the right to carry his insurance in any company he may select. But the whole question of insurance is purely a matter of private contract and is not affected in any manner by the law except in the one particular pointed out above.

Yours very truly,

C. M. CURETON,
First Assistant Attorney General.

CORPORATIONS—WAREHOUSE AND MARKETING COMPANIES—CORPORATE BONDS AND SECURITIES—PUBLIC WAREHOUSES.

Section 22, Permanent Warehouse and Marketing Act.

1. Bonds under this act can only be issued in double the amount of securities deposited in the State treasury.
2. The securities deposited in the treasury must be sufficient with the interest added annually to produce a fund equal to the face of bonds issued when these bonds become due.

March 18, 1916.

Hon. F. C. Weinert, and Hon. Peter Radford, Managers Warehouse and Marketing Department, Capitol.

DEAR SIRS: Your request accompanied by the letter from Mr. E. M. Riley, to your Mr. Radford, calls for a construction of Section 22 of the Permanent Warehouse and Marketing Act, which was passed at the Second Called Session of the Thirty-third Legislature. This section reads as follows:

"Corporations organized hereunder shall have authority to contract debts as have other business corporations, and, in addition thereto, may issue special bonds to be known as "sinking fund bonds," as follows:

"They may invest all or any part of their capital stock, to be not less than one thousand dollars ($1000), in such securities as are herein designated for the payment or investment of their capital, which, when approved by the board of supervisors, shall be deposited in the State treasury; the interest on such investment shall be annually paid into the State treasury, and be placed to the credit of the sinking fund for liquidation of bonds of such corporation, and which interest shall be from time to time invested by the board in similar securities, which, in turn, shall be deposited in the State treasury. Said securities, when so deposited in the State treasury, shall remain there as the sinking fund out of which the principal sum of the bonds hereinafter provided for shall be paid, and said securities shall not be used for any other purpose than to liquidate the bonds herein provided for, unless and until such sinking fund bonds have been paid, in which event the securities herein provided for shall be returned to the corporation owning same, and shall become a part of the general assets of the corporation. After the investment in the securities herein provided for shall have been made, the board shall grant authority to the corporation to issue bonds in double the amount of such original capital to bear not greater than six per cent interest, and to run for a period not exceeding thirty years. When said bonds shall have been issued and signed by the proper officers of the corporation they shall be registered by the board; said bonds shall show on their face that the principal thereof is secured by the securities herein required to be deposited in the State Treasury, and shall have plainly written, printed, lithographed or engraved on their face the words, "Sinking Fund Bond of.............State Bonded Warehouse Company," with the postoffice address of the corporation; said bonds shall show on their face also that the interest contracted to be paid thereon is secured to them by the general assets of the corporation. After said bonds have been issued as herein provided for, and registered by the board, they shall be returned to the corporation issuing them, and may then be by such corporation placed on the market and sold, but shall never be sold at less than ninety per cent of the face value."

You will note from the foregoing quotations that the statute provides that the bonds issued thereunder "shall show on their face that the principal thereof is secured by the security herein required to be

deposited in the State Treasury," * * * * and "shall show on their face also, that interest contracted to be paid thereon is secured to them by the general assets of the corporation."

You will note also from this same section of the law, that provision is made that the interest on the bonds deposited in the State Treasury, shall be annually paid in to the State Treasury, to be placed to the cerdit of the Sinking Fund for the liquidation of the bonds of such corporation, which interest shall be from time to time invested by the board in similar securities which in turn must be deposited in the State Treasury.

The law then continues:

"Said securities, when so deposited in the State Treasury, shall remain there as the sinking fund out of which the principal sum of the bonds hereinafter provided for shall be paid."

From these several provisions of law, it is quite plain, we think, that the bonds issued by the corporation are secured as to the principal or face of the same by the deposit made in the State Treasury and called the Sinking Fund; while the interest on the bonds issued by the corporation, are not secured by the deposit, but must be paid out of the general assets of the corporation. It seems to us then, that in construing all the language of the section, this conclusion is the logical and correct one, to-wit:

That bonds may be issued in double the amount of securities deposited in the Treasury, which bonds are secured as to their principal by the sum so deposited in the State Treasury to which is annually added the interest accumulation on the sinking fund. The expression in the section referred to, to the effect that after the investment in securities shall have been made, the board may grant authority to a corporation to issue bonds in double the amount of the original capital, means, we think, that corporations may issue bonds in double the amount of the capital stock, where all the capital stock has been invested in securities and deposited in the State Treasury; and that where all the capital has not been deposited in the State Treasury, then bonds can only be issued for double the amount of the securities which are actually deposited in the State Treasury; and at all events the amount of bonds deposited in the State Treasury must be sufficient with the accumulation of interest thereon to liquidate the amount of corporate bonds issued by the company at the date of maturity of such corporate bonds.

In other words, there are three limitations in the section with reference to issuing bonds for the corporation. In the first place, the bond issue cannot exceed double the amount of capital stock of the company, and in the second place, the bond issue cannot exceed in amount, the sum of money which will be produced by the securities deposited in the Treasury at the rate of interest borne by them, and in no event can a larger amount of bonds be issued than double the amount of the securities deposited in the State Treasury.

Yours very truly,

C. M. CURETON,

First Assistant Attorney General.

PERMANENT WAREHOUSE BILL—COTTON GINS—LEGISLATURE—CONSTRUCTION OF STATUTE.

1. Provisions of permanent warehouse law regulating cotton gins are germane to the general subject and are valid and binding provisions thereof.
2. A bill may contain many provisions for the accomplishment of the legislative purpose, provided they are germane to the one general subject indicated in the titles and are reasonably connected with the subject.

April 2, 1915.

Hon. J. H. Woods, Member of the Legislature, Corsicana, Texas.

DEAR SIR: Under date of March the 18th, I received a communication from you reading as follows:

"Inasmuch as the new warehouse law, called the Permanent Warehouse Law, will soon go into effect in so far as its provisions regarding cotton gins and ginning, and these provisions calls for very radical changes in some of the rules in regard to the cotton ginning business and there are several thousand ginners in the State and many thousands of farmers who will be affected more or less by the operation of this law, it becomes important to know if the provisions of said law in reference to the business of ginning cotton are valid and binding under the Constitution of this State. This law professes to be a law regarding the establishment of a bonded warehouse system and a marketing system. This is expressed in its title. Now the law actually goes on to take in the business of the ginner who has no connection with the warehouse system and whose business is generally outside of and independent of the warehouse, just as much as the planting, cultivation and gathering of the cotton and has no greater connection with a marketing system than has the actual production of the cotton in the first place. Now, then, does not this act take in more than one subject by branching out into the ginning business and thus become liable to the objection provided against by that section of the Constitution providing that only one subject shall be dealt with in an act of the legislature? And is this reference to the ginning business objectionable from any other constitutional standpoint?"

Your inquiry calls for the application of the provisions of Section 35, Article 3, of the Constituton, to the Permanent Warehouse Bill, which constitutional provision is as follows:

"Section 35. No bill (except general appropriation bills, which may embrace the various subjects and accounts, for and on account of which moneys are appropriated), shall contain more than one subject, which shall be expressed in its title. * * *"

We believe that an examination of the Permanent Warehouse Bill, enacted at the Second Called Session of the Thirty-third Legislature, being Chapter 5 of the Acts of the Special Session, found at pages 15 to 33, Session Acts, will disclose that the general subject and purpose of the bill is, *to provide better marketing conditions for farm and ranch products,* and, as a means to this end, a number of things are provided, to-wit: the creation of a board of warehouse supervisors; giving authority for the chartering of warehouse corporations and the regulation thereof; providing that all cotton gins, ginning for the public, are subject to a public use; compelling all such to obtain a license from the warehouse supervisors; prescribing

rules and regulations relative to the ginning, baling and sampling of cotton; requiring ginners to give bond to protect against deception in sampling of cotton, or the placing of any foreign matter, water or anything, in the bale to increase the weight thereof. All these provisions, it is believed, are germane to the general subject matter and general purpose of the bill—that is, the improvement of marketing and marketing conditions for cotton as well as other farm and ranch products.

The object of the constitutional provision above quoted is, to give advice as to the nature of each particular bill so as to prevent the insertion of objectionable features which might pass unnoticed, and also to prevent the insertion in one bill of unrelated subjects, whereby the joint votes of friends of these respective subjects might result in the passage of a measure which would doubtless fail if the subjects were presented singly. In other words, it is intended by this provision of the Constitution that only one subject may be presented in a bill in order that it may stand on its own merits.

While this is the purpose of the provision of the Constitution, the same has always received a liberal interpretation by our appellate courts, for otherwise legislation would often be embarrassed. It is generally held that a bill may contain many provisions for the accomplishment of the legislative purpose, provided, always, that the provisions are germane to the one general subject indicated in the title and are parts of, or incident to, or reasonably connected with the subject.

The conditions existing in this State prior to the enactment of this statute relative to the baling, sampling and handling of cotton, are well known. Without adequate warehouse facilities the producers were forced to place their cotton on the market as gathered, glutting the market and tending to bring about a lower price level, or to accept the alternative of exposing it to the elements for weeks and probably months, causing deterioration and waste, which materially damaged its marketable condition. Cotton was carelessly wrapped and baled, often foreign substances increasing the weight were baled with the cotton, and the method of sampling in vogue tended to deception and mutilated the exterior of the bale, rendering it an unsightly commercial package and opening up additional avenues for waste and pilfering. All this materially affected the marketable quality and the market value of the cotton; to correct these conditions the bill in question was enacted.

A construction of this provision of the Constitution was given by our Supreme Court in the case of Stone vs. Brown, 54 Texas 341. Among other things, Judge Bonner, for the majority, made the following observations:

"In the opinion of a majority of the court, the validity of that part of the statute under consideration, should be sustained upon the general principle that it should be held constitutional unless clearly otherwise; and because it is believed to be sufficiently germane to the original object of the creation of the commission as to be upheld, under the liberal construction given by this and other courts, in the consideration of similar constitutional objections.

"It may be worthy of note, that in the preceding Constitution the word 'object' was used instead of the word 'subject,' in the above connection. Const. 1845, Art. 7, Sec. 24; Const. 1866, Art. 7, Sec. 24; Const. 1869, Art. 12, Sec. 17. It may be presumed that the convention had some reason for substituting a different word from that which had been so long in use in this connection; and that in the light of judicial expressions, the word subject may have been thus substituted as less restrictive than object.

"The principal object of this constitutional provision is to advise the Legislature and the people of the nature of each particular bill, so as to prevent the insertion of obnoxious clauses, which otherwise might be engrafted thereupon and become the law; and also to prevent combinations, whereby would be concentrated the votes of the friends of different measures, none of which could pass singly; thus causing each bill to stand on its own merits. Cooley's Const. Lim. (4th ed.), 173; Giddings vs. San Antonio, 47 Texas, 555; Albrecht vs. the Staté, 8 Texas Court of Appeals, 216.

"Although a very salutary provision it has necessarily received a liberal construction.

"To require too great particularity in the caption would embarrass legislation and subject it to be often defeated by judicial construction, when the statute otherwise might be unobjectionable and highly beneficial.

"Roberts, Chief Justice, in Giddings vs. San Antonio, 47 Texas, 556, after announcing that similar provisions of our Constitution had been held mandatory, says: 'While this has been regarded as the settled rule of construction here, in its application, the most liberal construction has been given by the Supreme Court of this State, in accordance with the general current of authority, to make the whole law constitutional where the part objected to as infringing this part of the Constitution could be considered as appropriately connected with or subsidiary to the main object of the act as expressed in the title.'

"To the same purpose is the opinion of Moore, Justice, in Breen vs. R. R. Co., 44 Tex., 306; and in Austin vs. R. R. Co., the same learned justice approvingly quotes the following language from Mr. Cooley: 'None of the provisions of a statute should be regarded as unconstitutional where they relate, directly or indirectly, to the same subject, have a mutual connection, and are not foreign to the subject expressed in the title.'

"'So long as the provisions are of the same nature, and come legitimately under one general denomination or object, we can not say that the act is unconstitutional.' 45 Texas 267, Citing Phillips vs. Bridge Co., 2 Met. (Ky.), 222; Smith vs. Commonwealth, 8 Bush, 112; State vs. County Judge of Davis County, 2 Iowa. 284; Ins. Co. vs. N. Y., 5 Sandf. 10.

"The Court of Appeals of New York, in commenting upon a similar provision of their constitution, say: 'The degree of particularity with which the title of an act is to express its subject, is not defined in the constitution, and rests in the discretion of the legislature. (Sun Mutual Ins. Co. vs. N. Y., 4 Seld., 241.) An abstract of the law is not required in the title.' Brewster vs. the City of Syracuse, 19 N. Y. Rep., 117; People vs. Briggs, 50 N. Y. Rep., 564; People vs. McCallam, 1 Neb., 182.

"In Battle vs. Howard, it was held by this court that 'An Act concerning proceedings in the district court,' which gave to executors and administrators the right of appeal to the Supreme Court without bond, gave also similar right of appeal to the district court from the county court, an entirely distinct and separate tribunal, and that this construction did not violate the constitutional provision. 13 Texas 345; Murphey vs. Menard, 11th Texas 676.

In the recent case of R. R. Co. vs. Smith County at the late Tyler term (infra), it was decided that the title of an act approved August 21, 1876, (15th Leg., 265), entitled 'An Act to define the duties, qualification and liabilites of assessors of taxes, and to regulate their compensation,' was sufficiently definite and comprehensive, not only to give to the 'board of equalization,' as a tribunal, the jurisdiction to fix the valuation of property subject to taxation as against the taxpayer, under certain rules and regulations therein prescribed, but also to make their decision final without the right of appeal.

"We deduce from the following as the true test of the validity of a statute under this constitutional provision: Does the title fairly give such reasonable notice of the subject matter of the statute itself as to prevent the mischief intended to be guarded against? If so, the Act should be sustained.

"The reason of the rule not applying to such cases, the rule itself does not apply.

"Mr. Cooley says: 'The generality of a title is therefore no objection to it, so long as it is not made to cover legislation incongruous in itself, and which by no fair intendment can be considered as having a necessary or proper connection.' Const. Lim. (4th Ed.), 176 . . . .

"Wheeler, Justice, in commenting upon a similar provision under a former constitution, says: 'It could not have meant that the word "object" should be understood in the sense of "provisions"; for that would render the title of the act as long as the act itself. Various and numerous provisions may be necessary to accomplish the one general object which an Act of the Legislature proposes. Nor could it have been intended that no Act of legislation should be constitutional which had reference to the accomplishment of more than one ultimate end. For an act having one main or principal object in view may incidentally effect or be promotive of others; and it would be impossible so to legislate as to prevent this consequence. The intention, doubtless, was to prevent embracing in an Act, having one ostensible object, provisions having no relevancy to that object, but really designed to effectuate other and wholly different objects, and thus to conceal and disguise the real object proposed by the provisions of an Act, under a false or deceptive title.' Tadlock vs. Eccles, 20 Texas, 792."

The Court of Criminal Appeals, in Fahey vs. The State, 11 S. W. 109, construing this provision of the Constitution, used the following language:

"Most clearly, the subject of these acts is the regulation of the sale of spirituous, vinous and malt liquors and medicated bitters. Now, if there be but one subject in the act, but more than one object, the act would not be obnoxious to the Constitution. We could concede for the argument that the objects of these acts are to regulate the sale of these liquors, to collect revenue, and divers other purposes and objects, still, unless there was more than one subject in the act, it would be valid and constitutional. Again, suppose there be more than one subject mentioned in the acts, if they be germane or subsidiary to the main subject or if relative, directly or indirectly, to the main subject,—have a mutual connection,—and are not foreign to the main subject, or so long as the provisions are of the same nature, and come legitimately under one general denomination or subject, we can not hold the act unconstitutional."

Also see Ex Parte Hernan, 77 S. W., 225.

In construing a similar provision of the Constitution of that State, the Supreme Court of Indiana, in Mull vs. Indianapolis Traction Company, 81 N. E. 657, said:

"As used in the Constitution, Article 4, Section 19, requiring that every act shall embrace but one subject and matters properly connected therewith, which shall be expressed in the title, the word 'subject' refers to the thing about which the legislation is had, and the word 'matters' includes subordinate and incidental things relating to such general subject. The title of an act was 'An Act to amend Sections 1, 4 and 5 of an act. entitled "An Act concerning street railroad companies, granting additional rights and powers therein specified and matters relating thereto, and declaring an emergency."' The general subject of the act was street railroad companies and the provision giving power to acquire necessary ground for the construction of lines for the transmission of electricity for light, heat and power, and was not violative of the constitutional provision."

The Supreme Court of Illinois, in construing a similar provision of the Constitution of that State, in the case of People vs. McBride, 84 N. E. 865, held that the Constitution, Article 4, Section 13, providing that no Act shall embrace more than one subject, which subject shall be expressed in the title, prevents the joining in one act of incongruous and unrelated matters, since the word "subject" is not synonymous with the word "provision," and is not directed against the title, but the Act itself; and any act may contain many provisions for the accomplishment of the legislative purpose provided they legitimately tend to effectuate the object of the act, and, where all the provisions relate to one subject indicated in the title, and are parts of or incident to it, or reasonably connected with it, the act is valid.

Now applying the doctrine announced by these decisions of our own courts and those of neighboring States construing provisions of their respective Constitutions—in all material respects the same as ours,—we are brought to the conclusion that the Permanent Warehouse Bill under consideration contains but one subject; in other words, that the provisions of the Act regulating public cotton gins are germane to the general subject and are valid and binding provisions thereof.

Yours very truly,

B. F. LOONEY,

Attorney General.

OPINIONS CONSTRUING WORKMEN'S COMPENSATION ACT.

WORKMEN'S COMPENSATION—EMPLOYERS LIABILITY—WORDS AND PHRASES.

Thirty-third Legislature, General Laws, Chapter 179.

1. Where employees are under the direction and control of their employer as to the work to be done and the manner of its doing then they should be included in the pay roll of the company employing them and are in all things entitled to the benefits of the Workmen's Compensation Act, regardless of the fact that they may be paid by commission.

2. The term "employee," as used in our compensation act, by reason of its definition as being "a person in the service of another under contract of hire," etc., must be construed to mean the servant of another in the sense that the term servant is used in describing the legal relationship known as master and servant.

3. In determining who an employee is within the meaning of the act the controlling question is whether or not the employee is subject to the direction and control of the person employing him, to the extent of prescribing what work shall be done and how it shall be done.

February 11, 1916.

Hon. John. S. Patterson, Commissioner of Insurance and Banking, Capitol.

MY DEAR SIR: In your letter you state the question presented in substantially this language:

"This Department has been requested by the Southwestern Surety Insurance Company to obtain from you a legal opinion as to whether or not employees of concerns insuring under the Workmen's Compensation Law, which employees are paid for their services on a commission basis, should be included in the pay roll of the company employing them and insuring the payment of their compensation under said law, or whether the company has the right, because they are employed on a commission basis, to leave them off the pay roll in determining the amount of premium to be paid for a workmen's compensation policy issued to the employer."

The question restated is:

"Do employees whose compensation is fixed and paid on a commission basis come within the terms of Chapter 179, General Laws of the Thirty-third Legislature, commonly known as the Workmen's Compensation Act?"

Section 1 of Part 4 of this Act undertakes to define those who are subject to its provisions, and does do so in the following language:

"'Employee' shall include every person in the service of another under any contract of hire, expressed or implied, oral or written, except one whose business is but casual or is not in the usual course of trade, business, profession or occupation of the employer."

It will be noted that the method by which the employee's compensation is estimated or paid is not defined in the statute. "Average weekly wages" is defined in the same section we are now discussing and is declared to mean "the earnings of the injured employee during the period of twelve calendar months immediately preced-

ing the date of injury, divided by fifty-two." This, of course, constitutes no limitation on the means by which the employee is to be compensated and would not forbid the payment of the employee on a commission basis.

It is also a fixed rule of law that commissions paid to a traveling salesman, for example, for his services are wages.

In re Dexter, 158 Federal, 738.

So far we have observed nothing in this statute nor in any proper construction of it which would put without its purview one whose compensation is on a commission basis. There is a limitation in the statute, however, but it has no reference to the method of compensation. The limitation is that in order for one to be an employee he must be "in the service of another under any contract of hire, expressed or implied," etc.

In other words, the employee must be, in the language of the law books, the "servant," and the employer, the "master." Restated, the relation of master and servant must exist and when this relation does exist the method of compensation is an immaterial one. Does the fact that one may be paid by commissions instead of by wages prevent the relation of master and servant from existing? We will examine that question.

In the case of Singer Mfg. Co. vs. Rahn, 132 U. S. 518, an action was brought by a citizen of Minnesota against the Singer Manufacturing Company, a corporation, for personal injuries done to the plaintiff by carelessly driving a horse and wagon against her when crossing a street in Minneapolis. The complaint alleges that the driver of the wagon was the servant of the Singer Manufacturing Company and engaged in its business. The defendant company denied this and answered that the driver, one Corbett, was engaged in selling sewing machines on commission and not otherwise for it. The evidence on the trial of the case showed that Corbett was employed under a written contract to sell sewing machines and to be paid for his services by commissions on sales and collections, the company furnishing a wagon and he furnishing a horse and harness, to be used exclusively in canvassing for sales and in the general prosecution of the business. Corbett agreeing to give his whole time and best energies to the business and to employ himself under the direction of the company, under such rules and instructions as it, through its manager, should prescribe.

Upon this state of facts the Supreme Court of the United States held that Corbett was a servant of the company and that the company, as his master, was responsible to other persons for his negligence in the course of his employment.

Concerning the matter the Supreme Court in its opinion among other things said:

"And the relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words 'not only what shall be done, but how it shall be done.' Railroad Co. vs. Hanning, 15 Wall., 549, 556.

"The contract between the defendant and Corbett, upon the construction and effect of which this case turns, is entitled 'Canvasser's Salary and Commission Contract.' The compensation to be paid by the company to Corbett, for selling its machines, consisting of 'a selling commission on the price of machines sold by him,' and 'a collecting commission' and the sums collected of the purchasers, is uniformly and repeatedly spoken of as made for his 'services.' The company may discharge him by terminating the contract at any time, whereas he can terminate it only upon ten days' notice. The company is to furnish him with a wagon; and the horse and harness to be furnished by him are 'to be used exclusively in canvassing for the sale of said machines and the general prosecution of said business.'

"But what is more significant Corbett 'agrees to give his exclusive time and best energies to said business,' and is to forfeit all his commissions under the contract, if while it is in force he sells any machine other than those furnished to him by the company; and he further 'agrees to employ himself under the direction of the said Singer Manufacturing Company, and under such rules and instructions as it or its manager at Minneapolis shall prescribe.'

"In short, Corbett, for the commission to be paid him, agrees to give his whole time and services to the business of the company; and the company reserves to itself the right of prescribing and regulating not only what business he shall do, but the manner in which he shall do it; and might, if it saw fit, instruct him what route to take, or even at what speed to drive.

"The provisions of the contract, that Corbett shall not use the name of the company in any manner whereby the public or any individual may be led to believe that it is responsible for his actions, does not and cannot affect its responsibility to third persons injured by his negligence in the course of his employment.

"The Circuit Court, therefore, rightly held that Corbett was the defendant's servant, for whose negligence in the course of his employment, the defendant was responsible to the plaintiff. Railroad Co. vs. Hanning, above cited; Linnehan vs. Rollins, 137 Mass., 123; Regina vs. Turner, 11 Cox Crim. Cas., 551."

Singer Mfg. Co. vs. Rahn, 132 U. S. Rep., 523-524.

From the foregoing excerpts from the opinion it is seen that the fundamental basis of a contract in which the relation of master and servant exists is that the employer retains the right to direct the manner in which the business of the servant shall be done, as well as the result to be accomplished. In other words, the master directs not only what shall be done but how it shall be done. This is the test everywhere recognized and is well recognized by the courts of this State. It has long since been held in this State that the relation and liability of the master depends upon the right of control over the servant, and that the master has the right to direct the conduct of the servant and the mode and manner of doing the work.

Cunningham vs. Moore, 55 Texas, 375;
Cunningham vs. International Railroad Co., 51 Texas, 503;
Texas Life Insurance Co. vs. Roberts, 119 S. W., 926 (929).

In the last named case the court said:

"The word 'servant' in our legal nomenclature has a broad significance and embraces all persons of whatever rank or position who are in the employ and subject to the direction or control of another in any department of labor or business; it may in most cases be said to be synonymous with 'employee.'" 119 S. W., 929.

We may remark in passing that in support of the proposition just enunciated the court cites the Singer Manufacturing Company case, supra.

In the Roberts case a part of the compensation of Roberts was to be commissions. Notwithstanding this fact the court held that he was an employee or servant, saying:

"By the terms of the contract the company retained control over the work to be performed by him, which was generally conceded to be the controlling test in determining whether or not the relation of master and servant exists. * * * At any rate in the case at bar the plaintiff (Roberts) was neither a partner nor an independent contractor and he was an employee. * * *"

The general rule for determining when the relation of master and servant exists is laid down by Mr. Labatt in his work on that subject, as follows:

"Where one person is employed to do certain work for another who under the expressed or implied terms of the agreement between them is to have the right of exercise and control over the performance of the work to the extent of describing the manner in which it shall be executed the employer is the master and the person employed is the servant."
1st Labatt on Master and Servant, Sec. 2, page 9.

Speaking with reference to commissions the same author has this to say:

"On the other hand it is not necessary in order to establish the existence of a contract of service that the employee should have been paid by wages or salary. If he is shown to have been under the control of the employer in respect to the details of his work he will be regarded as a servant, although his remuneration may have taken the form of a commission."
1st Labatt on Master and Servant, Sec. 66, page 232.

One of the cases cited by Mr. Labatt in support of the foregoing text is the case of Reg. vs. Turner, 11 Cox C. C. 551, 22 L. T. N. S. 278. In that case the judge in charging the jury as to the considerations which were to be kept in view in determining whether the prisoner was a clerk or servant within the meaning of the statute, said:

"That depends on the terms of his employment. If a persons says to another, carrying on an independent trade, 'if you get any orders for me I will pay you a commission,' and that person receives money and applies it to his own use he is not guilty of embezzlement, for he is not a clerk or servant; but if the man says, 'I employ you and will pay you, not by salary but by commission,' then the person employed is a servant, and the reason for such distinction is this, viz.: That the person employing has no control over the person employed in the first case, but where in the second instance I have put one employs another and binds him to use his time about his (the employer's) business, then the person employed is subject to control."

In the case of Reg. vs. Bailey, 12 Cox C. C. 56, a man was employed by the prosecutor as a traveler to solicit orders and was to give the whole of his time to them, and it was held that he was a

servant, although he received no regular salary, but was paid by commission. To the same effect are various other English cases cited on pages 237 and 238, 1st Labatt on Master and Servant.

In the case of Employers Indemnity Co. vs. Kelly Coal Company, 41 L. R. A. (N. S.) 963, it was held that an "employee" is one who works for and under the control of his employer; and the mode of payment, while a circumstance to be considered in determining the question, is not decisive.

The sum and substance of the matter is that the term "employee," as used in our compensation act, by reason of its definition as being a person" in the service of another under contract of hire," etc., must be construed to mean the servant of another in the sense that the term "servant" is used in describing the legal relationship known as master and servant, and that in determining who an employee is within the meaning of the Act the controlling question is whether or not the employee is subject to the direction and control of the person employing him, to the extent of prescribing what work shall be done and how it shall be done; and that the question of compensation is not a controlling question, but only one thing to be considered in reaching a correct conclusion as to the evidence of the relation of master and servant.

We will answer your inquiry directly then and say that whereever employees are under the direction and control of their employer as to the work to be done and the manner of its doing then they should be included in the pay roll of the company employing them and are in all things entitled to the benefits of the Workmen's Compensation Act, regardless of the fact that they may be paid by commission.

Yours very truly,
C. M. CURETON,
First Assistant Attorney General.

WORKMEN'S COMPENSATION—TEXAS LIABILITY ACT—WORDS AND PHRASES.

Chapter 179, General Laws of the Thirty-third Legislature, Article 5246yyy, Vernon's Sayles' Civil Statutes, Article 5246hh, Vernon's Sayles' Civil Statutes.

1. The word "employee" as used in the Texas Employers' Liability Act is comprehensive enough, and as a matter of fact embraces every person whether a laborer or an officer in the service of another under any contract of hire and includes the officers of a corporation.

February 3, 1916.

Hon. John S. Patterson, Commissioner of Insurance and Banking, Capitol.

DEAR SIR: You have presented to the Attorney General through your Deputy Insurance and Banking Commissioner, a request for an opinion as to whether or not the officers of a corporation engaged

in operating its business are to be considered as employes of the corporation under the Texas Employers' Liability Act, passed by the Thirty-third Legislature in 1913.

We beg to advise you that in the opinion of this Department officers of the corporation are employes within the meaning of this Act and are entitled to the privileges and subject to its disabilities.

Section 1 of Part 4 of this Act, which is Article 5246yyy of Vernon's Sayles' Civil Statutes, of this State, defines the word "employee" as used throughout this Act and declares that "employee" shall include every person in the service of another under any contract of hire, expressed or implied, oral or written, except one whose employment is but casual or is not in the usual course of the trade, business, profession or occupation of the employer." This definition is comprehensive enough and as a matter of fact does embrace every person whether a laborer or an officer "in the service of another under any contract of hire." This Act of the Legislature not only applies to the servants of corporations, but to the servants of partnerships and individuals as well. Partnerships and individuals, of course, have no corporate officers and nothing in the Act lends color to the proposition that corporate officers are not to be considered as employees. It is true that the word "employee" in its general acceptation does not apply to officers of the government of a corporation.

Palmer vs. Van Santboord, 38 L. R. A., 402.

At the same time the word "employee" is comprehensive enough to embrace any one, whether an officer or workman in the service of another. The authorities say "an employee is one who works for and under the control of his employer."

Employers' Indemnity Co. vs. Kelley Coal Co., 149 S. W., 992; 41 L. R. A. (N. S.), 963.

The Century Dictionary defines employee, in part, as follows:

"One who works for an employer; a person working for salary or wages."

This opinion has been considered and approved in conference, and will be recorded.

It is true that this authority says that the term is usually applied only to clerks, working laborers, etc., and but rarely to the higher officers of a corporation or government or to domestic servants, but we are convinced that the use of the term "employee" in the Texas Statutes must be construed to apply to all persons in the service of another because this application follows the plain and simple meaning of the definition given in the statute.

It will be noted that in Section 2 of the Act, which is now Article 5246hh of Vernon's Sayles' Civil Statutes, that certain classes of employees were excepted from the general terms of the Act, and, among others, domestic servants and farm laborers. This exception is persuasive of the construction which we have given the definition of employee

as contained in Article 5246yyy. Our definition of employee is a copy of the definition contained in a Massachusetts act, and Mr. Boyd, in his work on Workmens' Compensation, Section 406, declared that the Massachusetts act covers all employees engaged in employments affected by the law.

You are therefore advised that "every person in the service of another under any contract of hire" in this State, unless within the specially excepted classes, as specified in Section 2 of the Act above referred to, are within the protective features of our employees compensation act and are likewise subject to the liabilities of that act.

Yours very truly,
C. M. CURETON,
First Assistant Attorney General.

WORKMEN'S COMPENSATION.

WORKMEN'S COMPENSATION—RAILWAY COMPANIES, TERMINALS.

By C. M. Cureton, First Assistant Attorney General.

1. Corporations chartered under subdivision 53, Art. 1121, of the Revised Civil Statutes, as terminal railway companies, are railway companies operating as common carriers, and are exempt from the provisions of the Workmen's Compensation Act.
2. Statutes cited or construed:

R. S., Art. 1121, Sec. 53.
Chap. 179, Gen. Laws, Thirty-third Legislature.

Authorities cited:

Houston Belt & Terminal Co. vs. Hornberger, 143 S. W., 272;
23 Am. & Eng. Ency. of Law, p. 649;
U. S. vs. Sioux City Stockyards Co., 162 Fed., 560;
U. S. vs. St. Joseph Stockyards Co., 181 Fed., 625;
1 Moore on "Carriers," Sec. 14, p. 50.
(47 Op. Atty. Gen., 399.)

WORKMEN'S COMPENSATION—WORDS AND PHRASES.

By C. M. Cureton, First Assistant Attorney General.

1. A waitress at a fashionable club is not a domestic servant within Sec. 2, Part 1, Chap. 179, of the General Laws of the Thirty-third Legislature.
2. A domestic servant within the meaning of this Act is one in the actual employ of the master, engaged principally in the master's household duties, and who is either actually or substantially a member of the household.
3. Statutes cited or construed:

General Laws, 33d Leg., Ch. 173, Sec. 2, Part I.

Authorities cited:

Century Dictionary Edition 1913, Vol. 3, p. 1727.
Wakefield vs. State, 41 State Supp., 556.
Williams vs. State, 143 S. W., 634.
Waterhouse vs. State, 21 Texas Ct. of App., 663.
Williams vs. State, 41 Texas, 649.
Cook vs. Dodge, 6 La. Annual, 276.
In re Howard, 63 Fed., 263.
Toole Furniture Co. vs. Ellis, 63 S. E., 55.
Waxham vs. Fink, 28 L. R. A. (N. S.), 367.
Erjauscheck vs. Kramer, 126 N. Y. Supp., 239.
5 Labatt's Master and Servants, 2 Ed., Sec. 1968, sub-division b, p. 6112.
7 Labatt's Master and Servant, 2 Ed., Sec. 2772, p. 826.
25 Am. & Eng. Encyc. of Law, 1133, 1134.
25 Am. & Eng. Encyc. of Law, 37.
(46 Op. Atty. Gen., 204.)

WORKMEN'S COMPENSATION—CONSTITUTIONAL LAW—INDUSTRIAL ACCIDENT BOARD.

By C. M. Cureton, First Assistant Attorney General.

1. Where a claim has been approved by the Industrial Accident Board, and the Insurance Company declines to make payment, any suit brought against the company should set up the facts, including the submission of the question to the board.
2. The Board is not a court, and its conclusions cannot be given the force and effect of a judgment.
3. The failure of an insurance company to pay the claimant the award made by the Board would not be ground authorizing the Insurance Commissioner to revoke the certificate of such company.
4. Statutes cited or construed:

Acts Thirty-third Legislature, Regular Session, Chap. 179.
Constitution of State, Art. 2, Sec. 1; Art. 1, Sec. 19.

Authorities cited:

Wichita Electric Co. vs. Hinckley, 131 S. W., 1192.
Armstrong vs. Traylor, 87 Texas, 508.

WORKMEN'S COMPENSATION—CORPORATE OFFICERS—WORDS AND PHRASES.

By C. M. Cureton, First Assistant Attorney General.

1. Officers of a corporation are employees within the meaning of the Workmen's Compensation Act of this State, and are entitled to the privileges and subject to the disabilities and limitations thereof.
2. Statutes cited or construed:

Acts Thirty-third Legislature, Chap. 179.

Authorities cited:

Palmer vs. Van Santboord, 38 L. R. A., 402.
Employers Indemnity Co. vs. Kelly Coal Co., 149 S. W., 992; 41 L. R. A. (N. S.), 963.
Century Dictionary, definition of "employe."

MISCELLANEOUS OPINIONS.

APPROPRIATIONS—CONSTITUTIONAL LAW—WORDS AND PHRASES.

Appropriation Act (H. B. No. 55) of the First Called Session of the Thirty-fourth Legislature.

Constitution, Article 3, Section 9.

1. The miscellaneous appropriation act passed by the Thirty-fourth Legislature, being House Bill No. 55, will go into immediate effect upon being signed by the Governor.
2. General and Special Laws defined.

June 4, 1915.

Hon. James E. Ferguson, Governor of Texas, Building.

DEAR SIR: Captain W. E. Craddock has presented to us House Bill No. 55, the caption of which reads as follows:

"An Act making appropriations to pay various miscellaneous items, except as otherwise stated in the item, on the taking effect of this act, making appropriations for deficiencies incurred in the support of the State Government for the fiscal year ending August 31, 1915, and for the purpose of meeting emergencies occurring during the fiscal year ending August 31, 1915; and declaring an emergency."

Captain Craddock requests that you be advised when this Act will be effective, should you approve the same as Governor of the State. The certificate of the Chief Clerk appended to the Bill shows that it passed the House on May 26, 1915; that it passed the Senate, with amendments, on May 27th, 1915; yeas 26, nays 2; that the Bill, with amendments, was then returned to the House, whereupon that branch of the Legislature refused to concur in the Senate amendments and requested appointment of a Free Conference Committee. The Senate granted the request for the appointmnt of a Free Conference Committee on May 27, 1915. The certificate of the Secretary of the Senate shows that the Bill passed the Senate by two-thirds vote, while the certificate of the Chief Clerk of the House shows that the Bill passed, but fails to disclose the vote by which it was passed.

Section 39 of Article III of the State Constitution provides 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 the 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."

The measure under examination is not shown to have received a two-thirds vote or that such vote was entered by yeas and nays on the journal. The journals are not before us for examination, and we will decide the question upon the vote recorded by the chief clerical officers of the House and Senate. We will assume, therefore, that the Bill did

not receive the necessary two-thirds vote from both houses. If it goes into effect at once, then it must do so under the constitutional exemption which declares that the general appropriation act shall become effective at once without the necessity of a recorded two-thirds vote. The question, therefore, for determination is: Is this measure a general appropriation act?

This question we will answer in the affirmative, and we beg to advise you that House Bill No. 55 is a general appropriation act, and when signed by you will be at once effective. The reasons which lead us to this conclusion will now be stated. We will first determine the meaning of the phrase, "a general appropriation act." An appropriation of the State funds is a setting apart from the public revenue of a certain sum of money for a specified object in such a manner that the executive officers are authorized to use that money, and no more, for that specific object.

Jobe vs. Caldwell, 125 S. W., 423.
Menefee vs. Askew, 27 L. R. A. (N. S), 537.

The term "general laws" is one which has been employed to designate different classes of laws. It is frequently used as the antithesis of "private," also of "local," and also of "special" statutes, and it is said that "in deciding whether or not a given law is general, the purpose of the act and the objects on which it operates must be looked to." Southern Express Co. vs. Tuscaloosa, 132 Ala., 326.

If the subject matter of the law be that of a general nature, operating throughout the country on all alike then it is a general law. State vs. Davis, 44 N. E., 511.

Various definitions have from time to time been given by the courts, but the following presents fairly well the underlying idea of all these definitions. For example:

In Ex Parte Burke, 43 Am. Reps., 231, a general act is defined as one which regards the whole community, and is used as synonymous with "public act"; in Holt vs. City of Birmingham, 111 Ala., 369, a general law is a law which operates throughout the State alike upon all the people or all of a class; in Davis vs. Clark, 106 Pa., 377, a general act is one applicable to every part of the commonwealth; in State vs. Murray, 17 South., 832, a general act is one which regulates the common good of all the inhabitants within the State.

It is held by numerous authorities that a statute which relates to persons or things as a class is a general law, while a statute which relates to particular persons or things as a class is a special one.

In the case of Parker-Washington Co. vs. Kansas City, 85 Pac., 781, it is said:

"In order to determine whether or not a given law is 'general', the purpose of the act and the objects on which it is intended to operate must be considered."

Various authorities have laid down this doctrine:

"A law which operates only upon a class of individuals is none the less a 'general law,' if the individuals to whom it is applicable constitute a class which requires legislation peculiar to itself in the matter covered by the

law. The class, however, must not only be germane to the purpose of the law, but must also be characterized by some substantial qualities or attributes which render such legislation necessary or appropriate for the individual members of the class."

Deyoe vs. County, 98 Am. St. Reps., 73.
Restoration Co. vs. Kerrigan, 8 L. R. A. (N. S.), 682.
City of Pasadena vs. Stimson, 27 Pac., 604.

Bearing in mind these several definitions of general laws, we will next proceed to examine some of the items of this Bill. The rule of construction which we must here observe is the fundamental one laid down by Sutherland in his "Statutory Construction," Vol. 2, Section 347:

"It is indispensable to a correct understanding of a statute to inquire first what is the subject of it, what object is intended to be accomplished by it. When the subject-matter is once clearly ascertained and its general intent, a key is found to all its intricacies;—general words may be restrained to it, and those of narrower import may be expanded to embrace it to effectuate that intent. 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."

Or, again, Mr. Sutherland says:

"* * * The object sought to be accomplished exercises a potent influence in determining the meaning of not only the principal but also the minor provisions of a statute. To ascertain it fully the court will be greatly assisted by knowing, and it is permitted to consider, the mischief intended to be removed or suppressed, or the necessity of any kind which induced the enactment * * *"

Sutherland, supra, Section 456.

The caption of this Act, as well as the first paragraph of the first section, expressly declares that one of its purposes is to appropriate funds for the payment of deficiencies which had been incurred in administering the affairs of the State Government. Another declared purpose is to provide funds for meeting emergencies during the fiscal year ending August 31, 1915. From this we must assume that one of the evils to be remedied by the statute was a liquidation of debts created under the law by reason of the failure of the last preceding appropriation bill to carry such funds for administering the affairs of the Government. Another evil to be remedied was to avoid creating further deficiencies in order that the State might operate upon a cash basis. When the various items of the bill are examined it will be found that they correspond with the declared purpose of the measure, as contained in the caption and in the first section.

For example: On page 2 of the Bill we find funds appropriated, among other purposes, for the following:

To pay expenses for Comptroller's office in investigating and prosecuting liquor cases;

To pay increase of salaries for six judges of the Supreme Court and Court of Criminal Appeals;

To pay for furniture purchased by the House of Representatives;

To pay the interest on the public debt;

To pay various court reporters of the State;

To pay for water, light and power furnished the Confederate Home;
To pay for typewriters purchased by the Courts of Civil Appeals;
To pay for the support of the State Hospital for Crippled and Deformed Children at Galveston;
To pay for the expenses of the Industrial Accident Board;
To pay costs and expenses on behalf of the State incurred by the Attorney General's Department in the prosecution of suits;
For maintenance of the Confederate Woman's Home;
To pay traveling expenses of the State Revenue Agent;
To pay certain expenses of the Comptroller's Department and the Department of Labor Statistics;
To pay the salaries of District Judges in newly-created districts;
To support and maintain the Southwestern Insane Asylum;
For the purpose of carrying into effect certain provisions of law relative to resurveying certain lands of the State, which work is now in progress under a previous statute;
An appropriation for public printing;
Appropriation to pay the salaries and expenses of the new Court of Civil Appeals;
An appropriation for the support of the Blind Institute;
Appropriation also for the support of the Deaf and Dumb Institution;
A general appropriation for a refund of erroneously paid franchise taxes;
An appropriation for the Supreme Court of State contingent upon the adoption of the constitutional amendment authorizing the increase of the membership of that body.

It is unnecessary for us to further note the items in this Bill. It is sufficient to say that the general purpose of the measure is fully and completely carried out by the items contained in the Act. It is true that the measure contains some appropriations to individuals and corporations direct, and, standing alone, might possibly be considered as in the nature of private acts or special laws, though this is exceedingly doubtful. However, this much is true, that special or general laws may contain an intermixture of items of a private nature without in any manner changing the general nature of the law. 26th Am.-Eng. Ency. of Law, page 531. In fact, some authorities hold that a private act which contains some provisions of a public nature is *pro tanto* a public act. Prior Underwriters vs. Lloyds, etc., 11 Misc. (N. Y.), 646.

However, from a consideration of the caption of the Act, an examination of its first section and from a glimpse into the necessities and purpose of the measure, it is entirely clear that this appropriation act is a general law, intended primarily to affect the entire body of the people of the State in that its primary and fundamental purpose is to pay either for the past or continued support of the State Government.

An examination of the bill will disclose that many of the items of appropriation are based upon deficiencies allowed by the Governor under our general statutes, which deficiencies were warranted only by an existing general appropriation bill passed by the Thirty-third Legislature. As such these deficiencies were necessarily based upon the general law, and it would seem to be sound that any bill authorizing their payment would necessarily be a general law. It has been authori-

tatively said that all general appropriation bills provide money for certain purposes, ordinarily for the expenses of the Government and public institutions, and, incidentally, may provide for the application of the appropriation and specify the purchase of materials required in running the same, and how it shall be done; yet such incidental specifications do not deprive the appropriation bill of its nature as general. State, Ex Rel Stratton vs. Rogers, 24 Wash., 417.

In this last cited case, the Supreme Court held that an act entitled "An Act providing for the purchase and completing and furnishing of a State capitol building, and providing for the payment of interest and making an appropriation," took effect immediately upon its passage and approval, since it must be construed as an appropriation bill falling within the exception contained in the Constitution, which declares that "no law, except appropriation bills, shall take effect until ninety days after the adjournment of the Legislature."

It is true that our State Constitution uses the words "the general appropriation act," but the use of this language is not a limitation upon the right of the Legisature to divide its appropriation act into as many different bills as it chooses. In fact, it has been the custom now for some time to pass several appropriation bills each session of a general nature, all of which become effective when signed by the Governor. So long as the purpose of the bill is to make a general appropriation for the support of the State Government, it is a general appropriation bill, and comes within the constitutional exception.

You are, therefore, advised that House Bill No. 55 will be effective immediately upon its being signed by Your Excellency.

Yours very truly,

C. M. CURETON,

First Assistant Attorney General.

APPROPRIATIONS—CONTRACTS.

Under an [illegible] 25,000 for the erection of a fire proof dormitory and dining [illegible] of Industrial Arts for Women, which appropriation is placed in the appropriation bill under the column headed for the year ending August 31, 1917, while said fund is not available until September 1, 1916, yet the Board of Regents of such institution would have authority to now contract for the erection of such dormitory and dining hall, the same to be paid for out of the appropriation subsequent to September 1, 1916.

Section 44, Article 3, Constitution, Article 2402a, 2402b, Vernon's Sayles' Civil Statutes.

November 17, 1915.

Hon. W. R. Hendrickson, State Inspector of Masonry, Public Buildings and Works, Capitol.

DEAR SIR: The Attorney General has your letter of recent date, reading as follows:

"The Board of Regents of the College of Industrial Arts, at Denton, Texas, wish to build a dormitory for girls and have same ready for occupancy during October, 1916. The appropriation for this building will be available September, 1916. Can we start work on the building before September, 1916,

with the understanding that no money will be paid or warrants issued for same before the appropriation is available?

"It is of the greatest importance that this building be started as soon as possible, owing to the serious shortage of dormitory room and the very low prices of building materials prevailing at present."

In addition to the information contained in the above letter you advised us orally that the citizens of Denton, the city in which is located the institution above named, have agreed if the contract for this building can be legally entered into at this time and the building erected in time to be available for the beginning of the term in September 1916, they will pay any interest charges demanded by the contractors on account of inability to obtain funds until the first of September 1916.

The appropriation bill of the Thirty-fourth Legislature in making provision for the support of the College of Industrial Arts for Women contains an item as follows:

"Fire proof dormitory and dining hall for the year ending August 31, 1917, $125,000."

The effect of this language in the appropriation bill is that said sum of money is appropriated for the purpose therein indicated, but that same is not available until the first day of September 1916. As we understand your letter it is desirable and essential to the welfare of the institution that this dormitory and dining hall should be available for use at the beginning of the term 1916, and if it can be legally done, the Board of Regents desire to contract for this building now in order that same may be finished and ready for occupancy at the time of the beginning of the next term.

The Constitution of this State in Section 44 of Article 3, contains the following provision:

"The Legislature shall provide by law * * * but shall not grant extra compensation * * * nor grant by appropriation or otherwise any amount of money out of the treasury of the State to any individual on a claim, real or pretended, when the same shall not have been provided for by preexisting law."

We also find in Article 2402a and 2402b, Vernon's Sayles' Civil Statutes 1914, the following restrictions placed upon Boards of Regents and officers generally in the erection of buildings, etc. Such articles are as follows:

"That it shall hereafter be unlawful for any regent, or regents, director or directors, officer or officers, member or members, of any educational or eleemosynary institution of the State of Texas, to contract or provide for the erection or repair of any building, or other improvement or the purchase of equipment or supplies of any kind whatsoever for any such institution, not authorized by specific legislative enactment, or by written direction of the Governor of this State acting under and consistent with the authority of existing laws, or to contract or create any indebtedness or deficiency in the name of or against this State, not specifically named and designated in the legislative enactment creating such fund, or provided for in any appropriation bill."

"That any and all contracts, debts or deficiencies created contrary to the provisions of this act shall be wholly and totally void, and shall not be enforceable against this State."

The above provision of the Constitution and Statutes is the only one upon which could possibly be lodged an objection to the contract inquired about and in our opinion this Constitutional and Statutory provision would not support a valid objection thereto. Any contract entered into by any agency of the State Government for the expenditure of State funds is invalid under the above provision of the Constitution unless the same is provided for by and based upon some pre-existing law.

Nichols vs. State, 32 S. W., 452.
Haldeman vs. State, 163 S. W., 1020.

In the case of Nichols vs. State, supra, the Legislature had authorized the construction of the General Land Office at a cost not to exceed the sum of $40,000. The original contract was entered into by the Commissioners appointed by the act with Nichols for the sum of $39,663. After the work had progressed to some extent additions and enlargements were made under a subsequent contract between Nichols and the Commissioner, which increased the cost some $12,000. Nichols received the original contract price, but there being no appropriation for the payment of the additional contract, the Legislature by a special Act authorized the widow of Nichols to institute a suit against the State to recover thereon not to exceed $7,000. The court in denying the right of Nichols to recover against the State held such contract and appropriation by the Legislaure in violation of the above quoted provision of the Constitution, saying:

"But we are of opinion that the claim of appellant is not based upon any pre-existing law, and that such claim falls within the spirit and meaning of the prohibition contained in the latter part of the section of the Constitution quoted. The apparent purpose of this provision of the Constitution was to relieve the State from liability for all claims that were not authorized by a pre-existing law, and to prohibit the Legislature from paying them."

The Haldeman case above cited was likewise a suit for labor and material over and above the contract price of a building and the original appropriation made therefor. The court in denying the right of Haldeman to recover used the following language:

"Inasmuch as the claim herein sued on was not a legal debt against the State, for the reason that it was in contravention of Section 44, Article 3, of the Constitution, above referred to, we do not think that the Legislature had any authority to make an appropriation for the payment of said claim, even had it done so absolutely, without requiring the same to be established by judgment of the court. Section 49, Article 3, of the Constitution of this State, provides as follows: 'No debt shall be created by or on behalf of the State, except to supply casual deficiencies of revenue, repel invasion, suppress insurrection, defend the State in war or pay existing debts.' The claim sued on herein was not for any of the items mentioned above, unless it be to pay 'existing debts.'

"If the debt was illegal, it did not exist; and the effect of the appropriation bill was to create, as well as to pay, the debt."

The above citation and quotations from the authorities is ample to support the proposition that a contract entered into by any State official that is not authorized by some pre-existing law is invalid and cannot be enforced, nor has the Legislature the power to appropriate funds belonging to the State in payment of such contracts.

However, in our opinion should the Board of Regents enter into the contract contemplated in your communication, such contract would not fall within this provision of the Constitution for the reason that the general appropriation bill of the Thirty-fourth Legislature went into effect immediately upon its passage under the provisions of Section 39 of Article 3 of the Constitution, and is now a valid law of the State. The fact that this $125,000 appropriated for the erection of the dormitory and dining room is not available until the first day of September, 1916, does not postpone the taking effect of this act of the Legislature until that date. This act is as much the law now as it will be subsequent to September 1, 1916, and the Board of Regents would be warranted in letting the contract for the erection of said building at the present time, or at any time after the enactment of such law, and prior to August 31, 1917, the expiration of the fiscal period for which said appropriation is made.

Of course as this $125,000 is by express provision of the act not available until September 1, 1916, no warrants could be drawn or payments made out of same until that date. We think the purpose of the Legislature would be met by the erection of this building prior to September 1, 1916, and its delivery thereafter, and paid for out of this appropriation subsequent to said date. There is a distinction to be made between this case and the ordinary supplies for institutions in that the building to be erected will not be delivered until at a time when the appropriation is available, and is of a permanent nature, as contradistinguished from the ordinary supplies consumed from day to day. Of course under an appropriation for the year beginning September 1, 1916, a department of the State government could not during the year beginning September 1, 1915, contract for, receive and consume supplies to be paid for from a subsequent year's appropriation, nor do we mean by this opinion to make a holding of that character.

We therefore advise you that in our opinion the appropriation bill of the Thirty-fourth Legislature is a pre-existing law within the meaning of Section 44, Article 3, of the Constitution and will support a contract entered into by the Board of Regents for the erection of a dormitory and dining room to be paid for out of the appropriation available September 1, 1916.

Yours truly,
C. W. TAYLOR,
Assistant Attorney General.

APPROPRIATIONS—ASYLUMS—STATE INSTITUTIONS—LEGISLATURE.

Where the Legislature, in the appropriation bill for State institutions fails to make provision with reference to the use of funds derived from the sale of junk, live stock, etc., the superintendents of such institutions have no authority under Articles 131 and 132, R. S., 1911, to make requisition on the State Treasurer for any part of such funds.

June 16, 1916.

Hon. George Leavy, State Purchasing Agent, Capitol.

DEAR SIR: You request a construction by this Department of Articles 131 and 132, Revised Statutes, 1911, especially with reference to the disposition of the funds therein referred to. These articles provide as follows:

"Art. 131.—* * * All funds of every character received into or belonging to the asylums, other than the sums of money appropriated for their support from time to time by the Legislature, shall, as soon as received, be paid over to the State Treasurer by the superintendents or other persons receiving it; and the treasurer shall keep the same separate and apart from all other funds in his hands, and shall pay the same out only on the order of the superintendents, approved by the presidents of the board of managers.

"Art. 132.—* * * The order mentioned in the preceding article shall specify on its face the purpose for which it is drawn and shall be deemed a sufficient voucher for the payment of the amount of money therein specified."

The above two articles must be construed so as to harmonize with Constitution, Article 8, Section 6. This section provides, in part, as follows:

"No money shall be drawn from the Treasury, but in pursuance of specific appropriation made by law; nor shall any appropriation of money be made for a longer term than two years * * *"

An Act of a State Legislature is valid unless it comes in direct conflict with the Constitution. Moore vs. Alexander, 107 S. W., 395.

Under the above quoted provision of our Constitution. when money is actually paid into the State Treasury, a statute providing for its payment other than by appropriation by the Legislature, is void and of no effect. The language of the Constitution itself admits of no other construction.

In the case of Institution for Education of the Mute and Blind vs. Henderson, reported in 18 L. R. A., 398, the Supreme Court of Colorado held that a statute which provided for the payment of bounties by a county treasurer for the destruction of certain wild animals or poisonous weeds, and for planting trees, the amount to be credited to that officer's settlement with the State Treasurer, violated a provision in the Constitution of that State to the effect that "no money shall be paid out of the treasury except upon appropriation made by law and on warrant drawn by the proper officer."

At first blush it would appear that Articles 131 and 132, supra, are in direct conflict with the above provisions of the Constitution, but in our opinion, they are valid when the Legislature makes provision in an appropriation bill for the asylums with reference to the

funds therein referred to. In the absence of such provision in the appropriation bill, the superintendent of an asylum would have no right under the law to make requisition on the State Treasurer for any amount placed to the credit of this separate fund.

The object of the above quoted provision of the Constitution is to secure regularlity, punctuality, and fidelity in the disbursement of public funds. A State eleemosynary institution is a part of the State's government, and inasmuch as the taxes paid by the people, as well as the revenues derived from other sources, are to be applied to the expenses for operating and managing the government, it is perfectly proper that the Legislature should have the power to decide the manner in which such funds should be applied.

"The power to control and direct the appropriations constitutes a most useful and salutary check upon profusion and extravagance, as well as upon corrupt influence and public peculation." 2 Story, Const. 5th ed., Sec. 1348.

We do not think that the funds derived from the sale of commodities by the State institutions, and referred to in the articles of the statute heretofore quoted, are special funds. These funds, while kept separate by the State Treasurer, are not created for a specific purpose and should be considered in connection with all the funds of the State to the credit of the general revenue. Special funds are created for special purposes, and such funds should be governed by the statutes and expended and administered in accordance therewith. 36 Cyc., 889, citing H. & T. C. R. R. Co. vs. State, (Civ.), 41 S. W. 157.

The present appropriation for the State Institution for the Training of Juveniles contains the following provision:

"Provided, that the proceeds of sales of all products raised or manufactured at the State Institution for the Training of Juveniles, and all funds received as compensation for labor performed outside of the institution or off of the premises thereof by any of the inmates of the same, together with the unappropriated balance of such funds remaining in the hands of the institution on August 31, 1915, shall be deposited in the State Treasury." (Acts of 1915, First Called Session, page 72.)

The present appropriation bill for the Girls' Training School at Gainesville, contains the following provision:

"Provided, that all proceeds of sale of all products raised or manufactured at the Girls' Training School at Gainesville shall be turned into the State Treasury." (Id. p. 73.)

The present appropriation bill for the State Tuberculosis Sanitorium at Carlsbad, contains the following provision:

"Provided, that all proceeds of sale of all products raised or manufactured at the State Tuberculosis Sanitarium shall be turned into the State Treasury." (Id., p. 75.)

It is therefore the opinion of this department, and you are so advised, that where the Legislature, in its appropriation bill for State institutions fails to make provisions with reference to the use of funds

derived from the sale of junk, live stock, etc., the superintendents of such institutions have no authority under the law, to make requisition on the State Treasurer for any part thereof.

Very respectfully,
B. F. LOONEY,
Attorney General.

ASYLUMS—ESCAPED INMATES—SHERIFFS' FEES.

Where a sheriff apprehends an escaped inmate of an asylum and under direction of his county judge or the superintendent of the asylum conveys such inmate back to the institution, he is entitled to mileage at the rate of ten cents per mile for each mile going and returning for himself, less the money value of any railrod pass used by him, and also the mileage for the inmate at the rate of ten cents per mile going. Articles 148 and 149, Vernon's Sayles' Civil Statutes; Articles 1130, 1137, Vernon's Criminal Procedure.

March 9, 1916.

Mr. J. E. Bell, Storekeeper and Accountant, North Texas Hospital for the Insane, Terrell, Texas.

DEAR SIR: The Attorney General has your favor of March 6 enclosing an account and correspondence relating thereto of Mr. J. D. Perkins, sheriff of Runnels county, for the capture and return to your institution of an escaped inmate. The first account submitted by Mr. Perkins was in the sum of $79.80, being 10 cents per mile from Ballinger to Terrell and return, a distance of 266 miles each way, and also 10 cents per mile for that distance for the patient. Upon the provision of the anti-pass law being called to the attention of Mr. Perkins, he revised his account and deducted therefrom 3 cents per mile from 228 miles of the trip, that is, from Ballinger to Dallas, being the money value of the railroad pass used by him in making the trip, after which deduction he submits his account in the sum of $65.22.

You desire to be advised if the above is a proper charge against your institution and should be paid by it.

Replying thereto we beg to say that Articles 148 and 149 Vernon's Sayles' Civil Statutes, dealing with the escape of inmates of asylums, their apprehension and return thereto, and the expense incident to such are in the following language:

Art. 148. "If any person confined in the asylum shall escape therefrom, it shall be the duty of any sheriff or peace officer to apprehend and detain him and to report the same to the county judge of the county, and also to the superintendent of the asylum, and upon the order of either to convey such patient to the asylum."

Art. 149. "Any officer who may convey a patient to the asylum in accordance with the provisions of the preceding article shall be paid for such service out of the funds of the asylum, at the rate of ten cents per mile for himself and each necessary guard he may employ, going and returning, and the same for the patient going, the distance to be determined by the superintendent, according to the most direct traveled route."

It appears from your communication that the sheriff and county judge of Runnels County have complied with the provisions of the above

statute. It seems that the sheriff, upon the apprehension of the escaped inmate, advised his county judge, who in turn communicated with your superintendent in ample time to receive instruction, although his communication did not reach your superintendent until after the departure of the sheriff with the inmate for Terrell. It is made the duty of the sheriff to convey the patient back to the asylum upon the instruction of either his county judge or the superintendent, and the law plainly fixes his compensation for such services upon a mileage basis; that is, the sheriff shall receive 10 cents per mile for himself in going and returning and the same amount for the patient going, which amount Mr. Perkins in his account has charged against your institution, less 3 cents per mile, the money value of his railroad pass used in traveling from Ballinger to Dallas, which he is required to do under the anti-pass law.

It is true that the mileage allowed sheriffs by the provisions of Articles 1130 and 1173, Code of Criminal Procedure, for executing process in criminal cases is somewhat less than that allowed by articles of the Civil Statutes above mentioned, and it is also true that a guard could be sent from the asylum to the point of the detention of the escaped inmate for the purpose of conveying him back to the asylum at much less expense to the institution than that incurred in the return of an inmate by the mode following in this case. However, Articles 148 and 149 are dealing with the specific subject and grant to the sheriff compensation by way of mileage for that particular duty performed by him, and we can but apply the law as written and advise you that the sheriff of Runnels county is justified in the presentation of the account as rendered and under the law he should be paid the account out of the funds of the asylum provided the route traveled by him is determined by the superintendent to be the most direct traveled route.

I am returning herewith the communications enclosed by you, as follows: M. Kleberg, county judge, to Hon. George F. Powell, superintendent, dated January 8, 1916; J. D. Perkins, sheriff, to Dr. Powell, superintendent, sworn account, dated January 19, 1916; J. D. Perkins, sheriff, to Hon. George F. Powell, superintendent, revised account, dated February 11, 1916.

As Mr. Perkins acquiesced in a submission of this question to this Department, we are sending him a carbon copy of this communicaton.

Yours truly,
C. W. TAYLOR,
Assistant Attorney General.

AUTOMOBILES—REGISTRATION.

Owners of automobiles are required to register with the county clerk and to place upon the cars driven by them a number corresponding with their registration number and to pay to the county clerk a fee of fifty cents for such registration. The fee of fifty cents so paid is merely a registration fee and is not a license or a license tax.

Such registration and payment of registration fee is required but once for each machine and is not an annual registration.

February 11, 1915.

Hon. H. H. Taylor, County Attorney, Texarkana, Texas.

DEAR SIR: The Department is in receipt of your communication of February 8, reading as follows:

"I write to ask for a construction of Art. 814, Penal Code of the Revised Criminal Statutes of 1911.

"The question is,—when the owner of an automobile pays the county clerk to have his car registered and receives the number of his car from the county clerk, does the owner of the car have to pay this registration fee every year, like other license tax, or is this first payment sufficient as long as the same car belongs to the person who paid the first fee."

The article of the Penal Code mentioned in your communication is a portion of the Act of 1907 regulating the running of automobiles and motor vehicles and is Section 1 of such act, reading as follows:

"All owners of automobiles or motor vehicles shall, before using such vehicles or machines upon the public roads, streets or driveways, register with the county clerk of the county in which he resides, his name, which name shall be registered by the county clerk in consecutive order, in a book to be kept for that purpose, and shall be numbered in the order of their registration; and it shall be the duty of such owner or owners to display in a conspicuous place on said machine the number so registered, which number shall be in figures not less than six inches in height. The county clerk shall be paid by such owner or owners a fee of fifty cents for each machine registered."

We think a correct interpretation of this article is that the registration and fee paid therefor is in no sense a license tax and that it is an act required to be performed but one time for each machine owned and used by each person.

There is no indication from a reading of this act that the Legislature was attempting to levy a tax of any character for the purpose of producing revenue for the State or county. On the other hand, it seems apparent that the only purpose of fixing a registration fee was to compensate the county clerk for the services rendered in making the registration and assigning to the person applying therefor a number to be used by such person upon the machine so owned and used. Legislation of this character has been considered by the courts of the various States of the Union and the uniform holding thereon is to the effect that the requirements are that of registration only and are in no sense a tax.

Commonwealth vs. Boyd, 188 Mass., 79;
State vs. Unwen, 73 N. J. L., 529;
State vs. Unwen, 75 N. J. L., 500;
People vs. Schneider, 139 Mich., 673;
Commonwealth vs. Hawkins, 14 Pa. Dist. Rep., 592;
Dillon on Municipal Corporation, Section 714.

In the cases cited above it is held that the purpose of such legislation is to furnish a means of identifying cars which may be run in violation of the rights of the public.

In the case of People vs. Schneider, cited above, the defendant

was convicted in the city court and fined $25 for operating an automobile in the streets of Detroit without having first registered said automobile and without placing thereon a number as required by an ordinance of the city. The defendant alleged that the city of Detroit was without authority to enact an ordinance making such requirement. The court affirmed the case and held that the city was authorized to enact an ordinance of this character but with this phase of the case we have nothing to do in this opinion. In this case the court held the purpose of the ordinance to be that of providing a means of identifying automobiles which endanger the safety of travelers and cited the case of Frankfort Ry. Co. vs. City of Philadelphia, 58 Pa. St., 119 as an authority, and quoted from that case as follows:

"It is obvious that its effect is that of police regulation. It clearly furnishes a means of identifying every car which may be run in violation of those rights and public interests which the city is authorized by its charter to maintain and secure."

On the question of whether or not the ordinance was one for the purpose of raising revenue, the court said:

"But it is said that the provision for registration and numbering is a license, and that the grant of authority to regulate gave the city no power to license. If the provision for registration and numbering—which involved no discrimination, and requires the payment of nothing more than is necessary to pay for the number which the municipality furnishes—can be regarded as a license (for conficting definitions of 'license,' see 2 Cooley on Taxation (3rd Ed.), p. 1137; Adler vs. Whitbeck, 44 Ohio St., 539), it is not a license for the purpose of raising revenue."

In Commonwealth vs. Boyd, supra, the court used the following language:

"The registration fee of $2, required to be paid by one, is plainly a license fee and not a tax, as the fees were held to be which were imposed by the city ordinances in question in Chicago vs. Collins, 175 Ill., 445; St. Louis vs. Grone, 46 Mo., 574; and Livingston vs. Paducah, 80 Ky., 656."

The case of State vs. Unwen, was one wherein a conviction had been had for a violation of an act of the Legislature defining motor vehicles and providing for the registration of same, which among other things provided that the owner should pay to the Secretary of State a registration fee of $1.00. In that case the court said:

"The designated fee is clearly not a tax upon property. Whether it can be regarded as a tax upon an occupation, which, under our constitution, is entirely distinct from tax upon property, need not be considered. It need not be considered because it is obvious that the fee mentioned is imposed as a license fee and not an impost on either property or occupation."

We quote from Dillon on Municipal Corporations as follows:

"The high speed at which automobiles may be operated, and the peculiar dangers attending their use, justify the Legislature in legislating for them as a distinct class. The exaction of a small fee or charge in connection

with the registration of an automobile is not a tax, but is simply a license fee."

We have cited the above cases and quoted therefrom from courts of other States of the Union in order to get an interpretation of the statutes similar to ours and from the cases cited it seems by unanimous consent the courts hold such a provision to be merely to provide for a registration fee and is not to be considered a tax.

The purpose of such legislation has also been announced by the courts of this State. In the case of King vs. Brenham Automobile Co., 145 S. W., 278, our Court of Civil Appeals for the Fourth Supreme Judicial District said:

"Not only was the corporation given existence for certain purposes, but in addition the State of Texas has required that the owners of automobiles or motor vehicles shall, before using such vehicles or machines upon public roads, streets, or driveways, obtain a license and procure a number for each car, which shall be in figures not less than six inches in height, and display it in a conspicuous place on the machine. The object of that law is for the identification of the owner and to fix the liability in case of accidents or violations of law; and if a person or corporation could escape liability by leasing or renting cars to drivers on a percentage basis the law fails. Acts of 1907, p. 193. As said in Babbitt on Motor Vehicles (Section 56): 'One of the principal purposes of motor vehicle legislation is identification of the vehicle and of the operator, in case of accident; and another is that the knowledge that means of detection are always available may act as a deterrent from lax observance of the law and of the rules of conservative and safe operation. Whatever purpose there may be in these statutes, it is subordinate at the last to the primary purpose of rendering it certain that the violator of the law or of the rules of safety shall not escape because of lack of means to discover him.' The purpose of the statute is thwarted. and the display number becomes 'a snare and delusion,' if courts would entertain such defenses as that put forward by appellee in this case. No responsible person or corporation could be held liable for the most outrageous acts of negligence, if they should be allowed to place a 'middleman' between them and the public, and escape liability by the manner in which they recompense their servants."

The caption of the act itself, it seems to us, is a sufficient designation of the purpose of the bill, and we quote that caption as follows:

"An act to regulate the running of automobiles and motor vehicles. and the requiring of the owner of such machine to register his name and the number of his machine with the county clerk of the county in which he resides, for the violation of which a penalty is provided."

Again, if it had been the intention of the Legisature that the fee prescribed by this article should be paid annually it would have been clearly expressed in the act. On the other hand by the absence of any such expression it appears to have been beyond all question of doubt the intention of the Legislature that a registration and payment of the fee was required but one time and that an annual registration and payment was never considered by the Legislature. There is no indication whatever in this act that the Legislature intended the fifty cents for such registration should become a part of the revenue of the State or county. On the other hand it clearly appears that such fee was intended as compensation to the clerk

for the services performed by him in making such registration and is as much a part of the fees of office of the county clerk as any other fee received by him in the discharge of his duties.

We are, therefore, of the opinion, and so advise you, that automobile owners are required to make but one registration for each car and to pay therefor fifty cents and that such registration and payment is not required annually.

Very truly yours,
C. W. TAYLOR,
Assistant Attorney General.

BILLS OF LADING—COMMON CARRIERS—RAILROADS—INTERSTATE COMMERCE.

R. S., Articles 716 and 717.
Chapter 9, Sections 3 and 14, General Laws Fourth Called Session Thirty-first Legislature.
P. C., Art. 1546.
1. Foreign and interstate bills of lading are not subject to the provisions of our laws prohibiting the issuance of bills of lading in sets or duplicates.
2. If purely local bills are issued, however, they are subject to the law.

June 30, 1915.

Hon. C. H. Theobold, County Attorney, Galveston, Texas.

MY DEAR SIR: The question propounded in your communication is whether or not Section 3 of Chapter 9, General Laws passed by the Fourth Called Session of the Thirty-first Legislature, applies to interstate and foreign bills of lading.

This section of the act read as follows:

"A bill of lading in which it is stated that the goods are consigned or destined to a specific person is a "straight" bill of lading, and a bill of lading in which it is stated that the goods are consigned to the order of any person named in such bill of lading is an "order" bill of lading. Order bills of lading shall not be issued in sets or in duplicate, but copies thereof may be issued; provided, such copy has written or printed across the face thereof: "Copy—Non-negotiable."

Section 14 of the same Act is the penal provision, the purpose of which is to insure a compliance with the provisions of Section 3. This Section (14) reads as follows:

"Any officer, agent or servant of a common carrier who knowingly issues or aids in issuing or knowingly permits to be issued any parts or sets or any duplicate of an order bill of lading shall be guilty of a felony, and upon conviction shall be punished for such offense by a fine not exceeding $5,000.00 and by confinement in the State Penitentiary for a term not exceeding five years."

We are of the opinion that these two sections of the law do not apply to bills of lading issued for shipments to foreign countries, or to other states. The extent of this ruling applies to these two sections and not to other portions of the act of the Legislature. Section

3 of the act contains certain provisions which within themselves, show that it was not the purpose of the Legislature to create a law which would undertake the burden of regulating interstate or foreign commerce. The first portion of Section 2 provides that an interstate or foreign shipment bill of lading "may contain within the written or printed terms, in addition to the other requirements of the act, the following." This clearly shows that in so far as interstate or foreign shipment bills are concerned the matter was optionary with the carrier company as to whether or not the bill should be drawn in accordance with the terms of this act and that no effort was made to impose the conditions thereof upon interstate or foreign commerce. Subdivision "i" of Section 2 contains this language:

"Provided that when any form of bill of lading has been approved by the Interstate Commerce Commission, and has been adopted by any carrier and made a part of its tariff then such bill of lading as to interstate and foreign shipments shall be a sufficient compliance with the provisions of this Act."

This emphasizes the conclusion we have previously expressed that it was not the purpose of the Legislature to attempt to regulate interstate and foreign commerce, where such regulation would of necessity or naturally be a burden upon such interstate or foreign commerce.

Messrs. Terry, Cavin & Mills of Galveston have filed a brief with this Department on the question here involved. This brief presents the questions concretely and we quote therefrom the following:

"It is our information that there are three kinds of traffic passing through or from Galveston and other Texas ports involved in the consideration of this subject, namely:

(1) Shipments originating at Galveston as the initial point for which bills of lading are issued here for the carriage to the foreign country:

(2) Shipments originating at a point in the interior of Texas for which through bills of lading from such interior point to the foreign port are issued at the initial point covering the entire carriage by rail to Galveston and thence by water to the foreign country, and,

(3) Shipments originating at a point in the interior of Texas destined and intended from the beginning of the shipment for export to a foreign country, but moving from such inferior point by rail to Galveston upon a local bill of lading, for which upon arrival at Galveston a new bill of lading is issued by the water carrier covering the movement from Galveston to the foreign country."

Messrs. Terry, Cavin & Mills insist that Sections 3 and 14 of Chapter 9, aforesaid, do not apply to either of the three characters of shipments specified above. In this conclusion we cannot concur, in its entirety. We have already indicated that it is our opinion that these sections of the law do not apply to interstate and foreign bills of lading, therefore we agree that these sections of the law do not apply to the first class of freight specified in the above quotation, to-wit: Shipments originating at Galveston as the initial point for which bills are issued for carriage to a foreign country.

We also believe that these provisions of law do not apply to the

second class specified in the foregoing quotation, to-wit: Shipments originating at a point in the interior of Texas for which through bills of lading from such interior point to the foreign port are issued at the initial point, covering the entire carriage by rail to Galveston and thence by water to the foreign country.

But as to the third class of shipments, to-wit, shipments originating at a point in the interior of Texas, destined and intended from the beginning of the shipment for export to a foreign country, but moving from such interior point by rail to Galveston upon a local bill of lading, and for which upon arrival at Galveston a new bill of lading is issued by the water carrier covering the movement from Galveston to the foreign country, we are of the opinion that Sections 3 and 14 of the law do apply. Our reason for this last conclusion is as follows:

It is true that the shipment under the circumstances stated is interstate or foreign commerce, as the case may be, yet inasmuch as the shipper and the carrier choose to issue a local bill of lading they must issue such local bill of lading in accordance with the local laws of the State. They are not compelled to issue a local bill of lading, but have the liberty and right to issue bills of lading specifying the true status of the shipment and issuing it to the point beyond the boundaries of the State, in which event they would not be governed by the local law, but having determined to issue a bill of lading it seems to us the bill should be issued in accordance with the local law. If, however, the shipment is in fact a foreign shipment or a shipment in interstate commerce and the carrier and shipper desire to issue a bill of lading to the extent only of the initial carrier's line, yet nevertheless contracting that the connecting carrier at the State line or at the port shall take up the shipment and issue therefor another bill of lading, carrying it to its destination point or destination port. then, of course, if such facts in the time before bill of lading issued at the initial point of shipment such bill of lading would not be a local bill, but would clearly be a bill evidencing an interstate or foreign shipment and would not be within the prohibitions of Sections 3 and 14 of the law under examination.

The point we make about it is this, that if the carrier and shipper determine merely to issue a local bill of lading then they must issue it in compliance with the terms of this law, regardless of the ultimate destination of the shipment. On the other hand, if they desire to issue a bill of lading only to the port or to the State line then they have the right to issue a local bill of lading for such purpose, provided the bill of lading states the true facts and shows that it is an interstate or a foreign shipment.

Messrs. Terry, Cavin & Mills direct our attention to the amendment of March 14, 1915, to the Act of Congress regulating commerce, in which amendment it is stated that Congress has spoken with respect to the subject of bills of lading and has specifically required transportation companies receiving property for transportation from a point in the United States to a point in an adjacent foreign country to issue receipt or bill of lading therefor. If this statement of the law is correct, then if a shipment is in fact a foreign shipment it

would be the duty of the carrier to issue bill of lading showing that fact. This being done the bill of lading would not be a local bill, but would be either a whole or a part of a bill of lading evidencing foreign shipment, and of course would not be under our law, but must be issued in accordance with the act of Congress.

You are advised, therefore, that bills of lading issued at the port of Galveston for carriage to foreign countries or interstate commerce are not required to be issued in accordance with the terms of Sections 3 and 14 of the act of the Legislature here under examination.

You are also advised that the same rule applies to shipments originating at a point in the interior of the State, for which bills of lading from such interior point to a foreign port are issued at the initial point, covering the entire carriage by rail to Galveston and thence by water to a foreign country.

You are further advised, however, that where local bills of lading are issued they must be issued in accordance with the laws of this State; provided, however, that bills of lading may be issued carrying the shipment only to the end of the initial carrier at the State line or to the port, without complying with the local laws of this State as to local bills of lading, where such bills thus issued show on their face that they are a part of an interstate or foreign movement and that the bill thus issued is merely one of a series out of two or more bills which are to be issued in carrying forward the shipment to its destination point in some foreign country or in some other State of the Union.

In other words, it is not a local bill of lading, but one of a series of foreign bills. But if a strictly local bill of lading is issued it must be issued in accordance with the laws of this State.

Yours very truly,

C. M. CURETON,

First Assistant Attorney General.

BUILDING AND LOAN ASSOCIATIONS—CORPORATIONS.

Thirty-third Legislature, First Called Session, Chap. 33.

1. An arbitrary withdrawal value of a share in a Building and Loan Association can not be fixed by its by-laws.
2. Its withdrawal value is fixed by statute, and means its *then* value less all lawful charges for loans, dues and fines for failure to pay dues, interest or premiums which fines can not exceed one per cent per month for each dollar in arrears of such dues, interest, dues or premiums.
3. Building and Loan Associations may provide in their by-laws that a member voluntarily withdrawing shall be paid out of only a certain proportion of funds on hand, and only when such funds are on hand.

April 19, 1915.

Hon. John S. Patterson, Commissioner of Insurance and Banking, Capitol.

DEAR SIR: The purpose of this opinion is to, in compliance with your request, pass upon the legality of certain proposed amendments

to the by-laws of the Bonham Building and Loan Association. These proposed amendments read as follows:

"Section 14. Any stockholder desiring to withdraw his stock shall make application to the Secretary of the Association for such withdrawal and at any meeting of the Directors subsequent to such notice to the Secretary, the Directors, if they so desire, may order such stock retired upon payment to such withdrawing shareholder of ninety per cent of the money paid in by him on said shares, together with the six per cent interest on said money per annum for the time the Association has had same, less all dividends paid on such shares. The Association shall be entitled to sixty days in which time to pay to said withdrawing stockholder the above mentioned money coming to him.

"Section 15. The 'withdrawal value' of shares of stock as the expression is used in Section 19, Chapter 33, First Called Session of the Thirty-third Legislature, shall be 90 per cent. of the amount of money paid into said Association on said shares with interest thereon from the several times of payment at 6 per cent. per annum."

It appears from the correspondence accompanying your letter that the ninety per cent withdrawal value of shares of stock in this association was adopted after your predecessor had declined to approve by-laws declaring a withdrawal value of only seventy-five per cent. The question has never formally come before this Department for consideration, but we have gone carefully into the matter and will now give you our conclusions.

Section 9 of Chapter 33, General Laws passed by the First Called Session of the Thirty-third Legislature, reads as follows:

"By the term 'withdrawal value,' as used herein, is meant: The then value of the stock at the time indicated in the connection in which the words are used, less the *lawful charges* against such shares in favor of the corportaion."

In order that we may determine the meaning of the statute quoted above, it will be necessary to make some inquiry into the law obtaining generally throughout the country at the time of the enactment of this statute. The privilege of withdrawing from a building and loan association before the expiration of the society or the maturity of the contract without a forfeiture of the money already paid in, is one of the most valuable of a member's rights, particularly of the rights of an investing member. The connection of a member with an association is essentially one of partnership for a definite period of time entitling him upon expiration of the time to reap the harvest of his investments in the enterprise. In becoming a member of the association he does so, ostensibly, at least with the purpose of remaining in it to the end, bearing his part of its burdens and finally sharing all its profits in the same proportion. His failure to continue in the concern, therefore, is essentially in the nature of a breach of contract, upon which the loss of his previous contribution might, not unreasonably, be held to follow, but circumstances, unforeseen at the time of his assumption of membership, may, without any wrong on his part, make a severance of his connection with the association desirable or imperative. A consideration of these matters therefore in times

past has led these associations to make provision for the withdrawal of members without the sacrifice of that which had been previously invested. It has been variously provided that a member desiring to withdraw shall be allowed to do so on proper notice being given of his intention and with the privilege of receiving from it what he has paid in by way of subscription, after deduction of all fines and charges against him, and of his proportionate share of the expenses of the enterprise, together with such share of the profits of the association as may appear just and warranted by its business.

The foregoing statement is a substantial digest of an elaborate text by Judge Endlich on Building Associations, Section 99.

It has been heretofore, however, well understood that the right of withdrawal does not give the withdrawing member the right to ask an account of his payments into and of the profits made thereon by the association. This statement is also from Judge Endlich's work. (Section 100.) The meaning of it is, that as associations have usually been operated in times past, the member was entitled to withdrawal of the amount of his contributions, but was not as a matter of right entitled to the profits accruing thereon but only to such part thereof as the association might determine.

Judge Endlich finally says, in discussing the question of withdrawal where it is not governed by statutory terms:

> "The most satisfactory expedient is that of allowing him to take out what he has paid in, *less fines and other charges still owing from him*, and a proportionate share of the expenses of the business to date, and add to it such a sum, as his share of the common profit, as may be deemed proper by the society."
>
> Endlich on Building Associations, Sec. 102.

This statement from Judge Endlich gives the general rule or method as has obtained among building and loan associations heretofore and has enabled us to interpret what is meant by the phrase "lawful charges," as used in Section 9 of our act quoted above. It means evidently *"charges still owing"* from a shareholder to the association. Therefore, the term "withdrawal value," as used in Section 9, means the value of the stock at the time less the lawful charges still owing by the shareholder to the association. The purpose of this statute was "to put this right upon a firm basis and to secure members against any kind of unfairness or oppression to which at the hands of the building association, they might become exposed."

Endlich on Buildings Associations, Sec. 103.

The lawful charges which may be made against a shareholder or member of a building and loan association under our statute are:

(a) Loans.

(b) Fines for non-payment of dues, interest or premiums; and

(c) Dues or premiums.

These are the only charges so far as we have been able to determine authorized by statute to be made. Of course, the expenses of running the association are taken out of the dues or premium and are neces-

sarily embraced within them. Section 19 of our building and loan act provides a limitation on the amount which may be taken out of the amount due only on a forfeited share and we take it that this would govern at the time of a withdrawal as well. The limitation is, that the amount shall not exceed one per cent a month on each dollar in arrears, whether such arrears be dues, premiums or interest. It would follow from what we have said that the withdrawal value of a share of stock in a building and loan association is the "then value" of the stock, less any loan held against it, less all fines for non-payment of dues, interest or premiums then due not in excess of one per cent a month for each dollar in arrears and less any amount due for premiums or dues. Therefore, an arbitrary amount, such as ninety per cent or any other per cent, cannot be fixed by the by-laws, for the law is "where these details are prescribed by the statute, no charter or by-law provisions can vary them."

Endlich on Building Associations, Sec. 104.

Mr. Lowery, the secretary of this association, in his communication to you, states that he feels that a building and loan association should have some protection in order to prevent unusual withdrawals during money stringencies. He says:

"We feel that the Association should have some protection along this line, in view of the fact that in the very nature of the business of a Building and Loan Association, the money controlled by them is always loaned out on monthly installment plan, and if after we have been in business for say two or three years and a money panic should come along, as has been the case for the past six months, a great many of the stockholders would want to cash out, and we could not hope to realize cash out of installment paper."

This suggestion involves some inquiry into the duty of a building and loan association to keep funds available for withdrawing members. The general rule is, that it is the duty of a building and loan association to keep itself as far as practicable and in accordance with the dictates of experience and reason supplied with an amount of money which will probably be required for withdrawals, but it appears to us that the right of withdrawal under certain circumstances may be modified and limited in a manner to protect the association against those contingencies to which Mr. Lowery makes reference. There are, of course, conditions which may arise under the statute which could not be modified or changed by any by-law provision; for example, that provided for in Section 7 of the act where shares are forfeited. In such instances the withdrawal value of the shares must be credited upon any loan due from the member. The same suggestion will apply to Section 8 and perhaps other particular circumstances specified in the law, but what we now refer to is the general right of withdrawal, which is referred to in the amendments to the by-laws of this association quoted above. We would suggest that as to the general withdrawal rights of members, that an association may provide in its by-laws that only a certain portion

of its money on hand at any one time shall be used for the purpose of liquidating withdrawal notices. Concerning this plan Judge Endlich says:

"The inconvenience which might arise to the society from multiplied simultaneous withdrawals, and the danger and fatal embarrassment to which its affairs might thus fall subject, at any moment, at the pleasure of even a comparatively small number of dissatisfied, evil-disposed, or unreasonable shareholders, are averted by the coupling, with that provision, of another, whereby not more than a certain proportion of the funds in the treasury shall, at any one time, be applicable to the satisfaction of withdrawing members, except by the consent of the directors of the building association.' This, then, becomes a charter limitation upon the rights of withdrawing members, and operates to prevent a conflict between them and the undisturbed exercise of the association's corporate functions, by narrowing them down to a certain portion of its assets as the source of their payment; whilst, at the same time, it is a check upon the society itself, an indication of the proportion of funds which it should be ready to disburse at short notice, and a warning against too marginless investments."

Endlich on Building Associations, Sec. 114;
Association vs. Silverman, 85 Pac., 394.

The legality of such a by-law was sustained by the Texas courts in the case of Texas vs. Hempstead Building and Loan Association, 13 S. W., 1020. Our court held that where the governing rule gave the right of withdrawal, but added a provision that not more than one-third of the funds in the treasury should be applied to withdrawals without the consent of the directors, that judgment could not be recovered against the association by a withdrawing member in the absence of allegation and proof by him that there are sufficient funds in the treasury to meet his claim in accordance with the rule or else an allegation that the directors had consented to its payment.

13 S. W., 1020.
Endlich on Building Associations, Sec. 116.

The sale rule obtains in other jurisdictions.

Breet vs. Monarch Investment Bldg. Society, 1st Q. B., 367;
Heinbokel vs. Natl. Savings Loan & Bldg. Assn., 59 N. W., 1050.

Concerning the rule enunciated in the cases cited Judge Endlich says:

"This result is based both upon the statutory and upon the by-law provision. It is pointed out that a withdrawing member is not to be placed in the same category with general outside creditors; that there is a patent inconsistency between permitting him to maintain the action and recover judgment and denying him the right of immediate execution; that, in spite of this incongruous qualification of the effect of the judgment, it would still secure to him superior rights not only against other members, but also against outside creditors whose later judgments were based upon claims which did not, like his, arise from stock and membership relations and ought therefore properly to be preferred to his; that the operation of the judgment as a lien would tend seriously to embarrass and cripple the association, making sales of its real estate impossible; and that on the other hand, the statute of limitations cannot begin to run until the right of action accrues.

"'The right to withdraw,' says Collins, J., 'and to receive back what has

been paid into the treasury by a member of the association exists solely by virtue of the by-law or the statute. If this right to receive money out of the treasury is made to depend upon its conditions the right is not perfect or absolute until that condition exists. . . . . . until there is money available for the purpose, no cause of action exists.' It is added, however, that the case considered is one in which there has been no bad faith on the part of the association, and that, if it neglect its duty towards withdrawing members by failing to take proper steps for replenishing its treasury, a proper remedy could be found. It would seem, therefore, that, at least in the absence of an allegation of such bad faith or neglect, the weight of authority goes to deny the right of suit under statutory or by-law restrictions, such as have been referred to in the preceding sections."

Endlich on Building Associations, Section 116.

From these authorities it is apparent that building and loan associations may protect themselves in this State by providing in their by-laws that a member desiring to withdraw voluntarily can only have the amount due on a withdrawal paid him out of such proportion of the funds available and on hand as may be specified in the by-laws; or, rather, that this matter may be governed and controlled in the by-laws. We know of no authority to support it, but upon the same line of reasoning used by the Courts in the cases cited above, the writer is of the personal opinion that a provision in the by-laws of a building and loan association, temporarily suspending the right of withdrawal during the period of a money panic, such as is referred to in Mr. Lowery's letter, would be a valid and binding provision which the courts of equity in this State would enforce. It is true that the existence of a money panic becomes a question of fact, but it is ordinarily not one which is difficult to prove, and I see no reason why the existence of this fact should not be made the basis of suspending for a limited period a contractual right. In other words, it amounts to a contractual extension of time of payment, dependent upon a certain condition, to-wit, general prevalence of a money panic. When this condition arises that feature of the contract becomes fulfilled and the right of the society to the extension of time enforcible. Manifestly, such a provision could not be used for arbitrary purposes or to evade the law or the contract, but the writer suggests it as one consistent with the purposes and objects of the building and loan association and not inconsistent with the principles of law which deny the right of withdrawal until a certain amount of funds are in the treasury of the association.

We therefore suggest that amendments to the by-laws of this association tendered you cannot be approved, but the same should be re-drawn to conform with the principles stated in this opinion.

Yours very truly,

C. M. CURETON,

First Assistant Attorney General.

BUILDING AND LOAN ASSOCIATIONS—BLUE SKY LAW—CORPORATIONS.

Acts Thirty-third Legislature, First Called Session, Chapters 32 and 33.
R. S., Arts. 1125 and 1141.

1. The Blue Sky Law does not apply to Building and Loan Associations.
2. By-laws of a Building and Loan Association can not provide that shares shall be "non-withdrawable."
3. Building and loan associations can not issue shares upon which a dividend is guaranteed. They may issue advance payment shares bearing a reasonable fixed dividend, payable if earned, which may have priority of payment over dividends on the general shares, but such shares are guaranteed and preferred only in the sense named.

April 19, 1915.

Hon. John S. Patterson, Commissioner of Insurance and Banking, Capitol.

DEAR SIR: You transmitted to us a communication from C. L. Thurmond of Victoria relative to a proposed corporation to be known as the Citizens Home Building & Loan Association, incorporated under Chapter 33, Acts of the First Called Session of the Thirty-third Legislature. The first question propounded is whether or not corporations to be organized or chartered under this law are subject to the provisions of Chapter 32, General Laws, passed by the First Called Session of the Thirty-third Legislature, and usually known as the Blue Sky Law. The question is one of some difficulty and involves an examination into the general nature of building and loan associations and inquiry into the purpose of the Blue Sky Law and its applicability to building and loan associations. The Blue Sky Law specially declares that it is applicable to all corporations organized for profit with certain exceptions, but building and loan associations are not found among the exceptions specified; in other words, building and loan associations are within the letter with the Blue Sky Law and if that is to govern, then the law would be applicable to such corporations, but upon a careful examination of the two laws here under review we have reached the conclusion that building and loan associations do not come within the purview of the Blue Sky Law and are not subject to its provisions. Our reasons for this conclusion will now be given.

In the first place Section 1, as well as other sections of the Blue Sky Law, clearly contemplate that corporations subject to its provisions shall have capital stock and that those which do not have a capital stock are not to be governed thereby, but from the nature of a building and loan association it is clear that it has no capital stock in the usual or essential sense of those terms. In the case of Winegardner vs. Equitable Loan Company, 94 N. W., page 1112, the Supreme Court of Iowa, in discussing the general nature of a building and loan association, among other things said:

"Such an organization has and can have 'no capital' in the ordinary sense of that word. except the contributions made from time to time by its shareholders: thus constituting a fund to be loaned or advanced to members desiring the same and presenting the requisite security. No share of stock in such association can be worth more at any time than the sum of the installments which have been paid thereon increased by its proportionate part of the profits earned; in other words, no share can ever be legitimately matured until the aggregate of such payments and earnings is equal to its par value. When that time comes the stock is retired by operation of law

and the holder ceases to be a member and becomes a creditor of the corporation for the face of his certificate."

Building and loan associations have been variously defined, but their general nature and purpose have been heretofore stated by us in our opinion No. 1118, substantially as follows:

"A building and loan association is, as has been suggested, essentially a corporate partnership, and has no functions except to gather together from small stated contributions sums large enough to justify loans. Their officers are the agents of each stockholder. They have no debtors and ordinarily no creditors except the stockholders, and whether a stockholder is a creditor or debtor depends on whether he is exercising his privilege of borrowing money from the common fund. As suggested above, mutuality is the essential principle of this character of association. Its business is confined, with certain express exceptions under the statute here under review, to its own members. Its object is to raise a fund to loan among its own members, or to such of them as may desire to avail themselves of that privilege. Each shareholder, whether a borrower or non-borrower, participates alike in the earnings of the association, and alike assists in bearing the burden of the loss sustained.

"Ebersman vs. Schmitt, 21 L. R. A., 184."

Security Savings & Loan Association vs. Elbert, 54 N. E., 753;

Union Mutual Building & Loan Association vs. Aichle, 61 N. E., 11.

McCauley vs. Workingman's Building and Savings Association, 35 L. R. A., 244;

Rhodes vs. Missouri Savings & Loan Co., 42 L. R. A., 93;

Albany Mutual Bldg. Assn. vs. City of Laramie, 65 Pac., 1011;

Washington National Bldg., Loan & Investment Assn. vs. Stanley, 58 L. R. A., 816.

From these authorities the wide distinction between a building and loan association and an ordinary corporation having a capital stock seems very clear and definite. The distinction referred to is emphasized when we examine in detail our Building and Loan Association Act, for example: Section 5 of the Act declares that the capital stock of such an association shall be divided into shares having a par value of not less than twenty-five dollars nor more than two hundred dollars, "payable in periodical installments called 'dues,' not exceeding two dollars per month on each share; provided that the by-laws may provide for the advance payment of installment dues and for which there may be issued an advance payment certificate." There follow other special provisions characteristic of building and loan associations, an examination of which will disclose upon the whole that building and loan associations, as to their capital, subscription, payment, withdrawal, liquidation and discharge rights and privileges differ in almost every essential particular from the ordinary corporation having a capital stock. To illustrate: The general corporation laws of this State provide that the capital stock of a corporation must in the first instance be all subscribed, one-half thereof paid in, and that the remainder must be paid in within two years' time. (Revised Statutes, Articles 1125 and 1141.) But such is not the case with reference to building and loan associations. Section 1 of Chapter 33, referred to above, provides that only fifty shares of stock need be subscribed before the charter is granted,

and it is not necessary that any of these or any part due thereon shall be paid in before the issuance of the charter. It is only necessary that the charter be drawn up, to be properly executed by the incorporators, with proof made that fifty shares have been subscribed for, whereupon the charter will be issued by the Commissioner of Insurance and Banking. These matters have been adverted to merely for the purpose of showing that a building and loan association is entirely different, both in its manner of organization and the general conduct of its business, from an ordinary corporation having a capital stock. Section 10 of the Blue Sky Law declares that no permit to sell stock shall ever be issued to any foreign corporation which has not at the time of making application for permit at least 50 per cent of its capital stock subscribed and paid in. This character of provision clearly could not apply to foreign building and loan associations because the business of such associations is to sell stock. That is essentially what they are organized for, and is as much a part of their business as the lending of money; for the sale of stock is ordinarily one of the necessary elements of loans made by them. When we turn to those sections of the Building and Loan Association Act having reference to foreign associations, we do not find that any such requirement as the foregoing is made as to foreign building and loan associations, but we do there find the rules laid down completely for the admission of foreign building and loan associations into the State. The two acts under examination were passed at the same session of the Legislature and since the building and loan association act as to foreign associations undertakes to set forth a complete system for the admission of such associations into the State, we are constrained to believe that it is exclusive in its operation in so far as the Blue Sky Law is concerned and that the provision (Section 10 of the Blue Sky Law relating to foreign corporations which come under that law) can have no reference to foreign building and loan associations. That much seems to be clear, but Section 10, quoted above, is entirely consistent with and persuasive of the correctness of the construction which we have heretofore announced, that is, that the Blue Sky Law does not apply to building and loan associations because of the essential difference in character of this class of corporations to those with which the Blue Sky Law was drawn evidently to deal. Section 12a of the Blue Sky Law provides that unless a proposed corporation is organized under the Act within two years after the granting of a permit, that the subscribers shall be refunded the amount paid to the promoter. This manifestly could not apply to building and loan associations, because these corporations are never organized in the sense that the ordinary corporation is organized. The ordinary corporation is organized by obtaining an 100 per cent subscription to its capital stock and the payment thereon of 50 per cent. Such a consummation would be called ordinarily its organization, but in the case of a building and loan association the organization is specially provided for in the first and second sections, which requires no capital stock except the subscription of fifty shares. That would complete the organization

and certainly it can not be supposed that anyone would assume that it would require two years to accomplish this purpose, for if it would, the inutility of organizing a building association under such conditions would be obvious. The fact is that a building and loan association is usually in the nature of a continuing corporation, or rather, one whose organization continues throughout the period of its existence. As its shares mature they are generally reissued and resold to someone else, and it may be regarded as a corporation of continuing organization, using the term "organization" in the sense which it is used in Section 12a of the Blue Sky Law; that is, as meaning obtaining subscriptions upon statutory terms to its capital stock. Therefore, clearly Section 12a was not intended to apply to building and loan associations. We might go through the two acts and point out definitely the various material differences between the ordinary corporation and a building and loan association as subject to government by the Blue Sky Law, but we think it unnecessary, as the inapplicability of the Blue Sky Law will be apparent upon a consideration of the two acts. The Nebraska Blue Sky Law, which was passed prior to our own, specially exempted building and loan associations from its purview, the Legislature of that State recognizing the inapplicability of a law of that character made for corporations generally to govern building and loan associations. (Opinions of the Attorney General of Nebraska, 1913-1914, page 156.)

You are advised, therefore, that in the opinion of this Department building and loan associations are not to be governed by the Blue Sky Law of this State, otherwise referred to as Chapter 32, General Laws of the First Called Session of the Thirty-third Legislature. On page 4 of the prospectus issued by the proposed citizens Home-Building and Loan Association we note that the purpose of the promoters of this corporation is to have all shares therein "nonwithdrawable." Since this, as well as other matters, will come before you when the by-laws are presented for your approval, we desire at this time, for the purpose of saving future difficulties, to direct your attention to the fact that under the laws of this State (Chapter 33, General Laws, First Called Session of the Thirty-third Legislature) the law under certain conditions makes shares in a building and loan association withdrawable. Section 9 of the Act expressly declares what is meant by "withdrawal value." Section 8 declares that a member shall have credit for the withdrawal value of his shares under conditions there specified. Section 7 provides for the credit of the withdrawal value of pledged shares of stock under certain conditions. Section 19 makes it mandatory on the corporation to allow the withdrawal value of shares of stock in case of forfeiture for nonpayment of dues. Various sections of the Act, as well as its general scope and purpose, clearly indicate that it was the purpose of the Legislature that members of a building and loan association should have the right under certain conditions to obtain the withdrawal value of their shares, and it is quite elementary that by-

laws in violation of the statutes would be void. (Endlich on Building Associations, Section 104.)

On page 4 of the prospectus referred to is the following:

> "Investment shares shall be preferred by the guarantee of a regular semi-annual dividend, the amount to be as provided in the by-laws."

On the previous page investment shares are defined as follows:

> "Investment shares will be fully paid at a fixed date in cash or by the retirement of matured or paid up loan shares."

The statutes of this State governing building and loan associations do not contemplate but one class of shares. These, however, are evidenced by two different character of certificates. One class is the ordinary periodical installment certificate, payable in installments not exceeding two dollars per month on each share. The other class is that which may be provided in the by-laws "for the advance payment of installment dues" and for which there may be issued an "advance payment certificate." We assume that the phrase "investment shares" refers to advance payment certificates. The prospectus above referred to declares, however, that investment shares shall be "preferred by the guarantee of a regular semi-annual dividend." We do not think that any dividend can be guaranteed by a building and loan association. Whatever dividend is paid must be paid out of the earnings of the association, and not from any other source. If the earnings are not sufficient, then there would be no dividends paid on this class of stock and the use of the word "guaranteed" in describing it is a misnomer, which ought not to be used in the by-laws of this corporation in describing this class of contracts. There is no express statute authorizing the creation of preferred stock. This being true, the general rule obtains to the effect that the preferred shareholder is but a shareholder with the right to have his dividend paid out of funds which the corporation has on hand available for such purpose, and not otherwise. Says Mr. Thompson:

> "The better view is that a corporation can not contract to pay interest or dividends on the shares of its capital stock in excess of its earnings, unless expressly authorized to do so by statute. The reason is that a corporation cannot in the absence of legislative sanction divide its capital stock among its shareholders."
>
> Thompson on Corporations, Sec. 2236;
> Reagan Bale Co. vs. Heuermann, 149 S. W., 229-30.

Our statute authorizes, as suggested, the payment for stock in a manner other than by monthly installment and the issuance therefor of an advance payment certificate. We believe that this advance payment certificate may be made to bear a specified dividend so long as the dividend declared is one within the probable earnings of the corporation, but we do not believe that preference could be deliberately made in favor of this class of stock; that is, we do not believe that a rate of dividend or interest on it could be properly

fixed in a manner purposely to increase its income above that which the other shares of stock of the corporation might earn. In other words, no undue advantage must be given this class of shareholders except that which arises from the larger investment which they make. The rule is stated in Johnson vs. Nashville, etc. Loan Association, 82 Am. St. Reps., as follows:

"It seems to be now settled by the preponderance of authority that a building and loan association under its general power, may issue, besides the ordinary form of installment stock, shares which have been either fully or partly prepaid, and stipulate for the payment of a specified dividend thereon, as long as that does not exceed a pro rata share of the profits (or possibly, in the case of full-paid stock, the legal rate of interest, if the profits should fall below that), as long as the holders of such stock are given no undue advantage over the holders of the ordinary stock: Murray vs. Scott, 9 App. Cas., 319, affirming in re Guardian, etc., Bldg. Soc., 23, Ch. Div. 440, 453; In re Middlesbrough, etc. Bldg. Soc., 53 L. T., N. S. 203, In re Reliance, etc. Bldg. Soc., 61 L. J., Ch. 453; Latimer vs. Equitable Loan, etc. Co., 81 Fed., 776; State vs. Equitable Loan, etc. Co., 142 Mo.. 325, 41 S. W., 916; People vs. Preston, 140 N. Y. 549, 35 N. E., 979; Criswell's Appeal, 100 Pa., 488."

This rule appears to be supported by other authorities:

People vs. Preston, 35 N. E., 979;
Folk et al. vs. State Capital Savings & Loan Assn., 63 Atl., 1013;
Bingham vs. Marion Trust Co., 61 N. E.. 29;
Latier vs. Equitable Loan & Investment Co., 81 Fed., page 779.

In the case last cited the United States Circuit Court for the Western District of Missouri, concerning the right of a building and loan association to issue paidup shares or certificates, among other things, said:

"A necessary prerequisite to loaning money is to get it. Accordingly investors are encouraged to take stock, and pay the installments in advance. They are allowed a fixed rate of interest, not exceeding 8 per cent., and the association receives the installments, some or all of them, in advance, and loans them out at a greater rate of interest than it pays, and in this way hastens the day of maturity of the stock, for the general benefit of its members. The general scheme thus indicated, the clear reference to advance payment of stock found in the statute, the provisions relating to full-paid stock found in the by-laws, clearly establish the abstract power on the part of the defendant to receive payment of its stock in advance, and issue certificates of full-paid stock therefor. If this power exists, reasonable terms and conditions of its exercise may be fixed by the by-laws or board of directors. The payment of stock in installments confers many possible advantages upon its holder. He participates in the large premiums and interest received for money loaned, in the fines and other charges imposed upon associate members. He receives a share in all the profits of the association, and this goes to expedite the maturity of his stock, or the profitable winding up of his financial venture. These advantages or chances for gain do not appertain to the holder of paid-up stock. In the nature of the case, he cannot apply his share of profits to the payment of his stock. He takes no interest in the speculative feature of the venture. He has money to invest, and is content with a reasonable interest thereon. Considering all these things, I cannot doubt it was a reasonable exercise of power on the part of the defendant to fix the rate of interest payable to this class of conservative investors at 7 per cent. per annum. I shall therefore hold that the defendant had power to receive payment

in advance for the stock in question, to issue for it the certificates in question, and to obligate itself to pay interest thereon at the rate of 7 per cent. per annum, in lieu of permitting the holders of such certificates to participate in the profits of the business of defendant corporation. This view finds ample support in authority. Hohenshell vs. Association, 41 S. W., 948; Missouri vs. Equitable Loan & Investment Co. (Mo. Sup.; not yet officially reported), 41 S. W., 916; Towle vs. Association, 75 Fed., 938; People vs. Preston (N. Y. App.), 35 N. E., 979; Kent vs. Mining Co., 78 N. Y., 159; End. Bldg., Ass'ns. s. 462."

Mr. Endlich, in summing up a concensus of the leading authorities on this particular question, states the rule as follows:

"Under a like power and the right to pay dividends, they may issue paid-up stock bearing income at any given reasonable rate per annum payable in cash out of and to the extent of the earnings of the association,—an arrangement on the part of any corporation to pay interest or dividends to its shareholders, without reference to the ability of the company to pay them out of its earnings being wholly illegal and void."
Endlich on Building Associations, Sec. 464, p. 441;
Hohenshell vs. Home Savings & Loan Asso'ns., 41 S. W., 950.

Judge Endlich, in Section 461 of his work, cited above, also uses this language:

"There is, however, nothing inconsistent with its character as such in permitting those of its members who feel themselves in a position to make a number of stock payments not yet due, to do so, thereby anticipating without inconvenience to themselves a duty which would have to be performed in any event, and putting into the hands of the association the means of hastening the final consummation of the enterprise. Accordingly it has never been questioned that an association may allow its members to make advance payments on the stock held by them. Indeed, so obvious are the advantages accruing to the association from such advance payments that there can be little doubt as to the power of the association in order to encourage them to allow those willing to make them a benefit in return, as, e. g., a moderate rate of interest upon them and to secure repayment in the event of failure of the enterprise, of such proportion of the pre-payment as may not then have accrued."

We have directed your attention to these authorities as stating what we believe to be the correct rule. There are quite a number of respectable authorities to the contrary, while there are some which go so far as to hold that building and loan associations may issue preferred stock, even in the sense that it would have the right to participate ahead of other shareholders in the residue of the estate upon the dissolution of the corporation, but we are convinced that the Texas courts under our statute will take the middle course, which is the one suggested here; that is, that advance payment certificates may be made to bear interest in the form of a dividend which may be made payable before a general dividend is declared in favor of the installment shareholders, but these advance payment certificates are not guaranteed in any sense of the word, but the interest or dividends payable on them can be made payable only in the event it is earned by the corporation; and they are not preferred shares, except in the limited sense suggested above. In the drawing of by-laws with reference to this class of shares the purpose of the corporation

should be made plain, so that one unlearned in the law will readily understand what is intended.

Very truly yours,
C. M. CURETON,
First Assistant Attorney General.

COMMERCIAL FERTILIZERS INSPECTION TAX—TAGS—FISCAL YEAR.

The inspection tax of twenty-five cents per ton paid to the State Chemist on commercial fertilizers sold or exposed or offered for sale is an annual license fee and the tags evidencing the payment of such license fee cannot be used after the expiration of the fiscal year for which they were issued.

The State Chemist has no authority to redeem unused tags or to exchange same for tags of a fiscal year succeeding the year for which the same were issued.

Chapter 109, Act Regular Session Thirty-second Legislature (Chapter 1, Title 2a, Vernon's Sayles' Civil Statutes.)

August 10, 1915.

Dr. G. S. Fraps, State Chemist, College Station, Texas.

DEAR SIR: The Attorney General is in receipt of your letter reading as follows:

"Please give me your ruling on the following provision of Section 4, of the Texas Fertilizer law, copy enclosed, which states that no tag, meaning fertilizer tax tag, shall be redeemed by the State Chemist. Do you understand this to mean that the State Chemist shall not pay any cash for tags redeemed, but may exchange them for tags of the next season, provided that they have not been used, or if he is prohibited from exchanging them also? If they cannot be exchanged, of course, the manufacturer pays for tax on goods which have not been sold, but as a rule the amount is very small."

In order to arrive at a correct solution of the question propounded by you it will be necessary to briefly review the act of the Thirty-second Legislature generally known as the Texas Fertilizer Law, which has for its subject the regulation of the sale and prohibiting the adulteration and misbranding of commercial fertilizers. A study of this act would lead to the conclusion that the inspection tax authorized by this Act is in effect an annual license fee levied and collected for the purpose merely of defraying the expenses of the State Chemist and those working under him in inspecting, analyzing and registering the commercial fertilizers and preparing the tags and bulletins and such other necessary and incidental expenses to the operation of the law.

It is expressly provided in Section 4 of the Act that the fiscal year contemplated shall be comprised between the dates of September 1 and August 31, inclusive. It is provided in Section 2 that the brand or stamp on the tag or package or on the label attached thereto used by manufacturers of commercial fertilizers shall be used uniformly during the fiscal year for which it is filed with the State Chemist by the persons using same, and that the certificate issued by the State Chemist upon compliance with the requirements of the

chapter shall be in force until the succeeding September 1. It is further provided in said section that the State Chemist shall publish annually a list of brands or trademarks registered by him. In designating the purpose for which the inspection tax of twenty-five cents per ton for commercial fertilizers sold or exposed or offered for sale is levied and collected, Section 4 of the Act states the same to be "The defraying of the expenses connected with the inspection of commercial fertilizers sold or exposed or offered for sale and experiments relative to the value thereof." It is further provided in this section that the fees received by the State Chemist and all penalties collected under the Act shall be deposited with the treasurer of the Agricultural and Mechanical College and expended under the direction of the board of trustees thereof in defraying the expenses of inspecting and analyzing commercial fertilizers, the preparation of tags and bulletins, experiments relative to the value of fertilizers and for such other purposes as the board of trustees of said Agricultural and Mechanical College shall allow or direct.

It is also provided in Section 4 that all firms, corporations or persons are forbidden to attach the tag prescribed by this section to any bag, barrel or package of any commercial fertilizer which has not been previously registered as required in Section 2 of this chapter and which is in accordance with all other provisions of the chapter.

For the purposes of this opinion the application of that portion of Section 4 last above referred to will be made to that portion of Section 2 which provides that the certificate of registration issued thereunder shall be in force only until the succeeding September 1.

The above analysis of this law leads clearly to the conclusion that the registration, use of tags and the payment of the inspection tax all relate to and have effect only for the fiscal year in which the same were issued, authorized and paid.

We now come to that provision of Section 4 of the Act upon which your inquiry is based, and which is as follows:

"No tag shall be used after the end of the fiscal year for which they are issued and they shall not be redeemed by the State Chemist."

You desire to know specifically if the State Chemist would be authorized to exchange tags of the present fiscal year for any unused tags, issued during the preceding fiscal year.

As stated in the outset, we are of the opinion that the inspection tax collected by the State Chemist is an annual license fee and that the tags evidencing the payment of such fee in so far as the tax itself is concerned are merely the annual evidence of the right to transact business in this State under the law and that upon the expiration of the fiscal year for which tags were issued they become worthless for all purposes, and the State Chemist would have no authority to redeem same in any manner, either by the return of the amount paid or by exchanging therefor tags of the current fiscal year.

License fees or taxes by whatever name they may be called are not levied and collected under the taxing power of the State, but on the other hand are authorized under the police power; that is, under the

right of the State to protect its citizens in their general welfare, morals, health and comfort. It is true that the police power cannot be used as a method of raising revenue which can only be done under the taxing power, but, as is said in the case of Brown vs. City of Galveston, 97 Texas, 1, "But the fact that the assessment under the police power results in producing revenue which may be paid into the Treasury for the use of a particular fund or as a part of the general fund, does not deprive the assessment of the character of a police regulation."

The above authority is particularly applicable in this discussion for the reason it might be contended that the clause in Section 4 authorizing the use of the fees collected for other purposes than those expressly mentioned in the Act as the board of trustees of the Agricultural and Mechanical College shall allow or direct. Our construction of this portion of the Act is that it is the authority for the trustees to direct the use of any surplus arising by operation of the Act over and above the expenses expressly authorized to be defrayed from such revenues. Even the raising of a surplus by a police regulation does not bring the Act within the taxing power of the State.

In the case of ex parte Gregory, 20 Court of Appeals, 210, the Court, through Judge Wilson, enters into a lengthy discussion of the distinction between license tax levied under the police power and the tax levied under the taxing power of the State, in which case the authorities making such distinction are collated and discussed somewhat at length. In this case the validity of an ordinance of the city of Galveston levying an annual license tax upon vehicles used on the street for hire was attacked. The Court upheld the ordinance as being enacted under the police power, the amount of the license tax collected being levied to meet the expense of the operation of police power. We think it clearly appears from the Act in question that the purpose of this tax is to meet the expense incident to the operation of the Act and that it can be sustained as an annual license fee paid by those operating under the Act for the privilege of engaging in a business which would otherwise be unlawful. Carbondale vs. Wade, 106 Ill. App., 654. There are many authorities holding that an amount paid for a license to engage in an occupation or business is a license fee and not a tax. City of Grand Rapids vs. Norman, 68 N. W., 269; State vs. McKinney, 74 Pac., 1095.

We therefore advise you that you would have no authority to redeem in any manner the tags issued for any fiscal years and that you would not have authority to issue tags for the current fiscal year in exchange for tags of a prior year, and that any tags on hand and unused by any person purchasing the same are a loss to the owners thereof, as they are merely the evidences of the right of the owner to transact business during the fiscal year for which the same were issued.

Very truly yours,

C. W. TAYLOR,

Assistant Attorney General.

COMMISSIONERS COURT—COUNTY COMMISSIONERS—BOUNDARY LINES—ELECTIONS—OFFICERS.

Change of boundaries of commissioners' precincts so that the residence of a commissioner, who was duly elected but had not qualified, is no longer in the precinct from which he was elected, does not disqualify him from holding the position.

Order of Court changing boundaries of commissioners' precincts is prospective and not retrospective in its operation.

January 8, 1914.

Hon. Marshall Spoonts, County Attorney, Fort Worth, Texas.

DEAR SIR: In a letter to this Department you state the following facts:

"On November 14, 1914, and after the county officials of this county had received their certificates of election, but before their qualification, the commissioners' court of this county re-districted the county, changing the lines of the commissioners' precincts. Mr. R. E. Buringer, who was re-elected as commissioner of precinct No. 1, was on the court which on that date re-districted the county. The lines were changed in such a manner that he, at the time of his qualification, did not live within the lines of the then Precinct No. 1."

Then you request an opinion from this Department as to whether the fact that Mr. R. E. Buringer, at the time of his qualification, resided outside of the precinct from which he was elected disqualifies him from acting as county commissioner.

The only provision of the Constitution directly touching upon the qualifications of a county commissioner is contained in the following sentence, which forms a part of Section 18, Article 5:

"Each county shall in like manner be divided into four commissioners' precincts *in each of which there shall be elected by the qualified voters thereof one* county commissioner, who shall hold his office for two years and until his successor shall be elected and qualified."

This portion of Section 18, Article 5, of the Constitution was enacted by the Legislature in 1876 and is now Article 2236 of the Revised Statutes.

Other provisions of the Constitution and statutes make certain requirements as to the place of residence of civil officers generally. Section 14, Article 16, of the Constitution, is as follows:

"All civil officers shall reside within the State; and all district or county officers within their districts or counties, and shall keep their offices at such places as may be required by law; and failure to comply with this condition shall vacate the office so held."

Article 3082, R. S., is as follows:

"No person shall be eligible to any county or State office in the State of Texas, unless he shall have resided in this State for the period of twelve months, and six months in the county in which he offers himself as a candidate next preceding any general or special election, and shall have been an actual bona fide citizen in said county for more than six months."

No decision of our higher courts construing the foregoing sections of the Constitution and the article of the statute will aid in a determination of this question:

The exact question here involved is whether a bona fide resident and inhabitant and qualified voter in a certain commissioners precinct of Tarrant County, who was duly and legally elected as a county commissioner in said precinct and had received his certificate of election, but had not yet qualified as commissioner, becomes disqualified from holding the office by reason of the fact that before his qualification the commissioners court so changes the boundaries of the commissioners' precincts of the county that such commissioner no longer resides within the precinct from which he was elected.

We do not find any decision in this State directly in point, but we do find some well-considered decisions from the higher courts of other States which are directly in point and all of which hold that under the foregoing state of facts the officer would not be disqualified.

In the case of Brungardt vs. Leiker, 21 Pac., 1065, which involved a state of facts identical with these under consideration, the Supreme Court of Kansas held:

"It will be seen from this statement that the question is whether or not the office of county commissioner from the third commissioners' district of Ellis county, held by the defendant, Conrad Leiker, was vacated by a change of the districts that placed Wheatland township wherein Leiker resides, in the second district. Leiker has not removed his residence. He still lives in the identical place as when elected. The board changed the boundaries of the districts, and by the change he is placed in the second district. Sec. 3, Art. 9 of the Constitution of the State provides: 'All county officers shall hold their offices for the term of two years, and until their successors shall be qualified, except county commissioners, who shall hold their offices for the term of three years; provided, that at the general election in the year eighteen hundred and seventy-seven the commissioner elected from district number one in each county shall hold his office for the term of one year, the commissioner elected from district number two in each county shall hold his office for the term of two years, and the commissioner elected from district number three in each county shall hold his office for the term of three years; but no person shall hold the office of sheriff or county treasurer for more than two consecutive years.' Leiker was elected for a full term of three years. His office would become vacant on the happening of one of the following events: His death; resignation; removal from the county; his conviction of an infamous crime, or any offense involving a violation of his official oath; and other causes enumerated in Section 218, c. 25, Comp. Laws 1885. No one of these events has happened, but there has been an attempt to legislate him out of office by the other two commissioners by a change in the districts. The county commissioners are authorized by statute to change the districts at least once in three years so as to adjust them to the changing conditions and locations of the population of the county (Section 11, c. 25, Comp. Laws 1885), but this provision must be construed so as to harmonize with that provision of the Constitution that makes the term of county commissioners three years. The change in the districts, then, can only take effect, so far as the election of the county commissioner is concerned, at the expiration of the three years from the time from which the member was elected from the changed territory. Leiker's term of office will not expire until the second Monday in January, 1890. In the case of Hayes vs. Rogers, 24 Kan., 143,

the change of districts was made so as to not interfere with the three-years tenure. The change in districts was made on the 5th day of July, 1888.

"We give effect to the language of the Constitution, and hold that Leiker is still a member of the board for the full term of three years, notwithstanding the change in the districts; that his successor must be elected this fall, and take the office next January. The case cited from Nebraska is not in point. In that case there was a voluntary removal from the district. If the construction contended for by counsel for the plaintiff should prevail, it would give any two commissioners power to dispose of a third one, who was not acting on any public question as they might desire, and thus subvert the principle upon which the Constitutional provision dividing counties into districts rests. The reason for that amendment to the Constitution was to give all parts of the county a fair representation in local affairs, and an equal voice in the location and distribution of local favors; and if it is within the power of two members to vacate the office of a third by a change in the boundaries of his district before the expiration of the three-years term, then the Constitutional provision is practically nullified."

The case of State ex rel Norwood vs. Holden, 47 N. W., 972, is directly in point in all respects. In that case the Supreme Court of Minnesota held:

"In our opinion, an order redistricting a county is merely prospective in its operation as to the election and qualification of members of the board of commissioners, and in no way affects the right to the office of those previously elected. There is nothing in the language of the statute to indicate that a redistricting is intended to have any retrospective operation. On the contrary, the language of Section 94 favors the opposite view. The commissioner, it says, 'must at the time of his election be a resident of said district and shall reside therein during his continuance in office.' What this last clause has reference to is an actual change of residence, and not a change of district boundaries. The division of a county into districts is merely for election purposes. The duties of commissioners are not local, or to be performed in only a particular part of the county. On the contrary, they are merely members of an entire board which acts as such for the entire county. Any other construction would lead to the gravest abuses, and often entirely defeat the popular will as expressed at the polls. It certainly could not have been the intention of the Legislature to permit a board of county commissioners, by redistricting after the election of their successors, but before their terms of office began, to continue themselves in office, and exclude those whom the people have chosen. Yet this is what the contention of respondents, if correct, would lead to. * * *"

* * * *

"The practical result, then, of respondent's construction of the law is that it is in the power of a majority of the board of commissioners by gerrymandering the county, to legislate out of office any two of their own number, or to keep out of office those who have been elected their successors, and hold onto the offices themselves for two years longer than the terms for which they were elected. There is nothing in the language of the statute which compels a construction leading to consequences so dangerous and unjust."

It is therefore the opinion of this Department that the rights of Mr. Duringer to the office of commissioner has not been affected by the fact that since his election, but before his qualification for such office, the boundaries of the commissioner's precinct from which he was elected was so changed as to leave his residence without the precinct, and that he is entitled to the office, and, if he qualifies, is the only person who can legally perform the duties of the office.

Very truly yours,

JNO. C. WALL,
Assistant Attorney General.

COMMISSIONERS COURTS—CITIES AND TOWNS.

The jurisdiction of cities and towns over streets and alleys is exclusive. The jurisdiction of commissioners' courts over roads is likewise exclusive.

Streets are "urban ways which can be and are generally used for the ordinary purposes of travel."

The words "roads and highways" are general and comprehensive, but when used in statutes relating to powers of commissioners' courts over roads and highways should be given the meaning of country roads.

A commissioners court may, with the consent of a city council, but can not without the consent of a city council, construct roads through the limits of an incorporated town or city.

February 2, 1915.

Hon. Marshall Spoonts, County Attorney, Fort Worth, Texas.

DEAR SIR: In a letter to this Department you state the following facts and make the following inquiry:

"In the construction of our roads in this county, the greater portion of which has been done under a special road law, we find that our main roads are not connected up by reason of the fact that they pass through small incorporated towns in our county. The commissioners want to expend their money to build good roads in these incorporated towns, for instance, we have a latteral road running from Arlington to Grapevine, both of these towns are incorporated, but by reason of the fact that the cardinal roads run through the center of these two places there is a hiatus of from one-half mile to a mile in each of the towns on the sub-cardinal road which *have* not been built. Our commissioners want to know if they have authority to construct those latteral roads after they strike the limits of these towns to connect with the cardinal and sub-cardinal roads."

We are not sure that we understand the meaning of your letter. We take it to mean that by the authority given in your special law to the commissioners court certain macadamized or graveled roads have been constructed in your county to the corporate limits of incorporated cities or towns like Arlington and Grapevine, and that the streets through these incorporated cities or towns have not been macadamized, graveled or paved, so that "a hiatus of from one-half mile to a mile in each of the towns" is left. You wish to know whether the commissioners court would have authority to construct the roads through the corporate limits of such cities or towns.

To answer your inquiry it is necessary to construe certain articles of the statute relating to the control by cities and towns of their streets and by counties of the public roads.

Article 854, Revised Statutes, among other things, provides that the city council is empowered "to have the *exclusive* control and power over streets, alleys and public grounds and highways of the city, and to abate and remove encroachments or obstructions thereon; to open, alter, widen, extend, establish, regulate, grade, clean and otherwise improve said streets; to put drains or sewers therein, and to prevent the incumbering thereof in any manner, and to protect the same from encroachment or injury; and to cause all able-bodied male inhabitants above eighteen years of age, except ministers of the Gospel, to work thereon, not exceeding five days in any one

year * * *; and to regulate and alter the grade of premises; and to require the filling up and raising of the same; and such city council shall also have power to alter or vacate the alley in any block or ground within the city," etc.

Article 855, Revised Statutes, provides that the city council shall have the power "to prevent the incumbering of the streets, alleys, sidewalks * * *; to compel all persons to keep all weeds, filth and any kind of rubbish from the sidewalks and streets and gutters in front of the premises occupied by them; to require and compel the owners of property to fill up, grade, gravel and otherwise improve the sidewalks in front of same."

Article 857, Revised Statutes, provides that the city council shall have the power to "establish, erect, construct, regulate and keep in repair bridges, culverts and sewers, sidewalks and crossways, and to regulate the construction and use of the same, and to abate and punish any obstructions or encroachments thereon," etc.

Article 858, Revised Statutes, empowers the city council to prohibit and restrain certain "amusements or practices tending to annoy persons passing the streets or sidewalks, or to frighten horses or teams * * * tending to the collection of persons on the streets and sidewalks, by auctioneers and others, for the purpose of business, amusement or otherwise."

Article 859, Revised Statutes, empowers the city council "to prevent, regulate and control the driving of cattle, horses and all other animals, into or through the city."

Article 861, Revised Statutes, provides that the city council "is empowered to prevent, prohibit and suppress horse racing, immoderate riding or driving in the streets; to compel persons to fasten their horses or other animals attached to vehicles, or otherwise, while standing or remaining in the streets."

A number of other articles might be cited to illustrate the "exclusive" control given city councils over streets and alleys.

At the same time there are articles of the statute which give commissioners courts of counties what might be termed complete control over the public roads of the counties. As instances:

"Article 2241. (1537) (1514) . The said Courts shall have power, and it shall be their duty:

"1. To lay off their respective counties into precincts, not less than four nor more than eight, for the election of justices of the peace, and constables, and shall fix the times and places of holding the various justices' courts in their counties, and shall establish places in such precincts where elections shall be held, also shall establish justices' precincts and justices' courts for unorganized counties, as provided by law.

"2. To establish public ferries whenever the public interest may require.

"3. To lay out and establish, change and discontinue public roads and highways.

"4. To build bridges and keep the same in repair.

"5. To appoint road overseers and apportion hands.

"6. To exercise general control and superintendence over all roads, highways, ferries and bridges in their counties.

"* * * * * *."

"Article 6860 (4671). The commissioners' courts of the several counties shall have full powers and it shall be their duty to order the laying out

and opening of public roads when necessary, and to discontinue or alter any roads whenever it shall be deemed expedient *as hereinafter prescribed.*"

"Article 6950. (4760). The commissioners' courts are authorized to make all reasonable and necessary rules and orders for the working and repairing of public roads, and to utilize the labor to be used and money expended thereon, not in conflict with the laws of this State, and enforce such rules and orders; and they are further authorized to purchase or hire all necessary road machinery, tools, or teams, and hire such labor as may be needed in addition to the labor now required of citizens to build or repair the roads."

We might also cite all of Title 119 of the Revised Statutes.

We will not attempt to discuss the effect of the priority of the passage of any one or more of these articles, but will attempt to reconcile conflicts which, in our opinion, are more seeming than real.

We call attention first to the fact that in the articles relating to the powers conferred upon city councils the words used are "*streets, alleys* and public grounds and highways *of the city,*" and in the articles relating to the powers conferred upon commissioners courts the words used are "public roads and highways."

The only definition of any of these terms we have found in Texas decisons is that given to the terms "streets and alleys" by the Court of Civil Appeals in the case of Kalteyer vs. Sullivan, 18 Texas Civil Appeals, 493, which is as follows:

"A way over land set apart for public travel in a town or city is a street, no matter what it may be called; it is the purpose for which it is laid out and the use made of it that determines its character. 'Street' is a general term, and includes all urban ways which can be, and are, generally used for the ordinary purposes of travel. A narrow way, less in size than a street, is generally called an alley; and if the alley is a public one, it is a highway, and in general, is governed by the rules applicable to streets. Elliot on Roads and Streets, 12, 13."

In other jurisdictions the terms have been defined as follows:

"In common parlance, the word 'streets' is supposed to relate entirely to the avenues and thoroughfares of cities and villages, and not to roads and highways outside of municipal. corporations; and it would be placing a very liberal construction on this word to hold that it meant a highway or a road, within the meaning of the Constitution, when it is not named or included within its express terms. In re Woolsey, 95 N. Y., 135, 138."

"'Streets and alleys' ordinarily relate exclusively to the ways or thoroughfares of towns or cities. They are laid out and dedicated to public use, and especially for the use and convenience of the property holders of the towns or cities, by the proprietor thereof, or laid out and established for the same purposes by the corporation authorities. While every street is a highway, every highway is not a street. Bebolt vs. Carter, 31 Ind., 355, 367."

"The use of the words 'street' and 'alley', in exclusion of the more general term 'highway', in Rev. St., c. 113, Sec. 9, which enacts that any person found drunk in any street, alley, or other place shall be punished therefor, indicates that the public road of the country was not intended, but only the avenues of the compact part of the town. State vs. Stevens, 36 N. H,. 59, 63."

"A street is a road or public way in a city, town, or village. It is a general term, and includes all urban ways, which can be and are generally used for ordinary purposes of travel. It is, in the strictest sense, a highway free to all, and maintained, not for private gain, but public benefit (Elliott Roads and Streets, p. 12), and will be included in the generic term of

'highway.' Sachs vs. City of Sioux City, 80 N. W., 336, 337, 109 Iowa, 224."

"A street is a public road or way in a city, village, or town; so that it is not necessary to allege that injuries sustained on the street were sustained on a public street. City of Ottawa vs. McCreery, 71 Pac., 986, 987, 10 Kan. App., 443."

The word "road" has been defined by the higher courts of various States as follows:

"A 'street' is defined by Worcester as a public way of a town passable by carriages, and by Webster as a paved way or city road; while 'road' is defined to be an open way or passage as between one town, city, or place and another, and as a track for travel, forming a connection between one city, town, or place and another; and the title of an act 'relating to roads and highways,' *where the statute itself makes no mention of streets*, but speaks throughout of *roads and highways*, was manifestly intended to apply to *country territory outside of cities*, and not to the territory within the city limits. Osborne vs. Mecklenburg County Com'rs, 82 N. C., 400, 402."

"'Roads, highways, or alleys,' as used in Const., Art. 3, Sec. 18, providing that the Legislature should not pass a private or local bill laying out, opening, altering, working, or discontinuing roads, highways, or alleys, on their face do not include 'streets' as that term is usually understood. In common parlance the word 'streets' is supposed to relate entirely to the avenues and thoroughfares of cities and villages, and not to roads and highways outside of municipal corporations, and it would be placing a very liberal construction on this word to hold that it meant a highway or a road within the meaning of the Constitution, when it is not named or included within its express terms. In re Woolsey, 95 N. Y., 135, 138."

"In common usage, and according to our statutory nomenclature, the term 'road' denotes a township or county highway. And the road act (Revision, p. 1017), giving an action to any person damaged by means of insufficiency or want of repairs of any public road of any of the townships of this State has no application to an accident occurring in consequence of a muncipal street being out of order. Carter vs. City of Rahway, 55 N. J., Law (26 Vroom), 177, 178, 26 Atl., 96."

"'Road crossing,' as used in a statute requiring railroad corporations to maintain cattle guards at road crossings, applies as well to streets which are crossed by railroads in villages as to country highways, the term 'highway' and 'road' being synonymous. If a highway is called a street it would nevertheless be a road, within the meaning of the statute. Strictly, a street is a paved way or road, but the term is used for any way or road. Brace vs. New York Cent. R. Co., 27 N. Y., 269, 271."

A fair and reasonable conclusion, then, is that while the terms "public road" and "highways" are broad and comprehensive and might include streets and alleys, yet, in their commonly accepted sense, in statutes relating to the powers of commissioners courts, they refer alone to country roads and are not intended to embrace "streets" and "alleys"—the latter meaning "urban ways, which can be, and are, generally used for the ordinary purposes of travel."

It must also be noted that while the word "highways" is used in Article 854, Revised Statutes, relating to the powers of city councils, that term is there modified in this manner, "highways *of the city.*" The reasonable mind would give to such a term the meaning of "streets and alleys."

We are, therefore, of the opinion that there is no real conflict between the provisions of the various articles quoted.

Clearly, it never was the intention of the Legislature by these laws to create a conflict in jurisdiction of cities and counties over streets and roads. This has been the conclusion of the civil branches of our higher courts every time they have had the matter under consideration.

The leading case on this question is that of the State vs. Jones, 18 Texas, 876. The trial court, in an opinion which was adopted by the Supreme Court as the opinion of the latter court, among other things said:

"The main, and indeed only, essential question presented is one of a conflict of jurisdiction between the county court of Goliad county and the town council of the town of Goliad, in respect to the authority of these two bodies over the roads, streets and thoroughfares which run through and are within the incorporated limits of the town.

"There is no doubt that a general jurisdiction has been given by law to the county courts to lay out, establish and keep in repair, in their respective counties, such roads, or public highways, as may be necessary for the travel and transportation of the products and commerce of the county, and consequently, the county court of Goliad county possessed the right and power to establish the road now in controversy, unless that power has been taken away or rendered inoperative by other legislation on the subject.

"The act incorporating the town of Goliad gives to the town council the right to lay out, establish and improve the streets and alleys of the town. These streets and alleys, when laid out and established, are as much public highways as the roads laid out by the county court. The statement of facts shows that there was a town council legally organized under the charter—that it was in the performance of the duties imposed upon it by the charter—that the town had been regularly laid out into streets and alleys, and that the road which has given rise to the present controversy passed over and along one of the streets thus laid out and established by the incorporated authorities of the town.

"The question then is, which of these two bodies, the county court or the town council, has the authority to regulate and keep in repair this street or road? Both cannot exercise it at the same time without producing a conflict which would be irreconcilable, and which might be exceedingly detrimental to the interests of the town. To illustrate: The council considers it essential to the health, beauty and convenience of the town that the streets should have a width of eighty feet, and accordingly in laying out gives to them that width. The roads of the county usually have a width of thirty feet, and the county court is not required to give to them a greater width, and in constructing them, under its authority to do whatever in its judgment may be necessary to perfect them, it may throw up embankments and cut ditches on either side by which they will be confined to the limits of thirty feet. Now suppose the county court should think proper to exercise this power over the street or road in question, would not that destroy the right of the council to regulate and improve its own street? And if the county court could exercise such a power in reference to this street, could it not, by laying out a public road over every street in the town, exercise a similar power over every street which the town council had laid out under the authority of its charter? And would not the exercise of such power entirely take away the right conferred on the council to lay out, regulate and improve the streets and alleys of the town?

"* * * No two independent bodies can exercise unlimited authority or control over the same subject matter, at the same time, without giving rise to conflicts and collisions which the law never intended, and which the people would never tolerate.

"* * * Until the town council acts under the authority conferred by its charter, the general authority of the county court over the subject matter continues to exist, and may be exercised. It is only when both bodies attempt to act in opposition to, and in conflict with, each other that the power and authority of one must cease and yield to that of the other, and in such a state of things I am of the opinion that the authority of the county court must yield to that of the town council.

"* * * In view of the whole subject, I am of the opinion that the county court had no jurisdiction over the road in question at the time the defendant was appointed overseer of it; that its appointment conferred upon him no authority to require the contiguous hands to work it, and had he made such requisition, the hands would not have been bound to obey it; and that as he possessed neither the legal right nor ability to make the road, or to keep it in repair, he is not responsible for its want of repairs. The indictment is therefore quashed."

The decision in this case has been repeatedly affirmed by the higher courts of this State and of various other States.

See First volume of Rose's notes.

The case of Norwood vs. Gonzales County, 79 Texas, 222, was a suit brought to recover a strip of land which was being used by the county of Gonzales for a public road. "In the year 1878 the land in controversy belonged to a Mrs. Rogan and was situated within the limits of Gonazles, a city then having a special charter giving it control over its streets and being governed by a board consisting of a mayor and aldermen." During that year the county commissioners court of Gonzales county "proceeding under the road law, made an order establishing a second class road over the land, and subsequently it caused the same to be worked as a public road." In passing upon the question involved the Supreme Court held:

"Without intending to decide that if the county commissioners court could have rightfully exercised jurisdiction to establish the road, the action taken in this instance would have been sufficient for that purpose, we think it must be held to have been without jurisdiction to do so in the year 1878, because the land was then included within the corporate limits of the city, and its proceedings at that time must be treated as having no legal effect. The State vs. Jones, 18 Texas, 874."

"The circumstances under which the county commissioners court may assume authority over the streets of incorporated cities and control them as public roads were defined for the first time by the act of the Legislature of March 14, 1885. Sayles' Civil Statutes, Article 4359a."

All decisions of the Court of Criminal Appeals on this subject were to the same effect until the case of Bluitt vs. State, 121 S. W., 171, and the vigorous and very able dissenting opinion of Judge Davidson in that case decidedly affects the majority opinion as an authority upon the subject. Among other things, he said:

"The county has control of the public roads, but towns and cities have control of the streets. The county has no authority over the streets of an incorporated town, nor has the county any authority to summon or require work of those who reside in such incorporated towns to work upon county roads. The county and the cities and towns are municipalities independent of each other, each being supreme within its own jurisdiction and political sphere. The county cannot assume jurisdiction of the streets, nor can the city assume jurisdiction of the county roads. They are mu-

nicipal bodies entirely separate and distinct from a political standpoint, each governed by such laws as the Legislature under constitutional authority may enact or authorize. Such has been the legal and judicial history of Texas. This question first came up in the case of State vs. Jones, 18 Texas, 874. It was again decided by the Supreme Court in Norwood vs. Gonzales County, 79 Texas, 218, 14 S. W., 1057. The Jones case, supra, has been followed by the appellate courts of this State in all the decisions. There have been several cases decided by the Court of Civil Appeals and Court of Criminal Appeals. Ex parte Roberts, 28 Texas App., 44, 11 S. W., 732. I deem it unnecessary to collate these, as all the decisions are harmonious, not even having been broken by a dissent. Nelson vs. Garfield Co., 6 Colo. App., 282, 40 Pac., 474; Gallagher vs. Read, 72 Iowa, 174, 33 N. W., 920; McGillom vs. Black Hawk Co., 21 Iowa, 418. This is also the rule in other States. For the first time in the history of Texas, a majority of the court in this case holds that the residents of an incorporated city or town can be compelled to work on the county roads. This is evidently erroneous. If my brethren are correct, then the residents of cities and towns could not only be required to pay taxes levied and collected for the purpose of keeping up the streets, but they would be required as well to go out into the county and work the public roads, thereby being burdened with onerous double duties. I do not care to follow this question, it is so obviously incorrect."

Other articles of the statute show that the Legislature has time and again recognized the distinction between the powers of city councils over the streets and alleys of a city or town and the powers of commissioners courts over the county roads.

Thus Article 2253, Revised Statutes, among other things, provides that commissioners courts and city councils are authorized "to co-operate in the erection of bridges within the corporate limits of any city or town," and may jointly erect such bridges "upon such terms and conditions as may be mutually agreed upon; and either or both * * * may issue its bonds to pay for its proportional part of the debt. * * *"

Article 2255, Revised Statutes, provides that commissioners courts of counties owning bridges within cities and towns shalll keep them in repair.

See also City of Llano vs. Wilborn, 152 S. W., 474.

Recognition of the distinction between the two governments is further shown by other articles of the statute. Thus Article 1298 provides:

"When any such cemetery is located without the limits of any city, the commissioners court of such county shall have the power to prescribe the maximum at which lots therein shall be sold."

Article 2251 provides:

"The municipal authorities of towns and cities, and commissioners courts of the counties wherein such towns and cities are situated, may co-operate with each other in making such improvements connected with said towns, cities and counties as may be deemed by said authorities and courts necessary to improve the public health and to promote efficient sanitary regulations; and, by mutual arrangement, they may provide for the construction of said improvements and the payment therefor."

Section 52 of Article 3 of the Constitution provides "that under *legislative provision* any county, any political subdivision of a county, any number of adjoining counties, or any political subdivision of the State or any defined district now or hereafter to be described and defined within the State of Texas, and which may or may not include, towns, villages or municipal corporations * * * may issue bonds or otherwise lend its credit in any amount not to exceed one-fourth of the assessed valuation of the real property * * * for the following purposes:

"(c) The construction, maintenance and operation of macadamized, graveled or paved roads and turnpikes, or in aid thereof."

This section of the Constitution, however, has no bearing upon the conclusion which should be reached in the matter under consideration because it relates alone to situations which would arise from the formation of road districts or from the issuance of bonds by counties, road districts or political subdivisions under legislative provisions authorized by the section, and this is not your case.

Article 6862, Revised Statutes shows the only conditions under which commissioners courts are empowered to take charge of the streets and alleys of cities or towns. This article is as follows:

"In all cities and incorporated towns in the State of Texas in which from any cause there is not a de facto municipal government in the active discharge of their official duties, the commissioners court of the county in which such city or incorporated town is situated shall assume and have control of the streets and alleys thereof, and shall have the same worked under the law and regulations for the working of public roads; and such streets and alleys for the purposes of this article shall be held and denominated public roads; provided, that all residents of any city or town, having no de facto city government, not otherwise exempt from road duty, shall be liable to road service as in other cases. (Acts of 1885, p. 25.)"

The only article of the statute which seems to in any way place superior authority in the country with reference to anything pertaining to the streets and alleys of a city or town is Article 2252, Revised Statutes, which is as follows:

"Whenever the commissioners court of any county shall deem it to the interest of the county to erect any bridge or bridges within the corporate limits of any city or town, said court may make contracts therefor and erect said bridges to the same extent and under the same conditions now prescribed by law for the construction of bridges outside of the limits of any city or town. (Acts of 1895, p. 164.)"

While it is true that this article says nothing about commissioners courts co-operating with city councils, yet the main purpose of the article was to empower commissioners courts to pay the entire cost of the construction of any bridge within the limits of a city or town which they deemed it to the best interest of the county to have constructed. The article, however, might be subject to the construction that if a city council refused to build such a bridge or co-operate with the commissioners court in doing so, such court might, without the consent of the council, construct the same.

You will see that thus far we have not discussed any feature of

your special road law. It has been examined carefully, however, by us and it contains nothing which affects the conclusion to be reached in this matter. Section 36 of this special road law is as follows:

"The provisions of this act are, and shall be held and construed to be, cumulative of all general laws of this State on the subjects treated of in this act when not in conflict therewith, but in case of such conflict this act shall control as to Tarrant county."

The general laws of the State must be looked to for the determination of the powers of your commissioners court to build the roads you have made inquiry about, because your special law is silent on this subject.

Upon the whole case, we are of the opinion that your commissioners court would not have authority, without the consent and acquiescence of the city councils of the cities or towns in the county, to construct roads within such cities or towns, unless it might be in a city or incorporated town "in which from some cause there is not a de facto municipal government in the active discharge of their official duties." We think, however, that with the consent of the city councils they might construct or co-operate in constructing roads through such towns or cities.

Hoping this furnishes you the desired information, we are,

Very truly yours,

JNO. C. WALL,
Assistant Attorney General.

COMMISSIONERS COURT—OFFICERS—COUNTY HEALTH OFFICER.

1. Commissioners court, after electing county health officer, has no authority to elect his successor until vacancy occurs in the office by death, resignation or removal, or until his term of office expires.
2. The term of office of an appointee begins to run from the date of the appointment. When the power to appoint to an office has been once exercised, any subsequent appointment is void unless the office has again become vacant.

January 23, 1915.

Hon. H. C. Nash, Jr., County Attorney, Corsicana, Texas.

DEAR SIR: The Department is in receipt of an inquiry propounded by you dated December 26, 1914. Your inquiry, based upon a statement of facts, is as follows:

"On December 13, 1912, Dr. W. D. Fountain was employed by the commissioners court of Navarro county as county health physician for a term of two years. The contract executed between him and the county is herewith attached and marked Exhibit A for your inspection.

"On the 13th day of November, 1914, the same commissioners court of Navarro county passed an order electing Dr. T. B. Sadler to be county health physician of Navarro county for a term of two years, beginning at the expiration of Dr. W. D. Fountain's term, which would be December 15, 1914, and ending on November 15, 1916. On the day following, to-wit,

November 14, 1914, the contract between Dr. Sadler and the county was approved by the commissioners court and ordered recorded, said contract being herewith attached and marked Exhibit B for your inspection.

"On November 14, 1914, at 4:30 o'clock p. m., a new commissioners court met, the term of the old court having expired. The new court being composed of four new commissioners, none of the old having been re-elected, and with R. R. Owen, county judge, organized the new commissioners court, and on motion adjourned to meet on November 16, 1914, at 11 o'clock a. m. On November 16, 1914, said new commissioners court met and proceeded to revoke, cancel, set aside and hold for naught the contract made by the old court on November 13, 1914, wherein the old court had elected Dr. T. B. Sadler as county health officer. On November 28, 1914, the new commissioners court elected Dr. W. D. Fountain county health officer. On December 14, 1914, Dr. T. B. Sadler filed his oath as county health officer, which was duly recorded in the county clerk's office. On December 19, 1914, Dr. W. D. Fountain entered into a contract with Navarro county as county health physician, which contract was in all things approved by the commissioners court. On December 21, 1914, Dr. W. D. Fountain executed the usual constitutional oath and the same was transmitted to the State Health Officer of the State of Texas."

From the above statement of facts it appears that on December 13, 1912, the commissioners court elected Dr. W. D. Fountain as county health officer, and that thereafter on November 13, 1914, the commissioners court elected Dr. T. B. Sadler county health officer with direction that his term of office begin at the expiration of the term of office of Dr. W. D. Fountain. On the day following this election new commissioners qualified and took charge of the county affairs, the term of office of the old county commissioners having expired. Thereafter on November 16, 1914, the commissioners court revoked the order appointing Dr. T. B. Sadler and on November 28, 1914, Dr. W. D. Fountain was elected county health officer.

You desire to be advised under the above statement of facts as to who is the county health officer of your county.

Answering the above inquiry, we will consider, first, the power and authority of the commissioners court to appoint a health officer.

Article 4538, Revised Civil Statutes, abolishes what was formerly known as county physician and created the office of county health officer. Article 4539 specifies the qualification, manner of appointment and compensation of county health officer, and among other things provides that it "is hereby made the duty of the commissioners court, by a majority vote, in each organized county, to appoint a proper person for the office of county health officer for his county, who shall hold office for two years and until his successor shall be appointed and qualified *unless sooner removed for cause.*"

The commissioners court of Navarro county therefore had the authority granted to it by law to appoint a county health officer, and proceeding under this authority the commissioners court did on December 13, 1912, appoint Dr. W. D. Fountain as county health officer, whose term of office by the provisions of law is for two years.

The question next recurs as to when this term of office would begin. The authorities hold that when no time is fixed by law for the commencement of an official term it begins to run from the date of the appointment. This question was fully discussed in the case of At-

torney General ex rel Haight vs. James H. Love, reported in 10 Vroom, page 476, 39 N. J. L. The same case is also discussed fully in the same volume on page 14. It follows then from all the authorities that Dr. Fountain was legally elected on December 13, 1912, county health officer of Navarro county, and that his term of office would be two years from that date. In the appointment of Dr. Fountain as county health officer the commissioners court exhausted its power; that is to say, that when Dr. Fountain was appointed it passed beyond the power of the commissioners court to alter or change this appointment unless Dr. Fountain had been removed from office for cause. In other words, as long as Dr. Fountain continued in the discharge of his duties as county health officer his term of office could not be interfered with by the commissioners court, and under the statement of facts it appears that no effort was made to remove Dr. Fountain, but that he remained in full control as county health officer and his services were recognized as such by the commissioners court at the time they made the appointment of Dr. Sadler.

The question then recurs, did the commissioners court have authority until a vacancy occurred and while Dr. Fountain was in the full discharge of his duties, to select another county health officer? We think not, and feel that we are amply supported in this opinion by the overwhelming weight of authority everywhere. The case above cited also decides this question, and holds that when a board has completely exercised its power of appointing a person to an office and that person is not removable at the will of the board, a rescission of the appointment will not affect the right to the office. In Sections 90 and 91, page 99, Public Officers by Throop, this doctrine is announced:

"Where an office has been once filled by an appointment, it cannot be deemed vacant until the expiration of the term for which the appointment was made, or the death, resignation or removal of the person so appointed. *Therefore where a power given to appoint to an office has been once exercised. any subsequent appointment is void, unless the office has again become vacant.*"

Section 92 of the above authority is as follows:

"But it has been held that where an office is to be filled by appointment by the Governor, with the advice and consent of the Senate, the Governor and Senate cannot forestall their successors by appointing a person to an office which is then filled by another, whose term will not expire until after the expiration of the terms of the Governor and Senators. * * *"

This doctrine was expressly upheld in the case of Ivy vs. Lusk, 11 La. Ann., 486, in which case the court said:

"However specious the argument that the Governor should, if possible, seek to avail himself of the assistance of his constitutional advisers, the Senate, in making appointments to office, and to avoid an independent nomination which would only have effect until the end of the next session of the Legislature, it is plain that an appointment thus made by anticipation has no other basis than expediency and convenience, and can only derive its binding force and effect from the supposition that there will be

no change of person, and consequently of will, on the part of the appointing power, between the date of the exercise of that power by anticipation, and that of the necessity for the exercise of such power by the vacancy of the office.

"But we hold it to be entirely inadmissible to pretend that the Governor and Senate can forestall the action of their own successors in office, upon executive appointments to other offices of which the term shall expire during their possession of the reins of government."

Supporting this doctrine, see also the case of Sigur vs. Crenshaw, 8 La. Ann., 401.

In the case of State vs. Mechan, 45 N. J. L., 189, this direct question was passed upon. The chief justice, rendering the opinion, said:

"The relator, it is admitted in this record, was duly appointed to the office of keeper of the jail authorized by a special act to be erected and maintained in the county of Hudson, and his complaint is that, having the right to continue in that position until his official successor should have been legally appointed, the respondent ousted him under the pretense of an appointment to the post by the board of freeholders whose term expired on the second day of May, 1882. The information shows that the relator's office did not terminate, so as to enable his successor to be chosen, until the fourth day of September, 1882, and it therefore appears that the respondent holds office by virtue of the authority of an outgoing board of freeholders, who undertook to fill an office that did not become vacant during the term of its own official life. Such a course was in direct opposition to the legal rule upon that subject as propounded by this court in the case of Haight vs. Love, 10 Vroom 14, 476. And it seems to me that the defense of this conduct on the part of this corporate body is of the flimsiest consistence. It is to the effect that the board which put the respondent into office had the right to hold over until a new board had been legally chosen, and that no such board has as yet been constituted. It is not pretended that this old board did actually continue in possession of its office until the term of the relator had expired; but it is asserted that in law it had the right so to do, on the ground that the new board elected to succeed it in the spring of 1882 had not been chosen from legally constituted voting districts."

The above case follows the doctrine laid down in 11 Vroom (N. J. L.), in the case of State ex rel vs. Hiram Van Buskirk, page 463, in which case it was held that a deliberative body has the right to vote and reconsider its vote upon measures before it, at its own pleasure, until, by a final vote, accepted as such by itself, a conclusion is reached. Such final action is shown by its adjournment thereon, the public promulgation of its action, or by subsequent proceedings inconsistent with a purpose to review, and that the power of appointment to office when executed by the performance of the last act made necessary in its execution, is not revocable without the consent of the appointee.

In the case of Hiram J. Thomas vs. James B. Burrus, 23 Miss., 551, the court said:

"Indeed, it seems so clear upon principle, that authority is not needed to sustain the position, that where the power given to appoint an officer has been exercised, any subsequent appointment must be void, unless the prior incumbent has been legally removed and the office become vacant."

In Johnson vs. Wilson et al., 2 N. H., the court uses this language in discussing a statement of facts similar to the one presented by you:

"It must be obvious, also, that when once accepted, no vacancy can be said to exist in the office till the term of service expires, or till the death, removal or resignation of the person appointed. The exceptions to these general principles are not numerous, and need not be considered in the examination of the present case."

We think now that it has been clearly established that Dr. Fountain was legally elected county health officer of Navarro county; that his term of office extended for two years; that during that period of time the commissioners court was powerless to again consider the matter of the appointment of a health officer in the absence of the death, resignation or removal for cause. The court having exhausted its power over the subject, when it named Dr. Fountain, could not again consider the matter of the selection of a county health officer until a vacancy appeared. The record affirmatively shows that no vacancy did appear. The court at the time it appointed Dr. Sadler recognized the validity and existence of Dr. Fountain's appointment in that it was provided that Dr. Sadler should not exercise the duties of office until the expiration of Dr. Fountain's term of office.

We therefore are forced to conclude that the court which convened on November 13, 1914, a month before Dr. Fountain's term of office had expired, which court selected Dr. T. B. Sadler as health officer, acted without authority, and that the appointment of Dr. Sadler so made was illegal and void. We hold that Dr. Fountain was at that time the legally constituted health officer of Navarro county; that he continued as such health officer until his term of office expired, and further still until his successor was elected and qualified. We are aware of the fact that the record subsequently disclosed that Dr. Fountain was again on November 28, 1914, elected by the commissioners court to serve as county health officer, and that he qualified on December 21, 1914. While Dr. Fountain was elected the second time before his first term of office expired, it is not necessary for us to discuss whether or not this appointment would be legal, for he would hold his office until his successor should qualify, and as he is his own successor we conclude that although it should be conceded that his second appointment was illegal he would still be the health officer by reason of his first appointment. We therefore hold that Dr. Fountain is now the duly and legally selected health officer of Navarro county.

Very sincerely yours,

W. A. KEELING,
Assistant Attorney General.

COMMISSIONERS COURTS—POWERS OF.

Commissioners courts have authority, from time to time, to meet the convenience of the people, to divide counties into four precincts, to change the boundaries of commissioners' precincts.

January 6, 1914.

Hon. J. C. Shipman, County Attorney, Hamilton, Texas.

DEAR SIR: In a letter to this Department you state that a petition signed by a number of citizens of Hamilton county has been presented asking that the commissioners court so redivide the county into commissioners precincts that each one of the four precincts will corner at the county seat. You ask this Department whether or not the commissioners court has the power and authority to make such a change.

Section 18, Article 5 of the Constitution is as follows:

"Each organized county in the State now or hereafter existing *shall be divided from time to time for the convenience of the people.* into precincts, not less than four and not more than eight. The present county courts shall make the first division. Subsequent divisions shall be made by the commissioners court provided for by this constitution. * * * Each county shall in like manner be divided into four commissioners' precincts. * * *"

The first three sentences of the above quotation from the Constitution plainly give commissioners courts the authority, "from time to time, for the convenience of the people," to divide counties into justice precincts. The Legislature by an act passed has also empowered such courts "to lay off their respective counties into precincts, not less than four nor more than eight, for the election of justices of the peace," etc. (Article 2241, Revised Statutes.) The higher courts of this State have held that the foregoing provisions of the Constitution and also the provision of the statute quoted, give the commissioners court power and authority, at any time the interests of the people may require, to change the boundaries of *justice* precincts.

State vs. Rigsby, 43 S. W., 271, 1101.

No law has been passed by the Legislature giving authority to commissioners courts, or making it the duty of such courts, from time to time, to subdivide the county into commissioners precincts. A determination of the question here involved will, therefore, depend upon the construction to be given to the last sentence in Section 18, Article 5, of the Constitution above quoted, in connection with the other language of such section.

The opinion of the Department is, that the meaning of the language used in this section with reference to commissioners precincts is, that "each county shall *in like manner* be divided into four commissioners precincts" that is, each county shall, in the manner provided in said section for the subdivision of counties into justice precincts, be subdivided into four commissioners precincts. The manner prescribed in said section for the subdivision of counties into justice precincts is, that "the present county courts shall make the first division"—that is, the first division shall be made by the justices of the peace of the different counties, who at that time composed the county courts; (see Sections 20 and 21 of Article 5 of the Constitution of 1869) that thereafter "from time to time, for the convenience of the

people'' the counties shall be subdivided ''by the commissioners courts, provided for by this Constitution''—the Constitution of 1876.

We think the foregoing is the only reasonable construction to be given to the words, '' each county shall *in like manner* be divided into four commissioners precincts.''

It then remains for us to determine whether this provision of the Constitution, in the absence of any act passed by the Legislature, clothes commissioners courts with the authority to, ''from time to time, for the convenience of the people,'' divide counties into four commissioners precincts.

After diligent search we are unable to find any decision by the higher courts of this State based upon any change made by commissioners courts in the boundaries of commissioners precincts. It has been decided, however, by the higher courts of this State, in construing the provisions of the foregoing section in reference to justice precincts, that by the provisions of this section of the Constitution alone, in the absence of legislation on the subject, commissioners courts were clothed with the authority, from time to time, to make changes in the boundaries of justice precincts, and we think the construction given to such provisions applies with equal force and appropriateness to the construction which should be given to the provision in reference to commissioners precincts.

In the case of the State vs. Rigsby, 43 S. W., 273, the Court of Civil appeals held:

"When the commissioners court was organized, in pursuance of the constitution and the laws passed thereunder, it possessed all powers conferred by both. When the court was once established *no legislation was needed* to enable it to exercise the powers given by the above provision to divide the county into precincts. The direction is plain and simple, and without condition or restriction, except that as to the number of precincts. It is said that no procedure is prescribed by which the power is to be exercised. If any was needed, the statute supplied it, when it required that the proceedings of the court should be recorded in its minute book. R. S. 1895, Art. 1554. This was all that was necessary. The power to divide the county into justices' precincts is also given by the statute, but not in terms so explicit as those used in the Constitution. R. S. 1895, Art. 1537. There can be no doubt *that both Constitution* and statute confer the power, and the only question is as to its extent. It is contended that a limitation upon the power is found in the constitutional provision fixing the terms of office of precinct officers; and that, since they are to hold for two years, it follows that the precincts cannot be changed during the terms, because the power to alter them would practically enable the court to destroy the office. The language of the Constitution expresses no such limitation. The division is to be made *'from time to time.'* The reason for the division is to be *the convenience of the people;* and the judge, both as to time and convenience, is the court."

Writ of error in this case was denied by the Supreme Court. (See 43 S. W., 1101.) This decision has been affirmed in Martin vs. Mitchell, 74 S. W., 566 and Hastings vs. Townsend, 136 S. W., 1143.

See also Territory vs. Board of County Commissioners of Cass County (Dak.), 50 N. W., 479.

You are therefore advised that it is the opinion of this Department that the provisions of Section 18, Article 5 of the Constitution, al-

though they have not been enacted into law by the Legislature, give commissioners courts the power and authority from time to time to change the boundaries of commissioners precincts to meet the necessities, requirements and convenience of the people.

Very truly yours,

JNO. C. WALL,
Assistant Attorney General.

CONFEDERATE PENSIONS.

The maximum amount that may be received from the State by any Confederate pensioner is eight and one-third dollars per month.

On the first day of March and September of each year the Commissioner must allot to each blind, maimed and totally disabled soldier and sailor, or blind and totally disabled widow of such soldier or sailor, the sum of eight and one-third dollars per month, and the remainder of the available pension fund shall be prorated among pensioners entitled thereto.

Pensions are payable at the end of each quarter; that is to say, on the first day of June, March, December and September of each year.

After the payment of the allotment of eight and one-third dollars per month to the blind and disabled soldiers and sailors, or widows of such soldiers and sailors, then the remainder is apportioned to those entitled thereto, and no deficiency shall ever be created. Therefore, if the available fund is sufficient at any time to pay to those soldiers and sailors, or widows of soldiers and sailors, an amount less than $25 for any one quarter, warrants can be issued only for their pro rata portion, and the Commissioner would have no authority to issue warrants in amounts greater than the pro rata share to which each is entitled, with the expectation of same being paid from future collections placed to the credit of the special fund in the treasury.

Article 6273 of the Revised Civil Statutes of 1911.

Sections 2 and 5, Chapter 141, Acts of the Thirty-third Legislature.

June 7, 1915.

Hon. J. C. Jones, Commissioner of Pensions, Building.

DEAR SIR: We have your letter of June the 7th reading as follows:

"On July 1, 1915, we find we have only enough money in the State treasury to our pension fund to allow each Confederate pensioner (not totally disabled) $12 for the present quarter. Can we, and comply with the law, issue warrants for more than the amount we have, and depend on winter money coming into this fund to reimburse said fund, or must we divide only the amount we have on hand in the treasury?"

Chapter 141 of the Acts of the Regular Session of the Thirty-third Legislature was enacted for the purpose of putting into effect the constitutional provision adopted in 1912 as an amendment to Section 51 of Article 3, authorizing the levy of a tax of five cents on the one hundred dollars for the creation of a special fund for the payment of pensions to Confederate soldiers and sailors.

Section 2 of the act above referred to provides, in effect, that out of the funds raised by the five-cent tax, which fund was expressly

appropriated for the purposes enumerated in the act, there shall be paid annually pensions of eight and one-third dollars per month, payable on the first day of September, December, March and June of each year to those soldiers and sailors, or widows of such soldiers and sailors, of the Confederacy who comply with the provisions of the law. The provisions of this section operate as a limitation upon the maximum amount that may be received by any pensioner, that is, under no circumstances, whatever may be the available amount of this special fund, may any such pensioner receive an amount in excess of eight and one-third dollars per month, or $25 payable quarterly.

Section 5 of the act referred to provides that on the first day of September and on the first day of March the Commissioner shall allot to each blind, maimed and totally disabled soldier and sailor, or the blind and totally disabled widow of such soldier or sailor, the sum of eight and one-third dollars per month. This section contains the further provision that the remainder of the appropriation shall be equally prorated among the pensioners who are in indigent circumstances only, and whose claims to pensions have been established as is provided in the law. There is the further provision in this section that all pensions shall begin on the first day of September and March after the filing and establishment thereof, but with the proviso that the Commissioner is authorized to fill any vacancy created by death or other causes at any time between the first day of September and the first day of March of each year.

Article 6273, Revised Civil Statutes of 1911, provides, in part, as follows:

"The payments of such pensions shall begin on the first day of March and September of each year; payable at the end of each quarter."

The effect of the provisions of the statute above referred to is to require the Commissioner on the first day of September and the first day of March of each year to allot out of the special fund to the blind, maimed and totally disabled pensioner the sum of eight and one-third dollars per month, and to apportion the remainder of the fund then on hand ratably between indigent pensioners then upon the rolls.

There is no authority vested in the Commissioner to authorize the issuance of a warrant in excess of the pro rata share to which a pensioner may be entitled. The last proviso of Section 2 of Chapter 141, above cited, is as follows:

"* * * And provided that in the event the appropriation made by the State Legislature out of such special fund for any one year shall prove insufficient to pay in full said pensions, there shall not thereby be created a deficiency outstanding as a valid claim against the State of Texas, and each pensioner shall only receive, except as herein or in existing law otherwise provided for, his or her pro rata according to the amount appropriated for that year."

The above quoted proviso is an absolute prohibition, as we see it, against the issuance of any warrant where the aggregate of such war-

rant so issued may exceed the amount of the special fund then on hand, and this proviso controls the provision at the beginning of Section 2 to the effect that each pensioner is entitled to eight and one-third dollars per month. In other words, as we view the Confederate Pension Acts of this State, the pensioners on the rolls on the first day of March and September, and those placed thereon to fill vacancies, are entitled to receive quarterly their pro rata share of any amount to the credit of the special pension fund and no more. This fund is raised by tax for this purpose only, and it is intended that whatever amount may be raised shall be prorated to those entitled thereto under the law and that they are entitled to the same in such amounts only as the available fund will supply.

We therefore advise you that you would be authorized to issue warrants to those pensioners who are indigent only for their pro rata part of the fund now on hand, or, as you indicated, $12 upon the present quarter, and that you would have no authority to issue warrants for more than that amount with the expectation of same being paid out of funds arising in the future.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

CONFEDERATE WOMAN'S HOME—REQUIREMENTS FOR ADMISSION—WORDS AND PHRASES—DOMESTIC RELATIONS.

1. A woman divorced from her husband is not his wife nor his widow.
2. Benefits of law establishing Confederate Women's Home extend not only to the wives and widows of indigent Confederate soldiers and sailors, but also to women who aided the Confederacy.

September 18, 1914.

Miss Katie Daffan, Superintendent Confederate Woman's Home, Austin, Texas.

DEAR MADAM: In our phone conversation this morning, you requested my opinion as to the eligibility of an old woman to become an inmate of the Confederate Woman's Home under the following statement of facts; that is to say, the old woman in question was once the wife of a Confederate soldier, but is now divorced from him, and he now is living with a wife he subsequently married.

While you did not state the facts, yet I assume that the old woman in question is over sixty years of age, is in indigent circumstances, that her former husband entered the Confederate service from Texas, or else came to Texas prior to January 1, 1880. On this assumption, the question condensed is, whether the old woman is the wife of an ex-Confederate soldier within the meaning of the law.

The constitutional provisions authorizing the establishment of the Confederate Woman's Home, after treating of the pension feature of the provision, reads as follows:

"* * * and also to grant aid for the establishment and maintenance of a home for said soldiers and sailors, their wives and widows, and women who aided in the Confederacy under such regulations and limitations as may be provided for by law; provided the Legislature may provide for husband and wife to remain together in the home." (Art. 3, Sec. 51, Constitution of Texas.)

The first section of the Act of 1911 (Session Acts, page 50), creating the home, reads as follows:

"Section 1. There shall be established in or near the city of Austin, in the State of Texas, a home for the indigent wives and widows and who are over sixty years of age, of disabled ex-Confederate soldiers and sailors who entered the Confederate service from Texas, or who came to the State prior to January 1, 1880, and whose disability is the proximate result of actual service in the Confederate army for at least three months, and also for women who aided the Confederacy. This institution shall be known as the Confederate Woman's Home."

A woman divorced from her husband is not his wife nor his widow, and hence the old lady in question could not gain admission to the home by reason of the fact that she was once the wife of a soldier, even though all the other requisite facts existed, such as age, service, residence, indigency, etc.

The popular meaning of the word "wife" is a woman who is united to a man in the lawful bonds of wedlock.

Thompson vs. Lewiston Co., 39 Atl., 556.
United States vs. Tenney, 8 Pac., 295.
Miller vs. Miller, 30 N. Y. Supp., 116, 79 Hun., 179.

A *wife* is a woman who has a husband living. To say that a person is a *wife* does not mean simply that she has been married, but that she was then and there a married woman.

Names vs. State, 50 N. E., 401.
20 Indiana Appeals, 168.

The word "wife" does not include a woman divorced.

Woods vs. Waddell, 8 N. E., 297, 44 Ohio, 449.
Cox vs. Cox, 10 Ohio St., 502, 2 Am. Rep., 415.

From the above authorities, we must conclude that a *wife* is a person who is united to a man in lawful wedlock and that the term does not and can not include a woman formerly bearing this relation but afterwards divorced.

The term "widow" in common parlance means an unmarried woman who has lost her husband by death; a wife that outlives her husband.

Cole vs. Mayne (U. S.), 122 Fed., 836.

A "widow" is defined to be an unmarried woman whose husband is dead; one who has lost her husband by death, and has not taken another.

35 N. Y. Supp., 481.

Where the husband and wife are divorced, the divorced wife, after the husband's death, is *not* his widow and is not entitled to dower.

Whitsell vs. Mills, 6 Ind., 229.

When these and other decisions which could be cited to the same effect are considered, we must conclude that the term "widow" means an unmarried woman who has lost her husband by death, and that, in no event, could a woman be considered the widow of a man from whom she had been divorced.

You will notice, however, that the benefits of this law, as found in both the Constitution and statute above quoted, extend not only to the wives and widows of indigent soldiers and sailors, but also *to women who aided the Confederacy.*

It would seem, therefore, that any woman, whether she was ever married to a Confederate soldier or sailor or not, who is over sixty years of age, is in indigent circumstances and who aided the Confederacy either in Texas during the war, or who aided the Confederacy elsewhere, and who came to Texas prior to January 1, 1880, is in her own right, and by reason of the aid she gave the Confederacy, eligible to become an inmate and to enjoy the benefits of the Confederate Woman's Home.

Of course, prior to the admission of any such to the benefits of the home, the management should be thoroughly convinced that all the necessary facts exist to justify their admission.

Yours very truly,

B. F. LOONEY,
Attorney General.

CONVICTS—COUNTY CONVICTS—COSTS.

Where a county convict makes affidavit that he is unable to pay the fine and costs adjudged against him and the county officer failed to put him to work or hire him out, under the statute, he is entitled to a credit of three dollars ($3) for each day that he may lie in jail.

Where a convict lies out his fine and costs in jail, the officers are not entitled to receive from the county any portion of their costs.

Article 878, Code of Criminal Procedure of 1911.
Article 6247, Revised Civil Statutes of 1911.
Article 6256, Revised Civil Statutes of 1911.

June 9, 1915.

Hon. John E. Kilgore, County Attorney, Huntsville, Texas.

DEAR SIR: The Attorney General is in receipt of your letter of May the 31st, reading as follows:

"Article 878 of the Code of Criminal Procedure provides that a county convict, having filed a pauper's oath, etc., shall be confined in the county jail a sufficient length of time to discharge the amount of fine and costs adjudged against him at the rate of three dollars per day, provided the county has no work for him to do, and the authorities are unable to hire him out.

"A case has arisen in our county to which the above applies. However, the question was raised in the commissioners court as to the payment of the officers' costs. I have been unable to find any case directly holding that the county is liable to the officers for their costs in such cases, but the case of Ex Parte Taylor, 30 S. W., 230, holds to that effect by inference. By request of the commissioners court I am writing you for your opinion on this point."

Replying to the above, we beg to say that in the opinion of this Department there is no obligation upon the county to pay, and the officers of the court are not entitled to their fees where a convict files the affidavit under Article 878 of the Code of Criminal Procedure, and is not put to work in the work-house or upon the public works, and is not hired out under the provisions of the law, and is therefore entitled to a credit of three dollars ($3.00) per day for the time he may remain in jail.

Article 878 of the Code of Criminal Procedure, referred to, is as follows:

"When a defendant is convicted of a misdemeanor, and his punishment is assessed at a pecuniary fine, if he makes oath in writing that he is unable to pay the fine and costs adjudged against him, he may be hired out to manual labor, or be put to work in the manual labor workhouse, or on the manual labor farm, or public improvements of the county; or, in case there be no such workhouse, farm or improvements, and, in case the county authorities fail to hire out such convict in accordance with the law regulating county convicts, he shall be imprisoned in the county jail for a sufficient length of time to discharge the full amount of fine and costs adjudged against him, rating such punishment at three dollars for each day thereof."

As we view the statutes of this State relating to matters of this character, the liability of the county to the officers of court for their fees in misdemeanor cases depends entirely upon the statutes relating thereto. Primarily, such costs are charged against the defendant, and he is responsible to the officers therefor, and it is only in cases where the county has put the convicts to work, or has hired them out and thereby received the benefits of their labor, that the county becomes responsible, instead of the convicts, for their costs.

By Section 8 of the Act, approved August 21, 1876, which became Article 3600 of the Civil Statutes of 1879, when a convict has satisfied his fine and costs in full by labor in the workhouse or upon the public works, it was the duty of the county judge to draw his warrant upon the county treasurer, in favor of each officer to whom costs were due for the amount of his costs, to be paid out of the road funds or any other county funds not otherwise appropriated. Under this statute, and up to the amendment of 1895, which is now Article 6247 of the Revised Civil Statutes of 1911, the officers were entitled to receive from the county all of their costs, but by the amendment aforesaid, they are now entitled to receive, where convicts are employed upon the public works of the county, pay one-half of such costs.

Under Article 6256 Revised Statutes of 1911, contained in Chapter 4 of Title 104, which chapter has to do with the hiring of county

convicts, whenever the amount realized from the hiring of such convict is sufficient to discharge in full the fine and costs, the county judge shall issue a warrant upon the county treasurer in favor of each officer for the amount of his costs. This latter statute covers the only instance in which the county becomes responsible to the officer for the full amount of his costs.

The case of Ex parte Taylor, 30 S. W., 230, referred to by you, and which you cite as appearing to hold inferentially that in such a case the officers would be entitled to their fees, to be paid by the county, has been carefully considered by us, and we think you are in error in placing such an interpretation upon it. The holding in this case is merely to the effect that where a convict makes the affidavit and the county authorities fail to carry out the provisions of Article 878 of the Code of Criminal Procedure, although the failure to hire out such convict was because of his refusal to be so hired out, did not deprive the convict of his right to a credit of three dollars ($3.00) per day. The court said:

"It is the duty of the commissioners court to so hire him out, and where the pauper's affidavit is made this becomes mandatory if the county would escape the payment of the fine and costs at the rate of three dollars per day in jail. The law, in this respect, is intended for the benefit of the county, which pays the expense of the convict while in jail. If he is hired out, and not in jail at the expense of the taxpayers, the law allows him the full benefit of his wages to be credited on his fine and costs; but in no event is such credit to be less than 50 cents for each day. There was no necessity for the county judge to have consulted the wishes of the convict in this case, but, as soon as the affidavit was made, he should have hired him out, and if the convict had proven refractory and had refused to labor, such labor could have been enforced. See Rev. Civ. Stat., Art. 3593."

We find nothing in this case indicating that the court intended to hold, or was impressed with the view that the county would be responsible to the officers for their costs in the event the convict laid out his fine and costs in jail, under the provisions of Article 878, Code of Criminal Procedure. On the other hand, as stated above, in this opinion we think the whole scheme of the law relating to the employment, hiring and serving out in jail of the fine and costs by a convict is opposed to the idea that where a convict performs no labor, the proceeds from which goes into the treasury of the county, that the officers shall receive from the county any of their costs.

We therefore advise you that in the case you submit, the county is not liable to the officers for any of the costs due them, and that the officers may receive their costs in the following cases only:

a. Where paid by the convict;

b. Where the convict is hired out on a convict bond and a sufficient amount is realized thereon to discharge same, the county is liabe for the full amount; and,

c. Where the convict satisfies his fine and costs by labor in the workhouse, county farm or public works, in which event the county is liable to the officer for one-half of the costs.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

CONVICT BONDS—TERMS—RELEASE.

Convict bonds may be made payable at such times and in such amounts, within the total amount of fine and costs due, as may be agreed upon between the county judge and the hirer under the convict bond.

The term of service under a convict bond cannot be greater than one day for each fifty cents of the fine and costs, although the statute provides that he shall be entitled to a credit of twenty-five cents on his fine and costs for each day he may serve under such hiring.

By agreement between the county judge and the hirer, the latter may pay all installments due to date upon the bond, and upon delivery of the convict be released from further liability on the bond.

Revised Statutes of 1911, Articles 6249, 6250, 6251.

February 19, 1915.

Hon. J. C. Shipman, County Attorney, Hamilton, Texas.

DEAR SIR: Your two favors of February 15th have been received by this Department, wherein you desire an opinion upon the following matters:

First: "Would a convict bond which provides for payments of $5 monthly be valid? Under Article 6249, Revised Statutes, among other things, is the following: 'And every convict shall be entitled to a credit of twenty-five cents on his fine and costs for each day he may serve under such hiring, including Sunday. * * *' In other words, could the rate spoken of in Article 6250, Revised Statutes (payment per day, week or month), be less than twenty-five cents per day?"

Second: "Three parties, a principal and two sureties, bonded out of jail a county convict, and were to pay a stipulated amount monthly on the amount that he owed as fine and costs. Two or three payments are now due and unpaid and I have gotten after the bondsmen about paying them. They said that they would like to pay the amount that is due to the present time, and turn him back to the county officers, or, in other words, back to jail. Now, what I want to know is your opinion in the matter as to whether or not the parties on a convict bond can, by paying the amount due on the bond, turn such convict back to the county authorities."

We will discuss your questions in the order appearing above.

1. We are of the opinion that a convict bond, providing for payments of five dollars monthly, is in compliance with the statute and valid.

Article 6249, Revised Statutes, 1911, in part provides: "Any person who may be convicted of a misdemeanor . . . . may be hired out to any individual, company or corporation within the county of conviction, to remain in said county."

The above article also provides that "every convict shall be entitled to a credit of twenty-five cents on his fine and costs for each day he may serve under such hiring, including Sundays."

There is also a provision in this article reading as follows: "And he shall be discharged at any time upon payment of the balance due on his fine and costs, or upon the expiration of his term of service. His term of service in no event to be greater than one day for each fifty cents of fine and costs."

The provision in the above article to the effect that the convict's

term of service shall in no event be greater than one day for each fifty cents of fine and costs, controls the provision that he shall be entitled to a credit of twenty-five cents on his fine and costs for each day, and therefore the convict is entitled to his discharge when he has served such hirer for a sufficient length of time to discharge the amount of his fine and costs at the rate of fifty cents per day.

Ex Parte George Duren, 40 Texas Crim., 162.
Gonzales County vs. Houston, 81 S. W., 117.

In the Gonzales case above cited the fine and costs amounted to $40.40; including the cost of hiring. The hirer executed a bond for the hire of such convict for the term of six months, at the rate of $7.50 per month. The convict served 81 days, which at fifty cents per day liquidated the amount of the bond. In a suit upon the bond the defendant set up that he was only liable on said bond for two and two-thirds months, or 81 days, at $7.50 per month, amounting to $20.20. The court held the hirer was liable for the full amount of the bond, and said:

"That law became a part of the contract, and yet, with a knowledge of it, the principal and sureties entered into an obligation to pay the county $7.50 a month for six months for the labor of the convict. It is true that it is provided in the bond that the convict should be discharged at the expiration of a term of service which, at the rate of 25 cents a day, would pay the fine and costs, but the hirer knew that the provision was in derogation of the statute. He agreed unconditionally to pay the county the fine and costs at the rate of $7.50 a month, whether the convict worked for him or not. He knew the convict could not be compelled to work more than eighty-one days for the fine and costs, and still chose to bind himself to pay the amount of $40.40 for his services."

Upon a rehearing the court discussed the question more at length, but adhered to the original holding, and gave judgment against the hirer for $40.40.

Article 6250 provides that the contract of a hirer shall be at some fixed rate per day, week, or month, which is the only obligation resting upon the county judge to comply with, with reference to the terms upon which such bond is payable.

Article 6251 provides that the obligation of the bond shall be in part as follows: First, that the hirer will prompty and faithfully pay the amount of money mentioned in the bond when the same becomes due and it shall be stated in the bond when the same becomes due. So it is left in the discretion of the county judge to enter into such a contract as may be agreed with the hirer as to the amount per day, week or month that will be exacted under the bond and in the due date of such payments.

Ex parte George Duren, 40 Texas Crim., 162.
Gonzales County vs. Houston, 81 S. W., 117.
Flewellen vs. Fort Bend Co., 17 Tex. Civ., 155.
Ellis vs. Fort Bend Co., 31 Texas Civ., 596.

We therefore advise you that a convict bond providing for payments of five dollars monthly would be valid, and that the hirer would

be liable thereon for the full amount of the fine and costs payable five dollars per month, and that the convict could not be forced to serve such hirer under the bond for a greater length of time than one day for each fifty cents of the fine and costs.

2. Replying to your second inquiry, we are of the opinion that upon agreement between the county judge and the hirer, and the delivery back of the convict, the bond executed by the hirer would be discharged.

Article 6251, Revised Statutes, 1911, vests the county judge with the discretion to make such contract with the hirer and prisoner as he may think best, provided always he acts within the limitations prescribed by Chapter 4 of Title 104, Revised Statutes, 1911.

Sayler et al. vs. Wilcox, Co. Judge, 170 S. W., 654.
Ex parte Miller, 72 S. W., 183.

In the Miller case, above cited, the court in discussing the right of the hirer to deliver the convict as a compliance with the bond, said:

"The contention, as we understand the record, is that the convict bond having been given, and the relator released from custody under and by virtue of it, the subsequent return by the hirer and the acceptance of relator by the county judge was void, and that the execution of the convict bond, under the facts stated, was of that character which could not be abrogated by the act of the hirer and the consent of the county judge. We believe this contention to be incorrect. There is no provision in our statute which prohibits the county judge from receiving back a convict after he has been hired out, or his acceptance of a convict under the circumstances detailed. * * * The statute authorizing the hiring of convicts seems to be full and ample, and leaves a large discretion with the county judge in making these contracts. It does not undertake to limit to one character of contract, or require an indivisible contract; that is, it does not undertake to require the county judge to hire out convicts, stretching over a sufficient time to cover the entire amount of fine and costs; and, if it did, this would frequently be found to be onerous, and even impossible. Persons are willing at times to hire convicts for a month, or for a limited period, when they would be unwilling to hire them for a longer time. Therefore, we believe the county judge did not err in receiving the convict back."

The case of Sayler et al. vs. Wilcox, above referred to, gives as one of the methods whereby a convict bond may be discharged and the obligors relieved, "a subsequent contract between the county judge and the obligors agreeing to take back the convict and his delivery under such agrement."

It therefore appears that the right of the hirer to return the convict and discharge the bond in pursuance of an agrement to that effect between him and the county judge, is not an open question.

We therefore advise you that upon the payment of the amount due upon the bond to date and a delivery of the convict into the custody of the officers in pursuance of an agreement made between the hirer and the county judge, would be a discharge of the obligation.

Yours very truly,

C. W. TAYLOR,

Assistant Attorney General.

COSTS—OFFICERS—CONVICTS.

The cash payments upon the total fine and costs assessed against the defendant should be applied, first, to the payment of officers' costs, and, second, to the discharge of the fine.

Where a fine is imposed in the justice court, the total fine and costs aggregating $18.70, and the defendant pays $8.70 in money and is committed to jail in default of the balance, the $8.70 should be applied on the costs.

Articles 6238 and 6249, Revised Statutes of 1911.
Article 1112, Code of Criminal Procedure.
Section 24, Article 16, Constitution.
Articles 1432 and 1436, Revised Statutes of 1911.

November 1, 1915.

Hon. Elmer Graham, County Attorney, Seymour, Texas.

DEAR SIR: In your favor of recent date addressed to the Attorney General, you submit the following:

"Suppose a man has a $5 fine imposed on him in justice court and the costs and fine aggregate $18.70; he has $8.70 in money to pay on same, and is committed to jail in default of the balance. Would the $8.70 have to be applied on the fine, or could it all be applied to the officers' costs?"

The statutes of this State are silent upon the question presented by you. We are of the opinion, however, that the officers of court are entitled to priority of payment out of any funds paid by the defendant.

Section 24 of Article 16 of the Constitution of this State is in the following language:

"The Legislature shall make provision for laying out and working public roads, for the building of bridges, and for utilizing fines, forfeitures and convict labor to all those purposes."

In pursuance of this constitutional provision the Legislature enacted Articles 1433 and 1438, Revised Statutes of 1911, the second subdivision of each of said articles dealing with the appropriation of fines in payment for work done on roads and bridges, and by Article 6236 it is provided that convicts shall be put to labor upon the public roads, etc.

In the case you present it is contempated by the law that when the defendant was committed to jail in default of payment of the balance of his fine and costs, that he should be put to work upon the roads of the county or other public work thereof. Whereas, if he had paid his fine and costs in full, the $5.20 fine would have been applied to work upon the public roads of the county, and in either event the purpose of the Constitution and statutes that all fines should be applied to the roads and bridges of the county would have been met.

It will be noted that in Article 6249, which provides for the hiring out of convicts, it is provided as follows:

"And the proceeds of said hiring, when collected, shall be applied, first, to the payment of the costs, and, second, to the payment of the fine."

This is recognition by the Legislature that the officers of the court are entitled to priority of payment for the costs accruing to them. We can see no distinction, in so far as priority of payment is concerned, in the hiring of convicts and in the case you present, and we are, for this reason, of the opinion that where partial payments are made upon the fine and costs that the costs would first be paid.

As having some bearing upon a question of this character we quote Artice 1112, Code of Criminal Procedure, which is as follows:

"Costs shall not be taxed after defendant has paid.—No further costs shall be taxed against a defendant or collected from him in a criminal case after he has paid the amount of costs taxed against him at the time of such payment, unless otherwise adjudged by the court upon a proper action filed for that purpose."

We think, under this statute, that if the defendant had so desired he could have paid into the court $13.70, the amount of costs, and thereby been secured against the taxing of any further costs in the case that might have been omitted from the bill as then rendered. This statute clearly gives the right of the payment of costs independent of the payment of fines, and we think warrants the interpretation that payments should first be applied to the payment of costs, as the defendant would be presumed in making a partial payment to have intended such payment to secure to him any benefit permitted by the statute.

The courts of this State in civil matters have continuously held that costs should be paid first.

City of San Antonio vs. Campbell, 56 S. W., 130.
City of San Antonio vs. Berry, 48 S. W., 499.
Greer, Mills & Co. vs. Riley's Estate, 53 S. W., 578.

In the case of the City of San Antonio vs. Berry, supra, the court held that costs of enforcing a lien are an incident of the debt and become a part of it, and that from the proceeds of the sale the costs are first to be paid. From what has been said above with reference to the collection of costs in criminal cases under our statutes relating thereto as well as the rule laid down in civil cases, we are of the opinion, and so advise you, that officers' costs in criminal cases are entitled to priority of payment and that in the case you present the $8.70, cash paid by the defendant, should have been applied on the costs.

Yours very truly,
C. W. TAYLOR,
Assistant Attorney General.

COUNTIES—LANDS.

Sales of real estate belonging to a county must be at public auction by a commissioner appointed by the commissioners court.

Sale at public auction of real estate belonging to county by a commis-

sioner appointed for that purpose should be preceded by advertisement as in judicial sales.

Articles 1370 and 3757, Revised Civil Statutes of 1911.

October 19, 1915.

Hon. W. R. Gibson, County Attorney, Claude, Texas.

DEAR SIR: The Attorney General is in receipt of your letter of October the 16th, reading as follows:

"The commissioners court of Armstrong county propose to sell twenty-five feet off of the east end of each of lots 13 and 14 in block 2, in the original town of Claude, the same being a part of the one-fourth block owned by the county and on which the jail is situated. They have passed an order and entered same on the minutes of the court appointing a commissioner to sell and deed said property in conformity to Article 1370 of Vernon's Sayles' Texas Civil Statutes. Now, what I desire to know is whether said article requires that the commissioner so appointed to advertise the property before offering it for sale? As I understand this statute, it requires that the property be advertised by posted notices or a notice in the local paper, giving the time and place of sale, and that it be sold in accordance with such notice, to the highest bidder, but the court thinks it can be sold by the commissioner without giving any notice either by posting or by publication.

"In my judgment, a sale without notice would, or might be, a private sale in reality, and the property might be sold for less than it would have brought if notice of sale had been given, and in that event the sale would be void. Am I correct, or is the court correct?

"To get the matter more clearly before you, I will state that a certain party wants this property for a specific purpose, but there might be others here who would be willing to pay more for it for other purposes, and if sold without advertising some one might say that had he known the sale was going to be made he would have given more for the property. See the case of Llano County vs. Knowles, 29 S. W., 56, and also the same case reported in the same volume, page 549."

Replying thereto, we beg to say that in our opinion a private sale of real estate belonging to a county would be invalid, and a deed executed by a commissioner, under such sale, would not suffice to pass title to the real estate therein described.

Ferguson vs. Halsell, 47 Texas, 421.
Penn vs. City of Laredo, 26 S. W., 636.
Ind., etc., Co. vs. Sulphur Springs, 63 S. W., 908.
Wooters vs. Hall, 61 Texas, 15.
Bell County vs. Felts, 120 S. W., 1071.
Matagorda Co. Dr. Dist. vs. Gaines & Corbett, 140 S. W., 374.
Hardin County vs. Nona Mills Co., 112 S. W., 825.
Spencer vs. Levy, 173 S. W., 554.
Logan vs. Stevens County, 81 S. W., 109.
Llano County vs. Knowles, 29 S. W., 549.

Article 1370 of the Revised Civil Statutes of 1911, reads as follows:

"The county commissioners court may, by an order to be entered in the minutes of said court, appoint a commissioner to sell and dispose of any real estate of the county at public auction; and the deed of such commissioner, made in conformity to the order of said court, under his proper hand and seal, for and in behalf of the county, duly acknowledged and

proven and recorded, shall be sufficient, to all intents and purposes, to convey to the purchasers all the right, title and interest and estate whatever which the county may have in and to the premises to be conveyed; provided, however, that nothing contained in this article shall authorize the county commissioners court of any county to dispose of any lands given, donated or granted to such county for the purposes of education in any other manner than shall be directed by law."

The wording of this statute had not been changed from the original enactment, and the cases cited above are all founded thereon.

In the case of Ferguson vs. Halsell, supra, the court in passing upon this question, used the following language:

"It is contended that such title is defective and void, inasmuch as it is a private sale to him directly by the county court, and not a sale at public auction by a commissioner appointed for that purpose by the county court, as required by the general statute regulating the sale of the real estate of the county. It is provided in the statute that 'the county court may, by an order to be entered in the minutes of said court, appoint a commissioner to sell and dispose of any real estate of the county at public auction; and the deed of said commissioner, made in conformity to the order of said court, under his proper hand and seal, for and in behalf of the county, duly acknowledged and proven and recorded, shall be sufficient, to all intents and purposes, to convey to the purchasers all the right, title and interest and estate whatever which the county may have in and to the premises conveyed.' (Paschal's Dig., Art. 1052.) Although this statute is permissive in its terms, yet it is the only mode expressly pointed out in the general laws of the State by which the county court can divest the county of its title to its real estate. No special law, as applicable to this particular case, has been referred to. The general doctrine is that as the county court is the agent of the county, in its corporate capacity, it must conform to the mode prescribed for its action in the exercise of the powers confided to it. The prescribing of a mode of exercising a power by such subordinate agencies of the government has often been held to be a restriction to that mode."

The following authorities may be referred to in support of the views here presented:

"A corporation must act in the mode provided for it. (2 Cranch, 150; 3 Wheat., 64; 20 Cal., 96.)

"A city corporation, with power to let out work upon notice, must give the notice; otherwise, the tax to pay for it can not be collected. (18 Wis., 92.)

"Municipal corporations are but agents, and persons dealing with them must know their powers. (20 Md., 1.)

"Contracts with corporations should be made in the mode pointed out in the charter. (Dill on Munic. Corp., 387.) Otherwise they will not be binding. (Ang. & Ames on Corp., 9th ed., 253.)

"These general authorities will suffice to show that appellant's title was not well founded, and that the court did not err in sustaining exceptions to the petition setting it up."

In the later case of Spencer vs. Levy, supra, the same question being under consideration by the court, it is said:

"We are of the opinion that the deed executed by the chief justice of Falls county to Frank Barnes, under whom W. M. Reed claimed, did not convey title to the grantee therein, for the reason that it does not appear

that he was appointed by the commissioners court to sell said land, nor that such sale was made at public auction."

The article of the statute above cited is the only authority upon which the commissioners court is authorized to dispose of real estate belonging to the county, and where such authority is thus given it must be strictly followed in order that the title of the county may be divested.

In the case of Matagorda County Drainage District No. 1 vs. Gaines & Corbett, above cited, the court in discussing the authority of officers, quoted from the case of Smith vs. City of Newburgh, 77 New York, 131:

"An absolute excess of authority by the officers of a corporation in violation of law cannot be upheld; and when the officers of such a body fail to pursue the strict requirements of a statutory enactment under which they are acting, the corporation is not bound in such cases, the statute must be strictly followed; and a person who deals with a municipal body is obliged to see that its charter has been fully complied with. When this is not done, no subsequent act can make the contract effective."

In the case of Hardin County vs. Nona Mills Co., supra, the court in discussing a question of this character said:

"A sale made otherwise than at public auction does not pass any title out of the county, because the exercise of the power to sell is in violation of the mode prescribed, and the sale is therefore void."

It therefore appears it would be necessary, in making the sale of the land belonging to the county, that the commissioners court appoint a commissioner, and that such sale be at public auction. Although the statute authorizing the sale of real estate belonging to the county and prescribing the procedure to be followed, does not specifically require that such auction and sale be advertised, yet we are of the opinion that such sale partakes so much of the nature of a judicial one as to require the advertisement made essential by law to the validity of sales of the latter charatcer.

In the case of voluntary auction sales of private property, there is no legal necessity for advertisement, and it is optional with the owner whether an advertisement precede the sale. (2 Ruling Cas Laws, 1122.) However, the sale of real estate belonging to a county, while a voluntary one on the part of the court, is not a sale of private property. The fact that the Legislature, in conferring this power upon the commissioners court, declared that such sales should be at public auction, discloses the purpose of that body to secure all possible publicity of the sale and to prevent any manipulation of price or favoriteism as to purchaser, such as would be possible in a private sale, or at a sale at auction, the time and place of which the public had no notice.

The rule as to notice in judicial sales is declared, in Morris vs. Hastings, 70 Texas, 26, to be:

"When notice of the sale has not been properly given, if application be made by the defendant in execution without unnecessary delay, the sale

may be set aside. But the notice of the sale, being for the benefit of the defendant, will be considered waived if not made in a reasonable time. (Freeman on Executions, 286.) And in a collateral proceeding it is not essential to the validity of the sale that there should have been an advertisement of the property. (Howard vs. North, 5 Texas, 308, 309.) Though if such irregularity is brought about by the fraud and collusion of the purchaser, and the property sells for a grossly inadequate price, the sale may be avoided as to such vendee and those holding under him with notice. (Stone et al. vs. Day, 69 Texas, 13.)"

A sale by the commisisoner, in the case you present, if made at public auction without advertisement, and it could be shown that the failure to advertise was the result of collusion between the commissioner and the purchaser and the property bought at an inadequate price, the same could be avoided.

We therefore advise that the commissioner should advertise such sale in the manner provided in Article 3757, Revised Statutes, for judicial sales.

Yours very truly,
C. W. TAYLOR,
Assistant Attorney General.

COURTS—APPELLATE DISTRICTS—ACT OF LEGISLATURE—COUNTIES.

Legislature intended to place Panola county in the Ninth Supreme Judicial District.

June 3, 1915.

Hon. J. R. Duran, County Attorney, Carthage, Texas.

MY DEAR SIR: The following question has been propounded to this Department by Mr. W. G. Banks, of your city:

Chapter 70, Acts of 1915, creating a Court of Civil Appeals for the Ninth Supreme Judicial District, provides that the Sixth district shall be composed of various counties, including Panola, and also provides that the Ninth district shall be composed of various counties, *including Panola.* The question to be determined is whether Panola county is in the Sixth or Ninth Supreme Judicial District.

Replying, I beg to state:

Chapter 120, Acts of 1911, provided that Panola county should be placed in the Sixth Supreme Judicial District. The counties composing the Sixth District as provided in the Acts of the Thirty-fourth Legislature are the same as the counties named in the Acts of the Thirty-second Legislature, with the exception of Shelby county, which is placed in the Ninth Supreme Judicial District. The counties composing the Ninth District, as shown by the Acts of 1915, are:

The counties of Shelby, Panola, Nacogdoches, Angelina, San Jacinto, Montgomery, Liberty, Jefferson, Orange, Hardin, Newton, Jasper, Tyler, Polk, Sabine, San Augustine. As the placing of Panola county in the Ninth District was subsequent to placing it among the counties of the Sixth District, and as the list of counties named in the Act of

1915 for the Sixth District is practically the same as the list named in the Act of 1911, excepting Shelby county, I am of the opinion, and so advise you, that it was the intention of the Legislature to place Panola county in the Ninth Supreme Judicial District.

It also appears to have been the intention of the Legislature to place Panola county in the Ninth District, for the reason that the county of Shelby is taken from the Sixth District, and the counties of Shelby and Panola are the names of the first two counties now comprising the Ninth District.

I am addressing this opinion to you direct, and am sending a copy of the same to Mr. Banks, for the reason that Chapter 26, Acts of 1913, prohibits the Attorney General from giving opinions to any one except the officials therein named.

Very respectfully,

B. F. LOONEY,
Attorney General.

COURTS—JUSTICE OF THE PEACE—CITY ORDINANCES.

A justice court has no jurisdiction in cases arising under penal ordinances of a city or town.

Article 106, Code of Criminal Procedure.

Article 903 et seq., Revised Statutes of 1911.

August 23, 1915.

Hon. L. H. Brittain, County Attorney, Albany, Texas.

DEAR SIR: The Attorney General has your letter of date August 19th, reading as follows:

"The city of Albany is an incorporated town, and has no city court. Can the city file criminal suits that are not on the penal code of Texas and have county attorney to prosecute same through the justice court."

Replying to the above inquiry, I beg to say that while the Act of 1899 which is now incorporated in the Revised Civil Statutes of 1911, which is Article 903 et seq., conferred upon corporation courts concurrent jurisdiction with justice courts in all criminal cases arising under the criminal laws of this State in which the punishment is by fine only and where the maximum of such fine may not exceed $200 and arising within the territorial limits of such city, town or village, yet there has been no legislation conferring upon justice courts jurisdiction of offenses arising under any penal ordinances enacted by the council or commission of any city, town or village.

Article 106, Code of Criminal Procedure, 1911, defining jurisdiction of justice courts is in the following language:

"Justices of the peace shall have and exercise original concurrent jurisdiction with other courts in all cases arising under the criminal laws of this State in which the punishment is by fine only, and where the maximum of such fine may not exceed two hundred dollars, except in cases involving official misconduct."

Article 904, Revised Civil Statutes of 1911 being a portion of the corporation court Act of 1899, in defining the jurisdiction of the courts therein created provides:

"Said court shall have jurisdiction within the territorial limits of said city, town or village, within which it is established, in all criminal cases arising under the ordinances of the said city, town or village, now in force, or hereafter to be passed, and shall also have jurisdiction concurrently with any justice of the peace in any precinct in which said city, town or village is situated, in all criminal cases arising under the criminal laws of this State, in which the punishment is by fine only, and where the maximum of such fine may not exceed two hundred dollars and arising within the territorial limits of such city, town or village."

It will thus be seen that jurisdiction of offenses made such by penal ordinances of cities, towns or villages is exclusive in the corporation court and therefore a justice court could not entertain jurisdiction of such offenses, and that until a corporation is authorized under the provisions of the corporation court act there is no court having jurisdiction to try offenses against city ordinances. The corporation court act above referred to constitutes the mayor of a city, town or village organized under the general law ex officio recorder unless the city council or board of aldermen shall by ordinance authorize the election of a recorder, and it would appear that it would be a very easy matter to organize in your town a corporation court with jurisdiction to try cases arising under the ordinances of the town.

Yours truly,

C. W. TAYLOR,
Assistant Attorney General.

CRIMINAL LAW—BAIL BOND—FIXING AMOUNT OF BAIL—HABEAS CORPUS.

When the district court is in session the judge thereof has authority to fix the amount of bail where a defendant is charged with a felony and it is a bailable case, and it is not necessary to resort to habeas corpus in order for the court to fix such bail.

When the district court is not in session and the defendant is arrested upon indictment found by the grand jury charging him with a felony, if the offense is a bailable one the sheriff may take bail.

The county or district attorney, as the case may be, is entitled to his fee when he actually represents the State on habeas corpus hearing.

Articles 316, 318, 337, 1118, Code of Criminal Procedure.

April 16, 1915.

Hon. Sam Neathery, County Attorney, McKinney, Texas.

DEAR SIR: In your letter of recent date you state the holding of your district judge to be that where a defendant charged with a felony is arrested while court is in session the only correct way the judge can set the bond is for the defendant to make application for habeas corpus. You desire to know if you as county attorney repre-

senting the State in such habeas corpus hearing would be entitled to your fee of $16 under Article 1118.

Replying thereto, we beg to advise that the right of the prosecuting attorney to a fee in habeas corpus cases does not in any manner depend upon the motives prompting the filing of the application, and whatever may be the cause of the filing of the application same has no relevancy in determining the right of such official to his fees under the statute. Article 1118, Code of Criminal Procedure, fixes the fee of the county attorney for representing the State in counties of the class to which Collin county belongs at $16, and you would be entitled to such fee if you actually appeared and represented the State upon the hearing.

The holding of your district judge, however, to the effect that defendant can be admitted to bond while court is in session only upon habeas corpus is contrary to our view and before we could agree to the correctness of this position we would have to be cited to such authorities as would materially change our view of the law as it now is.

It was formerly the rule in this State that where the court was in session and the defendant was arrested upon a felony charge it was the duty of the officer to take such defendant before the court in order that he might enter into recognizance or be committed, as the case may be. Article 325 of the Code of Criminal Procedure of 1895 read as follows:

"In cases of felony, when the accused is in custody of the sheriff or other peace officer, and the court before which the prosecution is pending is in session in the county where the accused is in custody, such sheriff or peace officer is not authorized to take a bail bond of the accused, but must take the accused forthwith before such court, that he may there enter into recognizance or be committed, as the case may be."

Under the above article it seems that the sheriff or other peace officer had no authority to take bail if the court was in session, but the defendant must be taken before the court and enter into a recognizance for his enlargement or be committed, as the court might determine. Under this article it was held that upon examining trial before a magistrate and the fixing of the bond that the sheriff would have authority to take the bond, but that such procedure did not apply to felony indictments pending before the district court.

Peters vs. State, 10 Crim. App., 302.
Gragg vs. State, 18 Crim. App., 295.
LaRose vs. State, 29 Crim App., 215.
Arrington vs. State, 13 Crim. App., 551.
Lindsey vs. State, 39 Crim. App., 468.
Short vs. State, 16 Crim. App., 44.
Kiser vs. State, 13 Crim. App., 201.

Such was the rule in this State until the amendment to Article 325 by the Act of 1907, page 148, which amendment is now Article 337, Code of Criminal Procedure of 1911, which reads as follows:

"In cases of felony, when the accused is in custody of the sheriff or other peace officer, and the court before which the prosecution is pending is in

session in the county where the accused is in custody, the court shall fix the amount of bail, if it is a bailable case; and the sheriff, or other peace officer, unless it be the police of a city, is authorized to take a bail bond of the accused, if executed with good and sufficient sureties, in the amount as fixed by the court, to be approved by such officer taking the same, and will thereupon discharge the accused from custody; and it shall not be necessary for the defendant or his sureties to appear in court, but such bail bond may be taken as if court was not in session, except for the fixing of the amount of bail as aforesaid."

It will be noted that by the amendment it is now made the duty of the court to fix the amount of bail, if it is a bailable case, if the court is in session in the county where the accused is in custody and the sheriff or other peace officer is authorized to take the bail of the accused in the amount fixed by the court and such bonds would be approved by the officer taking the same. It will be further noted from a reading of this article that the old rule of entering into a recognizance as defined by Article 316 is in effect abrogated or at least it is not now the sole method of enlarging the defendant for the new act expressly says that it shall not be necessary for the defendant or his sureties to appear in court. This new act serves two purposes. It obviates the necessity of entering into a recognizance, and second, it authorizes the sheriff to take and approve a bail bond, the amount of which has been fixed by the court while such court is in session:

Article 318, Code of Criminal Procedure, reads as follows:

"A bail bond is entered into either before a magistrate, upon an examination of a criminal accusation against a defendant, or before a judge upon an application under habeas corpus; or it is taken from the defendant by a peace officer who has a warrant of arrest or commitment, as hereafter provided."

This article is merely a definition of a bail bond and is not in any sense a limitation upon the right to bail or the manner in which bail may be entered into. It is true this article contains the expression that a bail bond is entered into before a judge upon an application under habeas corpus. This is merely, as said before, a definition of one character of bail bond and it would be applicable where a district court was not in session in the county in which the defendant was in custody and for any reason the sheriff or other peace officer having custody of the defendant should not allow bail, and the defendant should make application before the district judge to be admitted to bail upon habeas corpus.

We are of the opinion that it is made the duty of the district judge when the district court is in session upon it being made known to him that a defendant was in custody upon a grand jury indictment for a felony, to set the amount of the bail bond provided of course that the offense was not a capital one where the proof is evident as provided in Article 6, Code of Criminal Procedure. Of course in cases mentioned in Article 6 the court would have no authority to fix the amount of the bail without a hearing and such hearing should be under an application for habeas corpus.

We therefore advise you that in our opinion it is the duty of the

district judge when it is made known to him in any manner that a defendant is in custody upon a grand jury indictment charging him with a felony, if a bailable case, to fix the amount of bail and that upon the judge so fixing the amount of bail the sheriff or other peace officer having the defendant in custody would have authority to take and approve the bail bond.

Any other construction of our statutes would be unjust to the State and to our minds wholly without the contemplation of the statute for the reason that if every case where a defendant is charged with a felony in order to be admitted to bail while court is in session he must resort to habeas corpus thereby imposing upon the State the burden of the fees in such cases which we doubt not would result in fees being paid in an amount aggregating thousands of dollars and the treasury would be overwhelmed by obligations of this character.

Very truly yours,
C. W. TAYLOR,
Assistant Attorney General.

CRIMINAL LAW—PROCEDURE—CONTEMPT—JUSTICE OF THE PEACE.

1. Proceedings in case of contempt prosecuted to vindicate the authority of the court are punitive and criminal in their nature.
2. Such proceedings being criminal cases, the justice of the peace committing the contemnor and the peace officer executing the commitment may tax and collect as costs in such cases the fees prescribed by statute for like services rendered in other criminal cases, provided the judgment includes costs.

January 18, 1915.

Hon. Henry E. Pharr, County Attorney, Sulphur Springs, Texas.

DEAR SIR: Under date of December 15th, in a letter addressed to this Department, you state that the justice of the peace of Precint No. 1 of your county, assssed a fine of $5.00 against a party for contempt of court for refusing to answer questions propounded to him relative to certain violations of law, and ordered said contemnor committed to jail until he purged himself of said contempt by giving answers to said questions, and until he satisfied the fine assessed against him; that said contemnor, in obedience to said commitment, was incarcerated in jail, remaining there a day, after which time he was, at his request, again taken before the justice of the peace and purged himself of the contempt by making answers to said questions, and further satisfied the judgment of the court by paying the fine of $5.00 assessed against him as punishment for said contempt.

You desire to know whether any costs should have been taxed and collected as a part of the judgment in said case, or whether the contemnor was entitled to his release upon answering the questions and the payment of the fine.

We assume the justice of the peace was proceeding under the provisions of Articles 976 and 977, Code of Criminal Procedure, 1911. Said articles provide as follows:

"Art. 976. When a justice of the peace has good cause to believe that an offense has been, or is about to be, committed against the laws of this State, he may summon and examine any witness or witnesses in relation thereto; and, if it shall appear from the statement of any witness or witnesses that an offense has been committed, the justice shall reduce said statements to writing, and cause the same to be sworn to by the witness or witnesses making the same; and, thereupon such justice shall issue a warrant for the arrest of the offender, the same as if complaint had been made out, and filed against each offender."

"Art. 977. Witnesses summoned under the preceding article who shall refuse to appear and make a statement of facts, under oath, shall be guilty of contempt of court, and may be fined not exceeding one hundred dollars, and may be attached and imprisoned until they make such statement."

A refusal of a witness to answer any question which he may be lawfully required to answer is a contempt of court. A justice of the peace has the authority under the above quoted statutes to summon and examine witnesses relative to offenses that have been committed, or are about to be committed against the laws of the State, and if a witness so summoned should refuse to appear, or after having appeared should refuse to answer any question pertinent to the case under investigation, which he could be lawfully required to answer, he could be adjudged guilty of contempt of court and punished therefor by fine not exceeding one hundred dollars, and imprisoned until he purged himself of the contempt and until he satisfied the judgment against him.

In such cases the fine is assessed as a punishment for the offense committed. The offense is not committed against the judge or the court, but against the State. (Rudd vs. Darling, 25 Atl., 479.)

"Criminal contempts are all acts committed against the majesty of the law or against the court as an agency of the government and in which therefore the whole people are concerned. In criminal contempts the proceeding is punitive and the punishment operates *in terrorem* and has a tendency to prevent the repetition of the offense." State vs. Shepherd, 76 S. W., 79.

"Proceedings for contempt prosecuted to preserve the power and vindicate the dignity of the court and to punish for the disobedience of their orders are criminal and punitive in their nature and the government, the courts and the people are interested in their prosecution." In re Nevitt, 117 Fed., 448.

"Contempt of court is a specific criminal offense. But what class of criminal offenses 'contempt' belongs to is nowhere defined. It may be punished by fine or imprisonment at the discretion of the court. * * * So that a contempt incurred by violating an order of the court prohibiting anyone from interfering with the receivers of a railway with its operation, is a criminal offense." In re Acker, 66 Fed., 290.

In the case of New Orleans vs Steamship Co., 20 Wall., 387, the Supreme Court of the United States said:

"Contempt of court is a specific criminal offense. The imposition of a fine was a judgment in a criminal case."

In the case of Ex parte Robertson, 27 Texas Court of Appeals, 631, the Court of Appeals of this State said:

"Contempts are of two kinds, civil and criminal. 'Civil contempts are those quasi contempts which consist in failing to do something which the contemnor is ordered by the court to do for the benefit of advantage of another party to the proceeding before the court; while criminal contempts are all those acts

in disrespect of the court or of its process, or which obstruct the administration of justice, or tend to bring the court into disrepute. * * *"

In his able work on contempts, Mr. Rapalje says:

"An examination of the authorities, English and American, discloses five different kinds of imprisonment for civil and criminal contempts: 1. Imprisonment in the first instance by way of punishment for a criminal contempt. 2. Imprisonment for the non-payment of a fine imposed as such punishment. 3. Imprisonment for non-payment of a fine or penalty imposed as a compensation to the person injured by the violation of an order or decree in a civil action. 4. Imprisonment to compel compliance by a party or witness with the requirements of an order or decree of the court; and, 5, imprisonment for non-payment of costs."

In an able article on criminal contempts in the fifth volume of the Criminal Law Magazine, the distinguished writer, Mr. Seymour D. Thompson, says, with regard to imprisonment for the non-payment of a fine imposed as an indemnity to a party:

"The principles governing this species of imprisonment appear to be, for the most part, substantially the same as in cases of imprisonment for the non-payment of a fine imposed as a punishment for a criminal contempt; and with regard to this latter, he says that 'unless otherwise provided by statute, the ordinary form of the judgment is that the party is committed to jail until the fine and costs are paid'."

From the foregoing authorities we think it apparent that a contempt proceeding, such as the one under consideration, is a criminal proceeding or a criminal case. The justice of the peace has the authority to assess the fine as punishment for the offense committed and he likewise has the power to commit the contemnor until the judgment is satisfied.

The contemnor can not be lawfully committed to jail until the court has entered his order or judgment and issued his commitment based thereon. The commitment is the authority of the peace officer to incarcerate the contemnor.

The Fee Bill authorizes the justice of the peace to tax and collect the following fees in criminal cases:

"For each final judgment, 50c;
"For each commitment, $1.00."

The Fee Bill likewise authorizes the sheriff or constable to tax and collect the following fees in criminal cases:

"For each commitment or release, $1.00;
"For each mile he may be compelled to travel in executing criminal process, 5c."

In the instant case it was necessary that the justice of the peace render and enter a judgment against the contemnor. It was likewise necessary for him to issue a commitment. He was, therefore, entitled to tax and collect the fees prescribed by statute for such services. The peace officer executing the commitment was also entitled to tax and collect $1.00 for commitment and $1.00 for release, the contemnor having been actually committed, and said peace officer

was also entitled to charge for the necessary mileage, if any, he had to travel in executing said process. These costs, however, could be collected only upon condition that the judgment provided for the collection of same; that is, the judgment should have found the facts constituting the contempt, assessed the fine, and ordered that the contemnor be committed to jail until he purged himself of said contempt by answering the questions and until he further satisfied the judgment by paying the fine, together with all costs of said proceeding. If the judgment embraced the costs of the proceeding, we are of the opinion that the justice of the peace and the peace officer executing the commitment could lawfully collect the fees above indicated, but if the judgment did not provide for the collection of the costs, we do not think same could be collected.

Yours very truly,
C. A. SWEETON,
Assistant Attorney General.

CRIMINAL LAW—APPEARANCE BONDS—LIABILITY OF SURETIES.

1. A defendant in a misdemeanor case, after conviction, can not lawfully remain at large on his appearance bond pending action by the court on his motion for new trial.
2. In misdemeanor cases when the case goes to trial, the defendant is by that fact taken from the bondsmen and is in the custody of the officers and his bondsmen are discharged of liability until a new trial is awarded, either by the trial court or by the Court of Criminal Appeals.

May 13, 1915.

Hon. Dan Lewis, County Attorney, San Antonio, Texas.

DEAR SIR: Under date of May 8th, you requested the opinion of this Department upon the following question:

"The question has arisen here in the county court as to whether or not a defendant, after conviction, can stay at large on his appearance bond, and as to whether or not he will have to enter into a recognizance at once or will the appearance bond hold good during the time between filing motion for a new trial and conviction.

"I have been unable to find any authorities on this question and will appreciate your opinion thereon."

In order to determine when the liability of sureties on bail bonds in misdemeanor cases is discharged, it is necessary to first examine the statutory requisites of a bail bond.

Article 321, Code of Criminal Procedure, provides as follows:

"A bail bond shall be sufficient if it contain the following requisites:

"1. That it be made payable to the State of Texas.

"2. That the obligors thereto bind themselves that the defendant will appear before the proper court or magistrate to answer the accusation against him.

"3. If the defendant is charged with an offense that is a felony, that it state that he is charged with a felony. If the defendant is charged with a misdemeanor, that it state that he is charged with a misdemeanor.

"4. That the bond be signed by the principal and sureties, or in case all or either of them can not write, then that they affix thereto their marks.

"5. That the bond state the time and place, when and where the accused binds himself to appear, and the court or magistrate before whom he is to appear. In stating the time, it is sufficient to specify the term of the court; and in stating the place, it is sufficient to specify the name of the court or magistrate, and of the county."

A bond made in compliance with the above statutory provisions binds the defendant and his sureties for his appearance before the court in which the charge against him is pending at a time and place certain, then and there to remain from day to day and from term to term to answer the accusation against him or until he shall be discharged from further liability thereon according to law.

Article 843, Code of Criminal Procedure, 1911, provides:

"The effect of a new trial is to place the cause in the same position in which it was before any trial had taken place. The former convictions shall be regarded as no presumption of guilt, nor shall it be alluded to in the argument."

The provisions of Articles 321 and 843, Code of Criminal Procedure, are applicable to bonds in misdemeanor cases. The law with reference to bonds in felony cases was changed in some respects by the Legislature in 1907, which change we will hereafter notice.

Under the law as it existed prior to 1907, which law now governs bonds in misdemeanor cases, our Court of Criminal Appeals held that when a case goes to trial, the liability of the bondsmen on the appearance bond is discharged until a new trial is granted, either by the trial court or by the Court of Criminal Appeals, in which event the defendant is entitled to be released upon his original appearance bond, and when so released, the liability of his bondsmen again attaches.

By virtue of the fact that the case goes to trial, the defendant is taken from the custody of his bondsmen and placed in the custody of the officers and the bondsmen are absolved from further liability, unless a new trial is granted; that is, during the period from the time the case goes to trial until a new trial is granted, the bondsmen are not responsible for the defendant and are therefore not liable on the bond. If in the event of a conviction a new trial is not granted, either by the trial court or the Court of Criminal Appeals, the liability of the bondsmen is not revived; but if a new trial is granted by the trial court or by the Court of Criminal Appeals, the defendant is entitled to his liberty under the original appearance bond, and if released thereon the bondsmen again become liable.

As above stated, the Legislature in 1907, made some changes in the law with reference to bonds in felony cases, by the enactment of Article 900, Code of Criminal Procedure, which statute enlarges the liability of bondsmen in felony cases only. Said statute provides:

"Where the defendant in cases of felonies is on bail when his trial commences the same shall not thereby be considered as discharged, until the jury shall return into court a verdict of guilty, and the defendant taken in custody by the sheriff; and he shall have the same right to have and remain on bail during the trial of his case and up to the return into court of such verdict of guilty, as under the law he now has before the trial commences; but imme-

diately upon the return into court of such verdict he shall be placed in the custody of the sheriff and his bail be considered as discharged."

The above quoted statute has no application whatever to misdemeanor cases. In the case of Wiseman et al. vs. State, 156 S. W., 683, in an opinion written by Presiding Judge Davidson of the Court of Criminal Appeals, the question of the liability of bondsmen, both under the old and the new law, is fully and clearly discussed, and as misdemeanor cases are now governed by the old law, we consider this opinion of the court decisive of the question submitted by you, and will therefore quote a portion of same directly in point:

"There is another proposition presented for reversal. Appellant went upon his trial and was convicted. This conviction was at a subsequent day of the term, by the trial judge set aside and a new trial awarded. Section 2 of the Acts of the Thirtieth Legislature, page 31, provides that where the defendant in cases of felony is on bail, when his trial commences the same shall not thereby be considered as discharged until the jury shall return into court a verdict of guilty and the defendant taken into custody by the sheriff and he shall have the same right to remain on bail during the trial of his case and up to the return into court of such verdict of guilty as under the law he now has before the trial commences; but immediately upon the return into court of such verdict of guilty he shall be taken in custody by the sheriff and bail be considered as discharged. By the terms of the bail bond or recognizance it requires the principal to appear before that court from day to day and from term to term until discharged by order of the court, etc. Before the enactment of this statute when the accused was placed upon trial, he was taken from his bondsmen during the trial and they were no longer responsible for his attendance upon that trial. If acquitted, he was discharged; if convicted, he was placed in jail. Under the statute as it then was, if he was awarded a new trial or his case was reversed on appeal, he was entitled to his discharge under the bond he was placed under prior to his trial and conviction. In either event, whether a new trial was awarded him by the trial court or by the appellate court, upon granting of that new trial he was entitled to his discharge under his bond, unless the sureties had surrendered him, and in that event the sureties were considered discharged until the new trial was awarded or the reversal occurred and they would not be responsible for his appearance while he was in jail awaiting the order of the court on motion for new trial or the action of the appellate court, but would be if new trial was awarded. With reference to the appeal in felony cases where the conviction is for less than fifteen years, he may be given an appeal bond or recognizance and go out under that bond. Whether the appeal bond would discharge the sureties from all subsequent liabilities, is not necessary here to discuss, not being involved; but under the old law, as before stated, when the case went to trial he was taken from his bondsmen by virtue of that fact and placed in custody of the officers pending a disposition of his case, and to that extent the bondsmen were considered as discharged of liability until the new trial was awarded. The only difference, as we understand the provision and the former statute, is that the sheriff cannot now take the principal in charge until after a verdict of guilty has been rendered against him and the defendant is then taken into custody and his sureties are then considered as discharged from further liability on the bond until a new trial has been awarded him or some action is taken by the court which liberates him from that conviction; whereas, under the old law he was taken in custody upon going to trial. The only relative difference in the two statutes is, it permits the defendant under the Act of the Thirtieth Legislature to go out at large during his trial; whereas, under the previous law he was taken in custody immediately upon the announcement of ready for trial."

This case deals only with the question of bonds in felony cases. It discusses the difference between the old and the new law with respect to the time the liability of sureties on felony bonds is discharged, and

inasmuch as misdemeanor bonds are now governed by the old law, the rules announced in said opinion with respect to the old law are applicable to the question submitted by you.

We therefore respectfully advise you as follows:

1. A defendant in a misdemeanor case, after conviction, can not lawfully remain at large on his appearance bond pending action by the court on his motion for a new trial.

2. The defendant in a misdemeanor case, after the case goes to trial, is lawfully in the custody of the officers until his motion for new trial is acted upon. If the trial court should grant the motion and award him a new trial, he is entitled to be released upon his appearance bond, and if so released, the liability of his bondsmen again attaches, but in the event his motion for new trial is overruled and he appeals his case to the Court of Criminal Appeals, in order to have his liberty pending his appeal, he must enter into a recognizance as provided by the statute. If his case is affirmed by the Court of Criminal Appeals, the sureties on his recognizance are responsible for his appearance in the lower court, but if his case is reversed and remanded, he is entitled to his liberty on his original appearance bond.

3. In misdemeanor cases, when the case goes to trial, the defendant is taken from his bondsmen and placed in the custody of the officers and his bondsmen are considered as discharged of liability until a new trial is awarded, either by the trial court or by the Court of Criminal Appeals.

Yours very truly,
C. A. SWEETON,
Assistant Attorney General.

CRIMINAL LAW—OFFENSES—AIDING IN ESCAPE OF PRISONER—RESISTING ARREST.

1. Article 333, Penal Code of 1911, making it an offense to aid in the escape of a prisoner, construed.
2. It is necessary in prosecutions under said article to allege and prove, among other things, that the prisoner escaped from custody.
3. The elements of the offense denounced by Article 340, Penal Code of 1911, and the averments necessary to charge an offense thereunder.
4. Former jeopardy—when it attaches.
5. An acquittal will bar any subsequent prosecution for same offense if trial occurs in court of competent jurisdiction, whether bill of indictment is valid or not.

February 14, 1916.

Hon. J. O. Faith, County Attorney, Karnes City, Texas.

DEAR SIR: Under date of February 7th, you forwarded to this Department a bill of information in the case of the State of Texas vs. Desidro Compos, which said bill of information attempts to charge the said Compos, in the first count, with the offense of aiding a prisoner to escape from lawful custody, and in the second count with the offense of resisting an officer in making an arrest. You state that

the case went to trial on this information and after the State's evidence had been introduced the defendant made a motion for an instructed verdict, and as a ground therefor urged for the first time that the information was invalid for the different reasons assigned; that the Court held the information bad, and instructed the jury to return a verdict of not guilty for the defendant.

You desire to be advised, first, whether or not the counts in the information are invalid; second, if invalid, whether or not it would have been necessary for the defendant to have raised the point on motion to quash before the trial on the merits; and, third, if invalid, whether or not the court should have dismissed the case instead of instructing the jury to bring in a verdict of not guilty as was done.

Replying to these questions, we beg to respectfully advise you that in our opinion both counts in the information are bad, in that they do not sufficiently charge the offenses.

The first count undertakes to charge the offense denounced by Article 333, Penal Code, 1911. Said article provides as follows:

"If any person shall willfully aid a prisoner to escape from the custody of an officer by whom he is legally detained in custody after conviction of a misdemeanor, or while being so detained in custody on an accusation for misdemeanor by doing an act calculated to effect that object, he shall be punished by fine. not exceeding five hundred dollars, and if in aiding in the escape he shall make use of arms, he shall be punished by fine not exceeding one thousand dollars."

In our opinion, in order to make a case under the terms of said statute, it is necessary, among other things, to allege and prove that the prisoner held in lawful custody made his escape. In the first count of your information it is nowhere charged that the prisoner made his escape. We think the information and complaint charging this offense should contain the following necessary allegations:

First. That the officer having custody of the party was a duly qualified officer, authorized to hold said party in custody.

Second. That said officer legally held said party in custody as a prisoner on an accusation for a misdemeanor, (stating the offense).

Third. That if held by virtue of a warrant, said fact should be alleged and the warrant set out. If held without warrant, the facts authorizing the detention without warrant should be alleged.

Fourth. That the party charged knew the prisoner to be in the lawful custody of the officer.

Fifth. That said party with intent and purpose to aid in the escape of the prisoner from the custody of the officer, unlawfully and willfully did an act calculated to effect that object. (Set out fully the act or acts done.)

Sixth. That said act so done was done with the intent to effect the escape of the prisoner and was calculated to effect that object.

Seventh. That by means of same the prisoner was enabled to escape from said legal custody.

See Blanchette vs. State, 125 S. W., 26.

The second count of your information undertakes to charge an offense under Article 340, Penal Code. Said article provides as follows:

"If any person shall willfully oppose or resist an officer in executing or attempting to execute any lawful warrant for the arrest of another person in a case of misdemeanor, or in arresting or attempting to arrest any person without a warrant, where the law authorizes or requires the arrest to be made without a warrant, he shall be punished by a fine of not less than twenty-five nor more than five hundred dollars; and, if arms be used, by a fine of not less than fifty nor more than one thousand dollars."

Said count, in our opinion, is likewise bad for the following reasons:

First. It fails to allege whether the arrest was undertaken with or without a warrant.

Second. If the arrest was undertaken without a warrant, the facts should have been alleged, showing the authority of the peace officer to make the arrest without a warrant. If the arrest was undertaken with a warrant, the facts should have been alleged, showing it a legal warrant.

For a full discussion of these questions see:

Fulkerson vs. State, 67 S. W., 502.
Toliver vs. State, 24 S. W., 286.
McGrew vs. State, 17 Texas App., 613.
Graham vs. State, 13 S. W., 1013.
Alford vs. State, 8 Texas App., 545.
Pierce vs. State, 17 Texas App., 232.
Lee vs. State, 74 S. W., 28.
Sullivan vs. State, 148 S. W., 1091.
Harless vs. State, 109 S. W., 934.

The question as to the invalidity of the complaint and information should have been raised either by motion to quash or by motion in arrest of judgment, and if the Court had sustained either motion the county attorney could have filed a new complaint and information. If the question of the invalidity of the indictment had been raised in either of the methods above pointed out the defendant would not be in position to plead former jeopardy in the event the motion to quash or the motion in arrest of judgment had been sustained and the county attorney had prepared a new complaint and information and instituted a new prosecution against the defendant.

If the case had been dismissed, the complaint and information being invalid, jeopardy would not have attached. However, inasmuch as the Court instructed a verdict of not guilty, we do not think the defendant could again be put upon trial for said offense. The bill of rights, Article 1, Section 14, provides:

"No person, for the same offense, shall be twice put in jeopardy of life or liberty; nor shall a person be again put upon trial for the same offense after a verdict of not guilty in a court of competent jurisdiction."

The Court of Criminal Appeals of this State has repeatedly held that a dismissal of a case may be had at any time before a verdict is

rendered, and if the indictment or complaint and information be invalid, jeopardy does not attach.

Powell vs. State, 17 Texas Civ. App., 345.
Pizano vs. State, 20 Texas App., 139.
Herera vs. State, 35 Texas Crim. Reps., 607; 34 S. W., 943.
Mixon vs. State, 34 S. W., 290.
Curtis vs. State, 3 S. W., 86.

Under the latter clause of the above quoted article of the Bill of Rights, however, said Court has held:

"Where a party has been once placed upon trial in a court of competent jurisdiction to try an offense and a jury has once rendered a verdict of not guilty as to said offense, no matter how irregular the proceedings have been, the State can never again place the defendant upon trial for the same offense." Shoemaker vs. State, 126 S. W., 887.

In the Shoemaker case above cited the Court said:

"Therefore an acquittal will bar any subsequent prosecution for the same offense if the trial occurs in a court having jurisdiction, whether the bill of indictment is a valid one or not."

A verdict of not guilty having been rendered, therefore, in our opinion the defendant could not again be placed upon trial for the same offense, even though the complaint and information under which he was charged were invalid.

Trusting that the above will give you the information desired, I am,

Yours very truly,
C. A. SWEETON,
Assistant Attorney General.

CRIMINAL LAW—CONVICT BOND—HOW DISCHARGED.

A convict bond can only be discharged as follows:
1. Payment of bond in full;
2. A subsequent contract between the county judge and the obligors, whereby the county judge agrees to take back the convict and said convict's delivery under such agreement; and
3. The rearrest and delivery of the convict after escape.

February 19, 1916.

Hon. Charles C. Hines, County Attorney, Jefferson, Texas.

DEAR SIR: Under date of February 12 we have the following inquiry from you:

"On May 22, 1915, C. E. McNeil was convicted on a couple of misdemeanor charges and was fined $25 in each case. He did not have the money with which to pay off these fines and costs, and made the proper affidavit, and several parties signed a convict bond, or, rather, one party hired him from the county judge, agreeing to pay so much a month for him. Now, this man McNeil is a married man and lives in his own home,

and it was not in contemplation of the party who hired him that he was to work for him a single day, but the bond was made simply to give him a chance to pay it off without lying it out in jail, or being worked on the roads, etc.

"McNeil has paid in on both cases about $30 and his bondsmen made application to the county judge to surrender him and have him placed in jail in default of the payment of fine and costs and ask that they be relieved from any further liability. The county judge, acting upon this agreement, has issued a capias pro fine, and the same is now out, but not yet served. I have advised that, in the absence of a failure to labor (which was never contemplated) or an escape (a thing that has not been attempted) that the county judge has no legal right to allow the hirer to surrender the convict, but will be liable for the full amount of the bond whether the convict ever pays a cent on it or not.

"The county judge is relying on the case of Ex Parte Miller, 72 S. W., 183, which I don't think applies to this case.

"I want you to give me a full and complete opinion on this case, as this is not the first time that such has been done, and the State loses the fine and the officers their cost."

Replying thereto, you are respectfully advised that the question you submit was decided by the Court of Civil Appeals in the case of Salyer et al. vs. Wilcox, County Judge, 107 S. W., page 654. In said case the question of when a convict bond can be discharged and the obligors thereon relieved of liability was discussed at length. It was held that such a bond can only be discharged as follows:

1. By the payment of the bond in full.
2. By a subsequent contract between the county judge and the obligors whereby the county judge agrees to take back the convict and the convict is delivered under such agreement; and
3. The rearrest and delivery of the convict after escape.

The mere application of the bondsmen to the county judge to take back the convict would not relieve them of their obligation on the bond, nor would it authorize the issuance of process for the rearrest of said convict. It appears, however, from the decisions that the county judge has the authority to take back a convict by virtue of a subsequent contract or agreement made and entered into between him and the bondsmen.

In the case of Ex parte Miller, 72 S. W., 183, reference to which is made in your letter, the Court said:

"There is no provision in our statute which prohibits the county judge from receiving back a convict after he has been hired out. This is a matter of contract and in a general way may be said to be subject to the general rules and principles of contracts."

Therefore, the right or authority of obligors on a convict bond to redeliver the convict to the county judge before the fine and costs for which the bond was executed have been fully paid depends entirely upon their ability to make such a contract or agreement with the county judge. If the county judge should not agree to retake the convict the bondsmen could not lawfully surrender him and their liability on the bond could not be abrogated or in any manner affected by any attempt made to make such surrender.

Yours very truly,

C. A. SWEETON,

Assistant Attorney General.

DEPOSITORIES—COUNTY.

Where a new county depository is selected it can not be forced to receive the county funds from the old depository until the expiration of sixty days next after the time fixed for the selection of the depository.
Article 2444, Revised Statutes, 1911.

February 12, 1915.

Hon. J. J. Woodhouse, County Attorney, Victoria, Texas.

DEAR SIR: This Department is in receipt of your letter of February 10, as follows:

"At this term of our commissioners court a new county depository was selected and has filed its bond within the statutory period. The old depository has made a tender of the funds now on deposit belonging to the county, and before the lapse of the sixty days which is given him within which to do so. Can the new depository refuse to accept the funds before the expiration of the sixty days, or in other words, can the old depository compel the new depository to receive the same before the expiration of said time?

"As this is a very important matter, and it is necessary that an opinion be given immediately, I would thank you to please consider this matter keeping this in view."

Replying thereto we are of the opinion that the new depository could not be required to receive from the old depository the county funds until after the expiration of sixty days from the date fixed for the selection of the new depository.

We arrive at this conclusion from a construction of Article 2444, which reads as follows:

"As soon as said bond be given and approved by the commissioners court, an order shall be made and entered upon the minutes of said 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 thereafter, to deposit the same with said depository to the credit of said county; and, for each and every failure to make such deposit, the county treasurer shall be liable to said depository for ten per cent upon the amount not so deposited, to be recovered by civil action against such treasurer and the sureties on his official bond in any court of competent jurisdiction in the county."

It seems perfectly plain to us from a reading of the above article that the old depository could not be forced to surrender the funds of the county until after the expiration of sixty days from the time fixed for the selection of the depository. To our minds this provision of the law was inserted for the purpose of allowing the old depository a sufficient time in which to adjust its affairs to surrender the county funds, and likewise to give the newly-selected depository a sufficient length of time in which to adjust its affairs so as to accommodate the receipt of the county funds coming into its hands by reason of being selected as a depository.

It appears to us that it would be as unjust to force the funds upon the newly-selected depository until it had had an opportunity to adjust itself and prepare to take care of the fund as it would be to force

upon the old depository an immediate surrender of a vast amount of money. Common experience teaches that banks are not ordinarily in a position to at any time surrender large sums of money, nor are they in a position to receive large sums upon which they are obligated to pay interest without some notice and preparation for such disbursement or receipt.

We therefore advise you that the new depository would be under no legal obligation to receive funds of the county until after the expiration of sixty days from the date fixed for the selection of the depository. Of course, if the old depository is willing to surrender the fund and the new depository is willing to receive the same, the new depository having executed a satisfactory bond, there could be no legal objection to a consummation of such mutual agreement.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

DEPOSITORIES—COUNTY.

The provision of the county depository act to the effect that the depository selected has five days within which to file a bond is directory only and the commissioners court would have authority to accept such bond after the expiration of five days if they so determined.

The bond of the depository must be approved by the commissioners court and such court has no authority to delegate the power to apprve the bond to the county judge. Articles 2441 and 2443, Revised Statutes, 1911.

March 1, 1915.

Hon. C. P. Shepherd, County Attorney, Ballinger, Texas.

DEAR SIR: This Department is in receipt of your favor of recent date reading as follows:

"Article 2443 of Revised Statutes of Texas, 1911, provides among other things that a person selected as county depository by the commissioners court has five days within which to make his bond. Should the person, so selected fail to make and deliver the bond to the commissioners court within said time, may the court extend the time for said person, his bid being the highest made?

"Or must the court notify said person that his time is up and his deposit forfeited, and then re-advertise for new bids? Must the bond be approved by the commissioners court? Or can the court delegate that authority to the county judge, instructing him to approve the bond if the same has the sureties by the court designated?

"As yet, the person selected has failed to make and deliver his bond for the county and school funds, though he was notified verbally, of his selection on the afternoon of February 8, 1915."

Replying to your questions in the order named, we beg to advise you:

1. It is a general rule of construction that statutes specifying the time within which the duties of public officers are required to be performed are directory merely unless the phraseology of the statute is such that the designation of time must be considered as a limitation

of the power of the officer. Sutherland on Statutory Construction, Section 612.

The requirement of our statute as to the time within which the depository selected was to file the bond required is found in Article 2443, Revised Statutes, 1911, in the following language:

"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 or bonds payable to the county judge and his successors in office to be approved by the commissioners court of said county * * *"

The question you present is, would the commissioners court have authority to approve a bond after the expiration of five days? The procedure provided for in the event of the failure of the concern selected as depository to execute the bond required is found in the latter portion of Article 2441, Revised Statutes, 1911, in the following language:

"Upon the failure of the banking corporation, association or individual banker that may be selected as such depository to give the bond required by law, the amount of such certified check shall go to the county as liquidated damages and the county judge shall re-advertise for bids."

We find nothing in the statutes above quoted indicative of an intention on the part of the Legislature to prohibit the approval of the bond by the commissioners court after the expiration of the five days provided for in Article 2443, nor is there any inhibition against the filing of such bond after the expiration of five days. Of course if the bank selected should fail for any considerable length of time to file the bond and the certified check deposited as a guaranty of the good faith on the part of the bidder had been converted into the county treasury and the county judge had readvertised for bids, under such condition the commissioners court would be without authority to accept and approve the bond offered by such bank.

We advise you, therefore, that if the successful bidder should file a bond acceptable to the commissioners court within a reasonable time, although after the expiration of five days from its selection, but before readvertisement had taken place, the commissioners court would have authority to approve the bond.

As to your second question, we beg to advise that in our opinion the commissioners court would be without authority to delegate to the county judge the power to approve the bond of the depository. The language of the statute is plain and explicit that such bonds must be approved by the commissioners court.

The latter part of that portion of Article 2443 quoted above, that is, to be approved by the commissioners court of said county, admits of no other construction than the commissioners court alone has the power to approve such bond. This power being conferred upon the commissioners court without authority to delegate such power and the commissioners court having authority to act only in matters expressly conferred upon it by the Legislature, it would be powerless to delegate this authority to the county judge.

We therefore advise you that the commissioners court must approve

the bond of the county depository and that such court would have no authority to direct the county judge to approve the bond under any conditions or circumstances.

Yours very truly,
C. W. TAYLOR,
Assistant Attorney General.

DOMESTIC RELATIONS—HUSBAND AND WIFE—DESERTION OF WIFE—PENALTIES.

1. The offense of wilfully or without justification deserting the wife who may be in destitute or necessitous circumstances constitutes one offense and a conviction thereunder would be a bar to all subsequent prosecutions.

2. The offense of wilfully or without justification neglecting or refusing to provide for the support and maintenance of the wife who may be in destitute or necessitous circumstances is a continuous one and a prosecution therefor would bar any future prosecution covering the same time as carved in the former indictment, or if no period is carved in such former indictment, then would bar all prosecutions up to the filing of such indictment or complaint.

3. The conviction or acquittal upon a complaint alleging a refusal to provide for the support and maintenance of the wife would not be a bar to subsequent prosecutions alleging such failure to provide for a space of time subsequent to the filing of the former complaint. Chapter 101, General Laws, Regular Session Thirty-third Legislature.

April 8, 1915.

Hon. James M. Taylor, County Attorney, Corpus Christi, Texas.

DEAR SIR: The Department is in receipt of your communication of April 6, from which it appears that a party in your county was convicted in your county court upon an information charging in substance as follows, to-wit: That he did unlawfully, wilfully and without justification, desert, neglect and refuse to provide for the support and maintenance of his wife, who was then and there in destitute and necessitous circumstances.

You state that after the overruling of the motion for a new trial defendant gave notice of appeal to the Court of Criminal Appeals and filed appeal bond; that subsequent to this the deserted wife again called upon him for support and maintenance, which he refused to give, and you desire an opinion from this Department as to whether or not upon such subsequent failure or refusal to provide for the support and maintenance of his wife a second complaint could be filed against him and the Court enter an order granting the relief to the wife mentioned in Section 2 of the Act.

Section 1 of Chapter 101 of the General Laws of the Thirty-third Legislature, dealing with the subject of your injuiry, reads as follows:

"That any husband who shall wifully or without justification, desert, neglect or refuse to provide for the support and maintenance of his wife, who may be in destitute or necessitous circumstances, or any parent who shall wilfully or without justification, desert, neglect or refuse to provide for the support and maintenance of his or her child or children under the age of sixteen years in destitute or necessitous circumstances, shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not less

than twenty-five dollars and not more than five hundred dollars or by imprisonment in the county jail not more than one year, or by both such fine and imprisonment."

A similar statute to this was enacted by the Thirtieth Legislature, found on page 133 of the printed acts thereof, but by reason of the fact that this Act provided that the fine assessed against the defendant, upon conviction, should be turned over to the wife, the Court of Criminal Appeals of this State, in the case of Ex parte Smythe, 120 S. W., 200, held such act to be unconstitutional and void. The court made other objections to the act, but the above reason was the leading cause for its being held unconstitutional. The Legislature did not again undertake to pass such legislation until the enactment of the law above referred to. Many of the States of the Union have similar acts upon their statute books and the courts, in construing same, have been disposed to be very liberal in their interpretation of such statutes, holding same to be remedial in their nature and measures enacted in the interest of the wife and children to provide for their support. As was said in the case of State vs. Waller, 48 L. R. A., 588, in upholding the Kansas Statute, "Its object is to insure the observance of a high moral and social duty. It is remedial in purpose, although it provides for the infliction of a severe penalty, and it must be liberally construed in order that the legislative intent may be accomplished."

You do not state upon what phase of the statute your man was convicted; that is to say, whether it was for desertion or for failure to support. Of course, desertion may include both, but an offense is complete under this statute simply upon desertion by the husband of the wife, or the offense would be complete if without desertion he should fail to support his wife, who was then and there in destitute or necessitous circumstances. We take it, however, from the statement in your letter that this man was probably guilty of both offenses. Desertion only with which there is not coupled the additional ground of the failure to support would be a transaction complete within itself prompted by a single motive, and would not be a continuous offense for which subsequent indictments or complaints would lie, and a conviction under a charge alleging desertion only would be a bar to any future prosecutions unless the husband should return to the wife and again desert her.

Needleman vs. State, 170 S. W., 710.

In the case above cited the defendant had abandoned his wife before coming to Texas and the Court held that he could not be convicted upon this count in the information, as the offense was complete before coming to this jurisdiction, but upon the second count, charging him with refusing to provide for the support of his two minor children after their coming to Texas, the court sustained the conviction, the effect of which holding is to adjudge that the offense of failure to support is a continuous one and is complete within any period of time the pleader may elect to carve.

In the eleventh edition of Wharton's Criminal Law the rule as to

prosecutions by separate indictments for a continuing offense is thus laid down.

"Difficult questions indeed, may arise to be hereafter noted, when gas or liquor is tapped by a pipe through which there is a continuous passage for days. But whatever may be the conclusion as to such cases it is settled that nuisances when distinct impulses are given at intermittent successive times, may be the object of successive prosecutions. The distinction is this: When the impulse is single but one indictment lies no matter how long the action may continue. If successive impulses are separately given even though all unite in swelling a common stream of action, separate indictments will lie." (Section 34.)

In a note to the above section we find the following:

"The test is whether the individual acts are prohibited or the course of action which they constitute. If the former, then each act is punishable separately. If the latter, there can be but one penalty."

Applying the above rules to the questions under discussion, it will readily be seen that the act of abandonment or desertion, no matter how long such desertion may continue, yet it is the result of a single impulse, and but one indictment will lie and the defendant be subjected to but one penalty, but upon a charge of failure to support, such failure is the result of successive and continuous impulses, and even though such successive and continuous impulses unite to form a continuous stream of action separate indictments will lie.

This rule, however, is subject to the still further rule as laid down in the case of Fleming vs. State, 28 Texas Appeals, 235, as follows:

"When time is carved as in this case, then the offense being continuous whether there be a plea of former conviction or acquittal or not, the proof must be confined to acts done within the time alleged, and if the proof is confined to the time carved and no part of the time thus carved has been used or utilized by a former conviction under an indictment covering a whole or a part of the time used in this indictment, the plea of former conviction will not avail."

Fleming vs. State, 28 Texas Appeals, 235.
Novy vs. State, 62 Texas Crim., 492.
Creech vs. State, 158 S. W., 277.
Commonwealth vs. Standard Oil Co., 37 S. W.. 1090.
Cawein vs. Commonwealth, 61 S. W., 1090.
People vs. Sullivan, 33 Pac., 701.

The former conviction would bar all further prosecutions up to that time unless the information carved out the time of the commission of the offense and the evidence confined to such time. As is said in Novy vs. State, supra, "It is well established that such an offense as is charged in this case is a continuous one and a conviction bars all further or other prosecutions up to the time of the conviction unless the indictment or information carves out the time of the commission of the offense and the evidence, as well as the pleading, is confined to such time so carved out." In the case just quoted from the defendant was convicted of keeping a house wherein liquors were sold and kept for sale without obtaining a license, thereby constituting such place a disorderly house within the meaning of the statute. We assume there could be no contention raised but that if the defendant,

Novy, after the conviction upon such indictment or information, had continued the practice that other and further indictments or informations could be filed against him for such offense for the time subsequent to that for which the former conviction was had, and likewise in the case presented by you, if the defendant persists in his refusal to provide support for his wife, further indictments or informations would lie against him for the period of time subsequent to the filing of the former and prior to the filing of the new indictment or information.

In State vs. Baurens, 41 So. Rep., 442, the defendant was tried and convicted under an act very similar to the Texas statute. The defendant entered a plea of autrefois convict. The Court in that case held that the statute contemplates "a man shall at all times provide for the support of his wife and minor child in necessitous circumstances, and his neglect to do so during the period of time not covered by a conviction already secured under that Act is a distinct offense as to which a plea of autrefois convict predicated on such conviction is not good, the Court saying: "And his neglect to do so during a period of time not covered by a conviction already secured is a distinct offense to which the plea of autrefois convict predicated upon a prior conviction is not good."

From what has been said above, and upon the authorities cited, we are of the opinion, and so advise you, that successive complaints would lie for the failure to support the wife or children for the period of time subsequent to the former indictment or information and prior to the filing of a new indictment or information.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

FIRE ESCAPES—CONSTRUCTION OF LAWS.

The General Laws, Thirty-third Legislature, Chapter 12.

1. The fire escapes law applies to any building of over two stories in height where five or more persons shall be assembled regardless of whether these persons be employed on the first, second or third floors; provided, of course, the building is used for any manufacturing, wholesale or retail mercantile establishment, factory or work shop and warehouse.
2. When a law is plain and unambiguous it should be construed as written, and where the Legislature makes no exception to the operation of the general terms of the act the courts can make none.

October 18, 1915.

Hon. C. W. Woodman, Commissioner of Labor, Capitol.

DEAR SIR: So much of your letter as is necessary to be stated in this opinion is as follows:

"The question has arisen as to whether or not the fire escape law, enacted by the Thirty-fourth Legislature, applies to buildings three stories in height where less than five people are employed on the third floor of such building.

"We are inclined to think that the law applies to any building three or more

stories in height in which five or more persons are employed, regardless of whether they be employed on the second, third or first floor.

"Will thank you to give this matter your early attention as quite a number are awaiting your ruling on this point."

Section 1 of Chapter 12, General Laws, passed by the Regular Session, Thirty-third Legislature, in part reads as follows:

"That every building of over two stories in height now or hereafter used in whole or in part as a seminary, college, academy, schoolhouse, dormitory, hotel, apartment house, or lodging house or theater or place of public amusement, including halls for public gatherings, other than private residences, or any manufacturing, wholesale or retail mercantile establishments, factories, or work shops, warehouses where five or more persons shall be assembled, shall be provided with at least one, and as many additional fireproof stairways or ladders or iron spiral fire escapes on the exterior of such building placed in such position and as many in number as may be designated by the head of the fire department of that city or town, in or near which such building may be located, if there be one, or by the mayor, if there be no head of such fire department, or by the Comissioner of Labor Statistics, if such building be not in or near any incorporated city or town, or one having a head of its fire department."

You will note from the language used that all manufacturing wholesale or retail mercantile establishments or workshops or warehouses "*where five or more persons shall be assembled,*" are required to have fire escapes. The place of assemblage of the five or more persons is the establishment, factory, workship or warehouse, and not the floor thereof, which is a mere part of such building. The law applies to any building of "over two stories in height where five or more persons shall be assembled," and this regardless of whether these persons be employed on the first, second or third floors. The point of labor is immaterial. It is the number of stories of the building and the number of persons employed in the building, or, in the language of the statute, "assembled" there, which brings the place within the operation of the law. This construction is consistent with the plain letter of the law itself and the rule is that the plain meaning of the statute must be given it in interpreting it unless there exists some reason within the Act itself for a different construction.

In substantially the language of the authorities, when a law is plain and unambiguous, whether it be expressed in general or limited terms, the Legislature should be intended to mean what they have plainly expressed, and where the Legislature has made no exception to the operation of the statute the Court should make none.

State vs. DeLesdenier, 7 Texas, 76.
Anderson vs. Neighbors, 94 Texas, 236.
Summers vs. Davis, 49 Texas, 541.
McAnelly vs. Ward Bros., 77 Texas, 342.

Yours truly,
C. M. CURETON,
First Assistant Attorney General.

FIRE ESCAPES—WORDS AND PHRASES—CONSTRUCTION OF LAWS.

Acts Thirty-fourth Legislature, Fire Escape Law.
1. This Act applies only to buildings of over two stories in height.
2. "Over two stories in height," means over two stories from the level of the ground, and has no reference to cellars, basements or stories below the surface.
3. "Story," and "basement" defined.
4. "Fire proof" buildings are not excepted from the law.

March 10, 1915.

State Fire Insurance Commission, Capitol.

GENTLEMEN: The letter to your Department presenting the inquiry which you have transmitted to us is as follows:

"We are in receipt of the notice of the recent enactment of the Legislature in reference to fire escapes on all public school buildings over two stories in height, and desire your construction of the bill in reference to our high school building.

"Our ward schools are not over two stories in height, hence, the law will not be applicable.

"The grammar school has a basement and two stories in height with a fire escape.

"The high school building, being fire proof and having only a basement and two stories, would the law force us, under these circumstances, to go to a great deal of expense and furnish these escapes?

"Note the law, which says, 'over two stories in height.' Now, would you construe the building having a basement and two stories, over two stories in height And again, the building being fire proof, why the necessity of fire escapes?"

The answer to the questions suggested in the letter involves a construction of the fire escape law of this State passed at the Regular Session of the Thirty-fourth Legislature and approved February 16, 1915. The caption of the Act reads as follows:

"Making it compulsory to provide adequate fire escapes, upon all buildings of over two stories in height, used now or hereafter, wholly or in part as a seminary, college, academy, schoolhouse, dormitory, lodging house, hotel or hospital, for the accommodation of transient guests, manufactory, wholesale, retail or department store, or in any place in which five or more persons shall be assembled, other than a private residence, and declaring an emergency."

Section 1 of the Act provides:

"That every building of over two stories in height now or hereafter used in whole or in part as a seminary, college, academy, schoolhouse, dormitory, hotel, apartment house, or lodging house or theater or place of public amusement, including halls for public gatherings, other than private residences, or any manufacturing wholesale or retail mercantile establishment, factories, or work shops, warehouses where five or more persons shall be assembled. shall be provided with at least one, and as many additional fire proof stairways or ladders or iron spiral fire escapes on the exterior of such buildings placed in such position and as many in number as may be designated by the head of the fire department of that city or town, in or near which such building may be located, if there be one, or by the mayor, if there be no head of such fire department or by the Commissioner of Labor Statistics, if such building be not in or near any incorporated city or town, or one having a head of its fire department. If one or more fire escapes or ladders are required on each side of such building for the accommodation and protection of the guests,

assemblies, employees or inmates of such buildings, now or hereafter, used in whole or in part as a seminary, college, academy, schoolhouse, theater or place of public amusement, including halls for public gatherings other than private residences, or by any manufacturing, wholesale or retail mercantile establishment, factories or work shop, warehouses, where five or more persons shall be assembled or a place of public resort, shall be provided therewith; such stairways or ladders shall connect the cornice with the top of the first story of any such building by a metal platform, balcony, piazza, or other safe and convenient resting place on a level with the floor of each story so connected and of sufficient length to permit access to the same from not less than two windows of each story. They shall be convenient of access from the interior of the building, commodious in size and form and of sufficient strength to be safe for the purpose of ascent and descent. It shall be the duty of the school board controlling any school in Texas, conducted in a building, two or more stories in height, to have the building equipped with necessary fire escapes as is provided herein."

It is noted that the last clause in this section declares "it shall be the duty of the school board controlling any school in Texas, conducted in a building, two or more stories in height, to have the building equipped with necessary fire escapes, as is provided herein." This particular language *"two or more stories,"* is in direct conflict with both the caption of the Act and the preceding portion of Section 1, which declares that fire escapes shall be constructed in buildings "of over two stories in height." From a reading of the caption and the first portion of Section 1 we are led to believe that the provision quoted from the last sentence of Section 1, to-wit, "two or more stories," is merely a mistake, and that no real conflict was intended, and that the words, "two or more stories," must be held to be a legislative mistake and must be controlled by the words of the caption and the previous words of the Act, and be construed to mean "of over two stories in height." This construction is one in accord with the well-known rules laid down by the courts of last resort and embodied in the standard text books on the subject. The rule is that legislative enactments are not any more than other writings to be defeated on account of mistakes, errors or omissions, provided the intention of the Legislature can be collected from the whole statute, and the caption, title or preamble may be referred to for the purpose of correcting these errors.

Lewis' Sutherland on Statutory Construction, Vol. 2, Sec. 410.

The same general rule is universally followed and adhered to in every instance. It has been held that where one word has been erroneously used for another and the contest affords the means of correction the proper words will be substituted or supplied. This is but making the strict letter of the statute yield to the obvious intent. In the same manner words which are inconsistent with the intention otherwise plainly expressed in the Act may be regarded as redundant or surplusage.

Says Mr. Sutherland:

"Where the provisions of a law are inconsistent and contradictory to each other or the literal construction of a single section would conflict with every other following or preceding it, and with the entire scope and manifest intent of the act, it is certainly the duty of the courts, if it be possible, to harmonize

the various provisions with each other; and to effect this it may be necessary and is admissible to depart from the literal construction of one or more sections."

Lewis' Sutherland on Statutory Construction, Vol. 2, Sec. 410, page 798.

We conclude that the general purpose of this Act as disclosed by the caption and its entire contents was to provide that fire escapes should be affixed to the classes of buildings therein specified, where such buildings were "over two stories in height," and that the phrase in the last sentence of Section 1, to-wit, "two or more stories in height," was a mere legislative elision, or recrudescence to a posterior thought, not within the real legislative intent, and that the former phrase suggested, "over two stories in height," was intended and will control.

The next question involved is the meaning of the phrase, "over two stories in height," and the determination of whether or not a basement should be regarded as one of the two stories referred to in the statute. The statutes of this State express the common law rule of construction and provide that the ordinary signification shall be applied to words, except where such words relate to a subject of art or a particular trade.

Revised Statutes, Article 5592.
State vs. Cody, 120 S. W., 267.

It is likewise elementary, as well as statutory, that in all interpretations we should look diligently for the intention of the Legislature, keeping in view at all times the old law, the evil and the remedy.

Revised Statutes. Article 5502.
Hamner vs. Carrot, 132 S. W., 951.
Hidalgo County vs. Davidson, 101 Texas, 539.
International & Great Northern Ry. Co. vs. Voss, 89 S. W., 984.

Construing the phrase referred to above, in accordance with these plain rules of construction, we think that the words "over two stories in height" should be given their usual and ordinary meaning, and that this phrase means two stories above the surface of the ground. and that the basement story of a building, if it is in reality a basement, should not be considered in applying this law.

The plain, every-day meaning of the word "story" as used with reference to buildings, is that given in the dictionary, and is defined in the Century Dictionary as follows:

"A stage or floor of a building; hence, a subdivision of the height of a house * * * a story comprehends the distance from one floor to another."

A basement is a story which is wholly or in part beneath the surface of the ground and is distinguished from a cellar only by being well lighted and fitted for and used for household or other usual purposes.

Century Dictionary, Vol. 1, page 464.

The meanings given these words by this standard dictionary are those which are in every-day use and evidently those in the mind of the Legislature.

Again, it is an elementary rule of construction that we should bear in mind the evil intended to be remedied, and the evil intended to be remedied by the present law was the lack of facilities in buildings of over two stories in height to enable occupants to safely reach the ground in the event of fire. Manifestly the existence or nonexistence of a basement could have no effect upon the question as to whether or not a building should be equipped with fire escapes. We think that the law, in using the phrase, "over two stories in height," had reference only to those stories above the surface or level of the ground and that in applying the law to buildings it is unnecessary to consider cellars and basements. This construction is one in accord with the rules from time immemorial laid down by the courts, consistent with common sense and the general purpose to be effectuated by the Act.

Concerning the suggestion that a fireproof building should be exempted from the operation of this law, beg to say that the law itself does not exempt this class of buildings, and you therefore cannot do so. The reason the lawmakers did not exempt fireproof buildings is probably because there is no record of the construction of any building, ancient or modern, that fire will not destroy. The burning of Edison's three million dollar "*fireproof*" plant recently is fresh in the minds of the public as an example of the failure of that great genius to protect himself against this agency of destruction.

Yours very truly,

C. M. CURETON,
First Assistant Attorney General.

INSANITY—HABEAS CORPUS.

Asylum, release from.
1. The writ of habeas corpus is available to obtain the release of one confined in an insane asylum, where his confinement is continued by the officers of that institution after his recovery.

January 25, 1915.

Dr. Beverly Young, Superintendent Southwestern Insane Asylum, San Antonio, Texas.

DEAR SIR: Some time ago you requested the opinion of this Department as to whether or not persons confined in insane asylums in the State could be released therefrom by a writ of habeas corpus. I answered your communication some time ago in which I expressed the opinion that this could be done. The purpose of this communication is to place in permanent form the reasons for the facts previously expressed to you in the letter referred to.

Revised Statues (1911), Article 124, appears to confer upon the superintendents of State asylums authority to discharge patients. Article 142, Revised Statutes (1911), declares the patients may be discharged from the asylum at any time upon the recommendation of the superintendent, approved by the board of managers.

Article 161 provides in substance that when lunatics shall have been

discharged from any asylum as cured the superintendent of such asylum shall forthwith certify such fact to the county judge of the county where such person was adjudged a lunatic. Upon receipt of this certificate it is made the duty of the county judge to cause an order to be entered setting aside the previous judgment by which such person was adjudged a lunatic and that the county judge shall enter an order discharging such person.

From these provisions of law the statutory method of discharging a lunatic, or for one confined in an asylum under a judgment of lunacy, is for the superintendent of the asylum to recommend the dicharge of the patient, which recommendation, when approved by the board, operates as a discharge of such persons from the asylum. However, the judgment of lunacy still stands against the person until the superintendent has certified to the judge of court which rendered the original decree that such person is cured, when that judge in turn causes an order to be entered discharging such person from the previous decree.

The propositions of law, of course, do not apply to persons adjudged insane in accordance with the provisions of the Code of Criminal Procedure; that is to say, criminally insane, but only to the ordinary patient. The question, then, is whether or not the statutory method here provided is exclusive and whether or not the writ of habeas corpus may be resorted to where the superintendent of the asylum, or the board, declines to discharge a patient as cured.

Section 12, Article 1, of the Constitution, declares that the writ of habeas corpus is a writ of right, and shall never be suspended. All the judges of the courts of the State from the county court to the judges of the Supreme Court and the Court of Criminal Appeals, have authority to issue this writ. See Harris' Constitution, pages 337, 389, 442, 374, 365. The leading text on the subject of habeas corpus has this to say on the subject of the right of a lunatic to be released from confinement by that writ, to-wit:

> "In habeas corpus proceedings to obtain the discharge from custody of a person confined as a lunatic, the court may inquire into the character and nature of the derangement and determine the necessity of confinement. Its power is not limited to a mere determination of the question of sanity, but it may go further, and if proper, discharge the party from custody. 21 Cyc., 333."

In the case of in re Brown, 1st L. R. A. (N. S.), 540, the Court upheld the statute under which the prisoner was committed and said that he had the undoubted right at any time to assert that he was restored to sanity and to demand that the Court should investigate that subject, but dismissed the writ of habeas corpus on the ground only that the petitioner had not shown sufficient grounds for his discharge.

In the case of in re Boyett, 67 L. R. A. (N. S.), 972, the Court, in holding unconstitutional a statute making an act of the Legislature a prerequisite to discharge, quoted Buswell on insanity as follows:

> "In cases where a person, whether sane or insane, is detained or confined as a lunatic without authority of law, it appears that such person is entitled to be brought into court upon a writ of habeas corpus in order that the question of the legality of his detention may be inquired into."

In the case of Northfoss vs. Welch, 36 L. R. A. (N. S.), the Court said:

"There are no cases in this State involving the use of the writ of habeas corpus to obtain the release of an inmate of an insane hospital after he had recovered his sanity. But on principle we think there can be no doubt that the remedy exists, and there are cases in other jurisdictions where it has been applied. 21 Cyc., 333; Re Dixon, 11 Abb. N. C., 118; Church, Habeas Corpus, 3826; Gardner vs. Jones, 126 Cal., 614, 59 Pac., 126."

In the case of Peabody vs. Chandler, 25 L. R. A. (N. S.), 946, the Court, in upholding the New York statute and affirming the dismissal of a writ of habeas corpus, says:

"The commitment can last only so long as the defendant is insane, and he has the right at any time under the law, to have his sanity determined upon habeas corpus."

It seems to us that these authorities are conclusive of the issue. When a patient in an insane asylum ceases to be insane he is certainly entitled to his liberty. The only method provided by statute by which he may regain his liberty is release by the superintendent and governing board. If these officers fail to release him when he becomes sane again there is no remedy provided so far as the statute is concerned. The moment the patient recovers from his mental troubles he ceases to be the lawful subject of confinement and is entitled to his liberty. If his liberty is not granted him by the State's officers having him in custody, can he regain it? The answer is found in Section 13 of Article 1 of the Constitution, which declares, among other things, the following:

"All courts shall be open and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law."

Certainly confinement in a lunatic asylum after the person has recovered his mind is an injury done such person for which the Constitution declares he shall have remedy by due course of law. The only remedy left him under our law is the writ of habeas corpus, and however much it may from time to time be abused, the fact remains that it is available for any person illegally confined in a lunatic asylum, or in any other place.

We beg to advise you, therefore, that persons confined in an insane asylum have the right to seek their liberation by writ of habeas corpus, and that upon such trials the Court will have the right to go into the question of the patient's actual mental condition at the time of the trial. Under a familiar rule, such person having been convicted of insanity, the presumption would be that he is still insane and the burden would be upon him to establish his sanity, but if the Court concludes such person is no longer insane, he would have the right to restore such person to his liberty.

C. M. CURETON,
First Assistant Attorney General.

LABOR LAWS—FIFTY-FOUR HOUR LAW.

The fifty-four hour law does not apply to student nurses taking a course of instruction in a sanitarium.

The fifty-four hour law does not apply to graduate nurses employed by a sanitarium.

Chapter 56, General Laws of the Thirty-fourth Legislature.

June 1, 1915.

Hon. A. D. Dyess, County Attorney, Temple, Texas.

MY DEAR SIR: The Department is in receipt of your favor of recent date enclosing a communication from Drs. Scott & White, surgeons of the Temple Sanitarium, upon which you request an opinion from this Department as to whether or not such sanitarium is subject to what is known as the Fifty-four Hour Law, being C. S. S. B. No. 40, contained the printed acts of the Regular Session of the Thirty-fourth Legislature as Chapter 56, and if the student nurses and graduate nurses employed in such sanitarium may be required to be on duty for more than nine hours in any one calendar day. The exact facts and conditions are so clearly set forth in the letter of Drs. Scott & White that we will copy it, as follows:

"We wish to call your attention to C. S. S. B. No. 40, an Act, limiting the hours of labor for female employes recently enacted by the Texas Legislature and approved by the Governor on March 15.

"The Temple Sanitarium, an incorporated institution, conducts a Training School for Nurses, incorporated under the laws of the State of Texas. Young women of proper standing and educational attainment are admitted in the training school first, as probationers for a few weeks in order to determine whether or not they are suited for the profession of nursing, and whether or not the profession suits them. If found to be desirable, they are then admitted as members of, or pupils, in the training school. These student nurses receive their board and laundry, together with their training, and are furnished nominal amounts, averaging $8.00 per month to take care of their incidental expense. The sanitarium has a three years' course of instructions, as is required by the State Graduate Nurses' Association, and the State Board of Graduate Nurse Examiners. In as much as our own institution is largely surgical, we give these young ladies a term of service in the Santa Fe Hospital, which institution, as you know is more largely medical. This service is given them at the Santa Fe Hospital for the purpose of furnishing a complete medical, as well as surgical training.

"It has been our custom for these young ladies to be on duty either with patients or with their didactic course of training for a period of time longer than is prescribed by this law. The same thing applies to our graduate nurses, and other lady employes in the sanitarium, including the superintendent, superintendent of nurses, superintendent of operating room, anesthetist, etc.

"A graduate nurse receives, when on special duty, $25.00 per week and her board, which we estimate at $5.25 per week, making a total expense of $30.25. In order to make the matter clear to you, we will suppose that you are a patient in the sanitarium and that you require, or desire, the services of a special nurse. If, as we read the matter, a technical compliance with this law is demanded by you of the Attorney General, then it would be necessary for you to have three nurses in order to fill out the twenty-four hours' time. Three graduate nurses at $30.25 per week would make $90.75 per week for nurse service. This would, of course, deprive any, except the very rich of the services of special nurses.

"We use our undergraduate nurses on special service after they have been in the sanitarium for a sufficient length of time. This is necessary for the training and experience of the nurse. The knowledge necessary for the

proper handling of the sick cannot be attained by didactic lectures and text books. Such information must be supplemented by actual experience in the sick room. Each of our rooms are supplied with comfortable spring couches, mattress, etc., that make a desirable and comfortable bed for the nurse who is on duty. For instance, if you are the patient and have a special nurse it would perhaps be true that you would not require the services of a nurse at all during the night. If, however, you required a glass of water, or any other service, the nurse who was on duty would be subject to your call. During the day while the nurse would be actually on duty all of the time she would not be busy except when the service of the patient demanded it, and she would perhaps be putting in her time reading her lessons, doing crochet, or other fancy work, or entertaining herself during the time that you were entertaining yourself, or sleeping. In addition to the couches and rooms which are arranged for the nurses to occupy when they are not busy, they are each given four hours off during the day for their outdoor exercise and recreation.

"The salaries among our lady employes run as high as $150.00 per month, including board and lodging, and as before stated, graduate nurses, when on a special duty, $100.00 per month, board and lodging.

"You will readily see by the analysis of the situation that a rigid enforcement of this law as applied to hospitals will deprive, by virtue of its cost, sick people of the comforts and necessity of special nurses, and will, in our opinion, work a decided hardship not only on sick people, but on the nurses and the hospitals. It is our opinion that perhaps this law was enacted for the protection of women employes in sweat shops, and other places where laborious service is required, and poor living quarters are provided.

"We certainly do not wish to evade the spirit of the law. We have gone into the matter rather fully in order that you may be in position to give us such legal advice as may be necessary for our own protection, and for the comfort and care of our patients."

That portion of the Act in question is Section 1 of Chapter 56 of the General Laws of the Thirty-fourth Legislature, above referred to, and is in the following language:

"No female shall be employed in any factory, mine, mill, workshop, mechanical or mercantile establishment, laundry, hotel, restaurant or rooming house, theater or moving picture show, barber shop, telegraph, telephone or other office, express or transportation company, or any State institutions, or any other establishment, institution or enterprise where females are employed, except as hereinafter provided, for more than nine hours in any one calendar day, nor more than fifty-four hours in any one calendar week; provided, however, that in case of extraordinary emergencies, such as great public calamities, or where it becomes necessary for the protection of human life or property, longer hours may be worked, but for such time not less than double time shall be paid such female with the consent of said female; provided, this Act shall not apply to stenographers and pharmacists."

In our opinion such Act does not apply either to the student nurses or to the graduate nurses employed in a sanitarium.

It is perfectly clear that there is nothing in the Act to indicate any intention on the part of the Legislature to make same apply to student nurses, as there is no language contained in the act evincing an intention to make same apply to a school of any character, and while the student nurses may receive a small compensation for the services rendered by them in the sanitarium, yet this fact does not deprive the institution in this respect of the character of school.

Our opinion that the Act does not apply to graduate nurses employed in a sanitarium must be based upon a somewhat different construction of the statute. It will be noted from a reading of the Act

that the factories and institutions enumerated therein are such as employ females for manual labor and not requiring professional services. It is true that after the enumeration of certain factories and establishments wherein the employment of females for more than nine hours per day is prohibited, that the Act contains the clause, "Or any other establishment, institution or enterprise where females are employed."

Applying the rule of ejusdem generis in the construction of the section above quoted, and particularly to that clause last above referred to, we must arrive at the conclusion that the other establishments, institutions or enterprises referred to must be of the class, kind and character, as those already enumerated in the statute; that is to say, that class of institutions requiring of those employed manual labor, as distinguished from the professional services rendered by nurses. We are borne out in this construction by the language of the act itself, for the last clause of Section 1 reads:

"Provided, this Act shall not apply to stenographers and pharmacists."

Showing clearly the intention of the Legislature to take from the operation of the Act those females engaged in the professions of stenographers and pharmacists as distinguished from females employed by the institution and establishments enumerated.

Legislative acts limiting hours of labor being in effect an abridgment of the right of contract can only be sustained as a proper exercise of the police power, that is, for the protection of the health, comfort and general welfare of the people, and must be strictly construed.

Holden vs. Hardy, 169 U. S., 366.
People vs. Construction Co., 65 L. R. A., 33.
Miller vs. Oregon, 208 U. S., 412.
Atkin vs. Kansas, 191 U. S., 207.
Lochner vs. N. Y., 198 U. S., 45.

For the reasons above set out we are of the opinion, and so advise you, that the provisions of Chapter 56, General Laws of the Thirty-fourth Legislature, have no application to sanitariums, either as to student nurses or to graduate nurses or to the superintendent of nurses, superintendent of the operating room, anesthetist, etc., as they are in the very nature of things not within the contemplation of the statute, which, as we view it, is enacted for the purpose of protecting females engaged in manual labor.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

LABOR LAWS—FIFTY-FOUR HOUR LAW.

This act does not apply to overtime by a female who is in fact and law a partner, and, therefore, an "employer." But the question of partnership

vel non is a question of fact in each case. General rules for determining the existence of the relation.

August 3, 1916.

Honorable C. W. Woodman, Labor Commissioner, Capitol.

DEAR SIR: We have your letter reading as follows:

"A question bearing on the enforcement of the 'Fifty-four Hour Law' for female labor, enacted by the Thirty-fourth Legislature, has come before this Department, which we are submitting to your Department for a ruling.

"Do Sections 1, 1a and 1b of the act apply to females who own a part interest in the business in which they are employed, where such female is paid a wage or salary for her services by such firm or corporation?"

We do not think that the provisions in Section 1 and 1-b, Chapter 56, General Laws of Texas, 1915, page 105 (the Fifty-four Hour Law), applies where the female "employed" is in fact and law a partner in the business. However, in every case which can arise with respect to a question of woman working over-time where it is claimed she is a partner, presents a difficult question of fact. Each case must be examined and decided on its own pecular facts and circumstances. It is always difficult, and in fact impossible, to announce a general rule by which it can be determined whether or not a person is a partner within the meaning of the law. In view of this difficulty, and since this question will constantly arise in connection with your work, we give hereinbelow some illustrations under adjudicated cases.

Before doing so, however, it is well to state that the mere fact that a person may share in the profits of a business, or, in fact, may share in both profits and losses, is not conclusive evidence that he is a partner. And, as a general proposition, if the essential object of the contract and arrangement is to secure the services of the person in connection with a business, and that his sharing in the profits is adopted as a method of measuring his compensation, or is intended merely as a supplemental compensation, the relation of master and servant, and not of partners, ordinarily exists. The real test is the intention of the parties to be gathered from all the pertinent facts and circumstances.

In the case of Goode vs. McCartney, 10 Texas, 194 and 5, the Supreme Court of this State said:

"It is true that the criterion by which to determine, in general, whether persons are partners or not is to ascertain whether there is a communion of profit and loss between them. And it is said, if one person advances funds, and another furnishes his personal services or skill in carrying on the business and is to share in the profits, it amounts to a partnership. It would be a valid partnership, notwithstanding the whole capital was, in the first instance, advanced by one partner, if the other contributed his time and skill to the business, and although his proportion of gain and loss was to be very unequal. It is sufficient that his interest in the profits be not intended as a mere substitute for a commission, or in lieu of brokerage, and that he be received into the association as a merchant, and not as an agent. (3 Kent Com., Sec. 43.) But, to constitute a partnership, there must be a community of profits, or a specific interest in the profits, as profits, in contradistinction to a stipulated portion of the profits

as a compensation for services; and this, in this class of cases, is a test of partnership. (Ib. in notes; Story on Partnership, p. 51.) There is, consequently, a distinction between a stipulation for a compensation for labor, proportioned to the profits, without any specific lien upon such profits, and which does not make a person a partner, and a stipulation for an interest in such profits, which entitles the party to an account as a partner. (18 Wend., 184, 185; 20 Id., 70; 17 Vesey, 404, cited in note to 3 Kent, 25, 7th ed.) The evidence relied on to establish the alleged partnership was derived from the statements of the plaintiff; and he stated that Power was not his partner; and this statement accords with the legal conclusion, deducible from his further statement that the proportion of profits which Power was to receive was a compensation for his services as clerk. Such a participation in the profits would not constitute him a partner."

In Bradshaw vs. Apperson, 36 Texas, 133-138, same court, said:

"As this cause must go back for a new trial, and as the question of partnership must be again determined, it may not be improper here to remark that it is believed to be now a well-settled principle of the law of partnership that a clerk in a mercantile house, or an employe in any firm or business, who receives a certain per cent or portion of the profits of the firm, for or in lieu of a salary, is not thereby a partner, and liable for the partnership debts. But if a person stipulate for a certain portion of the profits as such, and not as wages, and becomes entitled to participate in the management and control of the business, and to an account of the partnership affairs, such person may be presumed to have intended to make himself liable as a partner."

And in Cothran vs. Marmaduke & Brown, 60 Texas, 370-373, the Court said:

"The true distinction is this: Where a clerk or agent by agreement is to receive a fixed portion of the profits as compensation for his time or labor, that he does this as clerk or agent and not as principal: for the partnership fund or effects may be legally used in paying such clerk or agent for his time and services. Therefore the fact that the effects are not resorted to for this purpose until profits have accrued and become effects would not make the clerk or agent receiving such effects as compensation for his services a partner. But when one advances money under an agreement that the principal is to be refunded, but for compensation he is to share in the net profits of the adventure, this makes him a partner, for he is then to share in the profits as a principal and not as a clerk or agent."

In Brown vs. Watson, 72 Texas, 216-220, the Supreme Court had before it a written contract by which Watson agreed to furnish Ousley & Company on consignment such a stock of pumps, etc., as the two parties might agree to be necessary and sufficient and in which Ousley & Company agreed to store, insure and sell the pumps, etc., and keep correct account of said business, and which contract further stipulated that "commissions of one-half profit on retail sales and one-third profits on wholesale sales are to be compensation to said Ousley & Company * * * for their services in storing and selling said pumps, etc."

With respect to this contract, the Court said:

"Such a contract for the payment of Ousley & Co. for their services does not of itself make them partners with Watson. 'It must be, however,

considered as now settled that a person paid for services rendered to a firm by a share of the profits, if this be given him only as compensation for services and he has no interest in the principal and no other interest in the profits, is not liable as a partner.' Parsons on Part., 92 (also note and citations under p. 71); Story on Part., Sec. 36; Parchen vs. Anderson, 51 Am. Rep., 65; 38 Cal., 203, Wheeler vs. Farmer."

The case of Shute & Limont vs. McVitie, 72 Southwestern 433, involved the question as to whether or not McVitie was an employe, or whether or not he was a partner, of Shute & Limont. On this question the Court said:

"It is insisted, however, that McVitie was not a mere servant of Shute & Limont, but was a manager of their Sherman office, and was interested in the profits of the business. It is urged that he was, therefore, vested with authority to manage the business according to his discretion, and that, unless there was an abuse of discretion, and injury resulted therefrom, the discharge was wrongful. While it is true that McVitie was not a mere servant of Shute & Limont, we think it must be conceded that he was an agent or employe, and not a partner in the true sense. His interest in the business was limited to the net profits, and was contingent, and was in the nature of wages. He contributed nothing to the capital stock of the concern, and was not responsible for any losses. Clearly, he possessed only such powers and was vested with only such discretion as was conferred on him by Shute & Limont. Authority to manage and control was in them, except as limited by the contract of employment."

In reaching your conclusion in any case as to whether or not the female "employed" is in fact and law a partner or not, it would be well to inquire into the following:

First, what was the real intention of the parties to the arrangement; second, does the female own a definite interest in the property or the business; third, has she the right to participate in the profits, and if so, upon what terms; fourth, is she liable for the losses, debts, etc., incurred by the business, and if so, to what extent and upon what terms?

This question of partnership, *vel non,* as it effects the administration of this particular law, furnishes an easy means for evasion of the purposes of the law, and we will be glad, therefore, to assist you as best we may in the determination of this question, as it may arise, on the detailed facts of any particular case, if you care to submit the facts to us for that purpose.

Yours very truly,

LUTHER NICKELS,
Assistant Attorney General.

LABOR LAWS—FIFTY-FOUR HOUR LAW.

Application of the law to overtime by women who are, or, are supposed to be, partners.

Honorable C. W. Woodman, Labor Commissioner, Capitol.

DEAR SIR: We have your letter of even date propounding further

question with respect to the application of the Fifty-four Hour Law to overtime by women in cases where the women may own an interest and share in the profits and losses, etc., of the firm, the "employer."

As stated in our former letter, if the woman is in fact and law a bona fide partner, in our opinion the law does not apply where the woman is a bona fide partner, because, she then, herself, becomes the employer and not the employe.

Your further question presents the case where the "female may own an interest in a business and share in profits and losses." This would, ordinarily, constitute her a partner and not an employe. However, these facts are not conclusive evidence of partnership, because, the real arrangement might be such, and might be intended, so as to be simply an evasion of the law. It would be well to ascertain the amount of the interest owned by her and the real terms upon which she shares in the profits and losses.

Your second question, presents the proposition, that the female may be both the employer (by being a partner), and an employe (by being in the service of the firm or partnership). As stated above, we think if she is a bona fide partner, then she is the employer, and being the employer, she cannot at the same time be an employe. Your proposition would be correct if the law of the State required a firm or partnership as being an "entity" or "person" in the way in which it recognizes a corporation as being an "entity" or "person."

Your third proposition suggests that the "partnership" idea, may afford employers an "easy means of evading the law, if, by making over a small share in the business to such female employes, they could work them long hours in comparison, of which, the profits accruing to the employes on her share in the business, would be a mere bagatelle." This would be true if it were not for the fact that an arrangement made with the intention of evading the law, would not have that effect. If such is the purpose of the arrangement, then the woman is an employee and the law is applicable to her overtime.

In order to make the law inapplicable, the partnership would have to be bona fide and we do not think that such an arrangement as you describe in your third proposition, would constitute a partnership. As suggested throughout our correspondence on this subject, the real intention and purpose of the arrangement, and not the form thereof, is the test. Neither does the mere form of the arrangment prove the intention or effect. As stated before, it becomes necessary in every such case to examine all of the facts, circumstances and conditions pertaining to the particuar case, and therefrom to determine whether the arrangement is a good faith one, or a mere attempt to evade the law.

Your fourth proposition, is as follows:

"Many firms and corporations have put into operation profit-sharing schemes whereby the employes participate in the profits of the firms or corporations. In cases of this kind, what would be the status of such firms and corporations and their employes under the law?"

Replying to this question, I will say, that as to "corporations" the

law would apply in full force in cases of this kind by reason of the fact that the "corporation" is recognized by the laws of the State as being a "person" or "entity" separate and apart from its stock holders, officers, employes, etc. As to "firms," the profit-sharing plan as ordinarily carried out, would not at all render the law inapplicable; as stated before, the plan would have to be such as to constitute the woman a partner, and therefore, an "employer"

Yours very truly,

LUTHER NICKELS,
Assistant Attorney General.

LABOR LAWS—WAGES—SEMI-MONTHLY PAYMENT OF.

Chapter 25, Acts of the Regular Session of the Thirty-fourth Legislature, applies to all employes of the persons, firms or corporations therein enumerated whether such employment be by the hour, day, week, month or year.

The fact that the law places the enforcement of the law under the direction of the Commissioner of Labor does not confine the Act to such institutions as by law fix the duties of that official, but the operation of the Act covers all persons, firms and corporations enumerated therein.

December 20, 1915.

Hon. C. W. Woodman, Commissioner of Labor, Austin, Texas.

DEAR SIR: The Attorney General has your letter of December 15, reading as follows:

"I am propounding to you a number of questions in regard to the semi-monthly pay day law and its application to certain employes. Will thank you to furnish me ruling.

"(a) Does the law apply to those who are under contract and are paid a salary and who perform services other than what may be termed manual labor?

"(b) Does the law apply to vice-principals, or what is generally denominated as superior servants, the test in this state being an employe of a corporation who has the right to employ and discharge, especially if such vice-principals be paid by the month or year and not by the day or hour, and therefore receive a salary instead of wages?

"(c) Does the law apply to superintendents and officials of a corporation, such as those on whom is imposed the duty of management?

"(d) Does it apply to the agents of a corporation, as distinguished from employes, such as the station agents of The Texas Company, who are paid either a salary by the month or a salary and commissions on sales, or commisions only, but whose duties constitute them what the law terms as 'local agents' in places and counties other than the general or division offices of the corporation?

"(e) Does the law apply to clerks and stenographers, employes at the general offices or division headquarters of the corporation, doing clerical work?

"(f) Does the fact that the enforcement of the law is lodged with the Commissioner of Labor and Statistics limit the class of employes to such as by law fixes the duties of this last named official?

"These questions are of common occurrence and your opinion on them will be very much appreciated."

Replying thereto we beg to advise that in the opinion of this Department your questions numbered (a) to (e), inclusive, should be answered in the affirmative.

Section 1 of Chapter 25 of the Acts of the Thirty-fourth Legislature, after enumerating the classes of persons, firms or corporations to which the same applies, provides that they shall pay each employee the wages earned by him or her as often as semi-monthly. We find nothing in this Act to indicate that the Legislature intended to make any distinction between employees of such persons, firms or corporations.

In your inquiry you make a distinction between "wages" and "salary." It is true that there is authority that the word "salary" implies a specific contract for a specific sum for a specified period of time, while "wages" are compensation for services by the day or week, and that "wages" in its ordinary acceptation has a less extensive meaning than "salary" and is usually restricted to sums paid as hire to domestic or menial servants and to artisans, mechanics, laborers and others employed in various menial occupations, while "salary" has reference to the compensation of clerks, bookkeepers or employees of like class, officers of corporations and public officers. It is also held that the term "wages" as distinguished from "salary" is commonly understood to apply to compensation for menial labor, skilled or unskilled, paid at stated times and measured by the day, week, or month, season or piece, but not by the job. On the other hand the lexicographers and authorities class "salary" and "wages" as synonymous. It is held that the word "salary" means a recompense or consideration paid to a person for his labor and industry in another man's business, whether it be derived from *salarium* or more fancifully from *sal,* the pay of the Roman soldiers, it carries with it the fundamental idea of compensation for services rendered. Indeed there is eminent authority for holding that the words "wages" and "salary" are in essence synonymous.

In dealing with the bankruptcy act the court held that the word "wages" means the agreed compensation for services rendered by the workmen, clerks or servants of the bankrupt, those who have served him in a subordinate or menial capacity and who are supposed to be dependent on their earnings for their present support, whether their employer has agreed to pay them by the hour, day, week or month or by the job or piece is wholly immaterial.

4th Words & Phrases, 2nd Series, 1220.

It is also held that the word "wages" within the meaning of the bankrupty act applies to commissions on sales made by an employee of the bankrupt.

We therefore answer your inquiries (a) to (e), inclusive, in the affirmative and say that the Act applies to each and all of the employees enumerated by you.

Replying to your inquiry number (f) beg to advise you that the act itself places the enforcement thereof under your jurisdiction and does not limit its operation to such institutions over which the law creating your department gives you jurisdiction, but that its operation and

scope is confined by Section 1 thereof to the persons, firms and corporations therein enumerated.

With respect, I am,

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

LABOR LAWS—LEGAL DAY'S WORK—EIGHT-HOUR LAW.

The time required of employes of a city in harnessing teams, greasing wagons and scrapers and going to the place of work in the morning, as well as the time required in return to the barn, unharnessing and feeding the teams in the afternoons, should be computed in arriving at the number of hours worked during any one day, and should the total time exceed eight hours, it would be a violation of the law. Chapter 68, Acts Thirty-third Legislature.

April 22, 1916.

Hon. John K. Russell, County Attorney, Cleburne, Texas.

DEAR SIR: In your letter of April 20, addressed to the Attorney General, you state in substance that the hands employed in constructing and repairing the streets of Cleburne are required to harness the teams and grease the wagons and graders in the mornings, and are then required to drive to their work and thereafter work eight hours each day, and after so working are required to drive the teams back to the city barn and there unharness and feed them, making the time actually worked each day between nine and ten hours, and you desire to know if such a practice is a violation of what is termed the eight hour law enacted by the Thirty-third Legislature.

Chapter 68 of the Acts of the Regular Session of the Thirty-third Legislature by Section 1 of such Act provides that: "Eight hours shall constitute a day's work for all laborers * * * employed on behalf * * * of any municipality * * * in any one calendar day where such employment is for the purpose of constructing, repairing or improving * * * roads, highways * * *."

Section 3 of the Act prescribes the penalty for a violation thereof.

In our opinion the eight hours during which the laborers may be required to work is that period of time beginning at the hour upon which they are required to report for duty and ending at the hour at which they are discharged, not including of course such time as may be allotted for the noon rest. If the employes of the city of Cleburne are required to report at the city barn in the mornings and there harness the teams and grease the wagons and scrapers, it is but an incident of their work upon the streets and the time so consumed must be computed in making up the eight hours of work during the day. Likewise, if the employes are required to take the teams back to the city barn in the afternoons and there unharness and feed them, the time so consumed would also be computed in arriving at the total time required of them, and if the total time actually engaged is in excess of eight hours a day it would be a violation of the law.

The case of the United States vs. Kansas City Southern Railway Company, 189 Fed. Rep., 471, was instituted by the government to recover penalties for the violation of what is commonly called the sixteen hour law. The railroad defended on the ground that the excess time was occasioned among other things by delay in meeting other trains, switching, hot-boxes, picking up and setting out cars, etc. In that case the Court said:

"But it is contended by learned counsel for defendant that the time during which the train was delayed should not be included within the time the crew was on duty. No reason is given for such construction, and there is nothing in the Act to justify it. The employe goes on duty when required by the rules of the employer to report for duty, and if for any reason he is delayed unless it is for some cause excepted by the proviso of the Act the time he is on duty runs."

In the case presented by you there is even less ground for the contention that the time thus consumed should not be considered in making up the legal day's work, for the reason that the men are actually engaged in required services; whereas the trainmen were idle in so far as any physical effort was concerned during the time the train was delayed on account of other trains.

More directly in point is the case of the United States vs. Illinois Central Railroad Company, decided by the District Court for the Northern District of Iowa, and reported in 180 Fed. Rep., 630, from which we quote as follows:

"I do not think the custom of the company not to strictly enforce the rule makes any difference. This man complied with the rule. He arrived at the engine 30 minutes before the leaving time of the train, and was actually engaged in doing the things required by the rule; and the question here is whether he was, during that time, within the meaning of the act, actually engaged in or connected with the moving of that train. This is the question here. In my opinion this man was on duty, within the meaning of the act, from the time he went there and commenced to supervise or overlook, that engine in preparation for the trip. It does not make any difference whether he was paid for this time or not. That was the time his work and the strain on him began. The work of an engineer, an employe of the railroad, begins when under the rule of the company he is there and is at work in connection with the preparation of the engine for the moving of the train. He must look over that engine. He must see that it is oiled up. He must see that the airbrakes are all right. He must move the engine down over the tracks and across the switches to connect it with the train. And in my opinion, he is on duty, within the meaning of the Act, during the time he is doing these things. If he goes there a half an hour before the time to start to do these things, during the time he is there doing them he is on duty. That is my view of it."

We therefore advise you that in the opinion of this department a computation of time under the eight hour law begins at the hour upon which the employes of the city are required to report for duty and ends at the hour upon which they are discharged, and that if the entire time required exceeds eight hours during any one day the Act is violated.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

LEGISLATURE—APPROPRIATIONS—STATE INSTITUTION FOR JUVENILES—NEGRO SCHOOL—FURNITURE.

Legislature would not appropriate money for erection of dormitory and leave the board of control powerless to utilize the building after its erection because of lack of proper equipment. Board could spend the money left on hand, after erecting the dormitory, for the purchase of such furniture, etc., as may be necessary to properly equip the school and utilize the dormitory already constructed.

October 7, 1914.

Hon. J. R. Elliott, State Purchasing Agent, Capitol.

DEAR SIR: Under date of the 5th instant you ask a construction of that portion of the Appropriation Bill enacted at the First Called Session of the Thirty-third Legislature, relative to the State Institution for the Training of Juveniles, located at Gatesville. Among other things, you say:

"The board controlling the Gatesville institution let a contract for the erection of this building, reserving from the funds enough to furnish the same. Prof. A. W. Eddins, superintendent of the institution, says he went before the Appropriation Committee and they agreed to give him the $40.000.00, with the understanding that he was to furnish the building out of that amount. He also claims that he had a letter from the Comptroller which he construed to mean that the furniture for the building was to be bought out of that appropriation. He has more than enough funds left with which to purchase the necessary furniture and desks. The Comptroller is now of the opinion that the purchase of the furniture, desks, etc., out of that fund is not authorized by the wording of the bill.

"Prof. Eddins further states that he is unable to buy the furniture from any other fund and that his building will be of no use and benefit to him without said furniture, that his appropriation for maintenance was based on the usual number of pupils, not exceeding, as he thought at that time, three hundred and fifty; that the courts have sentenced and filled the institution at the present time with about four hundred and fifty inmates. Under the law he is compelled to keep and care for these inmates, but it will be impossible for him to do so unless he can use this building.

"I would be pleased to have you render me an opinion as to whether or not you believe the Comptroller will be justified in allowing an account for the furniture and desks out of this fund, over and above the amount necessary for its construction."

An examination of the appropriation bill for this institution fails to show that there was any specific appropriation made for the purchase of furniture and desks and other equipment necessary for the installation of this school for juvenile negroes. It seems that heretofore a separate school for negroes has not been maintained, and that this Legislature deemed it wise to establish and maintain a school for the juvenile negroes becoming inmates of this institution.

The appropriation made is in the following language:

"One negro school and dormitory building, to be erected on the farm at a distance and separte from the white school, $40,000.00."

It was the evident purpose of the Legislature to provide for the establishment and operation of a negro school at this institution. To do so it was not only necessary to erect a dormitory to provide a proper house for the inmates, but to equip the same for occupancy

and to purchase such equipment, apparatus and appliances as are usual and necessary for the installation and maintenance of a school of the kind that was to be maintained.

It can not for a moment be presumed that the Legislature would do the foolish thing of appropriating a large sum of money for the erection of a dormitory as a part of the scheme of establishing a school for the negro inmates of this institution and leave the Board of Control powerless to utilize the building after its erection, because of want of proper equipment.

The appropriation in question when liberalised to carry out the evident intent and purpose of the Legislature may be paraphrased and stated as follows:

"For the establishment of a negro school and for the erection of a dormitory as a part thereof, and for the purchase of such furniture, fittings, equipment, apparatus, etc., as may be necessary, there is appropriated, etc., the sum of $40,000.00."

It will be observed that the Board controlling this institution is authorized to establish a negro school. The building of the dormitory that is specifically mentioned is only a part of the things necessary to be done to establish this school. To erect the dormitory and yet not furnish it would render futile and useless the expenditure of the money necessary to erect the building.

In my opinion it should not be seriously contended that the Board having control of this institution is authorized to expend the money left on hand after erecting the dormitory for the purchase of such furniture, furnishings, apparatus, etc., as may be necessary to fully establish, equip and put into operation this school and to utilize the dormitory already constructed. This construction is imperative, and in view of the intent and purpose of the Legislature and in the absence of any specific appropriation of money for the purchase of the furniture, equipment, etc., is necessary.

Yours very truly,

B. F. LOONEY,
Attorney General.

LEGISLATURE—SUPREME COURT—STATUTES.

1. The Legislature would not have authority to pass a bill authorizing the Attorney General, acting under the instructions of the Governor, to file proper suit with the State Supreme Court for the purpose of securing, by appeal, a construction of a Federal Statute or Constitution, when the enforcement of a State Statute is dependent upon the construction or application thereto of such Federal Statute or Constitution.
2. Jurisdiction of State Supreme Court.

October 5, 1914.

Governor O. B. Colquitt, Capitol.

DEAR SIR: Under date of the 3rd instant you write this Department as follows:

"I wish you would please investigate and advise me whether the Legisla-

ture could pass a bill in substance covering the following proposition:

"Where the enforcement of a State Statute is dependent upon the construction or application thereto of a Federal Statute or of the Constitution of the United States, that the Attorney General, acting under the instructions of the Governor, shall file proper suit with the Supreme Court of the State of Texas for the purpose of securing, by appeal, a construction of such Federal Statute or Federal Constitution applicable to the enforcement of the State Statute which is dependent thereupon."

Replying to your inquiry beg to express the opinion that the Legislature would not have the authority under the Constitution to enact a law such as you outline.

The jurisdiction of the Supreme Court is conferred by Section 3 of Article 5 of the Constitution, which reads in part as follows:

"The Supreme Court shall have appellate jurisdiction only except as herein specified, which shall be co-extensive with the limits of the State. Its appellate jurisdiction shall extend to questions of law arising in cases of which the Court of Civil Appeals have appellate jurisdiction under such restrictions and regulations as the Legislature may prescribe. Until otherwise provided by law the appellate jurisdiction of the Supreme Court shall extend to questions of law arising in the cases in the Courts of Civil Appeals in which the judges of any Court of Civil Appeals may disagree, or where the several Courts of Civil Appeals may hold differently on the same question of law or where a statute of the State is held void. The Supreme Court and the justices thereof shall have power to issue writs of habeas corpus, as may be prescribed by law, the said courts and the justices thereof may issue the writs of mandamus, procedendo, certiorari and such other writs as may be necssary to enforce its jurisdiction. The Legislature may confer original jurisdiction on the Supreme Court to issue writs of quo warranto and mandamus in such cases as may be specified, except as against the Governor of the State."

From the above it clearly appears that the jurisdiction of the Supreme Court is appellate and is confined to law questions that arise in civil cases only, because it can entertain jurisdiction only over cases of which the Courts of Civil Appeals have appellate jurisdiction.

The only original jurisdiction that may be conferred on the Supreme Court is to issue writs of quo warranto and mandamus in such cases as may be specified. There is no warrant in the Constitution for the enactment of a law authorizing the institution of a suit in the Supreme Court simply for the purpose of procuring a construction of the Federal Constitution or a Federal Statute in so far as the same might be applicable to the enforcement of a State Statute dependent thereon. The jurisdiction of the Supreme Court would only attach to cases, that is to say actual controversies, and while they would be authorized to decide such questions it would only be when the questions are presented in actual controversies in court and a suit or proceeding could not be instituted by authority of the Legislature simply for the purpose of determining the construction of a statute.

It is therefore my opinion that such a statute as you outline could not be constitutionally enacted by the Legislature, in view of the article quoted above.

Yours very truly,

B. F. LOONEY,

Attorney General.

LEGISLATURE—APPROPRIATIONS—COMMITTEE—STATE SENATE—PENITENTIARY.

1. Senate has the right by simple resolution to make appropriation out of contingent expense fund to cover compensation and expenses of committee and its employees to investigate all business of the State penitentiary system.
2. Such committee held to be legally constituted, and could perform its functions in vacation; and that the per diem of its membership and of its employees, and other expenses, could be legally paid from the unexpended contingent expense funds.

June 9, 1915.

Hon. James A. Harley, Chairman State Penitentiary Investigating Committee, Capitol.

DEAR SIR: Under date of the 7th instant, you sent to this Department the following communication:

"On the 27th day of May, 1915, the Senate of Texas adopted Simple Resolution No. 39, a copy of which is hereto attached and marked 'Exhibit A,' and on the 28th day of May, 1915, adopted Simple Resolution No. 41, a copy of which is hereto attached and marked 'Exhibit B.' Under the terms of said resolution, a committee of the Senate was appointed by the Lieutenant Governor consisting of five senators, to investigate all business, financial and commercial transactions of the Penitentiary System of Texas from January 1st, 1907, down to the time of the beginning of such investigation. The resolution provided that the committee should have authority to sit for a period not to exceed sixty days, and that the compensation and expenses of the members of said committee and its employees should be paid out of the contingent expense fund of the Senate, and an appropriation of five thousand ($5,000.00) dollars or so much thereof as may be necessary was made for this purpose. It is further provided that the committee shall submit its report to the Senate of Texas at the first session of the Texas Legislature, (regular or special), to assemble after the conclusion of the investigation herein provided for. There is still remaining to the credit of the contingent expense fund of the Regular Session of the Thirty-fourth Legislature in the State Treasury approximately $5.000.00, and to the credit of the contingent expense fund of the First Called Session of the Thirty-fourth Legislature, approximately $12,000.00, at the date of this request.

"The committee mentioned in said resolution met on the 29th day of May, 1915, and duly organized by the election of Senator Jas. A. Harley, as chairman, and Senator H. P. Brelsford, as vice-chairman, and Mr. W. V. Howerton, as secretary. The Comptroller of Public Accounts advises the chairman of this committee that there is doubt in his mind as to the authority of the Senate by a Simple Resolution to appropriate money out of the contingent expense fund set apart for the First Called Session of the Thirty-fourth Legislature to pay for duties to be performed by this committee after the adjournment of said Called Session, and further states that he is of the opinion that he would not be authorized to issue warrants for said purpose or purposes under the authority of said Simple Resolution as hereinbefore referred to.

"Therefore, you are respectfully requested to advise this committee in writing at once. First. Has the Senate, by a Simple Resolution, a right to make the appropriation out of the contingent expense fund such as is contemplated in the resolution; and, second, is the Comptroller authorized to issue warrants based upon said Simple Resolution drawn against the contingent expense fund of the First Called Session of the Thirty-fourth Legislature in payment of indebtedness incurred under such resolution for work done after the adjournment of the session of the Legislature?"

It is our opinion that your questions should be answered in the affirmative. The Department had occasion recently to investigate

the proposition of law involved in your communication. It seems that the House of Representatives, before adjournment of the Regular Session, passed a resolution authorizing a sub-committee of the General Committee on Appropriations to sit in vacation for the purpose of perfecting the General Appropriation Bills, authorizing the payment of the per diem of members of the sub-committee and their clerks and stenographers out of the contingent expense fund appropriated for the expense of the Thirty-fourth Legislature. Hon. H. B. Savage, Chairman of the House Contingent Expense Committee, sought the opinion of this Department as to the power of the House to create this Committee. After a very thorough investigation of the question, we issued an opinion on May 10th, affirming the power of the House to create the Committee to serve in vacation and to be paid out of the Contingent Expense Fund that had been appropriated by an Act of this Legislature. The same proposition is presented in your communication. The Senate, by resolution, appointed a committee of its membership to serve during vacation for the purpose of investigating the business, financial and commercial transactions of the Penitentiary System of Texas, from January 1, 1907, down to the date of beginning the investigation, and authorizing the payment of the per diem of the members of this committee and their employes from the contingent expense fund appropriated for the expenses of the Thirty-fourth Legislature. It would serve no useful purpose to re-state here the reasons and cite the authorities contained in the opinion heretofore rendered at the request of Hon. H. B. Savage, and hence we will content ourselves by simply re-stating the conclusion at which we arrived, and that is, that in our opinion the Senate was authorized to enter upon this investigation; that its special committee created for this purpose may sit and perform its functions in vacation and that it was fully authorized to order the expenses incident to the investigation, including the per diem of the members and employes paid, from the unexpended balance of the contingent expense fund.

The Legislature, or either branch thereof, has the right to make an investigation, such as is undertaken in this instance. (See Arts. 5517 to 5524, Acts of 1911.)

A question similar to this arose in 1909. It seems that the Thirty-first Legislature passed an Act providing for the appointment of four members of the Senate and five members of the House as a Committee to investigate the Penitentiary System. When the Bill reached the Governor's office it was referred to the Attorney General for an opinion. Hon. R. V. Davidson, Attorney General at the time, wrote an opinion in which he held that the Legislature had the authority to provide for the Committee thus composed of members of the Senate and of the House of Representatives to act after final adjournment of the Legislature; that such members could be compensated as members of the Committee while they were still members of their respective houses and that the Committee had authority to sit in vacation and make the investigation provided for. The only material difference in the situation presented there and the situation presented by the resolution under consideration is, that in the former

instance the Committee was created by joint action of both houses, whereas, in the case under consideration, the Committee was created by a Simple Resolution of the Senate.

The Acts of 1907, above referred to, being Articles 5517 to 5524, of the Acts of 1911, specially authorizes the Legislature, or either house thereof, by a committee of its membership, to undertake an investigation of this nature.

The fund in question had already been appropriated by a law and set apart for the contingent expenses of the Legislature and may be expended for such purpose by the Legislature acting jointly or by either house, and the Legislature itself, or either house thereof, is the final judge as to the purposes for which such fund may be expended. In other words, if the Senate deems it proper for their information in regard to penitentiary legislation to have the business affairs of the System investigated, and a report as to the result of the investigation made, its decision that this is the proper expenditure of the contingent expense fund is final, and we do not believe any executive officer, or any court as to that, possesses the power to revise their action and control their discretion.

This is, therefore, to advise you that, in our opinion, the Committee is legally constituted; that it has a right to perform its functions in vacation; that the per diem of its membership and of its employes and the other expenses of the investigation can be. and should be, paid from the unexpended contingent expense fund appropriated by the Legislature for the expenses of the Thirty-fourth Legislature, and that the Comptroller is fully authorized on proper requisition to issue warrants upon the Treasurer therefor.

Yours very truly,

B. F. LOONEY,

Attorney General.

LIENS—MECHANICS, CONTRACTORS, BUILDERS AND MATERIAL MEN.

The contract for erection, repair or improvement. as well as the bond of the contractor provided for in Article 5623. Revised Statutes, 1911. as amended by Chapter 143, Acts of the Regular Session of the Thirty-fourth Legislature, are to be filed with the county clerk, but there being no provision for the recording of such instruments the same are not required to be recorded.

July 28, 1915.

Hon. J. J. Woodhouse, County Attorney, Victoria, Texas.

DEAR SIR: The department is in receipt of your communication of July 4th, reading as follows:

"Would you please advise me whether it is necessary for the county clerk to record the contract and bond mentioned in the latter part of Article 5623 as amended by the Thirty-fourth Legislature, Chapter 143, Section 1, at page 224 of the General Acts. reading, 'Said owner, railroad company. its agent or receiver, shall cause to be executed a written contract for such erection, repair or improvement, and cause same to be *filed* with the county clerk of the county where the property is situated. and shall also cause to be executed and *filed* with said county clerk before the work is begun, a good and sufficient

bond by said contractor, conditioned as hereinafter provided; and when said bond and contract shall be so executed and filed, the said owner, railroad company, its agent or receiver, shall in no case be compelled to pay * * * etc.' "

From a reading of Article 5623 R. S., as amended by Chapter 143, General Laws Regular Session of the Thirty-fourth Legislature, as well as the preceding article in Chapter 2, Title 86, relating to liens it will be noted that in order to fix and secure the lien of an original contractor, journeyman, day laborer or any one furnishing material to a contractor, sub-contractor, agent or receiver it is necessary to file in the office of the county clerk in the first instance their contract and cause same to be recorded in a book to be kept by the county clerk for that purpose and as to materialmen it is made their duty in order to obtain the benefit of the law to file in the county clerk's office an itemized account of the claim and cause same to be recorded in a book kept by the county clerk for that purpose.

By the amendment to Article 5623 the following language was added.

"Said owner, railroad company, its agent or receiver, shall cause to be executed a written contract for such erection, repair or improvement, and cause same to be filed with the county clerk before the work is begun, a good and sufficient bond by said contractor, conditioned as hereinafter provided; and when said bond and contract shall be so executed and filed, the said owner, railroad company, its agent or receiver, shall in no case be compelled to pay a greater sum for or on account of labor performed, or material, machinery, fixtures or tools furnished, than the price or sum stipulated in the original contract between such owner and contractor."

It will be noted that the language used in that portion of the amendment copied above is that the owner, railroad company, its agent or receiver shall cause the contract to be *filed* with the county clerk and shall cause to be executed and *filed* with said county clerk a bond by the contractor conditioned as thereinafter provided, and it will be further noted that under the terms of this amendment when the bond and contract are so executed and *filed* that the liability is limited by the terms of the original contract. Thus it will be seen that the Legislature in dealing with the contract and bond under consideration has departed from the language used with reference to the filing of claims mentioned in the preceding part of Article 5623 and Article 5622, and has eliminated therefrom the requirement that such instruments be recorded in a book kept for that purpose.

This latter language is the usual mode adopted by the Legislature and expresses its purpose that an instrument filed with any officer shall be recorded and unless it was the intention of the Legislature that such instrument be recorded there will be no obligation resting upon the county clerk to perform that service nor would he be authorized to do so and charge the customary fee therefor. A paper is said to be filed when it is delivered to the proper officer and by him received to be kept on file. City of Dallas vs. Beeman, 45 S. W., 626.

A document may be said to be filed with the officer within the meaning of the statutes which requires certain instruments and documents to be filed when it is placed in his official custody and is de-

posited in the place where his official records and papers are usually kept. Snider vs. Methvin, 60 Texas, 487.

Filing a paper in modern usage consists in placing it in the custody of the proper official by the party charged with the duty and making of the proper endorsement by the officer. Stone vs. Crow, 51 N. W., 335.

In the sense of the statute requiring the filing of a paper or document it is filed when delivered to and received by the proper officer to be kept on file. The word carries with it the idea of permanent preservation of the thing so delivered and received that it may become a part of the proper record. People vs. Peck, 22 N. Y., Supp. 576.

In modern days it is usually held that a paper is filed on the part of the party who is required to file it when he has presented it at the proper office and left it with the person in charge thereof and paid the fees for filing, if any is required.

The term "file" is used to denote a paper placed with the officer and assigned by the law to his official custody. A file is a record of the court and it is the duty of the officer when a paper is thus placed in his custody to endorse upon it the date of its reception and retain it in his office and this is what is meant by filing the paper. Jones vs. Wells, 3 W. M. W., 794.

In the case of Holeman vs. Chevallier, 14 Texas, 337, the Court uses this language. "When the law requires a party to file it simply means that he shall place it in the official custody of the officer. That is all that is required of him." As is provided in Article 5623a added by Chapter 143, Acts of the Thirty-fourth Legislature, this bond is executed for the benefit and is made in favor of the owner, sub-contractor, workmen, laborers, mechanics and furnishers of material as their interest may appear and suit may be instituted upon such bond for the collection of any amount due to any of said parties. There is nothing in this Act of the Legislature authorizing or requiring the contract and bond to be recorded, and we are of the opinion that the Act has been complied with upon the filing of same with the county clerk.

Yours very truly,
C. W. TAYLOR,
Assistant Attorney General.

LOTTERY—GAMES OF CHANCE—GUESSING CONTESTS.

1. A lottery has been defined to be any distribution of prizes by chance.
2. If the influence of skill is apt to be thwarted by chance it is immaterial that the method permits the exercise of judgment or skill. *Held*, that a distribution of prizes to those who made the closest estimate of the number of beans in a glass jar comes within the statute defining a lottery as a scheme for distributing property or prizes by chance to those who pay, or agree to pay, a valuable consideration for the chance.

November 3, 1915.

Hon. J. W. Marshall, County Attorney, Hillsboro, Texas.

DEAR SIR: In your communication of the 29th ultimo, you submit the following scheme out-lined by some of the merchants of Hillsboro, and request to be advised whether in my opinion the operation of the same would be illegal:

The plan is to fill a jar with some sort of beans and when a customer trades a dollar cash or pays that amount on an account he will be given a ticket entitling him to make a guess as to the number of beans in the jar. With each and every ticket obtained the customer is to have an additional guess. These tickets will cost nothing, but will be given the customer free of all charge when he trades or pays a dollar on account. The merchants intending to participate in this scheme intend to give away 17 prizes to those "guessing closest to the correct number" of beans in the jar.

In reply thereto, I beg to respectfully advise that in my opinion any scheme whereby customers are awarded prizes by chance is a violation of the law defining and prohibiting lotteries.

A lottery has been defined to be any distribution of prizes by chance.

Randle vs. State, 42 Texas, 580,
Holloman vs. State, 2 Texas Cr., 610,
Prendergast vs. State, 57 S. W., 850.

While some authorities hold that if the result of the distribution of the prizes is determined alone by judgment or skill, the scheme is not a lottery, but the better rule is that if the influence of skill is apt to be thwarted by chance it is immaterial that the method of distribution permits the exercise of judgment or skill. 25 Cyc., 1635.

In People ex rel Ellison vs. Lavin, 66 L. R. A., 601, it was held that a distribution of prizes to those who made the closest estimate of the number of cigars on which a tax is paid during a specified month is made by chance, within the meaning of the statute defining a lottery as a scheme for distributing property or prizes by chance to those who pay, or agree to pay, a valuable consideration for the chance.

In an English case (Hall vs. Cox, 1 Q. B., 198), it was held that the distribution of prizes to newspaper subscribers who should approximate most closely the number of deaths in London during a specified week was held not to be a lottery, and in an Ontario (Canada), case (Reg. vs. Dodds, 4 Ont. Rep., 390), it was held that the award of "a prize to the person who should most closely estimate the number of beans in a glass jar was dependent on the exercise of skill or judgment and not on chance." These two decisions, however, were rendered on the ground that to constitute a lottery the distribution of the prizes must be *exclusively* by chance.

A precisely similar scheme as the one you submit was passed upon by the Supreme Court of Indiana, in the case of Hudelson vs. State, 94 Ind. 426, 48 Am. Rep., 171, and the Court there said:

"An expert mathematician might more nearly fix the size of the globe than an entirely uneducated person. And so he, and persons of better judgment, might more nearly fix the number of beans in the globe than persons of less judgment; yet the exact number would be a mere matter of guessing. That anyone should guess the correct number would be a matter of the merest chance, because there are no means of attaining to a certainty."

In the case of People ex rel Ellison vs. Lavin, supra, Justice Cullen, of the New York Court of Appeals, used the following language:

"If the contest for a prize was to be had among experts, the award of the prize, despite the many elements affecting the result, which no one could forsee, might possibly be held dependent on judgment, and not on chance. But the competition before us is not at all of that character. * * * We think the distribution in this case is controlled by chance within the meaning of the statute, and that, therefore, it is illegal."

The weight of authority, I think, tends to show that the operation of such plans as the one submitted by you will be illegal, and it is your duty as county attorney to prohibit same.

I return enclosure.

Very respectfully,
B. F. LOONEY,
Attorney General.

MEDICAL PRACTICE ACT—PHYSICIANS.

In order for a non-resident physician to practice in Texas except when merely called in consultation, he must be licensed either upon examination or upon reciprocity agreements and be registered in the county in which he practices.

Articles 5736, 5742 and 5738 and 5739, Revised Statutes, 1911, as amended by Chapter 63, Acts of the Thirty-fourth Legislature.

June 21, 1915.

Hon. B. N. Richards, County Attorney, Dalhart, Texas.

DEAR SIR: The Attorney General is in receipt of your letter of June 15th, in which you propound three questions relating to the Medical Practice Act, as follows, to-wit:

'I desire an opinion from your department under the Texas Medical Practice Act on the following state of facts, viz.:

"1. A lives at Clayton, Union County, New Mexico; is a practicing physician holding a diploma from a reputable school of medicine and a verification license from the State Board of Health, but has had neither his diploma nor verification license recorded with the district clerk of Dallam or any other county in Texas. He crosses the State line and comes into Texline, Dallam County, Texas, and practices upon patients for pay. In such calls, he is not called in consultation with another doctor, and has opened no office in Dallam County where patients may see him. Does he, in so doing, violate any law of Texas?

"2. A lives at Clayton, Union County, New Mexico; is a regular practicing physican, holding a diploma from a reputable school of medicine, but has not procured a verification license from the State Board of Health and has not had his diploma recorded with the district clerk of Dallam or any other county in Texas. He comes across the State line into Texline, Dallam County,

Texas, and practices upon patients for pay, and in said calls, he is not called in consultation with another doctor and has not opened an office or designated a place in Dallam County where patients may see him.

"Has he, in so doing, violated any law of Texas?

"3. A lives at Clayton, Union County, New Mexico; is a practicing physician, but holds no license or diploma from any reputable school of medicine, nor from the State Board of Health of Texas, or any other State, and has not recorded any license, diploma or verification license with the district clerk of Dallam or any other county in Texas. He calls on and treats patients at Texline in Dallam County, Texas, for pay, having opened no office, and having designated no place in Dallam County where patients may see him.

"In so doing, has he violated any law of Texas?"

It is expressly provided in Section 10 of the Act of 1907, which is now Article 5742 R. S., 1911, among other exceptions therein enumerated, that the Medical Practice Act shall not apply "to legally qualified physicians of other States called in consultation, but who do not open offices or appoint places in this State where patients may be met or called to see," so that it would not be a violation of the Medical Practice Act of this State for a non-resident physician who is not licensed or registered in this State to come into the State and practice when called in consultation, provided they do not open offices or appoint places in the State where patients may be met or called to see.

The only other method whereby a non-resident physician would be permitted to practice within the State of Texas is for him to comply with the provisions of the law with reference to securing license and registration. This may be dône in two ways: by an examination before the Board of Medical Examiners as any other applicant under Article 5739, as amended by Chapter 63, Acts Thirty-fourth Legislature, and a registration of his license in the office of the district clerk of the county wherein he may practice under Article 5736.

2. Article 5738 R. S., as amended by Chapter 63 of the Acts of the Thirty-fourth Legislature reads as follows:

"The board of medical examiners may, at its discretion, arrange for reciprocity in license with the authorities of other States and territories having requirements equal to those established by this law. License may be granted applicants for license under such reciprocity on payment of fifty dollars."

In the event the State of New Mexico has enacted laws with requirements equal to those established by the Medical Practice Act of this State as a condition upon which persons may be permitted to practice medicine, then the Board of Medical Examiners of this State would have the right to enter into reciprocity agreements with the authorities of New Mexico upon which license would be issued to practitioners from that state permitting them to practice in Texas, and if such arrangements have been made then a practitioner from New Mexico upon payment of $50.00 would receive from the Board of Examiners of this State a license to practice and upon securing such license it would be necessary that he register same in the office of the district clerk of the county in which he proposed to practice.

We therefore answer that it would be a violation of the laws of this State for a physician residing in New Mexico to cross the line

into Texas and practice his profession unless he has obtained the license and registration in some of the modes detailed in this opinion.

Very truly yours,

C. W. TAYLOR,

Assistant Attorney General.

NAVAL MILITIA.

The naval militia, created and maintained under the rules adopted and promulgated by the Texas Naval Board under authority of Chapter 71, Acts of the Regular Session of the Thirty-fourth Legislature, and the Act of the Federal Congress of February 16th, 1914, is an arm of the Texas National Guard, for the support of which, among other branches of the service, the commissioners court of any county or the council of any city or town is authorized and empowered to appropriate not exceeding the sum of one hundred dollars ($100.00) per month for the expense of such organization in such county or city.

Act of Federal Congress, February 16, 1914;
Chapter 71, Acts of the Thirty-fourth Legislature;
Article 5888, Revised Statutes of 1911.

June 22, 1915.

Hon. Chas. H. Theobald, County Attorney, Galveston, Texas.

DEAR SIR: In your favor of June 20th, directed to the Attorney General, you propound the following question:

"Can the appropriation authorized under Article 5888, Revised Civil Statutes, 1911, page 1258, for necessary expenses therein enumerated for the benefit of the militia, be extended to grant a similar benefit to the State naval militia organized under authority of the State Naval Board created by H. B. No. 10, Chapter No. 71, page 124, General Laws of the Thirty-fourth Legislature, at its regular session?"

Replying thereto, we beg to say that Section 1 of the Act of the Federal Congress of February 16, 1914, reads as follows:

"Section I. (*Naval militia constituted.*) That of the organized militia as provided for by law such part of the same as may be duly prescribed in each State, Territory, and for the District of Columbia, shall constitute a naval miltia."

By Chapter 71, Acts of the Regular Session of the Thirty-fourth Legislature, there is created a board to be styled "Texas Naval Board," consisting of the Governor of Texas and one other, to be appointed by him, which Board shall have power and is authorized to make, adopt and promulgate all such rules, orders and regulations as may be advisable and necessary for the creating and maintaining of an efficient Naval Militia, and said Board is empowered to co-operate with the Secretary of the Navy of the United States in putting into effect in the State of Texas the provisions of the Act of Congress, above referred to.

It seems, from a reading of the Act of Congress, that it was the intention of Congress to create and organize a new arm or branch of the State National Guard, and we are of the opinion that the naval

militia takes its place as one arm of the service, just as the infantry, cavalry, artillery and other branches.

Article 5888, of the Revised Statutes of this State, reads as follows:

"The commissioners court of each (county) and the council of any city or town in this State are hereby authorized and empowered, in their discretion, to appropriate a sufficient sum, not otherwise appropriated, to pay the necessary expenses of the troops, batteries, companies, signal corps, hospital corps and bands of the active militia of this State located in their respective counties, cities or towns, not to exceed the sum of one hundred dollars per month for such expenses of any one organization."

In our opinion, the language of the above quoted article is broad enough to include any branch of the service, a company, troop, battery or body of men, by whatever name called, that might be located within any county, city or town in the State, and that the commissioners' court or city council of any county, or city, or town in this State would have authority, under the above article, to appropriate not to exceed the sum of One Hundred Dollars ($100.00), per month for the expense of any such organization.

We therefore advise you that, in the opinion of this Department, the commissioners' court or the city council or city commission of any county or city in this State would have authority to appropriate not exceeding One Hundred Dollars ($100.00) per month toward the expenses of the Naval Militia located within such county or city.

Yours very truly,

C. W. TAYLOR,

Assistant Attorney General.

NAVIGABLE WATERS—PUBLIC WATERS.

Article 5338, Revised Civil Statutes of 1911.

A stream maintains an average width of thirty feet, within the meaning of Article 5338, Revised Statutes of 1911, when the water in the stream, at its ordinary stage, is thirty feet in width.

A survey which crosses a stream, navigable under the statute at the time the survey was made, does not deprive the State of title to the bed of the stream.

December 1, 1915.

Hon. M. W. Burch, County Attorney, Decatur, Texas.

DEAR SIR: In a recent letter you refer to Article 5338 R. S., of 1911, which defines as navigable all streams in so far as they retain an average width of thirty feet. You desire to know how such width is to be determined and measured.

The article referred to is as follows:

"All lands surveyed for individuals, lying on navigable watercourses, shall front one-half of the square on the watercourse and the line running at right angles with the general course of the stream, if circumstances of lines previously surveyed under the laws permit; and all streams, so far as they retain an average width of thirty feet, shall be considered navi-

gable streams within the meaning hereof, and they shall not be crossed by the lines of any survey."

This article was construed by Judge Brown in the case of City of Austin vs. Hall, 93 Texas 591. The opinion in that case shows that the article is made up of two distinct parts. The first part undertakes to specify the manner in which surveys shall be made on navigable water courses. The opinion of the Court, in the case referred to, points out that the first portion of the article relates to waters which are navigable "according to the general rule of decisions on that subject," and that the purpose of this portion is to retain in the State the title to the beds of all streams navigable according to the general rule of decisions. The second portion of the article arbitrarily classifies as navigable streams, in addition to those navigable according to the general rule, those which retain a width of thirty feet. This construction of the article becomes important to a proper understanding of what streams in Texas are navigable under the law and therefore public streams. The general rule in the United States is that those streams are navigable which have the capacity of use by the public for the purpose of transportation, commerce, etc., and it is not necessary that streams, to be navigable, have such capacity at all times, it being sufficient if they contain sufficient water to serve such useful purposes during any considerable portion of each year. See

Jones vs. Johnson, 25 S. W., 650.
Orange Lumber Co. vs. Thompson, 113 S. W., 563; 126 S. W., 604.
Burr's Ferry vs. Allen, 149 S. W., 358; 165 S. W., 878.
State vs. W. Tenn. Land Co., 127 Tenn., 575; 158 S. W., 746.
Lamprey vs. State, 52 Minn., 181; 18 L. R. A., 670.

The English rule also applies in this country, that is, that a stream is navigable and a public water when it is within the ebb and flow of the tide. See

Bland vs. Smith, 43 S. W., 49.
Roseborough vs. Picton, 34 S. W., 791; 43 S. W., 1033.

What we desire to emphasize at this point is, that not only are those streams, arbitrarily so classified because they maintain a width of thirty feet, navigable and public, but that also all streams which are navigable in fact, as hereinbefore defined, and all streams within the ebb and flow of the tide, are navigable and public streams in Texas, and under the statute above referred to the title to the beds of such streams has been retained by the State.

It is generally true that the question whether the bed of a particular stream in the State has been reserved to the State or not can be determined by an examination of the field notes of the grants bordering on the stream. If these field notes make the margin of the water or the edge of the stream or water, or the bank of the stream, the boundary or otherwise show a purpose to exclude the bed of the stream, such bed will remain the property of the State, regardless of the width or navigability of the stream. See

Dutton vs. Vierling, 152 S. W., 450.
Stewart vs. White, 128 Ala., 202; 55 L. R. A., 211.
Hardin vs. Jordan, 140 U. S., 371, 391.
5 Cyc., page 905.
Farnum on Water and Water Rights, Secs. 856-8.

If, however, the grants bordering on the stream make the stream itself the boundary and not the edge or bank of the stream it then becomes important to determine whether the stream was navigable, within the meaning of our laws, at the time the survey was made, for, if navigable, the survey would include no part of the bed of the stream, and, if not navigable, it would go to its center. The statute undertakes to provide an easy rule for the determination of this question by specifying the width of thirty feet.

We have not found any case in Texas which directly decides the method of measuring the stream in order to determine whether or not it is thirty feet in width. The question was raised in the case of Bunnell vs. Sugg (135 S. W., 701), but the Court of Civil Appeals expressly declined to pass upon the question.

Judge Brown, in the case of City of Austin vs. Hall, supra, in discussing Article 5338, by the use of the words "to the water line," indicates that, in his opinion, the purpose of this statute is to give the individual the title to the water line.

The opinion of the Court in the case of Denny vs. Cotton (22 S. W., 122), indicates that the owner of a survey on a navigable stream in Texas owns to the low water mark.

It is shown in Section 55 of Farnum on "Water and Water Rights" that the courts of most of the states fix the line between the State and the individual owner of land on navigable streams at the low water mark.

An examination of the definition of the words "low water mark" in "Words and Phrases," shows that the words are ordinarily used as the contrary to the words "high water mark"; that they do not mean the mark in case of a drought, but the line at which the water usually stands when free from disturbing causes.

Article 5338 provides that surveys on navigable water courses shall front one-half of the square *on the water course.* Because of the use of this language, and the authorities above referred to, we are of the opinion that in order to determine the width of a stream under this statute the width of the water in ordinary seasons should be measured, that is, the water in its ordinary condition when free from disturbing causes.

Whether the bed of a stream remains the property of the State or was included in the surveys on its banks or not depends not on its width or navigability at this time, but upon its width or navigability at the time the surveys were made. The fact that the surveys, by their field notes, show a purpose not to include the bed of the stream would strongly tend to show that at the time the surveys were made the stream was thirty feet or more in width, or navigable in fact, and so reserved to the State.

You desire further to know whether the fact that a grant crosses a stream of the State conveys the title to the bed of the stream, re-

gardless of whether the stream is navigable or not. We advise you that such grant could not convey the bed of the stream in the face of the statute above referred to. The grant would not be void but would pass title to the land exclusive of the bed of the stream. See Bunnell vs. Sugg (135 S. W., 701).

It may, however, be difficult to determine the width and navigability of the stream at the time the grant was made, and the fact that the grant crosses the stream will tend to show that the stream was not navigable within the meaning of the law at the time the grant was made.

Yours very truly,
G. B. SMEDLEY,
Assistant Attorney General.

NAVIGABLE WATERS—FISH.

So much of the waters of Caddo Lake as cover land originally a portion of the bed of the lake, but which land was sold as unsurveyed school land when the waters of the lake in 1873 were caused to recede by the removal of drift, are public waters in which the general public has the right to fish, subject to the regulations fixed by statute, prohibiting the use of illegal nets or methods in taking fish.

And if any person fishing in the waters of Caddo Lake, even though the bed of that portion of the lake in which he fishes was sold as unsurveyed school land, uses a net prohibited by the statute, he is subject to prosecution.

June 17, 1916.

Honorable Will W. Wood, Game, Fish and Oyster Commissioner, Capitol.

DEAR SIR: In your letter of June 15, you state that prior to 1873 Caddo Lake covered an area of something like ninety thousand acres of land, situated partly in Texas and partly in Louisiana, and that in the year 1873 the Federal Government removed an accumulation of drift in a stream below Caddo Lake with the result that the lake was substantially reduced in size and several thousand acres, formerly the bed of the lake in Texas, became dry land. Thereafter, this land was sold by the State as unsurveyed school land. Four or five years ago the Federal Government constructed a dam near the location of the accumulation of drift which was removed many years ago and the land which became exposed when the drift was removed, or a greater part of it, has been recovered by water of a considerable depth. You state that some of this land, which was sold as school land, has been forfeited to the State, but that a part of it is yet claimed by those who purchased it, or their vendees. You desire to know whether your Department has the authority under the law to enforce the statutes prohibiting the use of illegal nets and other unlawful methods of taking fish from the waters of the lake above that portion of the bed of the lake which became dry when the drift was removed, and which was sold as unsurveyed school land.

The statutes of this State which regulate the taking of fish and

prescribe penalties for a violation of such regulations, apply by their terms to the "public waters" of the State. For example, Article 923f of the Penal Code, prohibits the use of nets the meshes of which are less than four inches square in the "public" fresh water, rivers, creeks, lakes, etc.

It is clear that this statute applies to that portion of the waters of Caddo Lake which cover so much of the bed of the lake as was sold as public school land and thereafter forfeited to the State, since these waters as shown by the facts stated in your letter, are navigable in fact and since the bed of these waters is the property of the State. A somewhat more difficult question is presented as to those waters of the lake lying above the land which was sold as public school land after the lake receded. and which is still claimed by the purchasers or their vendees.

We are of the opinion, that even the waters last referred to are, within the meaning of our statutes regulating the taking of fish, public waters, and that therefore, those who fish in such waters cannot use the nets, or other methods, prohibited by the statutes. Originally, and in their natural condition, these were public navigable waters. The drift which held the waters in the lake was the result of natural causes and had existed for many years, so that the condition of the lake before the drift was destroyed, was a permanent condition. Lands were surveyed out of the public domain bordering on the lake and its condition at the time and the lines of these surveys followed the meanders of the lake. The very waters in question were used for many years for navigation by large boats and were doubtless used by the public for fishing. This condition was changed by the artificial destruction of the drift, but finally by the construction of the dam the original natural condition was substantially restored and the land which was sold after the destruction of the drift, became again the bed of a large navigable body of water.

If the sale of this land was valid when made (a question which need not be determined), the purchasers acquired only the surface and what was under the surface. They did not acquire such rights as the public had theretofore possessed, that is, the rights of navigation and the rights of fishing over this land. When the original natural condition was restored, the rights of the public, as they were originally enjoyed, still remained. That this conclusion is sound is supported by the well recognized rule that a grant by the sovereign of the bed of a navigable body of water will not vest in the grantee the rights of navigation and fishing to the exclusion of the public. This rule is as old as the common law. It is thus stated on page 305 of 29 Cyc.:

> "If the crown grants part of the bed or soil of an estuary or navigable river, the grantee takes subject to the public right, and he cannot in respect of his ownership of the soil make any claim or demand, even if it be expressly granted to him, which in any way interferes with the enjoyment of the public right."

To the same effect see

Hogg vs. Beerman, 41 Ohio St., 81; 52 Am. St. Rep., 71.

The Supreme Court of Tennessee in the case of State vs. West Tennessee Land Company, 127 Tenn., 575, 158 S. W., 746, held that the State cannot grant land under a navigable lake, but holds it in trust for the public.

See also the opinion of this Department to the Honorable W. G. Sterett, of date March 27, 1914, holding that the Republic of Texas in granting to an individual a portion of the bed of Offets Bayou, a navigable arm of Galveston Bay, did not impair the rights of the general public to use such waters for navigation and fishing.*

On the foregoing authorities and reasons, we are of the opinion that since the original condition of the lake has been substantially restored and the lands sold as school lands covered with navigable waters, the rights of the public to use such waters for navigation and fishing exist as they originally existed and that even those waters of that portion of the lake, the bed of which was purchased as school land, are public waters.

The same conclusion, however, can be sustained on other principles and authorities and without reference to the fact that the present is a restoration of the original condition. The belief of certain persons that so much of the waters of the lake as lie above the lands, which were sold as school lands, are not public waters, is doubtless based upon the assumption that the question whether waters are public or private, is determined by the ownership of the bed, whether by the State or by an individual. This is not always the correct test. It is true that in Texas the beds of most public or navigable waters are owned by the State and the beds of most non-navigable or private waters are owned by individuals, but this is occasioned by the fact that Texas has been careful to reserve from private ownership the beds of all navigable bodies of water. This is evidenced by Article 5338 prohibiting surveys from crossing streams navigable in fact and streams retaining an average width of thirty feet. This article has been in effect since the days of the Republic and is in harmony with the Mexican, Spanish and Civil Law. The public or navigable waters in Texas are of three classes. First, all waters within the ebb and flow of the tide; second, all streams, or other bodies of water, which are navigable in fact, that is, those bodies of water which have the capacity of use by the public for the purpose of transporting commerce, etc.; and third, all streams insofar as they maintain an average width of thirty feet. If the waters come within one of the foregoing three classes, they are navigable and, therefore, public waters, even though in some exceptional instances the beds happen to be privately owned.

It may be well to observe at this point that the terms "public waters" and "navigable waters" are generally used synonymously, the reason apparently being, that it is in navigable waters that the public has the common right of use for navigation, fishing and other lawful purpose.

See 29 Cyc., 304, 330; also
Lamphrey vs. State, 52 Minn., 181; 38 A. S. R., 541.
Gaston vs. Mace, 33 W. Va., 14; 25 A. S. R., 848.

*38 Op. Atty. Gen., 138.

It is the navigable bodies of water, of course, that the public has the right to use for navigation and it is in the navigable waters that the public has the right to fish. On page 992 of the 19th Volume of Cyc. the rule at common law as to the right of the publice with reference to fishing, is thus stated:

"By the common law all persons have a common and general right of fishing in the sea and in all other navigable or tidal waters."

A staute of the State of Wisconsin provided that all fish in the *public waters* were the property of the State and might be taken by any individual under certain regulations. In the case of Willow River Club vs. Wade, 100 Wis., 86; 42 L. R. A., 305, the question was involved as to the right of the public to fish in a stream navigable in fact, but the bed of which was owned by individuals. The court held that individuals owning the beds of navigable streams held the same in trust for the general public and that the public had the right to fish in such streams. In the opinion, after setting out the statute above referred to, the court said:

"Public navigable streams are certainly public waters within the meaning of this act."

The Supreme Court of Tennessee in the case of State vs. West Tennessee Land Company, 127 Tenn., 575, 158 S. W., 746, held that in addition to the right of navigation, the public had the right to fish and hunt in streams, technically navigable. The foregoing authorities are referred to merely to show that all navigable waters are regarded and classified as public waters.

To recur to the proposition that the waters of a stream, navigable in fact, are open to the public for navigation and fishing, even though the bed of the stream is privately owned, the rule is thus stated in the case of Smith vs. Rochester, 92 N. Y., 463, 44 Am. St. Rep., 393;

"Among other rights which pertain to sovereignty is that of using, regulating and controlling for special purposes the waters of all navigable lakes or streams, whether fresh or salt, *and without regard to the ownership of the soil beneath the water.* This right is known as the *jus publici* and is deemed to be inalienable."

In the case of Hogg vs. Beerman, 41 Ohio State, 81; 52 Am. Rep., 71, the court held that although the bed of a navigable bay was privately owned, it was still subject to the rights of the public to use the same for navigation and fishing. It is also settled that even though their beds are privately owned, those streams within a State which are navigable in fact, and form by themselves, or by uniting with other waters a continuous highway over which commerce is or may be carried on with the other states, are navigable waters of the United States and are subject to the public right of navigation.

See West Chicago R. R. vs. Chicago, 201 U. S., 506, 524.

We understand that the particular body of water in question is

within the foregoing definition, a navigable water of the United States, as well as of the State, and that it is in fact a highway of commerce. This is true not only of that portion of the lake, the bed of which has always been public property, but also of that portion of the lake, the bed of which was sold as school land. It is one continuous body of water. Since this is in fact navigable water, it is under the authorities hereinbefore referred to, public water within the language used in the statutes regulating the taking of fish in the public waters of the State.

We have found one case the facts of which very nearly fit the facts with reference to Caddo Lake. It is the case of Mendota Club vs. Anderson, 101 Wis., 479; 78 N. W., 185.

In this case land privately owned became partially submerged by the construction of a dam which increased the depth and extent of an adjoining lake so that it covered part of the land. The suit was an action for trespass against one who took fish in that part of the lake which was caused by the construction of the dam to cover a portion of the land. The court held that the whole of the lake was public water, saying:

"That dam was a permanent structure, designed to be such, and has so remained for nearly half a century. There is no claim that it was an unlawful structure. Although an artificial structure, which considerably increased the depth, the extent and breadth of the waters on the premises in question, yet the public had the right to navigate such waters after they were so increased in volume, the same as though they had always remained in that condition.

Whisler vs. Wilkinson, 22 Wis., 546.

Volk vs. Eldred, 23 Wis., 410.

Weatherby vs. Meiklejohn, 56 Wis., 73; 13 N. W., 697.

Smith vs. Youmans, 96 Wis., 103.

70 N. W., 1115, and cases cited by Mr. Justice Pinney on page 110, 96 Wis., and page 147, 70 N. W. Certainly, persons navigating the lake cannot be required or expected to carry with them a chart and compass and measuring lines, to determine whether they are at all times within what were the limits of the lake prior to the construction of the dam."

Somewhat similar, also, is the case of State vs. Lake St. Clair Fishing Club, 127 Mich., 580; 87 N. W., 117, in which the court quoted with approval the following from another opinion of the same court:

"It is well-settled law, with no respectable authority disputing it, that even where a person owns the soil by grant, and the waters of the sea or a navigable lake encroach upon it, and it thereby becomes covered with navigable water, and a part of the sea or lake, until such waters recede, or the land is otherwise reclaimed, and so long as it continues navigable, the public right to use it for purposes of navigation prevails. As long as it remains as it is, the people—the common public—have a right to navigate it. They can cross over it and pass up and down it, and the plaintiff is powerless to stop them. This is virtually conceded by his counsel. And, if the people have the right to pass over it, they have the right to take fish in its waters by hook and line, or in any other way common to all under our laws. They have the right to kill or capture ducks or other wild fowl resting or feeding upon its waters or flying over it. They have the right to call such ducks or other wild fowls by all the devices known to sportsmen and not prohibited by the general game laws, and in the season not inhibited by such statutes, from the air, land, or lake, upon or over the waters of this

bay, as long as it shall remain such. If the plaintiff owns the soil by grant, he has a right no doubt, to reclaim it by dikes or levees, but until he does so the public have the right to use it, as long as the waters are navigable."

We have discussed this matter somewhat at length, but it is believed that a consideration of the authorities which have been referred to and quoted from, will be valuable and they certainly are sufficient to show that navigable waters are public waters, even though their beds may happen to be privately owned.

We therefore advise you that your Department has the authority and it is its duty to enforce the statutes with reference to the use of illegal nets and methods in taking fish from the waters referred to in your letter.

Yours very truly,

G. B. SMEDLEY,
Assistant Attorney General.

PRISONERS—EMPLOYMENT OF GUARDS—JAILS—GUARDS.

The question of the necessity for the employment of guards for the safe keeping of prisoners and the security of jails is left to the determination of the commisioners' court, or in case of an emergency to the determination of the county judge.

April 27, 1915.

Hon. John E. Shelton, County Attorney, Austin, Texas.

DEAR SIR: Under date of the 22nd inst., you write this Department as follows:

"At the request of the sheriff of Travis county, Texas, I beg leave to ask if the county auditor of Travis county has the right to refuse to approve a warrant drawn for the purpose of paying jail guard or guards where the sheriff has with the consent and approval of the commissioners court employed such jail guard or guards."

Replying to your communication, beg to say that the responsibility placed upon a sheriff for the safe keeping of prisoners charged with either felony or misdemeanor is heavy.

Article 5109 of the Revised Civil Statutes and Article 49 of the Code of Criminal Procedure, make the sheriff responsible for the safe keeping of prisoners.

If he should wilfully permit a prisoner charged with a felony to escape he may be punished by imprisonment in the penitentiary. (Articles 320 and 321, Penal Code.)

If he should wilfully permit a prisoner charged with a misdemeanor to escape or even negligently permit a person charged with crime to escape, he may be punished by fine. (Articles 323, 324 and 325, Penal Code.)

He can not wilfully refuse or fail from neglect to execute any lawful process requiring the arrest of a person accused of a felony or misdemeanor, or refuse to receive such person into the jail without

becoming guilty of an offense punishable by fine. (Articles 326, 327 and 383, Penal Code.)

Ample provision is likewise made by law to enable sheriffs to properly perform their duty.

Article 1139, Code of Criminal Procedure is as follows:

"Each county shall be liable for all the expenses incured on account of the safe-keeping of prisoners confined in their respective jails, or kept under guard, except prisoners brought from another county for safe keeping, or from another county on habeas corpus or change of venue; in which cases, the county from which the prisoner is brought shall be liable for the expense of his safe keeping."

Article 1143, Code of Criminal Procedure is as follows:

"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 board of such guard, nor shall any allowance be made for jailer or turnkey, except in counties having fifty thousand population or more. In such counties of fifty thousand population or more, the commissioners' court may allow each jail guard two dollars and fifty cents per day."*

Article 1148, Code of Criminal Procedure is as follows:

"At each regular term of the commissioners' court, the sheriff shall present his account to such court for the expenses incurred by him since the last account presented for the safe keeping, support and maintenance of prisoners, including guards employed, if any. Such account shall state the name of each prisoner, and each item of expense incurred on account of such prisoner, and the date of each item, the name of each guard employed, the length of time employed, and the purpose of such employmnt, and shall be verified by the affidavit of the sheriff."

Article 1149, Code of Criminal Procedure is as follows:

"The commissioners' court shall examine the account named in the preceding article, and allow the same, or so much thereof as may be reasonable and in accordance with law, and shall order a draft to be issued to the sheriff for the amount so allowed, upon the treasurer of the county; and such account shall be filed and safely kept in the office of the clerk of such court."

In this connection we also call your attention to the provisions of Article 7127, Revised Statutes, which article is as follows:

"Article 7127, R. S. 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 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."

The question of the necessity of guards "for the safe keeping of prisoners and the security of jails" is left to the determination of the commissioners court, "or in case of emergency," to the determination of the county judge.

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*Article 1143, C. C. P., was amended by Chap. 20, Acts of 1915, First Called Session, with reference to population.

This power rests with them as long, and only as long, as the necessity exists. In cases of emergency, such as instanced by threatened violence to prisoners by mobs or threatened efforts by friends of prisoners to liberate them, the county judge, in his discretion, would be empowered to authorize sheriffs to employ necessary guards.

Of course it follows that an auditor would not have the legal right to refuse to approve a warrant drawn for a legal purpose and in a proper amount according to the facts of the particular matter under consideration.

Yours truly,
B. F. LOONEY,
Attorney General.

POLLUTION OF WATER COURSES.

Chapter 23, Acts of the Thirty-fourth Legislature, relating to the pollution of water courses and other bodies of water does not confer upon cities nor the State Board of Health the authority to suppress cow lots, hog lots, house lots, etc., located upon the water sheds of a reservoir used by a city that might pollute the water supply of such city.

August 24, 1915.

Dr. W. B. Collins, State Health Officer, Capitol.

DEAR SIR: In your communication of recent date you transmit to this Department a letter directed to you by Hon. John Durst, chairman of the city commission of the city of Tyler, wherein he desires to be advised as to whether or not the city of Tyler or the State Board of Health have the authority under what is known as the anti-pollution act, being Chapter 23 of the Acts of the Thirty-fourth Legislature to control the watershed of the reservoir to be used by such city to the extent of prohibiting thereon cow lots, hog lots, house lots, etc., the drainage from which would tend to pollute the water supply of the city of Tyler.

Replying thereto, we beg to say that our interpretation of the act in question is that its primary purpose is to prevent the pollution of water courses and public bodies of water by any town or city by reason of the discharge of any sewerage or unclean water or unclean or polluting matter or thing therein or in such proximity thereto as that it would probably reach and pollute the waters of such watercourse or other public body of water from which water is taken for the use of farm, live stock, drinking and domestic purposes and that it was not intended to protect watercourses and public bodies of water generally. There are many provisions of the act which bear out the above conclusion that the purpose of this act is to prevent the pollution of streams and public bodies of water by the discharge therein in close proximity thereto of the sewerage from cities and towns. In Section 1 of the act appears the proviso that the provisions of this bill shall not affect any municipal corporation situated on tide water: that is to say, where the tide ebbs and flows in such watercourse. In Section 3 of the act cities and towns of the State of the different

classes therein defined are given until January 1, 1917, with which to comply with the provisions of the act and make arrangements for the disposal of sewerage. In the latter part of Section 1 appears the following proviso:

"Provided, the provisions of this Act shall not apply to any place or premises located without the limits of an incorporated town or city, nor to manufacturing plants whose affluents contain no organic matter that will putrefy, or any poisonous compounds, or any bacteria dangerous to public health or destructive of the fish-life of streams or other public bodies of water."

The proviso last above quoted would seem to remove any doubt as to whether or not the act applies to the conditions stated in Mr. Durst's letter as it expressly exempts from the operation of the act places or premises located without the limits of an incorporated town or city, as well as manufacturing plants whose affluents contain no organic matter that will putrefy, etc.

We therefore advise you that the city of Tyler cannot under the act in question regulate the sanitation of the sources of water supply in the city of Tyler by the suppression of cow lots, hogs lots, house lots, etc., that might tend to pollute the water supply of that city.

What is said in this opinion applies solely to the act of the Legislature in question, being Chapter 23 of the Acts of the Thirty-fourth Legislature, regular session, and we do not desire to be understood as in any way undertaking to pass upon the right of the city should occasion arise, to enjoin any unwarranted use of any premises on the watershed that would cause pollution of the water supply of the city of Tyler. Cases of that kind would have to stand upon their own facts and it would be a matter between the city and the owner of the property located on the watershed and about which this Department could not undertake to advise.

With respect, I am,

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

PURE FEED LAW.

Construing Section 3, Chapter 108, Twenty-ninth Legislature.

Cotton seed hulls are not a concentrated feed stuff, within the meaning of this law, and hence are not subject to the tax and other regulatory measures.

If a feed is composed of cotton seed hulls and any one or more of the materials mentioned in Section 3 of the Act, it would be a concentrated feed, as contemplated by the statute.

The whole grain, or a feed that is composed of one or more of the whole grain of the materials mentioned, does not come under the control of the Pure Feed Law.

December 1, 1914.

Hon. B. Youngblood, Director Experiment Station, College Station, Texas.

DEAR SIR: After mature re-consideration we have concluded that

our advice to you under date of October the 12th, wherein you were advised that cottonseed hulls came within the meaning of the concentrated feed stuff law, and are therefore subject to a tax, and should be tagged, etc., as provided by the act, was erroneous.

Our first advice was given with serious misgivings at the time as to its correctness, but we were induced to advise you as we did under the idea that the law was of doubtful construction on this point, and that the doubt should be resolved in favor of the State.

We believe, however, that a careful study of the entire act makes it so apparent that the Legislature did not intend to include cottonseed hulls as one of the feed stuffs, the sale of which was regulated, that really no doubt exists as to the meaning of the law in this respect.

The caption of the act sets forth its purpose, to be to define and regulate the sale of concentrated commercial feeding stuffs, providing for the correct weighing, marking, etc., and for the collection of samples thereof to be analyzed.

Section 1 of the act seems to contemplate a kind of character of feed that is to be put up in packages of some kind, capable of being separately weighed, marked, tagged, etc., the procedure outlined being of a nature, in our judgment, unsuited to and out of place as applicable to the manner in which cottonseed hulls are usually handled and sold to the trade.

Section 3 of the act mentions the different materials included within the phrase "Commercial Feed Stuff," but nowhere mentions cottonseed hulls. It does mention, however, among other materials, wheat bran, rice bran, rice hulls, and concludes with the following general phrase "and all other materials of a similar nature."

If, therefore, cottonseed hulls are comprehended within this phrase as a material of a similar nature to those mentioned, it must be under the rule of *ejusdem generis*, that is, a material similar to wheat bran, rice bran, or rice hulls; in that, as these are composed of the outer covering of the grain, so cottonseed hulls are the outer covering of the cottonseed. This rule, however, is but one of the many rules of construction adopted for the purpose of ascertaining the meaning of a law, when its meaning is obscured, but is not to be invoked when the legislative intent is otherwise certain.

The rule, as stated by Black in his work on "Interpretation of Laws," is as follows:

"63. It is a general rule of statutory construction that where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned. But this rule must be discarded where the legislative intention is plain to the contrary."

It is doubtful if this rule would have any application, for the reason that cottonseed hulls could not, except by a very extravagant construction, be considered of the same genera with rice hulls, rice bran, or wheat bran.

The cotton plant, as a vegetable, is, in a general sense, of the same

family as wheat and rice, yet cotton could hardly be classed botanically as the same genus.

At the time the original statute was enacted in 1907, and for some time prior to that date, cottonseed hulls, together with cottonseed meal, constituted the chief cattle feed; in fact, was almost exclusively used in this State for the feeding and fattening of cattle for the market. It is significant that cottonseed meal should be specifically mentioned as one of the feeds controlled by the law and cottonseed hulls omitted. We are convinced, therefore, that if the Legislature had intended to include hulls, being at that time one of the chief articles of cattle feed, they would have been specifically mentioned in the act.

This law was not intended as a revenue measure, but as a police measure to prevent fraud, in counterfeiting and in adulterating feed stuffs. Hence all of its provisions must be read in the light of this dominant purpose.

It might be easy to counterfeit or adulterate most of the articles named, to detect which would require a chemical analysis, but cottonseed hulls in the nature of the case, are difficult of successful counterfeit or adulteration; an inspection, such as the statute prescribes, would afford no more protection to the purchaser than he could obtain for himself by the simplest kind of an inspection and examination.

This law was designed to protect the public from deceit and fraud in regard to those materials easy of successful counterfeit and adulteration, but with reference to all feed stuffs capable of being easily and readily inspected, the purchaser is able to protect himself. This idea is embodied in Section 2 of the act, which expressly provides that all whole grain feed stuffs are not brought under the control of the law.

In arriving at a proper construction of this act, we should not overlook the fact that it was enacted in 1907 and during the seven years it has been in operation those whose duty it has been to administer the same have not in its execution made an application of its provisions to cottonseed hulls, although during all that time this material constituted one of the chief articles of cattle feed.

If, however, a mixed feed should be composed of cottonseed hulls and any one or more of the materials mentioned in Section 3 of the act, or any material comprehended within the general language, we believe it should be classed as a concentrated feed and would come under the control of the law. As to cotton seed hulls, however, as such we are of the opinion, and so advise you, that the interpretation of this statute given you under date of October the 12th was erroneous, and we beg now to advise that, in our opinion, cottonseed hulls are not concentrated feed stuffs within the contemplation of Section 3 of the Pure Feed Law.

Yours very truly,

B. F. LOONEY,
Attorney General.

PURE FEED LAW.

Feed stuffs composed of whole grains of various kinds of seed do not come under the provisions of the law.

Feed stuffs of whole grains containing craked grain do not come within the meaning of the law unless they contain such a percentage of cracked or crushed grains as to require an anlysis to determine their composition.

October 6, 1914.

Hon. B. Youngblood, Director Texas Agricultural Experiment Station, College Station, Texas.

DEAR SIR:. This Department is in receipt of your communication of recent date in which you desire to know whether or not chicken feed made up of the whole grains of various kinds such as wheat, oats, barley, rye, milo, etc., come under the provisions of the law.

Replying thereto, we beg to say that in the opinion of this Department such feedstuffs would be exempt from the operation of this law. We base this opinion upon the provisions of Section 2 of the Acts of the Twenty-ninth Legislature, Chapter 108, which reads as follows:

"The term concentrated commercial feeding stuffs, as herein used, shall not include hay or straw the whole seed or grains of wheat, rye, barley, oats, Indian corn, rice, buckwheat or broom corn, or any other whole or unground grains or seeds."

It seems from reading this section that the Legislature expressly exempted from the operation of this law all feed composed entirely of the whole grain, and this idea is made more manifest by the succeeding section of the law defining those feedstuffs intended to be covered by the law, such section reading as follows:

"The term concentrated commercial feeding stuffs, as herein used, shall include wheat bran, wheat shorts, linseed meals, cotton seed meals, pea meals, cocoanut meals, gluten meals, gluten feeds, maize feeds, starch feed, sugar feeds, dried brewer's grains, malt sprouts, hominy feeds, cerealine feeds, rice meals, rice bean, rice polish, rice hulls, oat feeds, corn and oat chops, corn chops, ground beef, or mixed fish feeds, and all other materials of similar nature not included in Section 3 of this Act."

You are therefore advised that in the opinion of this Department the mixture of the whole seed of grains does not come within the provisions of the law requiring same to be registered and tagged.

The second question you propound as to whether such mixtures of whole seeds or grains containing a percentage of cracked seed or grain is a mixed feed and subject to the provisions of the law, we beg to say that this is a question of fact that it would be very difficult for this Department to give an opinion upon that would be of any value. Of course, if a sufficient percentage of the grain was cracked or ground as to bring such feedstuff within the meaning of any of those feedstuffs defined in Section 3 of the Act or any others similar thereto, then the same would come under the provisions of the Act. We do not think the law intended to prohibit the sale of feedstuffs composed of the whole grain except under the provisions of the act in

the event the same should contain any grains that were cracked or mutilated. The purpose of this act is to prevent the sale without a compliance of this law, of feeding stuffs, the composition of which cannot be readily detected, and such as require an analysis to determine the composition thereof, and we do not think that it was intended to cover these feedstuffs of whole grain that in the usual handling of such commodity some of the grains may have become crushed or cracked.

Yours truly,

C. W. TAYLOR,

Assistant Attorney General.

PURE FOOD LAW—ICE—FOOD AND DRUG ACT—TAXATION.

Holding that ice is food; that branch houses are liable to one dollar tax, as well as the principal house; meat markets who manufacture lard compound are manufacturers.

April 1, 1915.

Dr. R. H. Hoffman, Jr., Dairy and Food Commissioner, Capitol.

DEAR SIR: You desire to know if the Food and Drug Act, in prescribing penalties and regulations with reference to food and its adulteration, would include ice.

We advise you that it is the opinion of this Department that inasmuch as it is within the common knowledge of everybody that ice enters into and is a part of so many things that we eat and drink, that in the contemplation of this law, which is aimed to secure purity of all things we eat and drink, ice is to be treated as a food and it is your duty to take all steps that are necessary to see that it is pure and that no injurious substance enters into its manufacture.

Your next inquiry is as to whether or not manufacturers of ice are such manufacturers as Section 23 levies a tax upon, and the only question involved here is as to whether or not persons who manufacture ice are manufacturers of food. If so, are they liable to the tax? We advise you that we think that all companies who manufacture ice are liable to the tax levied in Section 23.

The case of Union County National Bank vs. Ozan Lumber Company, reported in 179 Federal, 710, draws a distinction between merchants and dealers and manufacturers. In this case it is held that a merchant and a dealer generally employed to designate persons engaged in the business of buying and selling merchandise or other personal property in the usual course of trade, while a manufacturer is used to designate those engaged in the business of making or producing articles for use or sale.

G. H. Tichenor Anticeptic Co., 43 So., 277;
City of New Orleans vs. LeBlanc, 34 La., 506;
City of New Orleans vs. Ernst, 35 La., 746;
Carlin vs. Southwestern Ins. Co., of Toronto, 57 Md. 526; 4 Amer. Rep., 440.

Lay down the doctrine that a manufacturer is one who gives new shapes, new qualities, new combinations to matter which has already gone through some artificial process, nearly all artificial products of human industry, nearly all such materials as have acquired changed conditions or new and specific combinations, whether from the direct action of the human hand from chemical processes derived and directed by human skill by the employment of machinery, are now commonly designated as manufactured. The Century Dictionary defines manufacture, as "the production of articles for use from raw or unprepared materials by giving these materials new forms, qualities, properties or combinations, whether by manual labor or machinery under these definitions, one who, by extracting the medicinal from various drugs, and making a chemical combination in which the ingredients lose their identity, creates a distinct product which for years is offered to and accepted by the public for distinct uses, may be regarded as a manufacturer."

We are, therefore, of the opinion that ice manufacturers are manufacturers of a food product, and are therefore liable for a fee of one dollar, to be paid to the Commissioner, as provided for in Section 23.

Your second proposition is to be advised if a branch house or branch houses are subject each to the fee of one dollar provided for in Section 23.

We advise you that we are of the opinion that each branch house who is a manufacturer of food and drugs doing business in the State of Texas, or all such persons as shall bring into and offer for sale within the State any article of food or drug, are liable to the one dollar fee.

The case of Norfolk & Western R. Company vs. Lynchburg Cotton Mill Company, 56 S. E., 146; 106 Va., 376, holds that a branch road as applied to railroads denotes a road connected indeed with the main line, but not a mere incident of it, or constructed simply to facilitate the business of the chief railroad, but designated to have a business of its own for the transportation of persons and property to and from places not reached by the principal road. Every branch house is a complete business within itself, and as such we believe if they do the things denounced by Section 23 they and each of them would be liable to the one dollar tax.

You desire also to know if meat markets who manufacture lard compound are subject to the tax. We think the authorities cited above would make them liable to the tax and they would likewise be liable as manufacturers of food products with reference to adulteration, etc.

Very truly yours,

W. A. KEELING,
Assistant Attorney General.

QUARANTINE.

Where a concern working large numbers of men compels its employes to contribute a certain amount each month to pay for medical services of a

company physician, and where employes contract contagious diseases and are turned over by the company physician to county health officer and such officer establishes a local quarantine, the county can not look to the corporation for reimbursement for the amount paid out for such quarantine.

In such case the county is under no obligation to furnish medical attention to the patient and should not pay the account of the health officer for medical services, the obligation upon the county being merely to establish and maintain the quarantine and to pay such officer merely for the services rendered to effect that purpose.

Chapter 95, Acts of the Thirty-second Legislature.

February 17, 1915.

Hon. O. B. Wigley, County Attorney, Newton, Texas.

DEAR SIR:. The Department is in receipt of your favor of recent date, reading as follows:

"In this section, there is at least one corporation, working hundreds of men, that compels its employes to pay for medical services of a 'company' physician, a certain amount each month. The payment of this fee, which is not optional with the employe, secures to him the services of a physician without further charge. Now, what we want to know is whether, when an employe, as above stated, contracts some contagious disease, e. g., diptheria, or small pox, and a local quarantine is declared by the county health officer, and the necessary expenses incident thereto had, can the county look to the corporation for a reimbursement of the amount paid out for such quarantine? It has been the rule for the company physician, upon these occurrences to call in the county health officer, and turn the patient over to him, and not attempt to treat him any further, leaving it entirely to the other physician. In the course of a year, this some times amounts to several hundred dollars, and if we can recover this money, or any portion of it, we would like to know it."

A solution of the question propounded by you involves the determination of the duties and obligation resting upon the county and the local health authority in cases of contagious diseases. What is known as the Sanitary Code for Texas, promulgated by the Board of Health, and enacted into law by the Thirty-second Legislature, is Chapter 95 of the acts of such Legislature, such chapter dealing with quarantine and disinfection and the rules therein laid down are adopted for the promotion and protection of the public health. By Rule 5 under the heading "Quarantine and Disinfection" it is made the duty of health authorities to establish local quarantine, as appears from the following language:

"All health authorities of counties, cities and towns in this State are hereby directed and authorized to establish local quarantine, hold in detention, maintain isolation and practice disinfection as hereinafter provided for, of all (such infected) persons, vehicles or premises which are infected or are suspected of being infected with any of the above named diseases whenever found."

By Rule 1, as set out in said chapter, it is made the duty of every physician immediately after the first professional visit to a patient who shall have or is suspected of having any contagious disease to report same to the local health authority.

Rule 13 of this chapter, in dealing with the management of contagious diseases, is as follows:

"In the management and control of leprosy, smallpox, scarlet fever (scarlatina), diphtheria (membraneous croup), and dengue, it is required that the house be placarded, premises placed in modified quarantine, patient in modified isolation, and complete disinfection done upon death or recovery."

"Modified Quarantine" mentioned in Rule 13 is defined in subsection "b" of Rule 5 to be:

'Modified quarantine includes, first, prohibition of entrance and exit, and in absolute quarantine except against certain members of the family authorized by the health authorities to pass in and out under certain definite restrictions; second, the placing of a placard as before; third, isolation of patient and attendant; fourth, prohibition of the carrying out of any object or material unless the same shall have been thoroughly disinfected."

It will thus be seen that it was the duty of the company physician in the cases mentioned by you to report same to the county health officer and upon same being reported to him, it was the duty of this officer to establish the local quarantine.

The duties of the county health officer in establishing local quarantine are set out in sub-section "b" of Rule 5 above quoted. By establishing such quarantine the county health officer does not become the attending physician upon the patient but merely an officer of the law protecting the public against the spread of the disease. There is no obligation resting upon the county to furnish medical attention, food or supplies in event the patient is not a pauper, and is able to procure same. This has been the holding of this Department continuously. The contract between the patient and the company, as indicated in your letter, is to the effect that in consideration of a certain amount retained monthly the company will furnish a physician for the employee in case of sickness, without charge. This is the extent of the contract. No obligation rests upon the company to defray any expense incident to a quarantine in event the employe contracts some contagious disease and is taken in charge by the local health authority and therefore upon this phase of the case we think no contention could be made that the company or corporation could be in any manner held bound to reimburse the county for the expense of maintaining the quarantine.

As above said, the county is under no obligation to furnish medical attention as a general rule and particularly do we think the county is relieved of this obligation in the case presented by you, for the reason that by reason of the contract between the employe and the concern for which he works, he is entitled to the services of a physician free of charge. There being no obligation upon the county to furnish a physician, should the county exceed its authority as we see it and pay the county health officer for his visits as an attending physician upon a quarantined patient, then the county would not be subrogated to the rights of the employe on his claim against the company for medical attention. Not only is there no privity contract between the county and the company, but the county has not been compelled to discharge a debt in order to save itself, for as is said in the case of Jones Lumber Company vs. Villegas, 128 S. W., 558, "while privity of contract is not necessary to the support of the right

of subrogation, yet in order for it to arise, some debt due a third party must have been paid by the person seeking its benefit; and in doing this he must not have been a mere volunteer but must have acted on compulsion to save himself from loss. Sandford vs. McLean, 3 Paige, 117; Insurance Company vs. Middleport, 124 U S., 549; Cole vs. Malcolm, 66 N. Y., 336."

In event the county should refuse to pay the health officer for his visits as attending physician, then the correct rule may be, and doubtless is, that the county health officer would be subrogated to the rights of the company physician and have a just claim against the company for his services, for the reason that the company physician has turned over the case to him and he has performed the services the company had contracted with the employe should be furnished him. However, this is a matter about which the county authorities are not concerned.

For the reason above set out, we are of the opinion, and so advise you, that in the case presented in your communication the county would have no claim against the corporation and would not be entitled to reimbursement for the expenditures incident to the local quarantine established.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

QUARANTINE—CONSTITUTIONAL LAWS.

Under the commerce clause of the Constitution, the Federal Government may enact and enforce quarantine laws and regulations affecting vessels engaged in foreign and interstate commerce.

The right of the States to protect the health and lives of their citizens is one of the reserved powers of the States and under such power the States may inspect and fumigate vessels coming into their ports, even though engaged in interstate commerce, provided, such commerce is not unduly burdened.

Valid laws of the United States respecting foreign and interstate commerce are superior to laws of the States, even though enacted under the police power.

Under a regulation promulgated by the Secretary of the Treasury of the United States, under the authority of the Federal Quarantine Laws, the State quarantine officials may be prevented from boarding incoming vessels engaged in foreign or interstate commerce until after the Federal quarantine officials have completed their inspection.

The Federal quarantine laws do not undertake to prevent the enforcement of the State quarantine laws and regulations, but enjoin upon its officers cooperation in the enforcement of the State laws.

The payment of fees for inspection, fumigation, etc., may be required by State quarantine officers of vesels engaged in foreign or interstate commerce, provided, such fees are reasonably compensatory for services actually rendered and are not for purposes of revenue.

August 9, 1916.

Dr. W. B. Collins, State Health Officer, Building.

DEAR SIR: In response to your recent request, we have made a very careful investigation of the questions of law arising out of the recent

controversy between the quarantine officers of the Federal Government and the State quarantine officers at Galveston. The important question is whether the Federal quarantine officers, in the inspection for quarantine purposes of vessels from foreign ports arriving at Galveston, have any rights of priority over the State quarantine officers.

The occasion for the investigation of this question arises out of a conflict between the Federal and the State officers at Galveston, each insisting on the right to inspect first for purposes of quarantine, fumigation, etc., vessels arriving at Galveston. We understand that the Federal officials have not undertaken to prevent the State officials from inspecting the vessels and enforcing the State quarantine laws, but, on the contrary, said officials have expressed a desire to co-operate with the State officials and to assist them in carrying out the quarantine laws and regulations of this State.

It appears that the Federal officials, however, have insisted on the right to board the incoming vessels at Galveston first and to complete their inspection before allowing the State officials to board the vessels, and that the State officials have insisted that their rights are superior to, or, at least, equal to the rights of the Federal officials, and that the Federal officials have no right to prevent them from boarding the vessels at such time and place as they may think fit for the purpose of enforcing the quarantine laws and regulations of this State.

Without setting out in detail the statutes of this State bearing upon this matter, it is enough to say that the Texas State Board of Health, of which the State Health Officer is president, together with the Governor are given control over State quarantine, with the right to promulgate rules and regulations governing quarantine, to prescribe rules and regulations necessary for the disinfection of all vessels arriving at the ports of the State, "the object of such rules and regulations being to provide safety for the public health of the State without unnecessary restrictions upon commerce and travel." See Revised Civil Statutes, Articles 4521, 4527, 4528, 4554, 4562, 4570 and 4572.

Under these laws, the State quarantine station at Galveston was established some years ago, and officers were stationed there and also facilities were provided for the inspection, disinfection and fumigation of incoming vessels, and we understand that certan rules and regulations have been promulgated in pursuance of these laws for such inspection, fumigation, etc., and fees have been provided for to pay for the services rendered, etc.

The general law of the United States respecting matters of quarantine is the act approved February 15, 1893. This act did not provide for the establishment of Federal quarantine stations, but it is apparent that its primary purpose was to assist and co-operate with the States in the enforcement of their quarantine laws and regulations, the power being given, however, to the Secretary of the Treasury to make additional rules and regulations to the State rules and regulations, where necessary, to prevent the introduction of diseases into the United States.

By Section 3 of this act it was expressly provided and clearly made the duty of the Federal Health Officers to co-operate and aid the State in the enforcement of the State quarantine regulations.

The act of Congress approved June 19, 1906, provided for the establishment of Federal quarantine stations, and we understand that it was under this act that the quarantine station at Galveston was recently established. There is nothing, however, in this act showing a purpose to take from the States the right to maintain quarantine stations or to enforce regulations.

Under the authority given him by the laws above referred to, the Secretary of the Treasury has promulgated certain regulations respecting quarantine matters. It is to be observed that Regulation No. 59 of the Revised Edition of the Quarantine Laws and Regulations of the United States, October, 1910, expressly provides that "the following regulations are the required minimum standard and do not prevent the addition of such other rules as, for special reasons, may be legally made by State or local authorities." It appears that by this regulation the right of the State to impose quarantine rules and regulations, in addition to those imposed by the Federal regulations, is expressly recognized.

The Sixty-fifth Federal Regulation is as follows:

"No person except the quarantine officer, his employes, United States customs officers, or pilots shall be permitted to board any vessel subject to quarantine inspection until after the vessel has been inspected by the quarantine officer and granted free pratique, and all such persons so boarding such vessel shall, in the discretion of the quarantine officer, be subject to the same restrictions as the personnel of the vessel."

We understand that it is under this regulation that the local quarantine officers at Galveston have recently been instructed by the Secretary of the Treasury not to permit any person to board any vessel subject to quarantine inspection, coming into the port at Galveston, until after the inspection by the Federal quarantine officers has been completed.

The direct question presented, therefore, is whether it is within the lawful power of the Federal Government to prevent State officials, in enforcing the State quarantine laws, from boarding vessels from foreign ports coming into Galveston before the inspection of the Federal quarantine officers has been completed. To state the question more generally, it is: Whether the quarantine laws and regulations of a State, enacted for the protection of the health and lives of its citizens, are superior to or at least of equal dignity with the quarantine laws and regulations of the Federal Government affecting interstate and foreign commerce.

It is no longer to be doubted that under the commerce clause of the Federal Constitution, which delegates to the Federal Government the power to regulate interstate and foreign commerce, that government may even enact laws of a police nature having to do with the protection of the lives, health, and even the morals, of the citizens of the States. In the face of the contention that the police powers of the States, to protect the health and safety of their citizens and to regu-

late the morals of their citizens, were reserved to the States and that the Federal laws affecting interstate and foreign commerce were invalid, because they constituted an invasion of such reserved powers of the States, the Federal Pure Food Law, Hours of Labor Law, Safety Appliance Act, and other similar laws have been sustained as regulations of interstate commerce. See

McDermott vs. Wisconsin, 228 U. S., 128;
Erie R. R. Co. vs. New York, 232 U. S., 671;
Pennell vs. P. & R. Ry. Co., 231 U. S., 675;
Hoke vs. U. S., 227 U. S., 308.

At a very early date effort was made to place a strict construction on the commerce clause of the Constitution but Chief Justice Marshall, in the case of Gibbons vs. Ogden (9 Wheat. 1), held that a broad and liberal construction should be placed on this clause, using the following language with reference to the meaning and scope of the power to regulate commerce:

"We are now arrived at the inquiry: What is this power? It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent and acknowledges no limitations other than are prescribed in the Constitution."

Justice McKenna, in the late case of Hoke vs. United States (227 U. S., 308), said:

"The principle established by the cases is the simple one, when rid of confusing and distracting considerations, that Congress has power over transportation 'among the several States'; that the power is complete in itself, and that Congress, as an incident to it, may adopt not only means necessary but *convenient* to its exercise, and the means *may have the quality of police regulations.*"

These decisions are by the court of final jurisdiction on the question. That the commerce clause of the Federal Constitution should be given such broad construction and that under it the Federal Congress may legislate in matters affecting the health, safety and morals of the citizens of the State is entirely contrary to the training and convictions of those of us who have been taught the doctrine of State's rights and who have insisted upon the democratic principle of strict construction. However, there is no appeal from the decisions of the Supreme Court of the United States. Though we may regret the trend of its decisions and the steady encroachment by the Federal Government upon the rights of the State, we are compelled to respect its judgments.

Of the power of the States to enforce quarantine regulations and to inspect, and, if necessary, fumigate vessels coming into its ports, even though engaged in foreign or interstate commerce, there can be no doubt. It is a duty inherent in a sovereign government to protect its citizens from disease. It is a duty which, in the opinion of the writer, could not have been surrendered to the Federal Government.

It is settled that reasonable inspection and quarantine by the States

of vessels engaged in foreign or interstate commerce are not burdens upon such commerce, even though they may affect it. The case of Minneapolis, etc. Ry. Co. vs. Milner (57 Fed., 276), was a suit to enjoin the State Board of Health of Michigan from detaining for quarantine passengers coming from Norway and other foreign countries through Quebec and into the United States. It was contended that such detention by the State officials, in view of the fact that the immigrants had already been inspected by Federal officials, amounted to a regulation of and burden on interstate commerce. The court held that such detention and inspection was the lawful exercise of the police power of the State and did not amount to a regulation of interstate commerce. In response to the suggestion that the passengers already had certificates from the United States inspectors, the court said:

"The objection that passengers who had certificates from United States inspectors were detained is not tenable. The states may exercise their police power according to their own discretion, and by means of their own officials and methods. The inconvenience resulting to emigrants and travelers from being halted and subjected to examination and detention at State lines is of trifling importance at a time when every offort is required and is being put forth to prevent the introduction and spread of pestilential and communicable diseases."

The case of Morgan's Steamship Co. vs. Louisiana (118 U. S., 455), was a suit to enjoin the Board of Health of Louisiana from collecting from plaintiff the fee of thirty dollars and other fees allowed by the law of Louisiana for the examination, which the State quarantine laws required of all vessels passing the station. This law was attacked as a tonnage tax and as violative of the commerce clause, but was sustained. Justice Miller, in the opinion, said:

"Nor is it denied that the enactment of quarantine laws is within the province of the States of this Union."

This case was cited and quoted with approval in the case of Campagnie Francaise, etc. vs. Board of Health (186 U. S., 380); in which the action of the State Board of Health in enforcing the State quarantine law was upheld. This latter case expressly held that it was not the purpose of the Federal quarantine law of 1893 to abrogate the State quarantine laws, and that Congress had, from an early day, recognized the power of the States to enact and enforce quarantine laws.

In the case of Louisiana vs. Texas (176 U. S., 1), which had to do with an effort on the part of the State of Louisiana to prevent the enforcement of a proclamation of quarantine by the Governor of Texas against New Orleans when infected with yellow fever, Chief Justice Fuller, speaking of the power of the States in quarantine matters, said:

"While it is true that the power vested in Congres to regulate commerce among the states is a power complete in itself, acknowledging no limitations other than those prescribed in the Constitution, and that where the action of the states in the exercise of their reserved powers comes into collision

with it, the latter must give way, yet it is also true that quarantine laws belong to that class of State legislation which is valid until displaced by Congress, and that such legislation has been expressly recognized by the laws of the United States almost from the beginning of the Government."

Given the existence of valid Federal laws and valid State laws respecting the quarantining of vessels engaged in interstate and foreign commerce, in case of conflict which will control? On principle, it appears that the important power and duty of the State to protect its citizens from disease could not be subordinate to any other power. It seems that acts of State officials in the protection of the lives and health of citizens of the State should be at least of equal dignity with the acts of Federal officials in regulating interstate and foreign commerce. This contention was made in the early case of Gibbons vs. Ogden (9 Wheat., 1), and was thus answered by Chief Justice Marshall:

"But the framers of our Constitution foresaw this state of things, and provided for it by declaring the supremacy not only of itself, but of the laws made in pursuance of it. The nullity of any Act, inconsistent with the Constitution, is produced by the declaration that the Constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the State Legislatures as do not transcend their powers, but, though enacted in the execution of acknowledged State powers, interfere with, or are contrary to the laws of Congress, made in pursuance of the Constitution or some treaty made under the authority of the United States. In every such case, the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it."

To the same effect is the following language used by Justice Harlan in the case of M. K. & T. vs. Haber (169 U. S., 614):

"* * * *a state statute, although enacted in pursuance of a power not surrendered to the General Government, must in the execution of its provisions yield in case of conflict to a statute constitutionally enacted under authority conferred upon Congress.*"

In the case of Morgan vs. Louisiana (118 U. S., 455), in which the Louisiana quarantine law was sustained, appears the following:

"But it may be conceded that whenever Congress shall undertake to provide for the commercial cities of the United States a general system of quarantine, or shall confide the execution of the details of such a system to a National Board of Health, or to local boards, as may be found expedient, all State laws on the subject will be abrogated, *at least so far as the two are inconsistent.*"

The language of Chief Justice Connor, in the case of St. L. S. W. Ry. Co. vs. Smith (49 S. W., 627), is the expression of one of the courts of this State to the effect that its officials in the enforcement of the police regulations are limited and restrained by the Federal Constitution and the laws enacted under it. He said:

"The difficulty in the present case arises in the application of the general rule, for it must be conceded that 'while a State may enact sanitary laws, while, for the purpose of self-protection, it may establish quarantine and reasonable inspection regulations, while it may prevent persons and animals

suffering under contagious or infectious diseases from entering the State, it can not interfere with transportation into or through its borders beyond what is absolutely necesary for its self-protection.' Railroad Co. vs. Husen, 95 U. S., 465; Brimmer vs. Rebman, 138 U. S., 78, 11 Sup. Ct., 213; Scott vs. Donald, 165 U. S., 58, 107, 17 Sup. Ct., 262, 265."

The rule is thus stated in Reed vs. Colorado (187 U. S., 137):

"Certain principles are well settled by the former decisions of this court. One is that the purpose of a statute, in whatever language it may be framed, must be determined by its natural and reasonable effect. Henderson vs. Mayor of New York, 92 U. S., 259, 268. Another is, that a State may not, by its police regulations, whatever their object, unnecessarily burden foreign or interstate commerce. Railroad Company vs. Husen, 95 U. S., 465, 472. Again, the acknowledged police powers of a State can not legitimately be exerted so as to defeat or impair a right secured by the National Constitution, any more than to defeat or impair a statute passed by Congress in pursuance of the powers granted to it. Gibbons vs. Ogden, 9 Wheat, 1, 210; Missouri, Kansas & Texas Railway Co. vs. Haber, 613, 625, 626, and authorities cited."

Justice Harlan, in the case of Hennington vs. Georgia (163 U. S., 299), said:

"Of course, if the inspection, quarantine or health laws of a State, passed under its reserved power to provide for the health, comfort and safety of its people, come in conflict with an Act of Congress, passed under its power to regulate interstate commerce and foreign commerce, such local regulations, to the extent of the conflict, must give way in order that the supreme law of the land—an Act of Congress passed in pursuance of the Constitution—may have unobstructed operation."

Other cases by which it is settled that the laws of the States, though resting upon the police power, must yield in case of conflict with valid Federal laws are:

Gulf etc. Ry. vs. Hefley, 158 U. S., 99;
Arkansas vs. K. & T. Coal Co., 183 U. S., 185;
Erie R. R. Co. vs. New York, 233 U. S., 671;
Asbell vs. Kansas, 209 U. S., 251.

In view of the authorities above referred to, there is no escape from the conclusion that under Federal quarantine regulation No. 65, above set out, the State quarantine officers at Galveston may be prevented from boarding vessels engaged in foreign or interstate commerce until the inspection by the Federal quarantine officer has been completed. The insistence on the part of the State quarantine officials of the right to board such vessels first amounts to a conflict with this regulation, a conflict between a valid regulation of the Federal Government and State officials acting under the State law, and in the language of the court, in the case of Arkansas vs. K. & T. Coal Co. (183 U. S., 185), "that which is not supreme must yield to that which is supreme."

We realize, of course, that the necessity of respecting this order of the Federal Government may, in a measure, embarrass the State quarantine officials in the performance of their duties and may tend, in a measure, to impair the efficiency of the State quarantine service

at Galveston, but such inconveniences and restraints are unavoidable under the existence of the respective powers of our two governments as these powers have been defined by the courts.

We do not mean to intimate that the State officials may not inspect, detain and disinfect vessels from foreign ports, or ports of other States, arriving at Galveston. They may do so, and may use any means proper for the protection of the lives and health of the citizens of this State, provided, they do not delay or burden such commerce beyond what is reasonably necessary for the accomplishment of such purposes and provided they do not violate the Federal quarantine laws and regulations. These principles are established by the authorities hereinbefore cited and many others.

The Federal law does not undertake to prohibit the State from maintaining quarantine at the ports, but it recognizes the rights of the States to pass laws for such purpose and it enjoins upon the Federal officials co-operation with the State officials in the enforcement of the State quarantine laws and regulations.

Whether the Federal government has the power to prohibit the States from detaining for inspection and fumigation vessels from foreign ports or from ports of other States, we need not undertake to determine, for, as has been shown, the Federal law does not go this far. It is, however, the conviction of the writer that the Federal Government has no such power. The State's right to protect the health and lives of its citizens could not be given away or taken away. As said by Justice Strong, in Railroad Co. vs. Husen (95 U. S., 465), this right is self-defensive. The police power of a State is as necessary and vital a function of sovereignty as is the taxing power. The most that can be exacted is that in the exercise of its police powers the State shall not interefere with the powers delegated to the Federal Government.

The State should not be compelled to rely upon the efficiency or inefficiency of the Federal quarantine service. The public health is a matter so vital that it should be safeguarded in every possible manner and your zeal in the performance of this important duty cannot be too highly commended.

For your further information as to the law bearing upon the administration of the State quarantine regulations with respect to vessels engaged in foreign and interstate commerce, we quote the following rule stated in the case of Railroad Co. vs. Husen (*supra*):

"While we unhesitatingly admit that a State may pass sanitary laws, and laws for the protection of life, liberty, health, or property within its borders; while it may prevent persons and animals suffering under contagious or infectious diseases, or convicts, etc., from entering the State; while for the purpose of self-protection it may establish quarantine, and reasonable inspection laws, it may not interfere with transportation into or through the State, beyond what is absolutely necessary for its self-protection. It may not, under the cover of exerting its police powers, substantially prohibit or burden either foreign or interstate commerce."

Under this rule such vessels, of course, should not be detained longer than reasonably necessary for the making of such inspection and for such treatment of the vessels and passengers as is sufficient to prevent

the spread of diseases over the State. This, indeed, is the avowed purpose of our quarantine laws and regulations, "to provide safety for the public health of the State without unnecessary restrictions upon commerce and travel." (Revised Statutes, Article 4572.)

Another matter calling for the application of this rule is the imposition of fees for inspection, fumigation, etc. The charging of such fees against incoming vessels has been attacked as a tonnage tax and also as a burden on commerce. But the right of the States to require payment of such fees has been sustained when they are a reasonable compensation for the services rendered and are charged as payment for services actually performed and not for revenue purposes. See

Morgan vs. Louisiana, 118 U. S., 455;
Cooley vs. Board of Wardens, 12 Howard, 299;
McLean vs. Denver etc. R. R. Co., 203 U. S., 38;
Red C Oil Co. vs. N. C., 222 U. S., 380;
Potapsco Guano Co. vs. Board of Ag., 171 U. S., 345;
Foots vs. Maryland, 232 U. S., 494.

In the foregoing opinion we have undertaken, somewhat at length, to set out the law bearing upon the several questions arising out of the situation at Galveston. If there are questions of law in this matter which we have overlooked and on which you desire advice, we will, upon your request, give them careful investigation.

Respectfully,

G. B. SMEDLEY,
Assistant Attorney General.

RAILROADS—ARTICLES 6552, 6654-(12), 6553, 6639, 6693 AND 6618 CONSTRUED.

The Railroad Commission has authority to require a railway company, which has a day agent and telegraph office at a regularly established station, to keep an agent at such station to accommodate passengers desiring to take night trains.

February 21, 1916.

Hon. J. C. Chesnutt, County Attorney, Henrietta, Texas.

DEAR SIR: We have your letter of the 16th inst., relative to depot accommodations at Bellevue.

The question presented by you is one that is constantly arising, and there seems to be serious doubt as to the existence of a remedy,—as against the railway company,—for the evil under the present law.

The writer hereof has reached the conclusion that there is a remedy, to wit, an order of the Railroad Commission requiring the installation of a night agent, etc., and a prosecution upon the failure of the railway company to obey the order.

My conclusion is reached in this way:

Article 6552, Revised Statutes, 1911, prescribes certain duties owed by railway companies. Amongst such duties are: (1) To furnish

"sufficient accommodations for the transportation of all such passengers and property as shall offer or be offered for transportation." Other duties are specifically prescribed in this, and the other articles presently to be mentioned, but it is obvious that the specific duties are parts of and relate to the broad duty prescribed by the language just quoted. Article 6552 also provides that failure to comply with the requirements thereof shall be deemed an abuse subject to correction by the Railroad Commission.

It is manifest that the duty to furnish proper depot accommodations is included within the language quoted from Article 6552, but there are several other statutes dealing with the subject in various ways, but all simply making more specific the general duty "to furnish sufficient accommodations."

Articles 6654-(12) and 6693, among other things, require the passenger depots to be kept "well lighted and warmed." The depot, manifestly, is the proper place to post the train schedules required by Article 6552. The keeping of the depots "well lighted and warmed," the posting of the schedules, etc., certainly import the necessity of the presence of an agent to perform these duties for the company. In the nature of things, a railway company could not keep its passenger depot properly lighted and warmed, according to varying weather conditions, without the presence of an agent to look after the appliances therefor.

Now Article 6553, as it was originally, and as it is since the amendment of 1913, amongst other things, lays upon the railway company the duty "to employ a competent train dispatcher whose duty it shall be to keep informed of the movement of all trains. * * *" It then prescribes that the test of the *places* to which this information shall be imparted is not stations having agents on duty but it is "stations having telegraph offices in or near them." It may be said that the penalty prescribed for violation of this Article runs against the train dispatcher personally; this is true, but it does not prove that it is not, also, the duty of the railway company to have the dispatcher, as prescribed, and, having him, to see that he performs the prescribed duty. The duty of the railroad company is absolute, and it could not very well have the information imparted to agents at stations "having a telegraph office in or near them," unless it also had an agent on duty at such stations to receive the same. It may be said also that Article 6639, Revised Statutes, 1911, as amended in 1913, lays certain duties upon the agent personally and provides punishment for his failure to perform the duties. This does not prove, however, that it is not, also, the duty of the company to have the agent present and to see that he does his duty by reason of the agency. In other words, the personal duty prescribed for the agent, and the personal liability fixed for him, is simply cumulative of the duties owed by the company itself, and the existence of personal liability upon the part of the agent does not at all destroy liability upon the part of the company.

If this were all of the law upon the subject, it would seem that the company could perform the duties laid upon it without the necessity

of having agents present at its stations, day and night, to perform them. But this is not all of the law.

Article 6618, Revised Statutes, 1911, in part, prescribed that "railroads shall be required to keep their ticket offices open half an hour prior to the departure of trains." The article also prescribes a penalty to be suffered by the company upon failure to do so, and that is that they shall not have the right to charge more than three cents per mile passenger fare. But this penalty is not exclusive; neither does the prescription of this particular penalty detract anything from the duty of the company to keep the ticket office open. The duty to keep the office open is absolute and has been so held by our courts.

See Mills vs. M. K. & T. Ry. Co., 94 Texas, 251-252, and cases there cited.
G. C. & S. F. Ry. Co. vs. Dyer, 95 S. W., 13.

In order for the company to keep the office open, within the meaning of this statute, it must have in the office a person authorized to sell tickets.

If, therefore, the company has passenger trains scheduled to pass and stop at stations during the night time it owes the traveling public the absolute duty to have an agent in the ticket offices at such stations for at least one-half of an hour prior to the departure of the trains therefrom.

The requirements of the opening of the office and the presence of the agent is for the accommodation of the traveling public, and the public could not be adequately served without this duty and its performance. The performance, or non-performance, of this duty results in the performance or non-performance, as the case may be, of the general duty prescribed in the language quoted above from Article 6552, the failure to perform which, according to that article, constitutes an abuse subject to correction by the Railroad Commission.

We have concluded, therefore, that the Railroad Commission has the authority to establish and enforce an order requiring the furnishing of an agent at Bellevue, to perform the duties discussed above with respect to the night trains of the railway company.

Yours truly,

LUTHER NICKELS,
Assistant Attorney General.

RAILROADS.

The Constitution and statutes give one railway company the absolute right to cross, intersect or join its tracks with the tracks of another railroad company and enjoin the duty to interchange traffic.

Chapter 35, Acts of 1915, applied to Dittlinger case.

April 15, 1916.

Hon. Allison Mayfield, Chairman, Railroad Commission, Capitol.

DEAR SIR: We have your letter of the 12th inst., together with

enclosures relative to application of the Dittlinger Lime Company, for track connections at Dittlinger.

The material facts relative to the matter seem to be as follows:

Dittlinger is a station on the line of the I. & G. N. Railway Company, about four miles west of New Braunfels in Comal County. It is also a station on a line of the M. K. & T. Railway Company, about three miles in length, extending from the station of Solms on the main line of the M. K. & T. Railway Company, between New Braunfels and San Antonio, to the east side of the right-of-way of the I. & G. N. Railway Company at Dittlinger, and according to the notice given by the M. K. & T. Railway Company, relative to the establishment of Dittlinger as a station, on its said line, the station is "a competitive point served by both the I. & G. N. and M. K. & T. of Texas," and said notice provides for "all necessary amendments to tariffs, mileage tables, etc." While the application is made by one industry, it appears from the notice issued thereon by the commission, that the purpose of the connecting or interchanging track, if it should be ordered, "being to provide for a permit for the interchanging of loaded and empty cars between said track that is to be operated by the Missouri, Kansas & Texas Railway Company of Texas, and the main line and switch tracks of the International and Great Northern Railway, and of the petitioner, at the station of Dittlinger." It does not appear whether there are other industries now located at this station, but manifestly the stations and the lines of railway are intended to be used and will be used as occasion demands, by the general public. It does not appear that the M. K. & T. Railway Company of Texas is a formal party to the application, but it does not appear from your letter that "at the hearing in this case it was stated by the representative of the Missouri, Kansas & Texas Railway of Texas that said company had no objection to urge, in fact, favored the entering by the Commission of an order requiring the connecting track as desired and requested by the petition." It also appears that the Dittlinger Lime Company owns several industry tracks on the north side of the line of the I. & G. N. Railway which it uses for the purpose of delivering and receiving empty and loaded cars in the shipment of its products.

In your letter you say:

"What the Commission desires in this case is your advice as to what action, if any, it can legally take towards affording the relief, or of accomplishing the purpose desired by the petitioner, either as a result of the hearing already had on the notice issued, or through a subsequent notice and hearing; this, of course, in the event the Commission should decide that the petitioner is entitled to relief—that his industry is entitled to the advantages to be derived from the Missouri, Kansas & Texas Railway of Texas being enabled to get into the plant."

This matter presents questions that are both novel and interesting and all of which are difficult of solution, and we are without the benefit of adjudicated cases bearing directly upon any of the points involved. Necessarily, therefore, we cannot advise you with certainty as to the powers of the Commission in the premises, but what we shall say upon the subject represents our best judgment as to what can be

done and this judgment we are ready to attempt to substantiate if litigation should follow the entry of an order in the case.

Section 1 of Article 10 of the Constitution of this State provides in part as follows:

"Every railroad company shall have the right, with its road, to intersect, connect with or cross any other railroad; and shall receive and transport each the others passengers, tonnage and cars, loaded or empty without delay or discrimination."

Article 6499, Revised Statutes of 1911, provides:

"Such corporation shall have the right to cross, intersect, join and unite its railway with any other railway before constructed at any point on its route, and upon the grounds of such other railway corporation, with the necessary turnouts, sidings and switches, and other conveniences in furtherance of the objects of its connection." And

Article 6500 declares that:

"Every corporation whose railway is or shall be hereafter intersected by any new railway shall unite with the corporation owning such new railway in forming intersections and connections and grant to such new railway facilities therefor."

It will be noted that the section of the Constitution and the statutes quoted above, confer upon a railway company an absolute right. That is, to connect with, or cross with its line, the line of any other railway company. All the rights and powers of private corporations, and especially corporations whose properties are charged with the public use, are conferred by the Government on the expectation of a benefit to the public resultant of the exercise of the same. This, of course, would be implied even though there were no express declaration of law thereunto. In matters of the kind under consideration, however, the section of the Constitution which confers this particular right, couples its grant with the absolute duty to interchange traffic, and this, of course, implies the furnishing of necessary facilities therefor, which implication is carried into positve statute law.

If, therefore, the representations of the M. K. & T. Railway Company of Texas made to the Commission at the time of the hearing, and referred to above can, under the rules of the Commission, be treated as an application, or as a joinder in the application, or if said company will join in said application, there can be no doubt of the power of the Commssion to make an order defining and requiring the connection.

Article 6701;
Article 6500.

The Commission seems to have full power to prescribe procedure before it, and we are inclined to think that it would have the right to consider the conduct of the M. K. & T. referred to, as an application, if it so desired. But independent of the question of whether or not the M. K. & T. Railway Company has joined in the application, there would seem to be reason and authority for holding that the

Commission could still require the connection. In the case of I. & G. N. Railway Company vs. Railroad Commission, 99 Texas, 332, the power of the Commission to require connecting tracks where two lines of railway actually cross each other is settled. So far as the public and public policy are concerned, there would seem to be just as strong reason for the existence of a duty to furnish interchange tracks at a station where two lines come together, but where the rails do not physically join, as in the other case.

Aside from this, however, the Supreme Court of this State, in G. C. & S. F. Ry. Co. vs. F. W. & R. G. Ry. Co., 86 Texas, 537-543, in speaking of what is now Article 6500, said:

"Article 4176 (R. S., 1879), enjoined upon the plaintiff to unite with the defendant in securing the intersection and connection; it was a mutual duty to be performed for the promotion of an important public purpose; in fact a duty enjoined upon both parties in the iterest of the public."

In S. & E. T. Ry. Co. vs. G. & I. Ry. Co., 92 Texas, 167, the Supreme Court said:

"Making connections between roads is a lawful purpose; in fact, a duty enjoined upon both parties in the interest of the public."

As stated before, we do not believe the makers of the Constitution and the Legislature, intended to confer upon one railroad company the right to join tracks with the line of another railway company, etc., without also prescribing the duty to do so where public interest required it. This duty we believe, may be deduced from all of the provisions of the Constitution and statutes in any way bearing upon the subject. If the duty is imposed upon the companies by law, then the Commission has jurisdiction to see that it is performed.

C. R. I. & G. Ry. Co. vs. Railroad Commission, 102 Texas, 393;

Article 6501 Revised Statutes, 1911, provides that if the two corporations cannot agree upon the amount of compensation for a crossing, intersection or connection, or the points and manner of the same, their differences shall be adjusted in the manner provided by law. The methods prescribed by law seem to be as follows:

The Railroad Commission may "define by its decree" the mode of such crossing which will occasion the least probable injury upon the lines of the company owning the road which is intended to be crossed. What compensation, if any, should be paid to the company whose line is to be crossed or intersected, may be investigated and adjusted by the Commissioners in a condemnation proceeding.

Ry. Co. vs. Ry. Co., 86 Texas, 536;
Ry. Co. vs. Ry. Co., 92 Texas, 162.

There is another method of procedure by which we think the substantial relief desired can be procured. The petitioner in this case manifestly can bring itself within the provisions of Chapter 35, Acts of 1915, page 66, and compel the M. K. & T. Ry. Co. of Texas to con-

nect its line with the industry tracks of the petitioner, provided, of course, there is no physical obstacle to the connection. There does not seem to be any such obstacle. In the first place as indicated above, if an order should be made requiring the M. K. & T. to make such connection, it would have the right to cross the track of the I. & G. N. for that purpose. In the second place, it appears that a non-grade crossing could be made without the necessity of an unreasonable large expenditure and thus the necessity for the erection and maintenance of an interlocker could be avoided. If the Commission should conclude that it has not power to compel the connection as proposed in the application now before it, upon an amended application asking for relief under the terms of Chapter 35, Acts of 1915, and a hearing thereon, and if it should find the necessary facts prescribed by said statute to exist, it could make an order granting relief, which, it seems to us, would reach the ends sought.

Yours very truly,
LUTHER NICKELS,
Assistant Attorney General.

SCALP BOUNTY ACT—APPROPRIATION—DEFICIENCIES.

By Chapter 32, Acts of the Regular Session of the Thirty-second Legislature, it is provided that persons who kill certain wild animals within this State shall be entitled to the bounties therein specified to be paid by the counties. It is further provided that upon the presentation of accounts by the commissioners' court the Comptroller shall draw his warrant from the State Treasurer for three fourths of the amount paid by such county and an appropriation of $100,000 is made to carry out the purposes of the Act, held: "such Act is not a temporary one and did not expire with the expenditure or lapse of the appropriation and is still in effect."

The $100,000 appropripriated by the Legislature being exhausted before the receipt of itemized statements from counties does not affect the validity of such claims and the Legislature would have authority to make appropriations to pay the claim of any county for three-fourths of the amount paid out by such county in pursuance of the act. Chapter 32, Acts Thirty-second Legislature Regular Session.

March 9, 1915.

Hon. M. M. McFarland, House of Representatives, Capitol.

DEAR SIR: The Attorney General is in receipt of your letter of March 1, reading as follows:

"I would be pleased to have an opinion at the earliest possible moment on the enclosed claim of Val Verde county, in reference to payment of scalp bounties, etc., as to whether the law ended or ceased to exist when the appropriation was exhausted, or whether it continued and is still in effect, and if the Legislature can make an appropriation to pay this claim."

You attach to your communication to the Attorney General one addresed to him under date of February 27, 1915, by your county judge, Hon. J. Q. Henry, from which it appears that the claim of $1,068.50 in favor of Val Verde County against the State, being three-fourths of the amount paid out on wild animal bounties, arose subsequent to the exhaustion of the $100,000 appropriated by the

Thirty-second Legislature, the surplus of which was further appropriated by the Thirty-third Legislature. It further appears from Judge Henry's letter that before allowance of such bounties by the commissioners court of Val Verde County, Judge Henry wrote the Comptroller to know if the appropriation was exhausted and received the reply that there was approximately $25,000 left in the appropriation and that upon receipt of such information from the Comptroller the court allowed and paid bounties aggregating $1,426, one-fourth of which, or $356.50, is to be borne by the county under the provision of the law, leaving to be paid by the State the sum of $1,068.50.

The matters detailed in Judge Henry's letter while they show good faith on the part of the commissioners court of Val Verde County, in our opinion do not affect the claim of the county against the State for the reason we believe that even though the appropriation had been exhausted and the commissioners court with knowledge of this fact had made payment of the bounties, still a claim for three-fourths of the amount would have been a just claim against the State for the reason that such bounties were paid under an existing law that was in full force and effect and had not in any manner been repealed by the Legislature.

What is known as the scalp bounty act providing for the payment of bounties for the killing of certain wild animals in this State was enacted by the Thirty-second Legislature, and appears as Chapter 32 of the printed acts of the Regular Session. After providing for the amounts to be paid for the killing of the respective wild animals therein enumerated Section 4 of the act makes it the duty of the commissioners court at each regular session to make an itemized statement showing the several amounts paid, to whom and when paid, by order of the court, which statement shall be entered upon the minutes of the court and a certified copy of such statement shall be transmitted by the clerk of the court to the Comptroller of the State. Thereupon it is made the duty of the Comptroller to draw his warrant upon the State Treasurer for three-fourths of the aggregate amount paid out by the county and payable to the treasurer of the county to be by him credited to the fund of the third class of said county.

In order to meet the obligations of the State arising under this act the Legislature by Section 6 thereof appropriated the sum of $100,000.

No limitation as to the time within which this $100,000 might be expended was fixed by the act but by reason of Section 6 of Article 8 of the Constitution which provides in part "nor shall any appropriation of money be made for a longer term than two years" such appropriation lapsed at the end of two years and on account of such constitutional provision the Thirty-third Legislature at its First Called Session embodied in the appropriation bill then passed the followng clause:

"All the unexpended balance of the appropriation made by the Thirty-second Legislature, Chapter 32 of the General Laws as enacted at the Regular Session, being House Bill No. 142, said appropriation being included in Section 6 of said act, are hereby appropriated for the purposes of said act, and the payment of said bounties as therein enumerated, for

the two years beginning September 1, 1913, and ending August 31, 1915."

Thereby the unexpended balance, whatever there may have been remaining of the $100,000 appropriated by the Thirty-second Legislature was appropriated by the Thirty-third Legislature for the period beginning September 1, 1913, and ending August 31, 1915. We are discussing this matter now in the light of a possible contention that the act providing for the payment of bounties for the killing of certain wild animals lapses with the exhaustion of the appropriation, while, as will hereafter be seen, we are of the opinion that such act does not lapse with the expenditure of the appropriation, yet conceding for the time being that such would be the result, it is apparent that such act has not ceased to be of force and effect for the reason that by the appropriation of the unexpired balance by the Thirty-third Legislature that body has continued such act in force at least to August 31, 1915, for the Legislature could not determine, at least it has not undertaken to do so, when the unexpended balance in the hands of the Comptroller would be exhausted. It must be presumed that the Legislature intended that such balance would be sufficient to meet all demands for the fiscal year ending August 31, 1915, so even though the act does lapse with the exhaustion of the appropriation it is still in effect and will remain so until August 31, 1915, and therefore the claims of Val Verde County is based upon an existing law that has not been repealed by the Legislature, and therefore such claim having arisen under and by virtue of an existing law it is a valid claim and should be paid by an appropriation made by the Legislature if the Legislature is convinced of the justice thereof.

While, as above stated, we are of the opinion that the original act of the Legislature could not be considered a temporary one and would lapse and cease to exist at the expiration of the appropriation, yet we will further express our views upon this subject.

It is a general rule in the construction of the statutes that they are perpetual when there is no time limit fixed by the statute within which these provisions are operative and upon the expiration of which time such statutes shall cease to exist. Lewis' Sutherland Statutory Construction, Second Edition, Section 244.

There is no intimation whatever in the language used in the act under discussion that it was the intention of the Legislature that such act should cease to be of force and effect upon the exhaustion of the $100,000 appropriated therein. The fact that the Legislature appropriated at the First Called Session of the Thirty-third Legislature the unexpended balance of the $100,000 appropriated by the first act is simply a recognition on the part of the Legislature of that constitutional provision which prohibits the appropriation of funds for more than two years. There are many statutes enacted by the Legislature establishing institutions of the State or creating offices of the State and making appropriation for the maintenance of such an institution for the salaries of such officers which appropriation under the Constitution can remain in force only two years and it could not be successfully contended that such acts were temporary and would expire with the appropriation. Such a rule would have the effect of

destroying numberless acts of the Legislature now in the statute books of this State.

Another rule of construction is, "though the reason for a statute ceases the statute continues until repealed." Sutherland Statutory Construction, Section 295; State vs. Eaves, 8 L. R. A., 259.

We are therefore of the opinion that this law has not lapsed nor will it lapse upon the failure of the Legislature to make an appropriation, but it will remain in full force and effect and the commissioners courts of the various counties of this State will have authority to operate thereunder and pay the bounties therein prescribed upon which payments the counties will have a claim against the State for three-fourths of the amount of their expenditure until the Legislature shall repeal the act.

Of course claims due the counties arising under this act could not be paid by the treasurer of the State until the appropriation had been made therefor by the Legislature.

Pickle vs. Findley, 91 Texas. 484;
Lightfoot vs. Lane, 140 S. W., 89;
Goodykoontz vs. Acker, 19 Colo., 360; 35 Pac., 911;
Ristine vs. State, 20 Ind., 328;
State vs. Stover, 7 Kan., 119; 27 Pac., 850;
State vs. Kennedy, 9 Mont., 389; 24 Pac., 96;
State vs. Kennedy, 10 Mont., 496; 26 Pac., 388;
State vs. Harshaw, 76 Wis., 230; 45 N. W., 308.

In the case of Pickle vs. Findley, supra, Pickle, the stenographer of the Court of Civil Appeals brought suit against the Comptroller to compel that official to issue a warrant for the payment of an alleged balance due from Pickle's salary as stenographer of the Court of Civil Appeals. The statute authorizing the appointment of a stenographer for the court provided that such stenographer should receive a salary of $1200.00 per annum, but the appropriation bill passed by the Twenty-fifth Legislature appropriated only the sum of $600.00. The Comptroller refused to draw warrants in favor of Findley except at the rate of $50 per month aggregating the $600 appropriated by the Legisature and Findley's suit was an application for mandamus to compel the Comptroller to issue additional warrants to aggregate the amount of $1200 as provided in the statutes creating the position. The court refused to remit, but said: "We do not hold that relator is not entitled to balance due upon his salary claimed by him. We now hold that there has been no appropriation for the payment of that balance and that the Comptroller is not authorized to draw his warrant therefor."

There are numerous authorities to be found holding that under conditions set out in the claim of Val Verde county that it would be the duty of the Comptroller to issue a warrant upon the presentation by the commissioners' court of claim arising under this Act. A discussion of whether or not it would be the duty of our Comptroller to issue a warrant under these facts would be useless for the reason that although such warrants might be issued they could not be paid by the Treasurer until after an appropriation therefor had been made by the Legislature and it would be useless for the Comptroller to pursue

that course because after all it is a matter to be determined by the Legislature, and the Legislature would be no more bound to appropriate the funds for the payment of warrants than it would be had no warrants been issued and the appropriaton was shown in the first instance upon which to base the issuance of the warrants by the Comptroller.

So, as is held in the Pickle case, it is our opinion that all counties holding claims arising by reason of what is known as the scalp bounty act are entitled to the amount due them, but that same cannot be paid until appropriation is made by the Legislature.

We therefore advise you as to the instant case or those similar that may be presented, that the Legislature has ample authority to incorporate these amounts in the appropriation bill and provide for their payment if the same are found by the Legislature to be correct.

Yours truly,

C. W. TAYLOR,
Assistant Attorney General.

SCALP BOUNTY ACT.

1. The $100,000.00 appropriated by Chapter 47, Acts Thirty-fourth Legislature, is not apportioned to the different counties.
2. In order for the commissioner's court of the various counties to ascertain when such appropriation is or about to be exhausted, they should communicate with the Comptroller.
3. The Act expressly provides the State shall not be liable after the appropriation has been exhausted. Therefore when the appropriation has been exhuasted, there will be no law authorizing the payment by the State and future legislatures would have no authority to make appropriations to pay deficiencies.
4. Counties are primarily liable for the payment of bounties, but upon an itemized statement being presented by the commissioners court through the county clerk to the Comptroller, it is the duty of the latter to draw his warrant on the State Treasurer for one-half the aggregate paid by the county, payable to the county treasurer, to be placed to the credit of fund of the third class of said county.

Const. Art. 3, Sec. 44;
Chapt. 47; Acts Thirty-fourth Legislature.

September 23, 1915.

Hon. Dixon Gulley, County Attorney, Carrizo Springs, Texas.

DEAR SIR: The Attorney General has your favor of 21st instant, relative to the Scalp Bounty Act of the Thirty-fourth Legislature and presenting for an opinion thereon the following questions:

"1. Is any part of the $100,000.00 appropriation apportioned to the different counties in the State?

"2. If not, how will each county know when the approprition is exhausted?

"3. When it is finally exhausted will the State be liable to the holders of properly registered scalps in excess of the appropriation?

"4. If so will the State be bound to make an additional appropriation to pay off such claims?

"5. Is the payment by the State conditioned, or on the condition, that each county pay one-half of the registered claims?"

Before answering the above questions in their due order, we will refer to such portions of the Act as are pertinent to your inquiries.

Section 1 of the Act, after stipulating the amounts to be paid for the killing of the respective animals therein enumerated, contains the following provisions.

"Provided, that the State shall not be liable for any claim arising under the provisions of this bill after the appropriation herein provided shall have been exhausted."

Section 3, after defining a "scalp," prescribing the procedure necessary to establish the claim for bounty, and defining the duties of the comissioners' court, contains the following:

"The clerk of the county court shall issue a warrant on the county treasurer for the amount specified, and payable to the party named in such certificate."

Section 4 provides the procedure for collecting from the State a refund of one-half the aggregate paid by the county, in the following language:

"It shall be the duty of the commissioners' court of the several counties of this State at each regular session of each year, to make an itemized statement showing the several amounts paid, to them, and when paid, by order of said court under the provisions of this Act; said statement shall be entered upon the minutes of said court, and a certified copy of each statement shall be entered upon the minutes of said court, and a certified copy of such statement shall be transmitted by the clerk of said court to the Comptroller of the State. Upon receipt of said certified copy by the Comptroller, it shall be his duty to draw his warrant upon the State Treasurer for one-half of the aggregate amount paid out by such county, under the provisions of this Act, as shown by said certified copy of the statement, payable to the treasurer of said county, which said amount. when received by said county treasurer, shall be by him credited to the fund of the third class of said county."

Section 6 makes an appropriation of $100,000 out of which the refund of one-half the amount expended by the counties shall be paid and is in the following language:

"And the sum of one hundred thousand dollars ($100,000.00) is hereby appropriated out of any money in the State Treasury, not otherwise appropriated, for the payment of the above named bounties."

Basing our reply to your questions upon the above pertinent provisions of the Act, we advise:

First: The appropriation of $100,000 made by the Legislature to defray the obligation of the State imposed by the Act to refund to the counties one-half the amount paid out thereunder, is *not* apportioned to the counties, and all statements of amounts presented by any county should be considered by, and warrants issued by the Comptroller in order of their receipt without regard to the county from which they come.

Second: The commissioners court of the various counties paying such bounties should, from time to time, consult the Comptroller and ascertain if the appropriation is or is about to be exhausted, as such method is the most direct method of obtaining such information.

Third: Answering your third inquiry, we advise that were it not for the provision copied above from Section 1 of the act, limiting the liability of the State to the appropriation made, we would say that although the appropriation might become exhausted, yet the act authorizing the presentation by the counties and payment by the State of an account for one-half the amount paid out, such counties would have a valid claim against the State that a subsequent Legislature would have authority to and should make an appropriation to pay. However, we are confronted with that constitutional limitation upon legislative appropriations contained in Section 44 of Article 3, as follows:

"nor grant, by appropriation or otherwise, any amount of money out of the Treasury of the State, to any individual, on a claim, real or pretended, when the same shall not have been provirded for by pre-existing law."

Any claim against the State not based upon some pre-existing law authorizing the same must therefore fall within the above provision of the Constitution and the Legislature would be powerless to authorize its payment—any act of the Legislature making an appropriation therefor would be void.

Nichols vs. State, 32 S. W., 452;
State vs. Wilson, 71 Texas, 291;
State vs. Haldeman, 168 S. W., 1020.

In the Nichols case above cited, plaintiff sued the State, by permission of the Legislature, to recover an excess in the contract price over and above the appropriation contained in the act authorizing the construction of the General Land Office Building and limiting the cost thereof to $40,000. The State alleged that the contract for the excess over the $40,000 authorized, as well as the act of the Legislature referred to, were in violation of Section 44, Article 3, of the Constitution; and the court in upholding this contention of the State said:

"But we are of opinion that the claim of appellant is not based upon any pre-existing law, and that such claim falls within the spirit and meaning of the prohibition contained in the latter part of the section of the Constitution quoted. The apparent purpose of this provision of the Cnstitution was to relieve the State from liability for all claims that were not authorized by a pre-existing law, to prohibit the Legislature from paying them. State vs. Wilson, 71 Texas, 291; 9. S. W., 155."

In the act here under discussion the liability of the State is expressly limited to the appropriation of $100,000 and the permission granted to incur liability on behalf of the State confined it to that amount. Therefore it follows that in so far as the State is concerned, when the appropriation is exhausted, the act lapses—there is no pre-existing law upon which to base an appropriation—the inhibition contained in Article 3, Section 44, becomes applicable and the Legislature would be powerless to make appropriation to pay claims of counties arising thereafter, all that would remain of the act would be the liability of the counties for such bounty without recourse on the State

for a refund of one-half. It is true the Thirty-fourth Legislature, page 125, Acts First Called Session, made an appropriation to refund scalp bounty claims of counties arising after the appropriation of the Thirty-second and Thirty-third Legislature had been exhausted. This Department held such appropriation valid, as the act of the Legislature authorizing such payments remained in full force, although the appropriation therein has become exhausted. However, that act (Chapter 32, Acts Thirty-second Legislature) contained no similar provision to that of the Thirty-fourth Legislature limiting the liability of the State to the amount therein appropriated.

We therefore advise a subsequent Legislature would have no authority to pay claims arising after the appropriation contained in this act has been exhausted.

Fourth: Your fourth question is fully answered in the answer to your third.

Fifth: The obligation of the State to refund one-half the amount of bounty paid by the county does not arise until the county has first paid the full amount authorized by Section 1 of the act. While the net result to the county is that it pays one-half the State does not pay one-half upon condition the county will pay the remaining one-half. The county is primarily liable for full amount of claim and when paid and presented as required by the act, the State refunds one-half of the aggregate.

Trusting the above fully answers your inquiry, I am, with respect,

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

SPECIAL ROAD LAW—ROAD COMMISSIONER.

Road Commissioner: A special road law when conferring upon county commissioners the duty of road commissioners and fixing a compensation therefor different from the compensation allowed by general law, is Constitutional.

A law conferring additional duties upon an officer in line with the duties of his office does not create a new office and therefore subject such law to the inhibition against holding more than one office of emolument.

Section 56, Art. 3 of the Constitution.

Section 40, Art. 16 of the Constitution.

Special Road Law of Jefferson County, Acts of the Thirty-second Legislature.

September 19, 1915.

Hon. Marvin Scurlock, County Attorney, Beaumont, Texas.

DEAR SIR: In your favor of recent date you desire an expression from this Department as to the constitutionality of the Road Law enacted by the Thirty-second Legislature for Jefferson county and particularly that feature of such law allowing to each commissioner the sum of $5.00 per day for services actually performed and providing that said sum so paid shall not exceed the sum of one hundred dollars per month. You refer to the case of Bell County vs. Hall,

138 S. W., 178, and to the opinion of this Department rendered to Hon. O. B. Colquitt, Governor, found on page 862 of Opinions of the Attorney General for 1912-1914, and ask if the Special Law for Jefferson county is not similar to the one referred to in the above mentioned opinion for Galveston county.

Replying thereto, I beg to say that all special road laws are enacted under Article 8, Section 9 of the Constitution, which provides as folows:

"And the Legislature may pass local laws for the maintenance of public roads and highways without the local notice required for special or local laws."

The above provision of the Constitution relieves special road laws of the inhibition placed on local laws by the provisions of Section 56 of Article 3 of the Constitution, which prohibits the passage of any local or special law authorizing, among other things, the laying out, opening, altering or maintaining of roads, highways, streets or alleys, or regulating the affairs of counties, cities, towns, wards or school districts. Therefore, the case of Hall vs. Bell County would not be an authority against a county road law for the reason that the contention upheld in that case was that the act was invalid because it undertook to regulate county affairs of Bell county and was therefore a special or local law inhibited by the provision of Section 56, Article 3, of the Constitution above referred to.

Young vs. The State, 51 Texas Cr. Rep., 366.
Smith vs. Grayson Co., 18 Texas Civil Appeals, 153.

The special law for Galveston county under discussion in the opinion rendered by this Department to Governor Colquitt was also subject to the same objection as the Bell County Auditor Law and was held by this Department to be in violation of Section 56 of Article 3 of the Constitution prohibiting the passage of local or special laws regulating the affairs of counties, in that such law attempted to regulate the pay of county officials to-wit, county commissioners for Galveston county, and to provide a different method of paying by fixing a stated salary of $100 per month in lieu of $3.00 per day for the days such commissioners might be engaged in holding a term of court, as is provided by Article 3670 of the Revised Statutes. The act of the Legislature under consideration in this opinion was not a road law. The sole purpose of this act was to provide a salary of $100 per month for the commissioners of Galveston county and of course came clearly within the rule announced in Hall vs. Bell County, that such a law is local and in conflict with the provisions of Section 56 of Article 3 of the Constitution.

In 1897 the Legislature enacted a special road law for Ellis county, being Chapter 110 of the printed acts of such Legislature, which act was amended by Chapter 30, Special Laws of 1905. By Sections 1 and 14 of this act as amended it is provided, in substance, that the county commissioners should be ex officio road commissioners, road superintendents and general road supervisors of their respective dis-

tricts and that when acting as road commissioners and road superintendents and performing the duties imposed upon them by law or by the commissioners court, that each commissioner should be entitled to $3.00 per day for the services actually performed, provided the sum to be paid would not exceed $50 per month, and which amount should be paid out of the road and bridge fund when the account should have been approved by the commisioners court. The constitutionality of this law was attacked in the case of Blewitt vs. The State, 56 Texas Criminal Reports, 525. This law was attacked as being in violation of Section 56, Article 3, of the Constitution prohibiting the passage of local laws. The court upheld the law under Article 3, Section 9, of the Constitution, authorizing the passage of local laws for the maintenance of public roads and highways. This law was also attacked as being in violation of Section 40, Article 16 of the Constitution, in that it undertook to create and impose on the county commissioner another civil office of emolument. The court declined to uphold such contention and said:

"The commissioners' court and the commissioners themselves are charged by law with the duty, authority and obligation of giving attention to all matters affecting the public roads in their respective counties, and the duties imposed on the commissioners of Ellis county by this Act come reasonably and seasonably within the general scope of their duties under the law."

It seems that the court in this case attacked the view that the act creating the Special Road Law for Ellis County merely conferred new duties upon the commissioners court or rather enlarged and amplified the duties of the commissioners with reference to roads that had already been conferred on them by the general law. The road law of Jefferson county is very similar to that of Ellis county. The powers conferred are identical and the additional compensation allowed to the commissioners as road supervisors differs only in amount of the county commissioners, as road supervisors of Ellis county are allowed $3.00 per day for their services as such not to exceed $50 per month, while the commissioners of your county while acting as road supervisors are allowed $5.00 per day and not to exceed $100 per month.

It is a sound proposition of law that the conferring of additional duties upon an officer in line with the duties theretofore conferred and fixing compensation therefor is not the creation of a new office so as to bring such officer within the inhibition of Section 40 of Article 16 of the Constitution prohibiting the holding of more than one office of emolument.

Powell vs. Wilson, 16 Texas, 59;
Kirk vs. Murphy. 16 Texas, 654;
Kinney vs. Zimpleman, 36 Texas, 554;
Kreugel vs. Daniel, 109 S. W., 1108;
State vs. Green, 30 S. E., 683;
La. vs. Sonnier, 33 La. Ann., 237.

In the Louisiana case cited above, an act of the Legislature had created the clerk of the district court ex officio jury commissioner. The court said:

"It only imposes additional duties and functions to the clerk, who cannot be charged for that reason as holding more than one office. The duty of assisting the jury commissioner in drawing of the jury are made part of his duties as clerk and he receives no appointment or commission as jury commissioner from any source. The legislation which requires him ex-officio to perform the duties of jury commissioner can not be construed as clothing him with an additional office, more than the constitutional provision which makes him ex-officio parish recorder of conveyances, etc."

Likewise in the case of State vs. Green, supra, a South Carolina case, the Legislature had created the probate judge a public guardian. The contention was made that this was the creation of a new office and therefore the same could not be held by the probate judge. The court said:

"It will be seen that the Legislature only intended to impose a new duty upon judges of probate as to matters within their jurisdiction. * * * There is no provision of the Constitution which prevented the Legislature from imposing the said new duty upon the judges of probate. It is merely incidental to the office of probate judge and does not create another office."

In our opinion, the provision in your special road law constituting your county commissioners road commissioners is merely adding a new duty incidental to the office of county commissioner and does not create another office.

We therefore advise you that in the opinion of this Department the provisions of your special road law creating each county commissioner a road commissioner for his respective precinct and providing that he shall be entitled to receive $5.00 per day for services not to exceed $100 per month, is not in violation of any provision of the Constitution of this State.

You also ask if a commissioner, in order to be entitled to his $5.00 per day, must actually go out on the road and inspect it, or would he be entitled to $5.00 per day by simply phoning out to camp, or by asking some one how things were out on the road? Does it not mean that he must actually visit the roads and inspect them in person each day when he draws his pay for the same?

We could not attempt to answer the above question, as it is one purely of fact, and questions of this character must be passed upon by the court, and if the court determines that the commissioner has performed the duties required of him under the law, then they should allow the account. We could not undertake to say just how little work a commissioner might do and be entitled to his pay, or on the other hand how much work he should do before he would be entitled to his pay. Matters of this kind should address themselves to the court in passing upon the account.

With respect, I am,

Yours very truly,

C. W. TAYLOR,

Assistant Attorney General.

STOCK LAWS.

Where the stock law is adopted prior to the enactment of the statute making it a penal offense to allow stock to run at large such latter statute does not become effective in such precinct until an election is held subsequent to the enactment of the penal provision. Articles 1241, 1249, Penal Code; 7235 and 7209, Revised Civil Statutes, 1911.

August 31, 1915.

Hon. J. S. Terry, County Attorney, Kaufman, Texas.

DEAR SIR: In your favor of recent date you propound the following question:

"Are persons permitting stock-horses, cattle, mules, jacks, jennets, hogs, sheep and goats, to run at large in Kaufman county, Texas, subject to the penalties laid down in Articles 1241 and 1249, Penal Code, 1911?"

You then state that Kaufman county in 1886 adopted statutes relating to hogs, sheep and goats and that in 1905 it adopted statutes relating to horses, mules, cattle, etc. Article 1241 of the Penal Code making it a penal offense to permit hogs, sheep and goats to run at large was enacted in 1897 subsequent to the adoption of said law by Kaufman county, while Article 1249 of the Penal Code prohibits the running at large in districts having adopted the stock law, of horses, mules, cattle, etc., was adopted in 1907 which was subsequent to the adoption of such law by Kaufman county.

The question presented by your inquiry is, therefore, do the penal provisions of the stock laws apply to those counties which had adopted such laws prior to the enactment of the penal provision. You state that under the authority of Johnson vs. State, 106 S. W., 374, and Neuvar vs. State, 163 S. W., 58, you are of the opinion that the penal provisions do not apply in your county but that your county judge holds to the contrary, and that Article 1241, Penal Code, applies to horses, mules, cattle, etc., as well as hogs, sheep and goats running at large in your county.

It is held in Neuvar vs. State, supra, that Article 1241 of the Penal Code of 1911, applies only to hogs, sheep and goats, while Article 1249 which was enacted in 1907 applies to horses, cattle, etc.

The local option stock laws of this State are founded upon Section 23 of Article 16 of the Constitution, which is as follows:

"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 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."

Based upon this provision of the Constitution the courts of this State have uniformly held that in those counties or subdivisions adopting the stock law prior to the enactment of the penal provision such

penal provisions are not operative until after a subsequent election re-adopting the stock law with such penal provision included.

Johnson vs. State, 106 S. W., 374;
McElroy vs. State, 39 Texas Crim. App., 529;

In the McElroy case last above cited the court through Judge Davidson based the opinion therein upon Dawson vs. State, 25 Texas Crim. App., 670; Robertson vs. State, 26 Texas Crim. App., 82; Lawhorn vs. State, 26 Texas Crim. App., 101, all of which cases deal with the local option law relating to the sale of intoxicating liquors and holding in effect that statutes enacted subsequent to the adoption of such laws are not applicable to the counties or subdivisions adopting the former law until after an election held subsequent to the act fixing the penalty or changing the former law in some respect. The Court of Criminal Appeals has also held that the statute making the sale of intoxicating liquors a felony in local option territory does not apply to such territory adopting local option prior to its enactment. Lewis vs. State, 127 S. W., 308. The Court of Criminal Appeals has held, however, that an act of the Legislature subsequent to the adoption of the local option law wherein a new offense is created and punished, becomes effective throughout the State and is applicable in territory theretofore adopting local option.

Dozier vs. State, 137 S. W., 679;
Fitch vs. State, 127 S. W., 1040;
Slack vs. State, 136 S. W., 1073;
Clark vs. State, 136 S. W., 260;
Mizell vs. State, 128 S. W., 125.

In the above cases the Court of Criminal Appeals held applicable in those counties having adopted local option the statutes subsequently enacted defining and prohibiting the offense of engaging in the business of the sales of intoxicating liquors in local option territory.

It seems from these opinions that the Court of Criminal Appeals holds that new offenses may be created and prohibited in aid of the local option statute prohibiting the the sale of intoxicating liquors in territory adopting the same. In fact in the Fitch case, supra, the court uses language which it seems would convey the idea that the court was at that time of the opinion that a statute enacted subsequent to the adoption of the local option law, which former law carried no penalty, but which latter law fixed a penalty, would be applicable in territory having theretofore adopted the former law. The court said:

"The Legislature could have enacted a law simply submitting to the people the question of whether they would have local option or not and subsequently have enacted a law defining offenses in order to carry out the result of the vote of the people to that effect. See Ex parte Dupree, 101 Texas, 150."

This court, however, has not gone to this extent for as noted above they have held inapplicable the statute making the sale of intoxicating liquors a felony whereas under the law as adopted it was merely a misdemeanor. The local option statutes relating to the sale of intox-

icating liquors in this State are based upon Section 30, Article 16 of the Constitution, which reads as follows:

"The Legislature shall at its first session enact a law whereby the qualified voters of any county, justice's precinct, town, city (or such 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."

Comparing Section 23 of Article 16 (the stock law section) with Section 20 of Article 16 relating to the sale of intoxicating liquors, as above quoted, there might be a distinction drawn between the two as to the power conferred upon the Legislature. In Section 20 the obligation is placed upon the Legislature to enact laws whereby the qualified voters of any county, etc., may determine whether the sale of intoxicating liquors shall be prohibited within the prescribed limits and no restriction is placed upon that body whereby the right to legislate in aid of such adopted laws is taken from it Whereas, Section 23 (the stock law) provides that any local law shall be submitted to the freeholders of the section to be affected thereby and approved by them before it shall go into effect. It would seem that under this latter section that before any act of the Legislature relating to the question of stock running at large could go into effect it must have the sanction of the people in the territory in which it may operate. The wording of this section negatives the idea that the Legislature would have any authority to pass any further act that could be made applicable to territory having adopted the former law. In the cases cited above this distinction is intimated by the court.

We have cited the above cases relating to local option as applied to the sale of intoxicating liquors for the reason that some confusion might arise as to whether or not the court has by these latter cases modified the holding in the former cases relating to stock law, but until the higher court reverses the holding in the Johnson and McElroy cases above cited, this Department will adhere to those cases and advise that the penal provision of the stock laws are not applicable in those counties adopting such laws prior to the enactment of the penal provision.

Yours truly,

C. W. TAYLOR,

Assistant Attorney General.

CHARBON OR ANTHRAX—STATE HEALTH DEPARTMENT—LIVE STOCK SANITARY COMMISSION.

The duties and powers of the State Health Department and the Live Stock Sanitary Commission with reference to the eradication of charbon or anthrax defined.

Chapter 169 Acts of the Regular Session of the Thirty-third Legislature.
Chapter 78 Acts of the Regular Session of the Thirty-third Legislature.
Chapter 58 Acts of the Regular Session of the Thirty-fourth Legislature.

July 14, 1915.

Dr. W. A. Davis, Secretary State Board of Health, Austin, Texas.

DEAR SIR:. The Department is in receipt of your favor of recent date reading as follows:

"I am in receipt of a letter from County Health Officer, B. F. Rhodes, of Breckenridge, Texas, containing this question:

"I would be glad to hear from you as to the relation between the State Health Department and the Live Stock Sanitary Commission in the handling of Charbon or Anthrax.

"I understand the State Veterinarian is making some effort to control the Charbon situation, and I would like to know the interpretation of the law governing the handling of this disease, so I can better understand my duty in the matter.

"Please advise this department as to the authority of the State Health Board, or its representatives, and also the State Veterinarian, in the handling of Charbon, and enforcing the law relating thereto."

Replying thereto we beg to say that from reading the various acts of the Legislature of this State relating to disease among live stock known as charbon or anthrax it would seem that the duty of eradicating same has been placed both upon the State Board of Health and the Live Stock Sanitary Commission of this State. However, these acts as we view them are not in irreconcilable conflict to the extent that the former act must fall by reason of an implied repeal of the former by the latter.

By Chapter 169 of the General Laws of the Regular Session of the Thirty-third Legislature, the same being an act defining the rights and powers of the Live Stock Sanitary Commission of Texas it is provided among other things that the Live Stock Sanitary Commission shall have the power, and it is made its duty to as far as possible eradicate anthrax and certain other enumerated diseases and other infectious, contagious or communicable diseases of live stock, and for this purpose it is empowered to establish special quarantine districts where such diseases or the infection of such diseases are known to exist and notice of the establishment of such special quarantine districts shall be given as provided for in Article 7314. By this act it is also made the duty of the Live Stock Sanitary Commission to prescribe methods of dipping or otherwise treating or disinfecting such premises or the live stock thereon as in their opinion are necessary for the eradication of the disease, and it is further provided that such commission shall have the power to call upon the sheriff of the county in which such live stock are found, and it shall be the duty of such sheriff together with the inspector to dip or otherwise treat such live stock, etc. See Section 3, Chapter 169, Acts of the Thirty-third Legislature.

It will thus be seen that the duty conferred upon the Live Stock Sanitary Commission of this State is that of quarantine, disinfection and treatment of the diseased stock.

By reference to Chapter 78, General Laws of the Thirty-third Legislature we find that the Legislature has again dealt with the subject of charbon or anthrax and conferred certain powers with reference thereto upon the State Board of Health.

Sections 10a, 10b, 10c and 10d added by the act in question to Chapter 30 of the General Laws of the Thirty-first Legislature read as follows:

"10a. That all of that portion of the State of Texas in which charbon or anthrax has heretofore been prevalent or any district of the State of Texas in which charbon or anthrax may become prevalent, shall be known as charbon districts and shall be subject to the provisions hereof.

"10b. That each person residing in a district where charbon or anthrax is prevalent or where the same is supposed to be prevalent shall report in writing to the county health officer, who in turn shall report in writing to the president of the State Board of Health at Austin, all cases where an animal or animals are suffering with charbon or anthrax or supposed to have such disease, and each physician practicing in the State of Texas shall report in writing to the president of the State Board of Health all persons suffering from charbon or anthrax or supposed to be suffering from same and in case of failure to do so any person so failing shall be deemed guilty of a misdemeanor and upon conviction shall be fined in any sum not less than $10.00 nor more than $25.00 and each case of which no report is made shall constitute a separate offense.

"10c. That the State Board of Health shall employ a bacteriologist at a salary of not more than $300.00 per month and during the time that charbon or anthrax is prevalent he shall make an examination and analysis and a scientific research for the purpose of combating with said disease and said bacteriologist may be kept in the district affected by charbon as many months each as the State Board of Health deems necessary and for the purpose of carrying out the provisions of this Act the sum of four thousand ($4000.00) dollars or so much thereof as may be necessary is hereby appropriated out of the general revenue not otherwise appropriated which shall be paid out on warrant drawn by the president of the State Board of Health and attested by the secretary of said Board."

"10d. That the State Board of Health acting through one of the members or through the local health office in the county where charbon is reported to be prevalent shall in person or through some one employed by them, visit all stock reported to have charbon or anthrax and see that proper steps be taken for the isolation of same from other stock and also isolate other stock which have been exposed to said disease and so keep same isolated for such period as it may deem necessary."

And to prescribe methods of treating or disinfecting the premises and the live stock thereon does not conflict with the duties imposed upon the State Board of Health by the provisions of Section 10a, 10b, 10c and 10d above quoted for the reason that the duties imposed upon the latter department and the regulations prescribed therefor can be carried out by that department without any conflict with the Live Stock Sanitary Commission in the discharge of its duties as prescribed by law. It is made the duty of each person residing in the district where this disease is prevalent to report to the county health officer who in turn shall report same to the president of the State Board of Health and each physician practicing in the State of Texas shall report in writing to the president of the State Board of Health all persons suffering from this disease.

By Section 10c it is made the duty of the State Board of Health to employ a bacteriologist who shall make an examination and analysis and scientific research for the purpose of combating with said disease.

By Section 10d the State Board of Health acting through one of its members or through the local health officer in the county where the disease is reported to be prevalent shall in person or through someone employed by them visit all stock reported to have charbon

or anthrax and see that proper steps are taken for the isolation of same from other stock. It is also provided by Section 10e of this act that the carcasses of stock which have died from charbon or anthrax shall be destroyed by burning by the owner or person in charge and prescribes a penalty for disobedience of this section.

While both of the above acts were finally passed by the Legislature on the same date, to-wit: March 26, 1913, yet the Journal of the House, pages 1578 to 1579 shows that Senate Bill No. 63, being Chapter 78, dealing with the authority of the State Board of Health over charbon or anthrax is the latter act and if it could be held that there is an irreconcilable conflict between the two or an ascertained repugnancy that cannot be harmonized then the latter act would control as by implication it would be a repeal of the former and leave the authority to deal with the disease known as charbon or anthrax solely with the State Board of Health. However, it is a general rule of construction that repeals by implication are not favored and such repeal can result only from some enactment, the terms and necessary operation of which cannot be harmonized with the terms and necessary effect of an earlier act. If the provisions relating to the State Board of Health are inconsistent with or repugnant to the provisions relating to the Live Stock Sanitary Commission to such an extent that they cannot be harmonized then the State Board of Health would have exclusive control. We are of the opinion, however, that there does not exist such a repugnancy or inconsistency between the two acts but that construing the two together same can be made to harmonize and leave each of the departments of the government with the duty to perform in an endeavor to eradicate this disease among the live stock of the State, as well as prevent its spread among the people of the State as seems to be indicated by Section 10b above referred to. Our construction of the two statutes under discussion is that the duty imposed upon the Live Stock Sanitary Commission is to establish quarantine.

Neither do we think that Section 10f of Chapter 78 which makes the county health officer the exclusive judge of the necessity of isolation or quarantine of animals infected with this disease is in conflict with Section 3 of Chapter 169 which authorizes the Live Stock Sanitary Commission to establish quarantine districts. The authority conferred upon the county health officer is to establish a local isolation or quarantine of particular cattle as distinguished from the quarantine in the broader sense, the authority to establish which is conferred upon the Live Stock Sanitary Commission, that is, the Live Stock Sanitary Commission has authority to establish certain quarantine districts from which nor into which cattle may be taken or sent.

The urgent necessity for effective work in the stamping out of this disease demands that there be no confusion in the operation of the law and proves the rule that two statutes in apparent conflict should be, if possible, made to harmonize to the end that both may stand, and we are of the opinion that both the Live Stock Sanitary Commission and the State Board of Health have a duty to perform under the acts relating to the respective departments, and that the duties therein

imposed can be performed by the respective departments without any conflict of jurisdiction or authority as is indicated in this opinion.

Very truly yours,

C. W. TAYLOR,
Assistant Attorney General.

SUNDAY LAW—PROVISIONS—GASOLINE.

September 11, 1915.

Hon. Thomas J. Saunders, County Attorney, San Marcos, Texas.

DEAR SIR: In reply to your letter of the 30th ult., I beg to advise that it would not be a violation of the law to rent pleasure boats on Sunday.

Article 300, Penal Code, 1911, provides, in part:

"The preceding article"—that is, Art. 299—"shall not apply to household duties, works of necessity or charity, * * * * nor the running of steamboats and *other water craft* * * * *"

Answering your second question, will state that the ordinary vocation of a boot-black is not a work of necessity, and it would be a violation of the Sunday law for a boot-black stand to remain open on that day for the purpose of transacting business. In 58 S. W., 129, it was held by our Court of Criminal Appeals that where no special circumstances exist, the work of a barber in shaving customers on Sunday is not a work of necessity as is excepted from the operation of the law prohibiting Sunday labor. If the business of a barber is not a work of necessity, then undoubtedly the business of a boot-black is not a work of necessity. However, there may be some isolated cases in which the work of a barber, or a boot-black, might be classed as a necessity.

With reference to your third question will advise that, in my opinion, it would not be a violation of the law for garages to make repairs on Sunday in cases of extreme necessity. As to what is a work of necessity, 24 Am. & Eng. Ency. of Law, page 541, gives the following definition:

"A work of necessity is not meant a physical necessity, but any labor, business, or work which is morally fit and proper to be done on that day, under the circumstances of the particular case." * * * * * "The necessity must be a real, and not a fancied, one."

In the case of Nelson vs. State, 25 Texas Appeals, 599, 8 S. W., 927, it was held to be a work of necessity to shoe horses used by a stage company in transporting the mail, the horses having arrived late Saturday, lame, and with loose shoes, it being impossible to start on the route at four o'clock on Monday morning, the schedule time prescribed by the post office department, without the horses being shod. Commenting upon this case, the Court of Criminal Appeals, in the Kennedy case (58 S. W., 129), said:

"But this could not be considered an authority to authorize a blacksmith to keep his shop open every Sunday, and during the entire day, in order to ply his vocation as a blacksmith."

It is not a violation of the Sunday law to sell magazines on the Sabbath, as newspapers are among the exceptions to such law, and the weight of authority tends to show that a publication in sheet form, intended for general circulation, published regularly at intervals, comes within the definition of a newspaper. 29 Cyc., 693.

" * * * if a publication contains the general current news of the day, it is none the less a newspaper because it is devoted primarily to special interests, such as legal, religious, political, mercantile, or sporting." 29 Cyc., 693.

Webster defines a magazine to be

"A pamphlet published periodically containing miscellaneous papers or com positions."

In 24 L. R. A., 793, it is held:

"A weekly journal devoted primarily to the interests of the legal profession, but containing matters of interest to the general public, such as personal items, notices of passing events, a record of property transfers and mortgages, and general trade advertisements, and having bankers, brokers, real estate agents, merchants and business men as well as judges and lawyers among its subscribers, is a newspaper within the Michigan statutes providing for publication of legal notices in a newspaper."
Lynch vs. Durgee, 24 L. R. A., 793;
Kerr vs. Hitt, 75 Ill., 51.

It was said in the case of Beecher vs. Stephens, 25 Minn., 146:

"Newspapers are of so many varieties that it would be next to impossible to give any brief definition which would include and describe all kinds of newspapers. It would therefore be unsafe to attempt to give any definition of the term except the very general one that, according to the usage of the business world and in the ordinary understanding a newspaper is a publication, usually in sheet form, intended for a general circulation, and published regularly at short intervals, containing intelligence of current events and news of general interest. But if a publication contains the general and correct news of the day, it is none the less a newspaper because it is chiefly devoted to the dissemination of intelligence of a particular kind or to the advocacy of particular principles or views."

In Kellogg vs. Carrico, 47 Mo., 157, it was held that a paper devoted to the gathering up and dissemination of legal news among its readers is, or at least may be, a newspaper.

Answering your fifth and last question, will advise that cigars and chewing gum could not consistently be classed as provisions. However, in my opinion, fruits and gasoline would come under the definition of provisions, and it would be legal to sell the same prior to 9 o'clock on Sunday morning, but not after that hour. In the case of Gulfport vs. Stratakos, 90 Miss., 489, 43 So., 812, the Court held that fruit is merchandise.

All articles of merchandise and all beverages, not excepted by Article 303, should be prohibited from being sold on Sunday.

Very respectfully,
B. F. LOONEY,
Attorney General.

VETERINARY MEDICAL EXAMINERS—STATE BOARD OF.

It is not necessary for the newly appointed members of the State Board of Veterinary Medical Examiners to meet in Austin, Texas, within thirty days after their appointment by the Governor to organize and take over the affairs of the Board. Section 3, of Chapter 76, Acts of the Thirty-second Legislature providing for the meeting of the Board in Austin related merely to the first organization, and it is not mandatory upon the future Boards to meet in Austin for the purpose of organization. Sections 2, 3 and 4, Chapter 76, Acts of the Thirty-second Legislature.

February 26, 1915.

Dr. E. F. Jarrell, President State Board of Veterinary Medical Examiners, Dallas, Texas.

DEAR SIR: The Attorney General is in receipt of your letter of the 23rd inst., reading as follows:

"Is it necessary for the appointees of Governor Ferguson on the State Board of Veterinary Medical Examiners to meet in Austin, Texas, to take over the affairs of the same Board under Gov. Colquitt? Or did this mean that the first organization of the Board should be in Austin"?

The Thirty-second Legislature at its regular session, as is shown by Chapter 76 of the printed acts thereof, provided for the creating of a State Board of Veterinary Medical Examiners, to consist of seven qualified veterinaries to be appointed by the Governor and to hold office for two years. The Act further provides that the Governor shall make such appointment within sixty days after the passage of the Act.

Section 3 of the Act provides in part as follows:

"The members of said Board shall meet in Austin, Texas, and organize within thirty days after the date of appointment by electing from their own number a president and secretary-treasurer."

Our construction of this portion of Section 3 is that if mandatory at all it could only be held so as applied to the first meeting of the Board, first appointed under the Act. This construction is borne out by the provision of Section 4, wherein it is provided "that the regular meeting of the Board shall be held during the third week in June of each year for the transaction of business and the examination of applicants at such places as may be determined by the Board, but other meetings may be held as necessary upon the call of the president and secretary." It will thus be seen that the places of the meeting of the Board are left to the discretion of the Board. The law does not undertake to establish any permanent place for the holding of such meeting or to fix a situs of the office of such Board.

There is nothing in this Act indicating that the Legislature had any intention whatever of establishing an office for such Board at the seat of Government in Austin, Texas. The provision quoted from Section 3 merely relates to the manner of the organization of the Board and is incidental to the chief purpose of the law which is to establish such board and provide a procedure therefor together with fixing the duties and powers thereof.

We therefore advise you that the provision providing for a meeting in Austin, Texas, is merely directory and that the gentlemen composing the Board appointed by Governor Ferguson can meet for the purpose of organization at any point within the State to suit their convenience.

Very truly yours,
C. W. TAYLOR,
Assistant Attorney General.

WITNESS FEES—OUT OF COUNTY WITNESSES.

Where a witness fee bill was not presented to the Comptroller until one year after final disposition of the case such claim is barred and an Act by the Legislature making an appropriation for the payment of such claim would be in violation of the Constitution and would confer no authority upon the Comptroller to issue a warrant in payment of such claim or upon the Treasurer to pay such warrant. C. C. P., Article 1138; Constitution, Article 3, Section 44 and Article 1, Section 16.

February 12, 1915.

Hon. Henry Sackett, Member House of Representatives, Capitol.

DEAR SIR: Some days since you left with this department a claim in your favor for $17.96, which you had filed with the committee on claims for approval and incorporation into the appropriation bill. Attached to this claim is a letter addressed to you by Hon. Frank L. Tiller, Chairman of the Committee, requesting that you attach an opinion from this department as to the legality of such claim.

There is also attached to this claim a letter dated January 16, 1889, addressed to Hon. W. R. McClellan, House of Representatives, by Hon. R. W. Findley, the then Comptroller of the State, from which it appears that the Comptroller refused to issue warrant for what appears to be a portion of this claim. The Comptroller cites Section 5, of Article 1093, Code of Criminal Procedure, to the effect that all claims for witness fees not presented within twelve months after the final disposition of the case shall be forever barred.

The items making up your claim of $17.96 are: Witness fee bill in favor of Don Green, $8.98; witness fee bill in favor of Ida Green, $8.98. Total, $17.96. It appears from these fee bills that the two parties named were attached witnesses in the case of the State of Texas vs. J. J. Fry, in the district court of Coleman county, such witnesses residing in Robert Lee, Coke county, each claim being for four days attendance and one hundred and sixty-six miles going to and returning from Coleman to Robert Lee at three

cents per mile.. It appears from these fee bills that the defendant in this case was acquitted at the September term, 1897.

It also appears from the rubber stamp impression on the fee bills, as well as the letter of the Comptroller to Mr. McClellan and above referred to, that these claims were filed in the Comptroller's Department on or about Jaunry 16, 1899, presumably prior thereto as on the last named date the Comptroller refused to pass same for payment. As the case was finally disposed of at the September term 1897, more than a year had elapsed from the final disposition of the case before such claims were filed with the Comptroller as appears from the letter referred to. The letter of the Comptroller above mentioned quotes Section 5, Article 1093, Code of Criminal Procedure, as follows:

"And all such claims or accounts not transmitted to or placed on file in the office of the Comptroller of Public Accounts within twelve months from the date of the final disposition of the case in which the witness was attached or recognized to testify, shall be forever barred."

The Comptroller correctly quoted the law, and this Article now appears as Article 1138, Code of Criminal Procedure of 1911.

In our opinion the Committee on Claims and Accounts of the present Legislature has properly failed to approve your claim. By reason of the failure of the owners of these accounts to file same with the Comptroller for payment within one year after the final disposition of the case by the plain terms of the statute such claims are forever barred and any attempt on the part of the Legislature to now incorporate same in an appropriation bill would be an attempt on the part of the Legislature to pass a special act exempting the owner or owners of these claims from the operation of a general law, and would in our opinion be in direct conflict with the provisions of Section 56, Article 3, of the Constitution, which prohibts the passage of special laws where a general law can be made applicable. Such action on the part of the Legislature would be in effect to segregate you from that class of individuals who by reason of their failure to file their claims for witness fees and mileage with the Comptroller within one year after final disposition of the case, are forever barred, and to particularize you and grant you a special privilege denied to all others falling within such class.

As said in Cooley on Constitutional Limitation, page 482, 6th Edition, "The Legislature may suspend the operation of the general laws of the State, but when it does so the suspension must be general and cannot be made for individual cases or for particular localities." In a foot-note to the above rule laid down by the author we find the following:

"The statute of limitations cannot be suspended in particular cases while allowed to remain in full force generally."
Hardin vs. James, 11 Mass., 396;
Davison vs. Johonot, 7 Met., 388.

The same author also quotes from the case of Lewis vs. Webb, 3 Me., 326, as follows:

"On principle it can never be within the bounds of legitimate legislation to enact a special law, or pass a resolve dispensing with the general law in a particular case, and granting a privilege and indulgence to one man, by way of exemption from the operation and effect of such general law, leaving all other persons under its operation. Such a law is neither just nor reasonable in its consequences. It is our boast that we live under a government of laws, and not of men; but this can hardly be deemed a blessing, unless those laws have for their immovable basis the great principles of constitutional equality. Can it be supposed for a moment that, if the Legislature should pass a general law, and add a section by way of proviso, that it never should be construed to have any operation or effect upon the persons, rights, or property of Archelaus Lewis or John Gordon, such a proviso would receive the sanction or even the countenance of a court of law? And how does the supposed case differ from the present? A resolve passed after the general law can produce only the same effect as such proviso. In fact, neither can have any legal operation."

The statute under discussion with reference to witness fee bill is clearly a statute of limitation, and therefore any attempt on the part of the Legislature to pass an Act permitting the payment of your claim would unquestionably be in effect an act suspending a general law for your individual benefit.

We quote again from the same author above referred to:

"The State, it is to be presumed, has no favors to bestow, and designs to inflict no arbitrary deprivation of rights. Special privileges are always obnoxious and discriminations against persons or claims are still more so."

We cite also as an authority on this proposition the case of McDonald vs. Benton, 132 S. W., 825, and Wally vs. Kennedy, 24 Am., Dec., 511.

Section 44, of Article 3 of the Constitution of this State reads as follows:

"The Legislature shall provide by law for the compensation of all officers, servants, agents and public contractors, not provided for in this Constitution, but shall not grant extra compensation to any officer, agent, servant, or public contractors, after such public service shall have been performed or contract entered into, for the performance of the same; nor grant, by appropriation or otherwise, any amount of money out of the treasury of the State, to any individual, on a claim, real or pretended, when the same shall not have been provided for by pre-existing law; nor employ any one in the name of the State, unless authorized by pre-existing law."

The effect of this provision of the Constitution is to prohibit the Legislature from granting by appropriation or otherwise any sum of money to any individual when same shall not have been provided for by pre-existing laws. While these claims were provided for by pre-existing law, yet by placing a limitation of one year upon the time within which same could be filed, by a failure of the owners thereof to file same within the prescribed time, such claims were taken out from under the operation of that law and therefore there is now no law upon the statute book providing for same and upon which they could rely for support. On the other hand, it is expressly provided by law that they are invalid.

For this reason we are of the opinion that should the Legislature make an appropriation for the payment of these claims such act

would be invalid and the Comptroller would have no authority to issue a warrant therefor, nor would the Treasurer have authority to pay same.

Nichols vs. State, 31 S. W., 452;
State vs. Wilson, 71 Texas, 291;
State vs. Haldeman, 163 S. W., 1020;
Shelby County vs. Gibson, 44 S. W., 303.

We are further of the opinion in an act of this kind that it would be a violation of Section 16 of the bill of rights, which reads:

"No bill of attainder, ex post facto law, retroactive law or any other law concerning the obligation of contract shall be made."

As said in the case of De Cordova vs. Galveston, 4 Texas, 478:

"Every statute which takes away or impairs vested rights acquired under existing laws or creates a new obligation or imposes a new duty or attaches a new disability in relation to transactions or considerations already past, must be deemed retrospective."

Again, the Supreme Court of this State in the case of Mellinger vs. City of Houston, 68 Texas, 37, said:

"The provision of this section prohibiting retroactive legislation was intended to impose a broader restriction on legislative power than could exist in its absence. It protects the citizen in every legal right existing before the enactment of any law designed to retroact and deprive him of it, and this whether the right be strictly speaking a right to property or not."

We are therefore of the opinion, and so advise you, that the Legislature would be without authority to make an appropriation for the payment of the claims you present, and we are further of the opinion that in the event such act should be passed that same would be inoperative and void and that such act would confer no power upon the Comptroller of this State to deliver a warrant for the payment of such claim or upon the Treasurer to pay such warrant.

We return herewith the two witness fee bills together with all papers and letters thereto attached submitted by you.

Very truly yours,

C. W. TAYLOR,

Assistant Attorney General.