SCHEDULE XVIII

OFFICIAL OPINIONS

(The opinions in this volume have been considered in conference of the members of the department and approved).

SUBJECTS OF OPINIONS.

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OPINIONS ON APPROPRIATIONS OF PUBLIC FUNDS.

OP. NO. 1656—BK. 48, P. 185.

APPROPRIATIONS—PERMANENT WAREHOUSE AND MARKETING ACT.

PERMANENT WAREHOUSE AND MARKETING ACT. SECTION 23.

Acts Thirty-fourth Legislature, First Called Session, Chapter 36, p. 160,

1. The 1915 appropriation bill for the Warehouse and Marketing Department is itemized, and there is no appropriation for the purpose of specifically carrying out the provisions of Section 23 of the Permanent Warehouse and Marketing Act.

September 6, 1916.

Messrs. F. C. Weinert, and Peter Radford, Managers, Warehouse and Marketing Department, Capitol.

GENTEMEN: In your letter of September 5th, you request an opinion from the Attorney General as to whether or not you may, under your present existing appropriation, carry into effect the provisions of Section 23 of the Permanent Warehouse and Marketing Act.

This Section reads as follows:

"The board of supervisors shall collect from every source available information concerning stocks on hand and the probable yield of farm and ranch products, and disseminate the same; and it may establish agencies for the sale of farm, orchard and ranch products wherever it may be deemed advisable, in which event it is empowered to prescribe all regulations for the conduct of such agencies as may be found necessary, and the expense incident to the establishment of any agency or agencies shall be paid as are other expenses incurred in the administration of this act."

That portion of the appropriation bill making the appropriation for your Department insofar as it is relevant to this inquiry, is as follows:

	For the Years Ending August 31, 1916, August 31, 1917.	
Warehouse and Marketing Department.	1916	1917
Salaries of two managers, at $3,600.00 per year each.	$ 7,200.00	$ 7,200.00
Salary of chief clerk.	2,000.00	2,000.00
Salary of bookkeeper.	1,500.00	1,500.00
Salary of bulletin clerk.	1,500.00	1,500.00
Salary of assistant bulletin clerk.	720.00	720.00
Salary of two stenographers.	2,400.00	2,400.00
Salary of porter.	480.00	480.00
Stamps.	500.00	500.00
Furniture and fixtures.	500.00	500.00
Stationery and printing.	2,500.00	2,500.00
Salaries of four warehouse examiners, including traveling expenses.	12,000.00	12,000.00
Salaries of four warehouse examiners, including traveling expenses.	12,000.00	12,000.00

Warehouse and Marketing Department.	For the Years Ending August 31, 1916, August 31, 1917. 1916.	1917
Salaries of six gin inspectors, including traveling expenses	$15,000.00	$15,000.00
Salaries of eight lecturers, including traveling expenses of lecturers and managers.	20,000.00	20,000.00
Total.	$66,300.00	$66,300.00

You will observe from the appropriation bill, that your appropriation is an itemized one. This being true, the funds appropriated for any particular itemized purpose cannot be diverted from such purpose and used for another. This, of course, is elementary and amounts only to saying that when the law is written it must be followed as written. In fact, the word "appropriate" as used in our Constitution, means the Act of the Legislature in setting apart or assigning to a particular use a certain sum of money substantially for a certain purpose, and in a Constitution similar to our own this meaning has been given the word.

Clayton vs. Berry, 27 Ark. 131.
See also State vs. Bordelon, 6 La. Annual, 687.
Woodward vs. Reynolds, 58 Conn. 490.
Second Am. Eng., Ency. Law, 514.

You are advised, therefore, that you have no general fund which you may use for carrying out the provisions of Section 23 in collecting and disseminating information relative to agricultural products and the establishment of agencies, etc. Of course, this appropriation contemplates the maintenance of your Department for the purpose of carrying out the provisions of Section 23, among others, and in a general way these funds, even under the itemized expenditures authorized and required, are used for the purpose of carrying into effect the entire law including Section 23, but at the same time you are confined to the methods of expenditure specified in the itemized appropriation bill, and you cannot divert any of the funds in the itemized bill to a different or more general purpose, as for example, you could not take the funds specified for salaries for warehouse examiners, gin inspectors or lecturers and use it to establish a sales agency, or to gather and disseminate information, except of course, insofar as these several classes of employes might, within the performance of their specified duties, assist in carrying out the general provisions of Section 23. I assume of course, as a matter of fact that through your lecturers, gin inspectors and warehouse examiners, you do gather and disseminate information, but this, of course, is only in line with their duties and as authorized by the appropriation bill.

I am compelled, therefore, to answer your question in the negative and state that you have no appropriation for the purpose of specifically carrying out the provisions of Section 23 and that you can only use money for the several purposes specified in your itemized appropriation.

Yours very truly,

C. M. CURETON,
First Assistant Attorney General.

OP. NO. 1668—BK. 48, P. 246.

1. The Board of Regents of the University of Texas when contracting for the construction of a building may take into consideration not only the amount of money on hand to the credit of the Available University Fund, but may also consider the amount of money that will be received for the credit of said fund on and before August 31, 1917, the end of the appropriation year.

2. By the terms of Section 1, Chapter 22, Acts First Called Session of the Thirty-third Legislature certain limitations are placed upon the right of the regents of the University to contract for the erection of buildings. Such buildings must be authorized by specific legislative enactment or by the written direction of the Governor.

October 23, 1916.

Mr. David Harrell, Chairman Building Committee, Board of Regents of the University of Texas, Austin, Texas.

DEAR SIR: You have requested the opinion of this Department as to whether the Board of Regents of the University of Texas is authorized to enter into a contract for the erection of a building on the University Campus, the contract price of which will slightly exceed the amount of actual cash now on hand to the credit of the University Available Fund, but which contract price can be met and paid from said Available Fund prior to August 31, 1917.

Replying thereto, you are respectfully advised that the Thirty-Fourth Legislature appropriated "for the maintenance, support and direction of the University of Texas, including the Medical Department at Galveston, including the construction of buildings for the years beginning with September 1, 1915, and ending August 31, 1917, all the available University funds including interest from its bonds, land notes, endowments and donations of gifts and fees collected and all receipts whatsoever from any source."

We are of the opinion that the Board of Regents in providing buildings for the University, may, at the time of making a contract for said buildings, take into consideration not only the amount of money on hand to the credit of the Available University Fund, but may likewise consider the amount of money that will be received from all sources for the credit of said fund on and before the end of the appropriation year, to-wit: August 31, 1917. If, therefore, the amount of money on hand plus the amount that will be received by the end of the appropriation period will be sufficient to cover the cost of the erection of the building or buildings, the Board would be authorized to make the contract as no deficiency would be created.

When the Legislature makes an appropriation of the Available University Funds, the Regents may enter into contracts authorized by law, payable in anticipation of the funds going to make up the Available University Fund being paid and made available by the appropriation, and such contracts do not constitute a creation of a debt or a deficiency.

In re: State Warrants, 55 American State Rep., 854.
The State vs. Medberry, et al., 7 Ohio St., 528; 26 Ency. of Law, 475.
The People ex rel. vs. Minor, 466, Ill., 384.
The State of California vs. McCauley, 15 Calif., 529.
The People ex rel. McCauley vs. Brooks, 16 Calif., 11.
Ristein, Auditor vs. State of Indiana, 20 Ind., 339.

It appears, however, that Section 1, Chapter 22, Acts First Called Session of the Thirty-third Legislature, places certain limitations upon the authority of the Board of Regents of the University to contract or provide for the erection or repair of any building. Said Section provides:

"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 to create any indebtedness or deficiency in the name of or against this State not specifically authorized by legislative enactment or to divert any part of any fund provided by law to any other fund or purpose than that specifically named and designated in the legislative enactment creating such fund or provided for in any appropriation bill."

It will be observed that said statute prohibits the regents from contracting or providing for the erection of any building, unless the same be authorized by specific legislative enactment or by written direction of the Governor. Inasmuch as there is no specific legislative enactment providing for the erection of the building for which the Board desires to make a contract, we would respectfully suggest that it would be necessary in order to comply with the terms of the requirements of said Chapter 22 for the Board to obtain the written direction of the Governor authorizing it to enter into a contract for such purpose.

The words "specific" means to make particular, definite or precise. It means the very opposite of general.

Smith vs. McCoole, 46 Pacific, 980.
Peters vs. Bants, 23 N. E., 84.

The Appropriation Bill is not a specific legislative enactment authorizing the Board of Regents of the University to contract for the construction of any particular building or buildings. It simply sets apart and appropriates the moneys constituting the Available School Fund for the maintenance, support and direction of the University and for the further purpose of constructing such buildings for the University as the Board of Regents may be authorized by law to construct. Said Board is authorized by law to contract for the construction of only such buildings as the legislature by specific enactment has provided for, or, in the absence of a specific legislative enactment, such buildings as it may have the written direction of the Governor of the State to construct.

Yours very truly,

C. A. SWEETON,
Assistant Attorney General.

OP. NO. 1700—BK. 48, P. 442.

GAME, FISH AND OYSTER COMMISSIONER—TRAVELING EXPENSES—TELELPHONE CHARGES—COMPLIMENTARY HUNTING LICENSE.

There is no authority to allow expense accounts of deputies while such deputies are in the city of Austin although such deputies may pay their poll taxes and claim citizenship in some other county of the State.

The charge for private or residence telephone of any man connected with the Game, Fish and Oyster Department can not be paid from the funds of that Department.

The Game, Fish and Oyster Commissioner has no authority to issue a hunting license complimentary and without charge.

January 27, 1917.

Hon. Sam C. Johnson, Chief Deputy Game, Fish and Oyster Commissioner, Capitol.

DEAR SIR: The Attorney General has your letter of January 26th, reading as follows:

"Can the Game, Fish and Oyster Department under the law, and appropriation for same, allow and have paid two dollars per day expense account for the Chief Deputy and the two traveling deputies, when said deputies and their families reside in the city of Austin, while said deputies are in Austin but pay their poll taxes in some other county and claim citizenship where poll taxes are paid?

Can the private or residence telephone of any man in the Game, Fish and Oyster Department be paid out of the funds under our appropriation, or otherwise?

Can any free, or complimentary hunting license be issued, under the law?"

Replying to your inquiries in the order propounded, we beg to say:

First. The Constitution of this State, Article 3, Section 58, is in the following language:

"The Legislature shall hold its sessions at the city of Austin, which is hereby declared to be the seat of government."

By the plain provisions of the above quoted section of the Constitution the city of Austin is the location and situs of the government of this State, and in which city are located the governing powers of the State. Not only does the Constitution make the city of Austin the seat of government, but the statute creating the office of Game, Fish and Oyster Commissioner expressly provides that such Commissioner shall have his office in the State Capitol in the City of Austin. Article 3976 Revised Statutes 1911 as amended by the Acts of the Thirty-second Legislature.

There is a further provision of the Constitution relating to the location of the offices of State officials, as will be seen by reference to Section 14 of Article 16 of the Constitution, which 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."

Therefore, by both constitutional and statutory provisions the office of the Game, Fish and Oyster Commissioner is located in the city of Austin and in the Capitol building there located.

As to the Chief Deputy, Article 4033 of the Revised Statutes of 1911 expressly provides that he shall maintain an office in the Capitol of the State, which of course is Austin, Texas. The position of traveling deputy, as indicated in your communication, so far as we are able to determine, was not created by the Act of the Legislature creating the office of Game, Fish and Oyster Commissioner and defining his duties, but such office or position has been provided for by the Legislature in the different appropriation bills for the support of your office. The items in the appropriation bill creating these positions, as we understand it, are as follows:

Salary of first assistant to enforce game laws...	$ 1,200.00	$ 1,200.00
Salary of second assistant to enforce game laws.	1,200.00	1,200.00

It therefore appears that such First and Second Assistants, or Traveling Deputies, as you term them, are a part of the office force of the Commissioner, and as such their headquarters, or the place from which they operate, is the office of the Commissioner located in the Capitol at Austin.

The official residence of every Head of a department, or an employe thereof where such department of the State Government is located in Austin, is in that city, and it is the duty of such officers and employes to maintain their place of abode there.

It is expressly provided by Article 2941, Revised Statutes 1911, now incorporated as Section 32 of the Revised Election Laws of this State, that officers and employes of institutions located in the Capital of this State may maintain their residence for voting purposes in their home counties, unless, of course, such persons desire to become bona fide resident citizens of Travis County, or such other county in which they may be employed. This article of the Statute is enacted for the benefit of those officers and employes who do not desire to move their citizenship to this county, and is a privilege granted them to retain their voting privileges in their home counties, but it is not intended and does not permit such officers and employes to maintain their place of abode in the home county while employed in the service of the State, and thereby authorize them to charge as traveling expenses the expenses incident to living in the city of Austin.

In our opinion the items in the various appropriation bills propense of any officer or employe while on the road traveling on business of the State away from the office of such department and from his place of abode where such department is located, and there is no authority in law for the allowance of any living expense account of any officer or employe while he is in the city of Austin under the guise of a traveling expense account.

Second: Answering your second question, we beg to say that there is no authority in law for the allowance and payment of telephone bills for the telephones maintained in the residence of any officer or employe of the State Government. Such telephones are for private and personal use of such officials and their families, and the State is

under no obligation whatever to defray the expense thereof. Such charges form no part of the necessary expense for the up-keep of any department or the enforcement of the laws of this State. We do not mean to hold of course that should an officer or employe use his private telephone to carry on long distance conversation about the business of the State that such long distance call should not be charged against the State, for that conversation would be upon the State's business and could properly be charged in an expense account, but the ordinary monthly rental on such telephone is a private matter and the charge therefor should be defrayed from private funds.

Section 6 of Article 16 of the Constitution provides:

"No appropriation for private or individual purposes shall be made."

Section 51 of Article 3 provides:

"The Legislature shall have no power to make any grant or authorize the making of any grant of public money to any individual, association of individuals, municipal or other corporation whatsoever."

This section contains the exception relative to pensions.

Section 3 of Article 8 of the Constitution is in the following language:

"Taxes shall be levied and collected by general laws and for public purposes only."

The only proper charge against an appropriation made by the Legislature is for any matter necessary in the enforcement of the laws of the State. In Bussey vs. Gilmore, 3 Me. 191, it is held that—

" 'Necessary charges,' as used in a statue authorizing towns to raise money for certain specific objects and other necessary charges, may in general be considered as extending to such expenses as are clearly incident to the execution of the power granted, or which necessarily arise in the fulfillment of the duties imposed by law."

Such term is further defined in Waters vs. Bouvonloir, 172 Mass. 286—

" 'Necessary charges' as used in Pub. St. c., 27, Sec. 10, authorizing towns to appropriate money for certain purposes, and for all other necessary charges, arising in such town, are confined to matters in which the town or city has a duty to perform, an interest to protect, or a right to defend."

We therefore advise in answer to your second question that the charges for a private telephone in the residence of a State employe cannot be defrayed from public moneys appropriated by the Legislature or arising from any source.

Third: Answering your third question, we beg to say there is no authority for the Game, Fish and Oyster Commissioner or any of his deputies to issue a hunting license to anyone complimentary or free of charge. The statutes of this State provide for the issuance of such license only upon the payment by residents of $1.75. The blank li-

censes are the property of the State and the Commissioner has no more authority to issue the same without the statutory fee being paid than he has to give away any other property belonging to the State. The fee belongs to the State, not to the officer, and he cannot remit it, or bestow it gratuitously. There can be no question that the Commissioner and his bondsmen would be liable to the State for the full amount of all such licenses so issued free of charge.

With respect, I am,

Very truly yours,

C. W. TAYLOR,
Assistant Attorney General.

OP. NO. 1741—BK. 49, P. 34.

APPROPRIATIONS—ADJUTANT GENERAL'S DEPARTMENT.

Acts Thirty-fourth Legislature, First Called Session, Chap. 32, page 142.
Acts Thirty-third Legislature, First Called Session, Chap. 40, page 122.
Acts Thirty-second Legislature, First Called Session, Chap. 3, page 12.

That item in the appropriation bill of 1915 for the Adjutant General's Department providing an appropriation for Camps of Instruction for the National Guard, "and all other military purposes," is sufficiently broad to authorize a purchase of stamps therewith.

March 7, 1917.

Hon. H. B. Terrell, Comptroller, State of Texas, Building.

DEAR SIR: In your communication of March 6th, you requested the opinion of the Attorney General as to whether or not stamps may be purchased and paid for by the Adjutant General out of funds appropriated by the Legislature, in the following item from the appropriation made for that Department which reads—"The payment of transportation and subsistence of the Texas National Guard, for camps of instructions at Camp Mabry, and all other military expenses, etc."

Laws passed by the First Called Session of the Thirty-fourth Legislature, page 142.

The same appropriation bill contains an appropriation for stationery, postage, telegraphing and telephoning, but this item of the appropriation has been exhausted and the Adjutant General desires to purchase stamps out of the item of appropriation referred to and quoted above. We assume that these stamps are to be used for military purposes.

Upon an examination of the wording of the above appropriation it will be observed that it is capable of two constructions, that is, that the phrase "and all other military expenses," may be given a limited interpretation and be construed to mean all other military expenses connected with the camps of instruction for the National Guard at Camp Mabry. On the other hand it may be given its general broad signification and mean all other military expenses to be incurred by the Adjutant General's Department.

On first examination the writer was of the view that it should be given the narrow construction first named, but we have been informed by the Adjutant General's Department that this character of appropriation has been similarly worded during a number of years past and has in actual practice been given a broad construction, and that it has been customary to pay out of this appropriation any and all kinds of military expenses including the purchase of stamps for the Department to be used in the administration of its affairs.

An examination of the Appropriation Bill for the Adjutant General's Department made in 1911, discloses that the language there used is the same as that quoted above from the 1915 Appropriation Bill. The same thing may be said as to the wording of the Appropriation Bill for this Department made in 1913.

See Acts of the First Called Session of the Thirty-second Legislature, page 12, and of the Thirty-third Legislature, page 122.

In these other appropriations referred to and the general appropriation for stamps, stationery, etc., appears the same verbiage that the same appropriation has in the 1915 Act. In other words an examination of the Appropriation Bills for 1911 and 1913 shows that they are worded in almost the exact language as is the Bill of 1915. As heretofore suggested the Departmental construction of these various measures has been that the phrase "and all other military expenses," was to be given its broad signification, and made the appropriation available for the purchase of stamps or any other military purposes. In view of this construction which has obtained for at least a number of years, we are of the opinion that the appropriation of 1915 should be given the broad meaning referred to.

The courts of this State uniformly hold that the construction given to a statute by the officers appointed to execute it and acted upon for a long term of years is entitled to a greater weight in determining its meaning.

Edwards vs. James, 7 Texas, 372.
Hancock vs. McKinney, 7 Texas, 384.
Railway Company vs. State, 95 Texas, 507.
State vs. Gunter, 81 Southwestern, 1028.

Moreover, stamps are an actual necessity in administering the affairs of the Adjutant General's Office, and we ought not, unless we are compelled, give a construction to the Appropriation Bill which will deprive the Department of this necessity. The appropriation of one thousand dollars for stamps, telephoning, etc., under the conditions which have existed in the Adjutant General's Department was necessarily inadequate and it is not to be presumed short of a necessary Legislative declaration that the Legislature intended to deprive the Department of the necssary stamps; particularly during the past four or five years when we have been on the verge of war with what is left of the Government of Mexico, and during which period of time the Adjutant General's Department has been more active than during any other period of its history since the closing of the Indian Wars during the late 70's, and the destruction of the bands of law violators during the early 80's.

The rules of construction laid down by the courts of this State declare that in construing a statute it should not be assumed that the Legislature intended to do an unreasonable thing, or one which would bring about inconvenience or absurdity.

Engelking vs. Von Wamel, 26 Texas, 471.
Cannon vs. Vaughan, 12 Texas, 404.
Railway Company vs. Tod, 94 Texas, 631.
State vs. Delesdenier, 7 Texas, 105.

We have therefore concluded to advise you that the particular appropriation referred to is available for the purchase of stamps and for any other military purposes necessary in the administration of the Adjutant General's Department.

C. M. CURETON,
Assistant Attorney General.

OP. NO. 1745—BK. 49, P. 198.

The Legislature cannot increase the salary of State officers by appropriating a larger amount in the appropriation bill, where the salaries have been fixed by general law.

April 30, 1917.

Hon. George Mendell, Jr., Vice Chairman, House Appropriation Committee, Capitol.

DEAR SIR: I have a communication from your Committee of the 26th instant as follows:

"The House Appropriation Committee by a unanimous vote has requested me to ask you for an opinion as to whether or not the Legislature, in the appropriation bill, can reduce or increase the salary of an officer or employe that has been fixed by statute."

Replying thereto, beg to say that it is our opinion that when the salary or compensation of an officer is fixed by law, in order to either increase or reduce the salary or compensation, the law itself would have to be amended under the usual procedure prescribed in the Constitution for amendments. This cannot be done in or as a part of an appropriation bill for several reasons.

In the first place a provision in an appropriation bill to either increase or diminish a salary is entirely distinct from the subject of appropriation for the support of the government, and not being germane, being an entirely different subject, to-wit, *the fixing of official fees or salaries,* its inclusion is prohibited by 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."

In discussing this identical question, our Supreme Court in the case of Linden vs. Findley, 92 Texas, 454, used this language:

"It would seem that when the Legislature is of opinion that the compensation fixed by law for the services of an officer is excessive, they should amend the law and reduce it, but that until so reduced they should make appropriation for the compensation which the law provides."

The converse of this proposition is inevitably true, that is, if the Legislature should be of the opinion that the salary or compensation of an officer fixed by law is inadequate, they should amend the law and increase it, but until so increased they should make appropriation for the compensation which the law provides.

The Legislature, of course, can place limitations and restrictions upon the money they do appropriate. They could refuse to appropriate money to pay salaries of officers or make an appropriation of less than the compensation fixed by law. In neither event, however, would the office be abolished or the statute fixing the salaries be amended, or in any way affected. The office would still exist and the officer would be entitled to his salary as fixed by the law. However, he would, in the absence of an appropriation to pay his salary, have to wait for some future Legislature to make the necessary appropriation.

Our Supreme Court on this particular proposition, in the case above referred to, used this language:

"But should they fail to do this (make sufficient appropriation to pay the salary fixed by law), it is simply a case in which the officer has a legal right but no remedy except an application to another Legislature. Under our Constitution, without an appropriation no money can be drawn from the treasury."

Your attention is called to these authorities for the purpose of showing that the Legislature in appropriating money to pay salaries of officers is not dealing with the subject of fixing fees or salary of office.

The latter is a distinct subject and must be dealt with separately, and the very law fixing the salary must be amended by a bill for that purpose.

The correctness of this proposition is supported by the case of the State vs. Steele, 57 Texas, 203.

In this case the salary fixed by law for the Adjutant General at that time was $3000, and the Legislature only appropriated $2500 and in a suit to recover the difference our Supreme Court, in an opinion rendered by Chief Justice Gould, used this language:

"It is denied that the law fixing the salary at $3,000 was repealed by the acts making appropriations for the support of the State government, for it is said there is no express repeal, nor is there any manifest repugnancy in those laws. Reasons might exist for appropriating less than was known to be due, or the deficiency of the appropriation might be the result of mistake. It is not the policy of the law to leave the salaries of State officials to be fixed only where the appropriations are made for their payment. Nor is it consistent with constitutional requirements to allow the law declaring that the salary of the Adjutant General shall be $3,000 per

annum to be amended so as to make the amount $2,500, unless the section as amended 'be re-enacted and published at length.' Const., Art. 3, sec. 36. These considerations tend strongly to the conclusion that the failure of the Legislature to make adequate appropriations for the salary of the Adjutant General as fixed by law did not operate a repeal or amendment of that law, or defeat that officer's right to the full salary as fixed by the statute."

The law fixing the compensation of officers could not be amended to the extent of increasing or diminishing the compensation even for two years, except by a Bill as provided in Section 36, Article 3, of the Constitution, which is as follows:

"No law shall be revived or amended by reference to its title; but in such case the act revived, or the section or sections amended, shall be re-enacted and published at length."

An amendment of the law fixing the salary of an officer being a subject distinct from the subject of appropriating money for the support of the government for two years, in our opinion, could not be considered by the Legislature, unless designated as one of the subjects for consideration at the special session. Section 40 of Article 3 of the Constitution on this subject is as follows:

"When the Legislature shall be convened in special session, there shall be no legislation upon subjects other than those designated in the proclamation of the Governor calling such session, or presented to them by the Governor; and no such session shall be of longer duration than thirty days."

Any attempt to increase or diminish an officer's salary during his term of office is prohibited by the statutes of this State, Article 7086, as follows:

"The salaries of officers shall not be increased nor diminished during the term of office of the officers entitled thereto."

This is simply an act of the Legislature, and, of course, the Legislature could by a valid law, pursuing the legislative procedure as prescribed in the Constitution, change this statute and increase or diminish the salary of an officer, but this cannot be done in an appropriation bill where the law itself has not been properly amended.

Without a valid pre-existing law authorizing it, the Legislature is prohibited by the Constitution from appropriating money to pay a larger compensation than that prescribed in the statute. This constitutional provision is Section 44, Article 3, and 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."

For the reasons above stated, we conclude, and so express our opinion, that the salary or compensation of officers as fixed by either the Constitution or statutes of this State, could neither be increased nor diminished in an appropriation bill.

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

OP. NO. 1802—BK. 50, P. 22.

APPROPRIATIONS—WORDS AND PHRASES.

Acts Thirty-fifth Legislature, First Called Session, pages 91 and 92.

1. Fire insurance may be paid for out of the appropriation for the support and maintenance of Deaf, Dumb and Blind Institute for Colored Youths.
2. A three-year fire policy may be taken out and paid for out of this appropriation.
3. The appropriation made to build a dormitory for boys, etc., at this institution cannot be divided so as to build two dormitories.
4. "Maintain" and "support" defined.

August 3, 1917.

Hon. Reynolds Lowry, Member, Board of Managers, Deaf, etc., Institute for Colored Youths, Austin, Texas.

DEAR SIR: Referring to the appropriation made by the Thirty-fifth Legislature for the Deaf, Dumb and Blind Institute for Colored Youths, you request the advice of the Attorney General as to whether or not the item contained in this appropriation for the support and maintenance of the institute named may be used so far as necessary for the purpose of paying insurance on the properties of the Institute.

An examination of the appropriation, which is shown on pages 91 and 92. Acts of the First Called Session of the Thirty-fifth Legislature, discloses that there is no special item for the payment of insurance on buildings. The item for support and maintenance appropriates Twenty-two Thousand ($22,000.00) Dollars for the first year and Twenty-one Thousand Five Hundred ($21,500.00) Dollars for the second year. The appropriation concerning this item reads: "For support and maintenance not otherwise provided for herein, including mileage and per diem of board of managers and trustees, etc."

The word "maintain" is one of very broad meaning, and may be said to mean to "hold or keep in a particular state or condition, especially in a state of efficiency." Kovachoff vs. Lumber Co., 121 Pac. 803. It has also been variously defined as meaning "to support, to sustain, to uphold, to keep up, to continue, not suffer to cease or fail, etc." Lucas vs. Railway Co., 73 S. W. 591. It has also been defined to mean "to bear the expense of, to support, to keep up, to supply with what is needed." Alexander vs. Parker, 19 L. R. A. 187.

The word "support" means substantially the same thing. 8 Words and Phrases, p. 6803.

We have been unable to find an authority which holds categorically that insurance is embraced within the terms "support and maintenance," but many people who are engaged in business, regardless of the character of that business, and including those who are engaged in the business of operating schools of every kind, hold that the insurance of buildings against fire is one of the necessities of safe business management. In other words, under modern conditions, insurance against fire is one of the common and ordinary methods of expenditure in the conduct of private institutions, including schools. The insurance of buildings, also, is one of the ordinary incidents to the management of various institutions of this State. The appropriation bills passed by this session of the Legislature contain numerous appropriations for the insurance of public buildings. Acts. First Called Session of the Thirty-fifth Legislature, pages 93, 153, 159, 162 and 164.

It is true that insurance is especially mentioned in various sections of the appropriation bill, and, of course, where the subject is specially mentioned in any particular section of the appropriation bill, the amount thus appropriated would be a limitation on the expenditure which might be made for insurance. In the appropriation section before us, insurance is not especially mentioned, but the authorized appropriation for support and maintenance expressly declares that its purpose is to appropriate money for the support and maintenance of the institution. Where the appropriation measure does not otherwise provide for it, having concluded that fire insurance is a legitimate and proper item in the support and maintenance of a public institution, and this item not having been specially mentioned in the appropriation before us, we have concluded that it may be paid for out of the appropriation for support and maintenance, and you are so advised.

You also stated to us that you could obtain insurance for three years on this property by the payment of an amount equal to two annual premiums, and you desire to know whether you have authority to pay for insurance for three years by paying therefor the cost of two annual premiums out of the first year's appropriation. Our opinion is that you may do so. It is true that the appropriation for the first year is intended primarily for the support and maintenance of the school for that year, while the sum appropriated for the second year is intended primarily for the support and maintenance of the school for the second year, but our view of the matter is that the mere fact that the insurance policy thus purchased would extend beyond the period of time of each year's appropriation is no substantial reason why you should not be permitted to purchase insurance as do other business men. The purchase of three year policies for two annual premiums is not only one of economy, but is a universal custom among business institutions which have occasion to purchase large amounts of insurance, and, having decided that you are authorized to purchase insurance, we must conclude that you have the right to do so in the usual and ordinary course pursued by those similarly situated in the business world.

Your next inquiry is whether or not the appropriation given you for the erection of a dormitory may be divided and used in the erection of two dormitories. This particular item of the appropriation bill reads as follows: "Dormitory for boys, with chapel, recreation rooms and class rooms, $40,000; this expenditure is authorized for the year ending August 31, 1918."

The courts of this State hold that so far as the erection of buildings is concerned, that the language of appropriation bills constitutes a limitation on the rights of governing boards in the expenditure of the funds. State vs. Haldeman, 163 S. W. 1020; Nichols vs. State, 52 S. W. 452.

The authority of a public officer is created by law, and unless so created and conferred it does not exist. Mechem on Public Officers, Sec. 828. The authority just referred to says: "So, where the law expressly requires that the contract shall be executed in a certain manner, etc., such requirements must be complied with, or the contract will not be binding on the government." Mechem, Sec. 831. See also Sections 828 to 834, inclusive.

These authorities are decisive on the question. The appropriation bill is a law. It authorizes you to build a dormitory for boys, with chapel, recreation rooms and class rooms. You are not authorized to build two dormitories, nor to change in any way the express purpose of this appropriation. The language used is a limitation upon your authority, and anything done other than that authorized by this Act would be done without authority of law, and your actions would be null and void.

You are advised, therefore, that you cannot build two dormitories, but can only build "dormitory for boys, with chapel, recreation rooms and class rooms," and that in so doing you cannot expend in excess of $40,000, the amount provided for this purpose.

Yours very truly,

C. M. CURETON,

First Assistant Attorney General.

OP. NO. 1870—BK. 50, P. 397.

APPROPRIATIONS FOR UNIVERSITY AND OTHER INSTITUTIONS—SALARY ADJUSTMENTS.

An appropriation for "salary adjustments" cannot be used to increase salaries generally.

January 26, 1918.

Hon. W. M. Fly, Chairman Joint Central Investigating Committee, Capitol.

DEAR SIR: On the 24th inst., I received copy of resolution adopted by the Committee over which you have the honor of presiding, requesting the opinion of this department as to the legality of the action of the several governing boards of the educational institutions, namely: the Board of Regents of the State University, the Board

of Directors of the A. & M. College and the Board of Regents of the normal schools in using certain contingent funds appropriated for salary adjustments in increasing the amount of compensation of members of the faculty and administrative employes of these institutions over the amounts named in the appropriation bill.

On investigation I find the language of the appropriation for the different institutions to which your inquiry relates as follows:

University.

Contingent Fund.

For such adjustments in salaries and for such additions to the staff as may be necessary, to be determined by the Board of Regents.

The Agricultural and Mechanical College.

Contingent expenses, additional teachers, salary adjustments and other necessary expenses as directed by the board of directors.

Prairie View State Normal and Industrial College.

Contingent expenses, additional teachers, salary adjustments, and other necessary expenses as directed by the Board of Regents.

College of Industrial Arts.

Sam Houston Normal Institute.

North Texas State Normal.

Southwest Texas State Normal.

West Texas State Normal.

East Texas State Normal.

Contingent expenses, additional instructors, salary adjustments and other necessary expenses as directed by Board of Regents.

It thus appears that the language with reference to all these institutions is practically identical, except as to the University, additions to the staff being specially authorized. Your question involves the inquiry as to the meaning of the Legislature by the use of the phrase "salary adjustments," that is to say, does this authorize the managing boards of these institutions to increase the salaries as fixed in the appropriation bill.

The fundamental rule in the construction of all statutes is to ascertain the intention of the Legislature, because this really constitutes the law. We must arrive however at this intention by applying to the words employed their ordinary signification except words of art or words connected with a particular trade or subject matter when a particular meaning is attached thereto. The words "salary adjustment" have not acquired any particular signification as words of art or of a particular trade or with reference to any subject matter. Therefore we must apply to them their ordinary signification.

The word "adjustment" in the Century Dictionary is used in a number of senses, among others, the following:

First: The act of adapting to a given purpose; orderly regulation or arrangement; as to the adjustment of a part of a watch.

Second: The state of being adjusted; a condition or adaptation; orderly relation of parts or elements.

Third: That which serves to adjust or adapt one thing to another or a particular service, as the adjustments of constitutional government.

Definitions could be multiplied, but it is believed that the above fairly represent the meaning of this term, from which it will be dif-

ficult to get the idea that "adjustment" is synonymous with the term "increase."

Formerly appropriations for these institutions were made in lump sums leaving to the managing boards plenary authority to appoint officers, employ teachers and fix salaries, but the Legislature in response to the demand of the dominant political party of the State made in its platform at El Paso in 1914, ceased lump sum appropriations and has begun to itemize these bills, fixing very definitely the salaries for the different positions and definite amounts for the different purposes named.

There is nothing in the context to aid in the interpretation of this phrase and nothing in the Journal that sheds light. The present Legislature is the first one to employ this phrase with reference to contingent fund appropriations; hence there has not and could not have attached to this phrase any particular meaning.

In the absence of a journal reference to this subject we have endeavored to arrive at the sense in which the Legislature used this phrase from the discussion before the committee just before and at the time the bill was under consideration and the understanding of members of the committee and representatives of these different institutions who were present and participated in the discussion.

It is insisted by members of the Committee that this contingent fund was not to be used to increase the salaries of teachers beyond the maximum allowed in the bill for each teacher. An example given by them is as follows, which illustrates their idea of the meaning of this phrase: that is, if a department such as the Department of English in one of these institutions had one full professor at a salary of say $1800.00 a year and one adjunct professor at a salary of $1500.00 per year and it became necessary to promote the adjunct professor to a full professor, the salary would have to be adjusted and the $1500.00 raised to $1800.00, and that this fund could be drawn from to pay the $300.00 required. We thus get an idea of the meaning attached to this phrase by members of the appropriation committee of the Legislature.

They further say:

"The committee (the Appropriation Committee) discussed the item of salary adjustment, additional teachers, etc., and allowed a sum for this purpose. It was the intention of the committee that this fund should be used for incidentals for paying the salaries of additional teachers or for adjusting any differences between the maximum and the minimum salaries allowed to teachers. It was the opinion of the committee that this fund should not be used to increase the salaries of teachers beyond the maximum allowed in the bill for each teacher."

I requested a similar statement from the President of the University as to his understanding of the purpose and intention of the Legislature in using this phrase "salary adjustment" in the appropriation bill. Under date of the 25th inst., he wrote me and I quote from his letter as follows:

"We are charging to the item above mentioned the salaries in full for the new positions which have been created by the Board of Regents since the appropriation bill was passed by the Legislature, and for which no

appropriation is made in any of the other items of the bill. In addition to this, we are charging to the item above mentioned only those amounts which are necessary to bring the salary of any member of the teaching staff up to the level of the salaries which correspond to their respective ranks. Such other increases within respective ranks as have been made by the Board of Regents are not cheageable to the contingent fund item referred to, but are charged against the matriculation and other fees paid by the students of the University. In other words, we have endeavored to interpret the item mentioned in view of the understanding which we had with the Legislature when this appropriation was requested, and the money so appropriated, in so far as it is being used at all, is being used in good faith in the 'adjustment' of salaries, and not for the purpose of a general increase of salaries. The matriculation and other fees paid by the students last year and this year are more than enough to take care of all the salary increases, strictly speaking, which have been made by the board, and would, I think, also be sufficient to take care of all of the items mentioned under the contingent fund appropriation now under discussion, if it were thought best to make use of the fees for this purpose. The Board of Regents has adopted a system of salaries and ranks in the University, with a maximum and minimum figure for each rank, and the adjustment referred to above applies to the carrying into effect of this arrangement.

"In addition to the above, may I call your attention to the fact, for such influence as it may have upon the question, that of the appropriations made for salaries to the University for this current session of the Legislature, approximately $70,000 remains untouched at the present time? This is due to the fact that the war has brought about a considerable decrease in the number of students in this institution, and the positions left vacant by the large number of resignations and leaves of absence, also brought by the war, have not been filled by the Board, but other members of the faculty have increased the amount of work done and have endeavored to take care of the situation adequately. The Board of Regents and administrative authorities of the University are making every effort to conduct the work of the University this year with every possible economy, and the saving above indicated represents only a part of what the sum total of saving will be before the expiration of the fiscal year.

"Trusting that the above interpretation of the Act of the Legislature meets with your approval and assuring you of my readiness to do whatever the clear interpretation of this Act requires, etc."

The view of President Vinson is in accord with that of members of the Legislature wherein speaking of this contingent appropriation he says:

"We have endeavored to interpret the item mentioned in view of the understanding which we had with the Legislature when this appropriation was requested and the money so appropriated in so far as it is being used at all is being used in good faith in the adjustment of salaries and not for the purpose of a general increase of salaries."

The Legislature in lengthy detail has fixed the salaries to be paid the different officers, professors, adjunct professors, etc., of these institutions and if it had intended to set aside these contingent funds to be used by the managing boards to increase generally the amounts of salaries stated in the appropriation bill it would have said so in plain language authorizing the increases, but it did not do so; therefore we must give to the phrase "salary adjustment" some other meaning.

The phrase of course was inserted in the bill for some purpose and is to be given some reasonable interpretation, and we have concluded that its purpose was to enable the Boards of Managers of these insti-

tutions whenever a teacher or professor or adjunct professor should be promoted to a higher position charged with greater responsibilities to which the Legislature had attached a higher salary, that this fund was to be used, among other things, to make up the difference between the salary of the person thus promoted and the higher salary attaching to the position to which he is promoted. To illustrate, take the Department of History in the University appropriation found at page 6, printed acts of the Second and Third Called Sessions. The Legislature has appropriated $3,000.00 per year as salary for a professor of American History and $2,200.00 per year for an associate professor of American History and $1,900.00 per year for an adjunct professor of Latin, American and English History, and $1,800.00 per year for an adjunct professor of Modern European History, and $1,700.00 per year for an adjunct professor of Ancient History, etc. It is within the discretion of the Board of Regents to promote any of these adjunct professors and associate professors and instructors to professorships or higher positions, in which event, this contingent fund could be drawn upon to make up the difference between the salary attaching to the position from which they are promoted and the salary attaching to the position to which they may be promoted.

This, in our opinion, was what the Legislature meant by "salary adjustment," and while it may be used to increase salaries, it is not to be primarily so used and cannot, in our judgment, be used primarily for that purpose. To illustrate this point; take the salaries attaching to full professors mentioned on the same page—for instance in the Department of Government, to which the Legislature has attached a salary of $3,250.00 per year; in the Department of Greek the Legislature has attached a salary to the position of professor of $3,000.00; in the Department of History the sum of $3,000.00; in the Department of Home Economics $3,000.00; in the Department of Institutional History $3,250.00, and in the Department of Journalism $3,250.00

These salaries could not be increased from this appropriation because there is no other position higher to which a promotion could be made and an adjustment of salaries would not become necessary.

We are therefore of the opinion that these contingent funds were not intended to be used by the Legislature primarily to increase salaries above the amounts fixed by the Legislature, but may be used incidentally wherever one holding a subordinate position is by the managing board elevated to a higher position carrying a larger salary, in which event this fund may be used in adjusting the salary to the more responsible and important position.

We express no opinion whatever on any question not involved in your inquiry; which is, as to the meaning of the Legislature in using the phrase "salary adjustments" in connection with these appropriations for contingent funds.

Yours truly,

B. F. LOONEY,
Attorney General.

OP. NO. 1915—BK. 51, P. 171.

APPROPRIATIONS—CONTINGENT EXPENSES.

The appropriation bill for contingent expenses is intended to cover those items of expense necessary in the operation of the Legislature as a body.

Either the House or Senate may authorize an expenditure from this appropriation for any necessary purpose in the conduct of the affairs of that body.

As to what is a necessary expense the body ordering the expenditure would be the judge, so long as the expenditure was confined to those items made use of by the body.

The expense of disinterring the body of an ex-Governor, removing the same to Austin and erecting a monument to his memory, is not a contingent expense of the Legislature and could not be paid upon a resolution by the Senate from the contingent expense fund.

Monuments may be erected, but the expense thereof should be borne from an appropriation made by a bill enacted by both House and Senate.

April 11, 1918.

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

DEAR SIR: You transmit to this department a communication addressed to you by Senator W. L. Hall, chairman of the committee appointed by the Senate at the Fourth Called Session of the Thirty-fifth Legislature, to have the remains of Governor Albert C. Horton disinterred and removed from the cemetery at Matagorda and interred in the State Cemetery at Austin and erect a monument over the grave to the memory of Governor Horton. You also transmit a copy of the Senate Journal dated March 26, 1918, containing the resolution above referred to, same being simple resolution No. 60 adopted by the Senate on that date.

You ask an opinion from this Department as to the legality of the action of the Senate in providing for this expenditure out of the contingent expense fund of the Senate.

The resolution under which this expenditure is sought to be made, after reciting certain instances in the life of Governor Horton, proceeds as follows:

"Resolved, that the sum of $1000, or so much thereof as may be necessary, is hereby appropriated out of the contingent expense fund of the Senate to pay the expenses of removing the remains of the said Governor Albert C. Horton from Matagorda, Texas, and reinterring them in the State cemetery at Austin, Texas, and for purchasing and erecting such monument over his grave and to his memory as the said committee of Senators shall select.

"Hall, Bailey, Clark, Strickland, Hopkins, Buchanan of Bell, McNealus, Johnson of Hall, Faust, Bee, Parr, Caldwell, Lattimore, Dean, Collins, Alderdice, Westbrook, Floyd.

"The resolution was read and adopted and the Chair appointed Senators Hall, Bailey and McNealus as the special committee provided for in said resolution."

In our opinion there is no authority vested in either the House or the Senate to incur an expenditure of this character to be paid from the contingent expense fund. We base this conclusion upon two principles which will be hereinafter discussed.

It is true that the Fourth Called Session of the Thirty-fifth Legislature enacted the usual bill making appropriations for contingent expenses of that special session of the Legislature. This bill appropriates the sum of $16,000.00 to pay the contingent expenses of the Fourth Called Session of the Thirty-fifth Legislature. Section 2 of this Act, is as follows:

"House Bill No 2 appropriates $10,000 to pay contingent expenses of the Fourth Called Session of the Thirty-fifth Legislature. Section 2 of this Act is as follows: 'Section 2. The approval of the chairman of the Committee on Contingent Expenses of the Senate approved by the President of the Senate or of the chairman of the Committee on Contingent Expenses of the House of Representatives, approved by the Speaker of the House, shall be sufficient evidence to the Comptroller upon which he shall audit the claims and issue warrants for the respective amounts upon the State treasury."

This section in effect makes each house the judge of the necessity for any expenditure out of this fund. That is to say, each body is the judge of the necessity for any contingent expense of that body, therefore, if an expenditure should come within the meaning of contingent expense the courts would not interfere with the expenditure of this money. The rule would be otherwise, however, if an expenditure was for an item not necessary in the actual operation of the Legislature as a body. We quote from volume 2, Words and Phrases, page 1502, as follows:

"The adjective 'contingent,' as used in appropriation bills to qualify the word 'expenses,' has a technical and well-understood meaning. It is usual for Congress to enumerate the principal classes of expenditure which they authorize, such as clerk hire, fuel, light, postage, telegrams, etc., and then to make a small appropriation for the minor disbursements incidental to any great business, which cannot well be foreseen, and which it would be useless to specify more accurately. For such disbursements, a round sum is appropriated under the head of 'contingent expenses.' Dunwoody vs. United States (U. S.), 22 Ct. Cl., 269, 280."

It is the practice of the Legislature to pay all incidental expenses from the appropriation for contingent expenses, that is to say, from this fund they pay the actual necessary expenses incurred in the operation of the Legislature as a body. In fact, this is the definition of the term "contingent expenses" contained in the case above cited. The act makes an appropriation of funds in the treasury to pay such contingent expenses. In our opinion this language should be limited to the actual necessary expenses incurred in the conduct of the affairs of the Legislature as a body, and could not be drawn upon to defray the expenses of any undertaking either body of the Legislature might desire to engage in, other than the actual operation of the body as a part of the Legislature. If this were not true the Legislature could by enacting a contingent expense bill sufficiently large, conduct the entire business of the State through simple resolutions enacted by either House or Senate.

For the above reasons we advise you that the expenses authorized to be incurred by Senate simple resolution No. 60 could not be defrayed from the contingent expense appropriation.

There is yet another, and to us a sufficient reason, why this expense cannot be borne from the appropriation in question.

Section 39, Article 16 of the Constitution is as follows:

"Sec. 39. Memorials of Texas History.—The Legislature may, from time to time, make appropriations for preserving and perpetuating memorials of the history of Texas, by means of monuments, statues, paintings and documents of historical value."

By the above Constitutional provision the Legislature is authorized to make appropriations for preserving and perpetuating memorials of the history of Texas by means of monuments, statutes, etc. Under this provision the Legislature would clearly by a bill enacted by both houses have the authority to make appropriations for the purposes contained in the resolution under discussion.

Section 6 of Article 8 of the Constitution provides in part, that "no money shall be drawn from the treasury, but in pursuance of specific appropriation made by law." As said above, it is true the Legislature has passed an appropriation bill to cover contingent expenses. Under our construction as hereinbefore stated, the erection of monuments is not contemplated in the passage of a contingent expense act. Especially is this true in the light of the constitutional provision with reference to the right of the Legislature to perpetuate the history of Texas by the erection of monuments. This article of the constitution, construed in connection with Section 6. Article 8, with reference to specific appropriations, we think, would bear no other construction than that an appropriation for this purpose must be specific and authorized by a bill enacted by both branches of the Legislature.

For the reasons above set out, we advise you, that any expense incurred under said simple resolution No. 60 in the interment and removal and burial of the remains of Governor Horton and the erection of a monument over the same, could not be paid from the contingent expense appropriation of the Fourth Called Session of the Thirty-fifth Legislature.

I return herewith Senator Hall's letter to you.

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

OP. NO. 1772—BK. 51. P. 326.

STATE UNIVERSITY APPROPRIATION—FERGUSON VETO.

Ferguson's attempted veto of State University appropriation considered and the conclusion reached that a substantial portion of the appropriations were not vetoed.

The Board of Regents may use such amount of the available funds as may actually be in hand on September 1, 1917, and thereafter, and at any time during the two-year period may capitalize or in any other manner use the credit of such funds to become available at any time during said two-year period in order to secure money needed for immediate use.

In the event the available funds shall become exhausted, and in the event the total appropriations contained in said bill shall not become available, the University could lawfully be operated upon donations, gifts, etc., which it might be able to procure from any source.

The University could not borrow money outright and bind the State for the repayment thereof, but some citizen or group of citizens could probably be found who would advance the money and a constitutional amendment could be adopted which would assure the repayment of the money thus advanced.

June 9, 1917.

Hon. Robert E. Vinson, President, University of Texas, Austin, Texas.

DEAR SIR: I have your letter of the 8th instant, wherein you say:

"At the approaching meeting of the Board of Regents of the University, to be held on June 11, it will be necessary for me to submit recommendations as to the conduct of the institution for the session of 1917-18. In view of the condition of the University appropriation as contained in the general educational bill as finally approved by the Governor, I am unable to determine what funds will be available for the operation of the University.

"Will you, therefore, kindly advise me at as early a date as may be possible what funds under the bill as approved by the Governor will be available for the support and maintenance of the University for the year 1917-18."

Herewith I will give you my views on the subject for what they may be worth.

I.

I am of the opinion that the total sums appropriated for the support, etc., of the University, as contained on Page 27 of House Bill 13, have not been vetoed. The bases of this opinion are as follows:

House Bill 13 (making appropriations for the support of the State's Educational Institutions) as approved, signed and filed by the Governor, is a final Legislative enactment, complete as a whole and complete in its various parts. The Caption of the Act, as approved and filed, is in the identical form given it by the Legislature. It is the function of the Caption to epitomize the provisions of the body of the Act and to declare the purpose of the whole enactment. A Completed Bill is the result of the joint action of the Legislature and the Governor, and in cases of doubt the language of the Caption may be looked to to solve the ambiguity. City of Austin vs. McCall, 95 Texas, 565. The Caption of this Act is clear, and it unequivocally declares one of the purposes of the Bill to be the making of "appropriations to pay the salaries of officers and employes . . . . and other expenses of maintaining and conducting . . . . University of Texas, etc., etc."

Section 1 of the Act is also clear and unambiguous. The language thereof must be read in connection with and as a part of each succeeding Section and item thereof; it is such language as may be appropriately used in the making of appropriations. Fulmore vs. Lane, 104 Texas, 499.

Section 1 is immediately followed by provisions for the support, etc., of the University of Texas for the two years beginning September 1, 1917, and ending August 31, 1919.

In the veto "proclamation" the Governor specifically describes the items intended to be vetoed as the items marked with "blue-pencil," on pages 1 to 24, inclusive, of the Bill.

The Bill as approved and filed by the Governor, (after eliminating all items "blue-penciled") down to and including pages 27 thereof, reads as follows:

"H. B. No. 13.

An Act making appropriations to pay the salaries of officers and employes of certain educational institutions and other expenses of maintaining and conducting them, as follows, to wit: University of Texas, Agricultural and Mechanical College, State Experimental Station, Prairie View Normal, College of Industrial Arts for Women, Sam Houston Normal Institute, North Texas Normal, Southwest Texas Normal School, West Texas Normal School and School of Mines at El Paso, East Texas Normal College, John Tarleton Agricultural College, and declaring an emergency.

Be it enacted by the Legislature of the State of Texas:

Section 1. That the following sums of money, or so much thereof as may be necessary, be and the same are hereby appropriated to pay the salaries of officers and employes and other expenses necessary for the support and maintenance of certain educational institutions of the State, as follows, to wit:

University of Texas,

For the maintenance, support, and direction of the University of Texas, including the Medical Department at Galveston, including the construction of buildings, for the years beginning September 1, 1917, and ending August 31, 1919, all the available University funds, including interest from its bonds, land notes, endowments and donations, all gifts and fees collected, and all receipts whatsoever from any source. For the maintenance, support and direction of the University of Texas, including the Medical Department at Galveston, for the two years beginning September 1, 1917, and ending August 31, 1919, from the general revenue.

Main University.
Salaries.
College of Arts.
Applied Mathematics.

	For the years ending Aug. 31, 1918.	Aug. 31, 1919.
Professor, dean of the College of Arts, dean of men	$ 3,500 00	$ 3,500.00

School of Mines, El Paso.
Salaries.

Dean and professor of mining and metallurgy	3,300.00	3,300.00
Professor of chemistry	2,200.00	2,200.00
Professor of engineering	2,200.00	2,200.00
Professor of geology and mining	2,200.00	2,200.00
Instructor in engineering	1,320.00	1,320.00
Instructor in modern languages	1,200.00	1,200.00
Tutor in English and economics	350.00	350.00
Lecturers	300.00	300.00
Assistant in chemistry	250.00	250.00
Registrar	825.00	825.00
Librarian	250.00	250.00
Steward in dormitory	250.00	250.00
Power plant attendant	250.00	250.00
Janitor	720.00	720.00
Janitor	350.00	350.00
Night watchman	600.00	600.00

Schools and Laboratories.

Assaying	440.00	300.00
Chemistry	480.00	460.00
Drawing and surveying	85.00	85.00
Electro-chemistry	.....	775.00

Mechanics	$220.00	$220.00
Mineralogy and geology	485.00	375.00
Ore testing	375.00	365.00
Physics	1,530.00	927.00
Practice mine	.....	2,000.00
Current Expenses.		
Advertising	180.00	.....
Fuel, lighting and power plant supplies	850.00	850.00
Furniture	365.00	85.00
Campus expense and supplies	125.00	125.00
Insurance	200.00	200.00
Janitor's supplies	85.00	85.00
Library	700.00	400.00
Office expenses	325.00	325.00
Water	500.00	500.00
Tank, piping, etc	600.00	.....
Moving and erecting mill on new site	900.00	.....
Contingent Fund.		
To make such adjustments as may be necessary, and to meet such contingencies as may arise, to be determined by the Board of Regents	1,500.00	2,500.00
Total:		
School of Mines	26,510.00	27,477.00
Medical Branch	98,755.00	98,755.00
Main University	719,698.50	710,198.50
Grand total	$845,963.50	$836,430.50

Provided that no money herein or hereby appropriated for any purpose shall be paid to any person, directly or indirectly, who is not at the time of receiving such pay, remuneration or emolument a citizen of the United States under the laws of the United States.

Provided, however, that this Act shall not apply to any person who is not a citizen of the United States under the naturalization laws of the United States who has resided in Texas for a period of ten years and who shall within thirty days after this Act shall take effect make application to become a citizen of the United States and who shall within two years after making such application become a citizen of the United States under the naturalization laws of the United States.

The appropriations herein provided for are to be construed as the maximum sums to be appropriated to and for the several purposes named herein, and no expenditures shall be made, nor shall any obligations be incurred which, added to the actual expenditures, will exceed the amounts herein appropriated for either of the said purposes, except under the provisions provided for in Article 4352, of Chapter 2, Title 65, of the Revised Civil Statutes of 1911.

It must be apparent at a glance that the Bill, in its final form, contains all the language necessary to make appropriations for the support, etc., of the University in total amounts, as follows:

School of Mines	26,510.00	27,477.00
Medical Branch	98,755.00	98,755.00
Main University	719,698.50	710,198.50

plus "all the available University funds."

In making appropriations for the support of State Institutions it is not at all necessary for the same to be itemized, but a "lump sum" appropriation is valid. In other words, the Legislature, in the due exercise of its power, might have given the Bill, originally, the form in which we now find it; and if it had done so, and the same had been signed and filed by the Governor, there could be no doubt as to the competency of the Bill to make appropriations in the total amounts stated. This is, in effect at least, held in Fulmore vs. Lane, 104 Texas, 499. It seems to me, therefore, that H. B. 13, as approved by the Governor, prima facie at least, appropriates the total sums stated for the support, etc., of the University for each of the two years mentioned. The Bill, in its final form, clearly states such to be its purpose; if it does not make such appropriations, then its plain language must be wrenched from its obvious meaning, and this must be done upon evidence extrinsic of the language of the Bill itself.

The only source of information to which reference may properly be made in an endeavor to limit the specific terms of the Bill are (1) the veto proclamation of the Governor; (2) Laws controlling appropriation bills, and laws in pari materia.

Since the exercise of the veto power is legislative, a veto must be interpreted according to the rules applicable to the construction of statutes.

Fulmore vs. Lane, 104 Texas, 499.

If the language of the veto is plain it must be given literal effect; if ambiguous, doubts must be resolved in harmony with the legislative intent insofar as the same may be ascertained from the entire subject matter. In his concurring opinion in Lane vs. Fulmore, 104 Texas 499, 525, Mr. Justice Ramsey said:

"It is a further rule, well established, that we should not, unless required to do so, give such a construction to the Governor's veto as would necessarily occasion great public and private mischief, but a construction will be preferred which will occasion neither, unless the latter would do violence to a well settled rule of law."

Looking now to the veto proclamation in question, and interpreting it according to its literal import, it seems to me that there is nothing contained therein to limit the effect of the Bill in its final form as described above. That no such limitation exists, I think, is demonstrable from the language of the veto message itself construed according to well established rules.

In entering upon an examination of the veto message, a fact of prime importance must be fixed in mind. The filing of the veto proclamation and the filing of the Bill as signed were two related acts: (1) contemperaneous; (2) concurrently necessary to the disposition of the Bill. The two acts, to be concurrently effective, must be harmonious; consequently, under fundamental rules, they must be construed, if possible, so as to be in harmony one with the other, and so that one act will not destroy the other in whole or in part. Now let us apply this idea to the facts: By one of the concurrent, contemporaneous acts the Governor filed and thereby approved, the Bill

as set out above carrying the total appropriations stated for each of the two years. This act was as formal, solemn and final as the filing of the veto proclamation. Certainly the Governor meant for the Bill to have the form finally given it by him; in the absence of a plain statement to the contrary there is no warrant for saying that, in giving the Bill this final form, he did something which he did not intend to do. It follows, therefore, that the other contemporaneous, concurrent act, to-wit: the veto, should be construed, if possible, to be in harmony with the act of filing the Bill in its final form.

There is no difficulty in reaching such a construction of the veto.

As stated above, the veto message describes the items intended to be vetoed as those "blue-penciled" on pages 1 to 24 inclusive, of the Bill as filed. The items vetoed, according to the message itself, are those "all fully described in House Bill 13, on pages 1 to 24, inclusive"; the message, in another place, says:

"And only and all said appropriations described in said House Bill 13, on said pages 2 to 24, inclusive, are hereby disapproved and vetoed, and the same are blue-penciled and vetoed."

This language is specific; it specifically describes the items (by particular reference) to which the veto was intended to apply; and being *specific*, under fundamental rules, it must be understood to control any general and conflicting language, if any, in the message. The portions of the Bill as copied above were neither "blue-penciled," nor are they to be found on pages 2 to 24. Consequently, if it should be held that any of such portions were vetoed, the *specific* descriptions of the vetoed items as contained in the message must be changed so as to include pages 25, 26 and 27 and so as to include items on page 1, which were not marked with "blue pencil." But this expansion of the "description" would violate the plain language of the Governor wherein he says "and only and all said appropriations described in said House Bill 13, on pages 2 to 24, inclusive, are hereby disapproved and vetoed, and same are blue-penciled and vetoed." But this expansion of the description would go much further than violating the Governor's plain language; it . . . . would also destroy the force of his first act of approving and filing the Bill in its final form as shown above. So to expand the "description" is to say that the Governor did not do what he intended to do in filing the Bill and that he did not say what he intended to say in his message.

I reiterate that the Bill in its final form is a complete Legislative enactment, carrying total appropriations in the amounts shown: the Bill in its final form is in harmony with the plain and specific language of the veto message. To hold that a single word or figure of the Bill in this form was vetoed would involve the repudiation of every rule of construction and ascribe to both the Bill and the veto message a meaning unequivocally negatived by the plain language of each.

Upon those who may contend that the total appropriations for the University were vetoed must rest the burden of showing two things: (1st) That there is conflict between the terms of the Bill as filed and the veto message, and in order to do this a conflict

must be found in the terms of the message itself. We say this because the Bill, *as approved,* specifically carries the total appropriations named, and the veto message particularly describes the items vetoed as being on pages 2 to 24 of the Bill, and neither the totals nor the appropriating language is to be found on those pages; (2nd) Having found the ambiguity, they must go further and point to some indicia within the Bill or message impelling the conclusion that neither the Bill nor the Message (wherein it is specific) mean what they say. I think the task in either instance is impossible of accomplishment. My reasons for thinking so have been, in part, already indicated; other supporting reasons may be assigned by way of anticipation.

It may be said that the intention to veto the totals is evidenced by the following language of the message:

"I hereby veto and disapprove the entire appropriation made by the Thirty-fifth Legislature for the support of the State University of Texas, for the fiscal years beginning September 1, 1917, and ending August 31, 1919, the same aggregating $98,755.00 for the fiscal year ending August 31, 1918, and $98,755.00 for the fiscal year ending August 31, 1919, for the support of the Medical Branch of the University at Galveston, Texas; and aggregating $719,698.50 for the fiscal year ending August 31, 1918, and $710,198.50 for the fiscal year ending August 31, 1919, for the support of the main University; same to be spent for the payment of salaries of various professors, associate professors, instructors, assistants, adjunct professors, tutors, curators, secretaries, employes, agents, officers, business manager, assistant business manager, auditors, land agents, laborers of all kind and description, and for various contingent funds, current expenses, traveling expenses, in said Medical Branch of the State University at Galveston, Texas, and in the said main University situated at Austin, Texas," etc.

This language, taken by itself, might produce the veto of the totals.

But, when taken by itself, it is misleading. It cannot be considered by itself. It is familiar law that all parts of a written instrument must be read together. It is also familiar law that all portions of all related documents must be read together, and that each portion must be given effect if possible. This is especially true of statutes and of statutes accompanied by veto messages. To segregate the clause last quoted from the Message and to give it literal effect, manifestly, would render ineffective and meaningless all other portions of the Message and also further amend the Bill as actually signed and filed. This has been pointed out above, but attention is here called to the important fact that the above quoted general language is specifically limited, in the same sentence, by the following clause:

"*and all fully described in the original House Bill Number* 13, *on pages* 1 *to* 24, *inclusive,* * * * *to which* reference is made for a more particular description of the appropriations hereby disapproved and vetoed."

and further along in the same sentence this language is found:

"*and only* and all said appropriations described in said House Bill 13, on said pages 2 to 24, inclusive, are hereby disapproved and vetoed, and the same are blue-penciled and vetoed."

The complete language can mean but one thing, and that is that the items marked with blue-pencil on the pages designated were intended to be vetoed. The totals are not marked with "blue pencil," nor are they on the pages named; to hold that they fell within the general condemnatory language quoted requires the reformation of the Governor's message so as to eliminate the specific qualifying clauses.

It may be said, also, that the totals named in the general language quoted correspond to the totals contained on page 27 of the Bill. This is, however, unimportant. The Constitution authorized the Governor to veto "items" of the Bill. Each of the sub-divisions contained on pages 2 to 24 was an "item" subject to veto. Fulmore vs. Lane, 104 Texas, 499. Each of the totals for each of the years as contained on page 27 of the Bill was a separate "item" subject to veto, *Ibid.* The veto of the totals alone would not have affected the detailed "items" on pages 2 to 24, *Ibid;* nor would the veto of any or all of the detailed "items" on pages 2 to 24 affect the totals unless the totals themselves were vetoed, *Ibid.* The Message does not directly, or by reference, mention the total items contained on page 27 of the Bill; it will be noted that the general language of the Message (quoted above) says that the items vetoed "aggregate" sums which correspond to the totals on page 27. This means that the items vetoed on pages 1 to 24 "aggregate" the amounts mentioned, and does not, at all, necessarily refer to the total sums set out on page 27.

But it may be said, further, that there is no apparent reason for the veto of the items on pages 1 to 24, and all of them, unless it was also intended for the totals on page 27 to be vetoed.

There are various answers to this. In the first place, since the Governor had the power to veto the detailed items on pages 2 to 24, and at the same time leave the totals on page 27 intact, and since this is clearly the prima facie effect of the Bill as filed with the Message, it is not necessary to ascertain the reasons therefor. In the second place, if possible, reasons must be shown they are readily deducible from the *effect* of the Bill in its final form. If our construction of of the Bill and the Message is correct, then the effect of the Bill as re-formed by the Governor is to leave the total amounts appropriated in force, to be expended for the general purposes enumerated in the Bill according to the discretion of the Board of Regents, whereas the original Bill undertook to specify, in detail, how the money should be spent. It will be noted that the original Bill left the manner of the expenditure of the "available funds" entirely to the Board of Regents, and the effect of the veto, as we construe it, is in like manner to enlarge the power of the Board over the expenditure of the totals. The Governor had the power to object to any number of the specific items and to strike them from the Bill, leaving the totals intact, and in this way to deal with the disposition of the funds. For instance: He may have thought that the amount specifically set aside for any particular purpose was too large, and yet have thought that the particular purpose itself should be carried out; by striking out the specific item and leaving the totals the purpose could still be accomplished and a proper amount of money be spent therefor by the Regents. The entire effect of the veto is to permit the total amounts to

be redistributed by the Board of Regents to the details necessary in the proper administration of the institution.

The construction which I have given the Bill and the Message ascribes effect to every provision of both instruments; any other construction destroys, in whole or in part, some portion of each. This of itself impels my belief that this construction is correct.

But there is another reason to be found in the Organic Law and the Constitutional relation of the Departments of Government. By Section 10, Article 7, of the Constitution the Legislaure is commanded to provide for the "maintenance, support and direction of a University of the first class." By subsequent Sections *partial* provision—by way of a "permanent fund"—is made for its support. But that the People whose command is found in Section 10, Article 7, understood that the proceeds from the "permanent fund" would be inadequate for the proper support of a constantly growing "University of the first class" and that it should be the duty of the Legislature to supplement this fund by appropriations is unmistakably shown in Section 11, wherein such appropriations are specifically mentioned, and in Section 48 of Article 3, wherein the right of the Legislature to impose taxes for the support of State Universities and Colleges is definitely granted. In the exercise of these powers the Legislature, in the passage of House Bill 13, declared the "available funds" to be wholly insufficient for the maintenance of the University and proceeded to supplement the same by appropriations. This was a declaration of fact within the jurisdiction of the Legislature, and the force of its finding should not by construction be disturbed unless reversal thereof is rendered imperative by other law. That the Governor did not intend to disturb this finding of fact is conclusively shown by the circumstance that his veto Message itself, under any construction thereof, provides for a supplement of the "available funds." With this condition of fact established, it is impossible to imagine that the Governor thought that a supplemental appropriation of only $3500 per year was sufficient for the maintenance of the "Main University."

With these plain Constitutional commands before us, with the unreversed finding of fact of the total inadequacy of the "available funds" before us, and in the absence of an unmistakable declaration by veto, violence to reason and gross injustice to the Governor would be the resultants of a holding that he intended to veto the entire supplemental appropriation (except $3500 per year) for the Main University. The Governor has made no such declaration; on the contrary, he has more than once repudiated such an idea: Once, *positively,* by signing and filing the Bill which clearly appropriates the totals named on page 27 thereof; twice, *negatively,* by specifically limiting the veto to the items set forth on pages 2 to 24.

We hold, therefore, that the total amounts of money stated on page 27 of the Bill will be available for the support and maintenance of the University and its branches to be expended under the direction of the Board of Regents for the two years named.

What has been said above represents my belief as to the effect of the veto and the availability of funds for the support of the University. My knowledge of the unsettled condition of the affairs of the

University leads me to believe, however, that my judgment in the premises may not be taken as final, and that an adjudication of the question by the Courts will, probably, be required. Pending such adjudication the University must operate, and, happily, in my opinion, the Appropriation Bill itself furnishes the means to this end.

II.

I refer to the provisions as to the "available funds." By the Bill "all the available University funds, including interest from its bonds, land notes, endowment and donations of gifts and fees collected, and all receipts whatsoever from any source" here appropriated "for the maintenance, support and direction of the University of Texas including the Medical Department at Galveston, including the construction of buildings for the two years beginning September 1, 1917, and ending August 31, 1919." No limitation upon the use of these funds other than the general language quoted is to be found in the Bill, and their expenditure is wholly within the control of the Board of Regents at any time during said two-year period. In my opinion the Regents may use such amount of such funds as may actually be in hand on September 1, 1917, and thereafter, and at any time during the two-year period may capitalize or in any other manner use the credit of such funds to become available at any time during the said two-year period in order to secure money needed for immediate use.

In the event such available funds shall become exhausted, and in the event the total appropriations contained on page 27 of House Bill 13, discussed above, in accordance with this opinion, shall not become available, the University could lawfully be operated upon "donations," "gifts," etc., which it might be able to procure from any source.

III.

While I do not think the University can borrow money outright and bind the State for the repayment thereof, I do believe that some citizen or group of citizens can be found who would have sufficient confidence in the good faith of the people of Texas to lead them to advance to the University such sums of money as may be needed for its proper maintenance during the two years, upon the expectation that the Legislature, at its next session, would submit to the people of Texas a Constitutional Amendment recognizing such advances as being debts which ought to be paid by the State and in the expectation that such Amendment when submitted would be adopted by the people, thereby insuring the benefactors the return to them of the moneys with interest thus patriotically advanced for this high purpose.

Respectfully submitted,

B. F. LOONEY,
Attorney General.

OP. NO 1808.

APPROPRIATIONS—ATTORNEY'S FEES.

The Board of Regents of the State University is not authorized to pay from appropriations made by the Legislature, to maintain the University, an attorney's fee incurred by certain members of the Board of Regents in defense of a suit brought against them as individuals to restrain them from executing an alleged conspiracy entered into to deprive a certain faculty member of his legal right; the suit not being against the State and not against the Board of Regents as such, but against a minority of the Board as individuals, is not a suit against the State nor does it concern the State, and, hence, it is not a public matter, the expenses of which are to be paid from public funds.

Even if it should be considered a legal demand, yet the appropriation to maintain the University would not authorize the payment of an attorney's fee incurred under the circumstances.

July 27, 1917.

Hon. J. M. Edwards, State Treasurer, Capitol, Austin, Texas.

DEAR SIR: I am reducing to writing the verbal opinion I expressed to you the other day, to the effect that the fee of eleven hundred ($1100.00) dollars, allowed by the Board of Regents of the University, in favor of Martin & McDonald, for legal services performed in the defense of certain members of the Board of Regents, who were defendants in the suit filed against them by Mr. Lomax, and tried by Judge Ireland Graves, can not legally be paid from public funds.

I will now state my reasons:

The action was originally brought against C. C. McReynolds, A. W. Fly, C. E. Kelly and John M. Mathis. Since the filing of the suit G. C. McReynolds resigned, and the vacancy was filled by the appointment of W. G. Love, who was by amendment made a defendant in the cause as was also E. J. Mathews, Secretary of the Board of Regents. Therefore, the action may be considered as being against four members of the Board of Regents only, to wit: A. W. Fly, C. E. Kelly, John M. Mathis and W. G. Love, and E. J. Mathews, Secretary of the Board. The Board of Regents of the University of Texas is an administrative agency of the State, for the government of its University, created by the Constitution and laws of the State.

Harris' Constitution, Art. 16, Sec. 30a.
Vernon's Sayles' Statutes, Art. 4042a-4042c.
Vernon's Sayles' Statutes, Articles 2636, 2638, 2639, 2640, etc.

The Board is composed of nine members, with general authority to govern the affairs of the University. Those parts of the plaintiff's petition necessary to be considered in determining the nature of the action are shown in the following excerpts therefrom:

"That upon failure of said Board of Regents as then constituted to sustain the charges so preferred by the said Ferguson against your petitioner, and upon such charges to remove petitioner from his position, as aforesaid, the said Ferguson, as your petitioner is informed and believes and thereupon charges, continued his said design to have your petitioner removed from his said position, and to that end exerted and attempted to exert and still attempts to exert ulterior and improper influences upon

the members of said Board as now constituted and above named; that sundry vacancies have occurred upon said Board from time to time, and the said Ferguson has appointed upon said Board only men whom he thought to be subject to such influences, and upon whom he has continued to attempt to exert such influences, and that because of such influences so exerted and attempted to be exerted upon them by the said Ferguson, said defendants above named have conspired together and are conspiring together to remove petitioner from his said position and discharge him therfrom without good cause and without giving him an opportunity to be heard.

"Petitioner says that defendants aforesaid, in response to the improper influences so exerted upon them by the said Feruson are in session at the City of Galveston in Galveston County, Texas, and are there conspiring together to carry out the illegal and improper instructions and orders of the said Ferguson to remove from his position your petitioner herein and others similarly situated, as aforesaid, and that unless said defendants and each of same, are restrained by the most gracious order of this court from so carrying out said conspiracy, that your petitioner and all others similarly situated in said faculties will be irreparably injured, in that their means of livelihood will be unlawfully and unjustly taken from them and their professional career unjustly and irretrievably injured and destroyed by an ignominous dismissal from honorable employment;

"Premises considered, petitioner prays that this court issue its most gracious temporary restraining order, restraining and preventing the said defendants, and each of same, all of whom are now in Galveston County, Texas, as aforesaid, where service of process upon them may be had, from doing or performing any act or thing, or entering into any agreement or combination, or taking or attempting to take any vote, or passing or attempting to pass any resolution for the purpose of removing or attempting to remove your petitioner, and others upon the faculties of said University similarly situated, from the positions now held by them until the further orders of this court, and that upon final hearing a permanent injunction issue perpetually restraining and preventing said defendants and each of same from taking action or performing any of said acts."

The prayer against the defendant, E. J. Mathews, was as follows:

"That the said E. J. Mathews, Secretary of said Board, be temporarily enjoined from taking account of, receiving, recording or publishing any vote made or attempted to be made, or any act or thing done by any of said named defendants, or by S. J. Tucker should he attempt and be allowed to participate in the proceedings of said Board, of or affecting any matter or thing as to which injunction is herein prayed against the Regent defendants."

It will be observed that the suit against the secretary was more formal than real, as he was sought to be prohibited from recording the acts and doings of the real defendants against the doings of which the injunction was issued.

Summarized, the complaint made in the petition is that the defendants named had *become disqualified to act* as Regents upon the question of the removal of the plaintiff in that action "and others of the faculties of said University similarly situated." The charge of disqualification made in the petition does not extend to those members of the Board of Regents not named as defendants, nor does it extend to the defendants concerning any other matter or question than the removal of the plaintiff and other members of the faculty similarly situated.

6 Curpus Juris, 811.
29 Opinions of Attorney General of United States, 99.

A school board must act as a unit in the manner prescribed by statute, as a board convened for the transaction of business but a majority may lawfully do official acts. In other words, it is not necessary that all members of a board of this character should concur in the exercise of its authority.

Voorhees Law of Public Schools, Sec. 44.
23 American and English Encyclopedia of Law, 366.

Nor is it necessary that all members of a board attend the meeting, provided all have had notice of the meeting, and there is a quorum present.

23 American and English Encyclopedia of Law, 366-7.

These general rules obtaining in other jurisdictions are statutory in this State, for Revised Statutes, Article 5502, Subdivision 5, declares:

"A joint authority given to any number of persons or officers may be executed by a majority of them, unless it is otherwise declared."

From this general and statutory rule, it is clear that a majority of the Board of Regents of the University of Texas may act on any matter coming before the Board. The question is, did the fact that four members of the Board were unable to act because enjoined on account of *alleged disqualifications* disable the Board from performing its statutory duties as a Board, in the management and government of the University?

In the case of People vs. Hecht, 45 American State Reports, 96, the Supreme Court of California held that the ineligibility of two members of a board of fifteen would not prevent action by the board.

In the case of Trustees, etc. vs. Brooks, 173 S. W. 305, the Court of Appeals of Kentucky held that the fact that there was one vacancy on a board with the statutory number of five members would not prevent the board from acting, and that its acts were valid. The court, in part, said:

"The statute provides that the board of trustees of graded common school districts shall consist of five members (Section 4469-A), and it is argued by appellees that as, at the time the election was held, for the purpose of authorizing the bond issue, there was a vacancy in the board, and there were only four members thereof, the board had lost its entity, and the four members had no power or authority to take any action except to fill the vacancy. The record shows that the four members unanimously joined in all of the proceedings leading up to the election. It is not claimed that there is any statutory provision preventing a quorum of the board from acting, and, in the absence of such provision, a quorum may take any action that the whole board might take. Barry vs. Town of New Haven, 162 Ky. 60, 171 S. W., 1012."
173 S. W., 307.

From these authorities, I think the conclusion correct that the Board of Regents of the University of Texas, although four of its nine

members were enjoined by reason of alleged disqualification from acting, was still qualified to act. All members of the Board, including those enjoined, had authority to, and were qualified to participate in the discussion of a vote upon any matter relative to the government of the University, except the four defendants named in this suit could not do or perform any act or thing, or enter into any agreement or combination or take or attempt to take any vote or pass or attempt to pass any resolution for the purpose of removing or attemtping to remove the plaintiff in this action or others upon the faculties of the University similarly situated from the positions held by them until the further orders of the Court. But this was by reason of their alleged disqualification, the determination of which issue was before the court, and presented a situation of no greater legal difficulty than would have been presented by a disqualification for any other cause. The suit was brought against the defendants individually and not against the Board, and, therefore, involved only a private right, to wit, the question of the disqualification of A. W. Fly, C. E. Kelly, John M. Mathis and W. G. Love, to exercise a certain function of their office. The public was not injured by reason of the existence of the lawsuit to any greater extent than it would have been if these gentlemen were disqualified to participate in any particular matter before the Board, by reason of interst or relationship.

Such being the status of the matter, the public did not have such interest in the litigation as would justify the defense of the suit at public expense, and for this reason this department on the 8th day of June, 1917, in a communication to Hon. Wilbur P. Allen, Chairman of the Board of Regents, declined to defend the suit.

Among other defenses urged, the defendants' claim that the suit was against the State, and, as the plaintiff had not secured consent of the State to be sued, that the same ought to abate.

Thus the judgment of the trial court was invoked on this issue.

In overruling this contention, Judge Graves, in a lengthy opinion, among other things, said:

"The argument is made that the suit seeks to control action of respondents in their official capacity. This may be conceded, and yet it does not follow that an attack is made on the State or that her rights are common to any defense that may properly be urged in this suit. It must also be conceded that neither the form of the suit nor the names of the record parties will naturally determine the character of the suit; the object to be accomplished or, in other words, the effect of the decree that may be entered may be recorded as the distinguishing charactristics."

Here relator seeks protection from the effects of alleged unauthorized conduct. Later, we assume, however, that the effects of such unsanctioned conduct were to prejudice the rights of the State instead of the individual rights of relator. Suppose, for example, that certain members of the Board should seek illegally to dispose of University property, can it be doubted that the Attorney General, in behalf of the State, might properly invoke the protection of a Court of Equity? Applying respondent's criterion, the supposed suit would be a suit by the State against the State. Applying what is believed to be the true test, as above indicated, neither this suit nor the supposed case would be a suit against the State.

Thus Judge Graves disposed of the contention of the defendants and held that the suit in question does not involve the interest of the State but was of a personal nature.

In the case of Hotchkiss vs. Plunkett et al., 60 Conn. 230, 22 Atl. 535, it was charged that the board of education of a school district had conspired together to injure the business reputation and standing of the Atwaters, and hinder and obstruct them in the prosecution of their business, and that in pursuance of such conspiracy they seized and secreted a bid which the Atwaters had made to the school district to furnish stationery for use in its schools and; in further pursuance of the same conspiracy, that they falsely stated to different parties that Atwaters carried on their business dishonestly, and had cheated the school district.

In holding that the attorney's fees could not be paid out of the funds of the school district, the court said:

"It seems to us to be too plain for anything but statement that the school district of the city of New Haven has no interest in injuring the business reputation and standing of a co-partnership of its citizens; nor is there any duty authorized by law, or imposed upon any of its officers or agents, to engage in a combination for such purpose, or to make charges of dishonesty and cheating. Any attempt to use the money of the district to defend its agents from such acts would seem to be so palpable a misuse of it that the court would not hesitate to interfere by way of an injunction."

The case of Conley vs. Daughters of the Republic, 106 Texas 80, was a suit to restrain the Superintendent of Public Buildings and Grounds from entering upon the Alamo property and making repairs according to an appropriation of the Legislature making provision for such repairs, and directing that it be done by said Superintendent; it was alleged by the defendant that it was in effect a suit against the State and could not be maintained. On this point, Judge Brown, speaking for the Supreme Court, said:

"It has been insisted that this is a suit against the State, therefore, not maintainable. This is not an action against the State, but against the plaintiff in error, charging him with a violation of a law of the State, and an invasion of plaintiff's rights. Stanlet vs. Schwalby, 85 Texas, 348; 36 Cyc., 917. The subject is treated exhaustively in the text and notes at the place cited. If the decision should be against plaintiff in error, it would not affect the State, but simply establish that he entered upon the premises and proceeded contrary to law, or without lawful authority. The petition for injunction alleged no act done by the plaintiff in error which he was not authorized by law to do under the instruction of the Governor. His entry did not interfere with the corporation in its possession, nor hinder the performance of any duty. The injunction was improperly granted."

While the Lomax suit grew out of the proposed action of these Regents, it no more involved the interest of the State than the proposed action of Conley in the above suit. If the decision of Judge Graves had been adverse to the defendants, it would in no sense have affected the State; it would not have embarrassed the Board of Regents to discharge its full duty, but would have established the fact that the said Regents, in connetcion with the Governor of the State, entered into an unlawful conspiracy detrimental to the plaintiff. This Texas case,

recently decided by our Supreme Court, is directly in point, and enables us to determine whether or not the Lomax suit involved a public matter, the expenses of which the State ought to bear, or a purely personal matter, the expenses and consequences of which the individuals must bear.

It is true the Lomax suit failed, so did the suit against Conley fail, but the fact that the plaintiff in each of these cases failed to sustain by proof the allegations could not change the nature of the suit. The nature of the suit is established by its own allegations, and not by the result. If it was a suit against members of the Board, in their individual capacity, in the beginning, it remains so throughout.

No individual is immune from the possibility of having groundless suits brought against him; he must appear in court and answer, and if the employment of counsel is necessary he must bear this expense from his own pocket. When a man enters upon the discharge of public duties he carries with him always this liability.

For the reasons above stated, my opinion is that this fee of eleven hundred ($1100.00) dollars can not legally be paid from public funds.

The Appropriation Bill, by authority of which it is proposed to pay this fee, enacted at the First Called Session of the Thirty-fourth Legislature, makes an appropriation "For the maintenance, support and direction of the University, etc."

No general expense, or contingent fund, is itemized in this appropriation, and no authority given to employ attorneys, and nothing expressed from which such authority could be implied. It is, therefore, my opinion that even if the charge was a legal one against the State, there exists no appropriation from which the same can be paid.

Furthermore, if under the facts of this case it could be said that the suit involved a public matter which should have been defended at the expense of the State, and if the Legislature had made a specific appropriation for attorneys' fees to be used by the Board of Regents in defense of such suits, it is my opinion that an appropriation for such a purpose would have been unauthorized by the Constitution, for the following reasons:

The Constitution, Section 1, Article 4, designated the *Attorney General* as one of the *executive officers of the State*. The office of Attorney General was one well known to the common law. The common law has been adopted in this State and is as much the law governing the affairs of this State as any statutory or constitutional provision. All the powers pertaining to this office at common law belong to it now except as the same may have been changed or authorized by our organic law. At common law the Attorney General was the law officer of the crown and was its chief representative in the courts. Under our form of government, all the prerogatives that pertain to the crown in England are vested in the people. Therefore, if the Attorney General is vested by our Constitution with the common law powers of that office and is obligated to perform the various common law duties devolved upon the officer, he became, and is the law officer of the people and their only legal representativ in the courts, unless, as above stated, the Constitution provides otherwise.

This same question arose in the State of Illinois. The Legislature there by an act approved June 29, 1915, among other things, made an appropriation for the expense of the insurance department. An appropriation was made "for legal services, $4,000.00 per annum; for expenses of prosecution for violations of the insurance laws, $15,000.00 per annum * * * for traveling expenses of attorneys, court costs *in re* prosecutions for violations of the insurance laws, $2,000.0 per annum."

The provisions of the Constitution of Illinois are almost identical with the provisions of the Constitution of this State in so far as the question now under consideration is concerned.

In disposing of the case the Supreme Court of Illinois, among other things, said:

"By our Constitution we created this office by the common law designation of Attorney General, and thus impressed it with all its common law powers and duties. As the office of Attorney General is the only office at common law which is thus created by our Constitution, the Attorney General is the chief law officer of the State and the only officer empowered to represent the people in any suit or proceeding in which the State is the real party in interest, except where the Constitution or a constitutional statute may provide otherwise. With this exception only he is the sole official advisor of the executive officers and of all boards, commissions and departments of the State Government, and it is his duty to conduct the law business of the State both in and out of the courts. The appropriation to the Insurance Superintendent for legal services and for traveling expenses of attorneys and court costs in prosecutions for violations of insurance laws is unconstitutional and void.

See American Annotated Cases, 1916 B.

Fergus et al. vs. Russel et al., 270, Ill., 304, 110 N. E., 130.

There is no provision of the Constitution of this State creating the University or in establishing the Board of Regents for its management, that attempts to strip or to authorize the Legislature or the Board of Regents to strip the Attorney General's office of its inherent common law power and duty to represent the State's interest in litigation involving this institution. If, therefore, the suit in question had involved the interest of the State, and if the Regents had a fund suitably appropriated by the Legislature, its use for such a purpose would, notwithstanding, be illegal.

The suggestion may be made that if the suit involved a public matter, the Attorney General having declined on request of the Chairman of the Board of Regents to defend the same, therefore, the expense incurred was necessary and legal.

The answer to such a contention is, that if the suit was one involving the State's interest it was the duty of the Attorney General to defend the same and on his refusal he could have been compelled by mandamus to perform the duty.

The conclusive answer, however, is that unless the Board of Regents is clothed with legal authority to employ attorneys and pay fees from public funds, it does not exist at all, and could not arise from the fact that the Attorney General either mistakenly or wilfully declined to perform his duty.

Yours very truly,

B. F. LOONEY,
Attorney General.

OPINIONS WITH REFERENCE TO BANKS AND BANKING.

OP. NO. 1744—BK. 49, P. 170.

BANKS AND BANKING—COURTS, VENUE AND JURISDICTION OF

Revised Statutes, Articles 404, 478, 469, 1526.
Revised Statutes, United States, Article 5236.

1. Suits on rejected claims against insolvent banks should be brought against such banks in the county where they transacted business.
2. The Commissioner is not a necessary, but is a proper party to such suits.
3. Such suits should be brought merely for the establishment of the claims, not either as mandatory actions against the Commissioner or for judgments and execution against the banks.

April 27, 1917.

Hon. Chas O. Austin, Commissioner Insurance and Banking, Capitol.

DEAR SIR: On yesterday we received a letter from Messrs. Thompson, Knight, Baker & Harris, Attorneys, at Dallas, Texas, which reads substantially as follows:

"The Peoples State Bank of Longview is in liquidation, and the Commissioner of Insurance has charge of same through its liquidating agent, Mr. John O. Douglas.

In behalf of certain cotton brokerage clients of ours in New York, we have filed claims with the liquidating agent, aggregating about $22,000, growing out of some cotton accounts handled by our clients.

The liquidating agent has rejected the claims upon the supposition that they are gambling transactions and not provable against the Bank. It will be necessary for us to file suits on the claims in order to establish them and the time for filing one of the suits will expire in about ten or twelve days.

The purpose of this letter is twofold. First, from our reading of the State Banking Laws and your very good book on the subject, we are left in doubt whether the Commissioner of Banking is a proper or necessary party defendant. We are inclined to assume that he is not a necessary party, but that he is a proper party. Have you or your department ruled in this matter? If so, we would very much appreciate having your views. Second, does your department defend these suits? If so, we assume that you would prefer to have us file suit in Austin, especially as the case will be decided on law to submit the case at Austin as at Longview."

A proper reply to this communication necessarily calls for an opinion of the Attorney General, and since the question will likely be a recurring one we have concluded to write an opinion directly to you expressing the views of this Department so that your office and the public as well may have the advantage of the rules which will govern this office in similar cases.

The claims referred to in the above letter were rejected by the Commissioner by authority of Revised Statutes Article 464. This same article of the statute declares that when a claim has been rejected by the Commissioner, "the action upon the claim so rejected must be brought within six months after the service," referring to the service of notice of rejection by the Commissioner. The statute

is somewhat indefinite as to the character of suit which is to be brought and as to the venue of the action. However, a consideration of additional statutes as well as the Federal Statute to which Article 464 is somewhat similar, will, we believe, make clear the purpose of the Legislature in all respects.

Article 464 as a whole reads as follows:

"May reject claim if, etc., notice, etc., action on.—If the Commissioner doubts the justice and validity of any claim, he may reject the same, and serve notice of such rejection upon the claimants, either by mail or by written notice personally served. An affidavit of the service of such notice, which shall be prima facie evidence thereof, shall be filed with the Commissioner. The action upon the claim so rejected must be brought within six months after such service." R. S., 1911, 464.

The National Bank Act covering the same subject is Section 5236 of the statutes of the United States and reads:

"From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the Comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held." Federal Statutes, Article 5236.

It will be noted from reading the Federal Statutes that provision is made for the receiver of a National bank paying such claims as may have been proved for his satisfaction, "or adjudicated in a court of competent jurisdiction." As to this the State act is somewhat similar, except a claim under the State Statute, in our opinion, must first be passed upon by the Commissioner and be rejected before it may be adjudicated by the court. The Federal Act would seem to contemplate that creditors may either prove their claims before the Comptroller or they may establish their claims in court by a suit against the defaulting bank.

Third Michie on Banks and Banking, p. 1191.

With us, however, the claim must first be presented to the commissioner and be by him rejected before any suit is brought. In the instant matter, however, the claims have been rejected by the Commissioner and the question is where the suit should be brought, and against whom. As suggested above, our Banking Act is similar to the Federal Act and for that reason should be construed in the same manner, except where the language used requires a different construction.

Collier vs. Smith, 169 S. W., 1111.

Our judgment is, therefore, that the action referred to in Article 464 should properly be brought against the bank, for the reason that under the Federal Statute suits for the establishing of the claims are brought against the banking association itself.

Third Michie on Banks and Banking, 1891.
Kennedy vs. Gibson, 8th Wallace, 506.
White vs. Knox, 111 U. S., 784.

Our view of the matter is that the bank itself being still a corporate entity, notwithstanding its insolvency, should be a party to the suit; that the Commissioner may be made a party also, but is not a necessary party. The courts in this State have held that the Commissioner, upon taking charge of a bank because of its insolvency, has a right to use the name of the bank in instituting and maintaining suits for the recovery of its assets.

McWhirter vs. First State Bank, Amarillo, 182 S. W., 682.

In this case the court held that the Commissioner of Insurance and Banking had the right to bring an action in the name of the bank which was in his hands for the purpose of liquidation, and among other things, said:

"Appellant's first assignment of error is that: "The Court erred in overruling defendant's plea in abatement, * * * because plaintiff's petition fails to show any authority in the said W. W. Collier and J. O. Roots to maintain the suit in the name of the plaintiff, First State Bank, and said petition shows that said First State Bank is incompetent to maintain said suit in its own name.

"The Supreme Court of the United States, in the case of Bank of the Metropolis vs. Kennedy, 17 Wall. 19, 21, L. Ed. 555, referring to previous authorities, decided by the same court, said:

" 'We have already decided in the case of this very receiver that he may bring suit in his own name or use the name of the association. Kennedy vs. Gibson, 8 Wall. (75 U. S.), 506 (19 L. Ed., 476). The subject was also lately discussed in the case of Bank of Bethel vs. Pahquioque Bank, 14 Wall. (81 U. S.), 383 (20 L. Ed., 840), and the same views were held; the action in that case being brought against the insolvent bank.'

"Appellant admits, of course, the initiative existence of the corporation, whose affairs are in the hands of the government, except in so far as its duties and responsibilities are suspended by the possession, under the law, by the State officers. The point is that the deprivation of dominion by the board of directors over the assets of the corporation is such that the corporation itself could not sue to realize upon the assets, and that the power could not be conferred upon it to sue for the benefit of the liquidator, or Collier, the Commissioner.

"The authorities, in similar matters, are against the contention. If a receiver could use the name of a national bank in bringing a suit, we can see no objection to the use of the name of a State bank by the Commissioner for the same purpose." S. W., 182, 683.

It will be noted that the ruling here made follows a construction that the Supreme Court of the United States placed upon the National Bank Act and that it holds, as suggested above, that action may be brought by the Commissioner in the name of the bank.

We must conclude, therefore, that our courts would also follow the holdings of the Federal courts to the effect that an action brought to

establish a claim could be brought against the bank, notwithstanding the fact that it is in the hands of the Commissioner.

The next question is where suits of this character should be brought. Revised Statutes, Article 464, does not undertake to state the venue, but this section is a part of the general liquidation provisions of our banking laws and other sections clearly indicate the venue of all actions concerning the liquidation of a bank in the hands of a commissioner.

Revised Statutes, Article 474, fixed the venue of suit to enjoin the Commissioner after he has taken possession of a bank in the district court "of the district in which such bank it located."

Article 458, which confers authority upon the Commissioner to sell the property of an insolvent bank upon the order of a court authorized him to obtain such order from the district court "of the county in which such State bank was located and transacting business."

Article 469 which prescribes the rules under which the Commissioner is authorized to pay dividends by a bank when it is in a course of liquidation, requires that the Commissioner should do so in such manner and upon such notice as may be directed by the district court, "of the district in which such bank was located and transacting business."

This last named article of the statute is a part of Section 9, Acts of 1909, Second Special Session, and Article 464 is a part of the same section. In fact, the various statutes to which we have just made reference are all a part of Section 9 and, of course, must be construed together. On construing them, our view of the matter is, that the phrase contained in Article 464, to-wit: "The action upon the claim so rejected must be brought within six months after such service" means, that the action must be brought in a court of competent jurisdiction in the district in which such bank was located and transacting business. In this case, in the district or county courts of Gregg County. The action of course should be brought for the establishment of the claim and not for a judgment against either the bank or a bank Commissioner. An action could not be brought of course against the Commissioner to compel him to allow the claim for this would be mandatory in its nature and within the exclusive jurisdiction of the Supreme Court of the State as that jurisdiction is prescribed by Revised Statutes, Article 1526.

We think the proper course to pursue is to bring the action against the bank alleging the fact that it is in the hands of the Commissioner, etc., with a prayer for service upon the Commissioner and finally if the opinion of the court should be favorable to the claimant the judgment would be merely the establishment of the claim as against the bank itself, and that further than this, the court would not be authorized to act. After a claim has been once established in this manner by the court, the Commissioner could of course then be mandamused and made to allow it if he should reject the claim after its establishment.

Our judgment about the matter is that the courts of Gregg County are the only ones having venue of such a suit as thus contemplated

and that the district court of Gregg County in the limited way provided by statute has charge of the liquidation of the bank. I am not quite sure but that the district court alone has jurisdiction of claims of this character regardless of the amount in controversy for the reason that practically all things that are done by the Commissioner must be done upon approval of the district judge or the district court, but it is unnecessary to brief this particular question at this time.

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

OP. NO. 1765—BK. 49, P. 255.

BANKS AND BANKING—COMMISSIONERS' COURTS—TAXATION.

Revised Civil Statutes, Art. 7564.

1. There is no statute authorizing a bank to disclose to the commissioners' court the status of its depositors' accounts, nor authorizing such courts to require such a disclosure.

2. A bank is not required to furnish the commissioners' court a list of its depositors' accounts, and can not do so without rendering itself liable for damages.

May 9, 1917.

Hon. Chas. O. Austin, Commissioner of Insurance and Banking, Building.

DEAR SIR: The letter from a Mr. J. G. Alsup, Cashier of the First State Bank at Grand Saline presenting the question concerning which you desire the advice of the Attorney General, reads substantially as follows:

"I have been informed that the commissioners' court of this, Van Zandt, county have passed an order directing the banks of the county to make, from their books, a list of the depositors of the date of January 1, 1917 and the amount to the credit of each and to submit the same to the said commissioners' court for their examination. This action is taken by the court that they may be able to force a rendition of money on deposit in the various banks. Will you kindly advise me on this matter as to the legality of such an order and whether or not I shall comply or use my own discretion in the matter?

"It appears to me that this is beyond the powers of the court. It is a violation of the confidence which should exist between the depositor and the bank."

We beg to advise you that the Commissioners' Court is without authority to enter or enforce any such order as that described in the letter quoted above. Revised Statutes, Article 7564, defines the authority and duties of the Commissioners' Court with reference to corrrection, equalization and approval of the assessment lists and books of tax assessors. It reads as follows:

"The commissioners' courts of the several counties of this State shall convene and sit as boards of equalization on the second Monday in May of each year, or as soon thereafter as practicable before the first day of

June, to receive all the assessment lists or books of the assessors of their counties for inspection, correction or equalization and approval.

"1. They shall cause the assessor to bring before them at such meeting all said assessment lists, books, etc., for inspection, and see that every person has rendered his property at a fair market value, and shall have power to send for persons, books and papers, swear and qualify persons, to ascertain the value of such property, and to lower or raise the value on the same.

"2. They shall have power to correct errors in assessments.

"3. They shall equalize improved lands in three classes, first-class to embrace the better quality of land and improvements, the second-class to embrace the second quality of lands and improvements, and the third-class to embrace lands of but small or inferior improvements. The unimproved lands shall embrace first, second and third class, and all other property made as nearly uniform as possible.

"4. After they have inspected and equalized as nearly as possible, they shall approve said lists or books and return same to the assessors for making up the general rolls, when said board shall meet again and approve the same, if same be found correct.

"5. Whenever said board shall find it their duty to raise the assessment of any person's property, it shall be their duty to order the county clerk to give the person written notice who rendered the same, that they desire to raise the value of the same. It shall be their duty to cause the county clerk to give ten days written notice before their meeting by publication in some newspaper, but, if none is published in the county, then by posting a written or printed notice in each justice's precinct, one of which must be at the court house door.

"6. The assessors of taxes shall furnish to the board of equalization, on the first Monday in May of each year, or as soon thereafter as practicable, a certified list of names of all persons who either refuse to swear or to qualify or to have signed the oath or affirmation as required by law, together with the assessment of said person's property made by him through other information; and the board of equalization shall examine, equalize and correct assessments so made by the assessor, and when so revised, equalized and corrected, the same shall be approved."

You will note that the authority under which the court in this inquiry assumes to act is subdivision 1 of the article quoted above. This subdivision, however, only authorizes the court to "see that every person has rendered his property at a fair market value." For this purpose they are authorized to send for persons, books and papers, swear and qualify persons, in order that they may "ascertain the value of such property and to lower or raise the value of the same." You will note from this that the authority of the board relates only to the ascertainment of or the lowering or raising of value of the property actually rendered. The courts hold that a board has no power to add to or strike from the assessment roll property placed thereon by the assessor or omitted by him. In the case of Sullivan vs. Bitter, the Court of Civil Appeals of this State, following opinions of the Supreme Court, said:

"The commissioners' court sitting as a board of equalization has no power under the law to assess property for taxes. The authority to assess property, save in exceptional cases, is vested in the assessor of taxes of the several counties of the State, and the method of making such assessments is plainly pointed out by statute. See Title 104, Chap. 3, R. S., 1895. 'An assessment of necessity involves at least two things, to wit, a listing of the property to be taxed in some form, and an estimation of the sums which are to be a guide in the apportionment of the tax.' Cooley on Taxation (4th Ed.), 596. An assessment by the properly constituted author-

ity is absolutely essential to support a tax. Galacha vs. Wendt, 114 Iowa, 604, 87 N. W., 512; Judy vs. National Bank, 133 Iowa, 252, 110 N. W., 608. In the absence of a statute authorizing it, a board of equalization can not assess property not listed and valued by the assessor. Cooley on Taxation, 776, 777. In this State such board 'has no power to add to the rolls property not previously assessed or to take from them property which they embrace.' See Article 5124, Revived Statutes, 1895, as amended by Acts 1907, 459, Chapter 11; Davis vs. Burnett, 77 Texas, 13, 3 S. W., 613; Galveston County vs. Gas Co., 72 Texas, 509, 10 S. W., 583; San Antonio St. Ry. vs. City of San Antonio, 22 Texas Civ. App., 341, 54 S. W., 907; 1 Cooley on Taxation, 777." 113 S. W., 195.

It is quite clear, therefore, that the order of the commissioners' court referred to in the letter above quoted is beyond the powers of the commissioners' court for a compliance with it would not be of any assistance to them in the performance of any legal duty imposed upon them by law. However, even if the statutes of this State gave the commissioners' court authority to make assessments and for this purpose to inspect and examine the records of corporations, still the order referred to embracing as it does the accounts of all depositors of the bank whether citizens of Texas, or of another state and whether they had correctly rendered their deposits or not, is too broad in its nature for even a court of equity in the construction of such a statute to require a compliance with.

Applegate vs. State, 63 N. E., 16.

In this case a petition for a mandamus and alternative writ to compel a bank to allow inspection of its books by the tax assessor was held insufficient for the reason that it proceeded upon the theory that the tax assessor could examine the account of any depositor regardless of whether such depositor was bound to pay taxes in this State and in alleging that tax payer had omitted to make returns of his deposits or that any tax payer had omitted to make a proper return. The statutes of the State of Indiana in which this case arose provided "for the purpose of properly listing and assessing property for taxation and equalizing and collecting taxes, the township assessor, county assessor, county auditor, auditor of State, boards of review and board of tax commissioners shall each have the right to inspect and examine the records of all public officials and books and papers of all corporations and tax payers in this State without charge." The Supreme Court of the State of Indiana held that the assessor did not have the right to compel the bank to disclose to him its list of depositors and their accounts.

Concerning the matter the Court in part said:

"This case can be decided properly without entering upon the consideration of the constitutional question to which counsel for appellant invite our attention. The alternative writ and petition in this case are insufficient. The relator has proceeded upon the theory that he was entitled, as county assessor, to examine the account of any depositor in said bank, regardless of the question as to whether he was obligated to pay taxes in this State. Appellant was not required to accord appellee so unrestricted a privilege. In a case like this, where appellee was bound to show not only a clear, but also a specific, duty violated, it was not the duty or right of the court below to attempt to segregate from the demand in all of its

breadth the right that appellee may have had. Moreover, the amended alternative writ and petition are insufficient because the relator does not allege that any taxpayer who was a depositor in said bank on the first day of April, 1898, or on the first day of April, 1899, had omitted to make a proper return for taxation of all of his money so on deposit, or that the relator had just cause to believe that he had not done so. The alternative writ or the petition ought also to have alleged what taxpayers had, as he believed, so omitted to make return of his money on deposit in said bank for taxation. Whether the petition and alternative writ were otherwise defective it is not necessary to determine. It is evident, however, that, if appellee's pleadings had contained the allegations suggested by us, it would then appear that relator was seeking a remedy for the omission to perform what he conceived to be a specific duty. With the pleadings in their present form, relator appears to be in the attitude, at least to some extent, of using one of the highest writs known to our system of jurisprudence for the purpose of determining a mere question of abstract right. Mandamus is not a remedy for settlement of moot questions, but it is intended to compel the performance of the concrete legal duties."

Our view is, that a bank has no right to disclose the status of its depositors' accounts to any one except in the enforcement of the law or in the maintenance of some right where such disclosure is authorized by law or directed by court in the administration of justice, and certainly a bank has no right to disclose to any one the state of its depositors' accounts unless required to do so by statute.

See Morse on Banks and Banking, Sec. 294.

In the instant case, there is no statute authorizing a bank to disclose to the commissioners' court the status of its depositors' accounts and no statute authorizing commissioners' courts to require such disclosures. The bank, therefore, is not required to furnish the list referred to in the letter quoted nor can it do so without rendering itself liable for any damage or injury which might accrue to any one or more of its depositors.

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

OP. NO. 1796—BK. 49, P. 399.

BANKS AND BANKING—THEFT—EMBEZZLEMENT—PENAL CODE ARTICLES 1340, 1341, 1342, 1346, 1416, and 1419.

1. Penal Code, Article 1346, is not applicable to the theft or destruction of the records and papers of a State Bank.
2. Theft of such papers or records by an employe may be punished under the embezzlement statute.

July 14, 1917.

Hon. Chas. O Austin, Commissioner of Insurance and Banking, Capitol.

DEAR SIR: Your letter of July 12, propounding an inquiry for the consideration of this office reads as follows:

"I beg to inquire whether or not in your opinion Article 1346, Chapter 9, Title 17, Revised Criminal Statutes of Texas, 1911, is broad enough to justify this Department in asking the proper authorities to prosecute the cashier of a State bank who has removed many of the books, debit tickets and other records from the bank for the purpose apparently of preventing the county commissioners court from ascertaining the amount of interest due upon county deposits carried with the bank, and some of which records have been destroyed by the cashier or others acting at his direction.

"The statute referred to reads as follows: 'If any person shall take and carry away any record, book or filed paper from any clerk's office, public office, or other place where the same may be lawfully deposited or from the lawful possession of any person whatsoever, with intent to destroy, suppress, alter or conceal, or in any wise dispose of the same, so as to prevent the lawful use of such record or filed paper, he shall be deemed guilty of theft and punished by imprisonment in the penitentiary not less than three nor more than seven years.

"The offense referred to was committed while the offender was cashier of one of our State banks but he has since resigned at the instance of this department and upon demand of this department has attempted to restore to the possession of the bank the books removed therefrom but has been unable to restore certain debit tickets and other papers pertaining to entries concerning interest due by the bank to the county upon its daily balances."

The question for determination is whether or not the facts stated in your communication will authorize a prosecution under the Penal Code, Article 1346. Your letter correctly quotes the Article, and it is therefore unnecessary that it again be stated in this opinion. A construction of the verbiage of the article leads us to believe that the offense defined relates only to the unlawful taking or carrying away of public records, books or filed papers properly belonging to a public office, and that the article does not undertake to punish any offender for taking or destroying the records, books or papers of a private corporation, such as a bank.

You will notice that the initial language of the article refers to "any record book or filed paper from any clerk's office." This manifestly refers to the office of a public officer and not to the place of work or business of a private individual or a private corporation. We are of the opinion, therefore, that the facts stated in your communication would not constitute an offense under this article of the Penal Code.

However, any one embezzling, or fraudulently misapplying, or converting to his own use any property of a private corporation would be guilty of embezzlement under the Penal Code, Article 1416. This article reads as follows:

"Article 1416. If any officer, agent, clerk or attorney at law or in fact, of any incorporated company or institution, or any clerk, agent, attorney at law or in fact, servant or employe of any private person, copartnership or joint stock association, or any consignee or bailee of money or property, shall embezzle, fraudently misapply or convert to his own use, without the consent of his principal or employer, any money or property of such principal or employer which may have come into his possession or be under his care by virtue of such office, agency or employment, he shall be punished in the same manner as if he had committed a theft of such money or property."

The term property as used in this article includes any and every article commonly known and designated as personal property, and all writing of any description that may possess any ascertainable value. The definition stated is taken from the Penal Code, Article 1419, which reads as follows:

"Article 1419. The term "money," as used in this chapter, includes, besides gold, silver, copper or other coin, bank bills, government notes or other circulating medium current as money; and the term "property" includes any and every article commonly known and designated as personal property, and all writings of every description that may possess any ascertainable value."

The only diffculty about the case presented in your letter is whether or not the books and papers destroyed or converted by the party to whom you refer have any ascertainable value, and, if so. whether or not this value is sufficient to make the offense a felony, so that the offender may be adequately punished. You will note that Article 1416 declares that punishment for embezzlement shall be in the same manner as if the accused had committed a theft. The punishment for theft of $50.00 and over is set forth in the Penal Code, Article 1340, which declares that theft of property of the value of $50.00 or over shall be punished by confinement in the Penitentiary for not less than two nor more than ten years. The punishment for theft of property under the value of $50.00 is defined in Article 1341, which fixes the punishment at imprisonment in the county jail not exceeding two years and by fine not exceeding $500.00, or by imprisonment without the fine.

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

OP. NO. 1791—BK. 49, P. 411.

BANKS AND BANKING—BANKS, FEES FOR EXAMINATION OF—CONSTRUCTION OF LAW.

R. S., Art. 522.
U. S. R. S., Sec. 5240.

1. Trust companies must pay examination fees in proportion to their capital stock as provided by statute; and the Commissioner has no authority to reduce these fees unless he reduces the fees for all banks of the same class.

2. When a law is plain, it should be held to mean what is plainly expressed, and unless exceptions are named, none can be allowed.

July 17, 1917.

Hon. Chas. O. Austin, Commissioner of Banking, Capitol.

DEAR SIR: Your letter presenting the question for determination by the Attorney General reads substantially as follows:

"Article 522, R. S., Texas, 1911, provides that the expense of every general and special examination of our state banks shall be paid by the

corporation examined in such amount as the Commissioner of Insurance and Banking shall certify to be just and reasonable, but fixes a maximum limit to such fees.

"The custom in this department from the time when this statute became effective appears to have been to collect the maximum fees permitted by law, of all banks examined. This is as it should have been, in my judgment, as the maximum fees are necessary to provide funds to carry on the work and also are in many instances not commensurate with the labor and time necessary to examine a large number of our banks, by reason of the fact that such fees are based upon the capital stock of the bank and not upon the assets thereof, and it quite often happens that a bank with assets of $250,000, pays no more fee for examination that a bank with assets of less than half this sum. Very naturally, the larger the volume of assets of any bank, the greater the time and labor necessary to a proper examination of such bank.

"On the other hand, we have one particular case in Texas of a trust company with a capital stock of $600,000, and it limits its business exclusively to the making and selling of mortgage loans. The examination of this company requires very little time, the examiners find it possible to work it in a day or less. Were this company engaged in a general banking business and carrying a line of deposits commensurate with its capital and its location, it would have a large volume of loans and discounts which would require several days time to check and investigate, and under these conditions the statutory fee of $125 per examination would not be excessive. On the other hand, $125 is an excessive fee for an institution to pay for an examinaton requiring six or eight hours, especially when it is considered that those examinations must be made at least four times in each year.

"During the past year the management of this company has made repeated efforts to have this department reduce the fee for the examinations, but consideration of their appeal has not been had, because of reasons of business expediency.

"This Commissioner, however, is now inclined to the opinion that the fee is excessive and that the company should have some relief, provided such may be legally extended to it, and I desire to have your opinion as to whether or not the Commissioner of Insurance and Banking may legally and arbitrarily reduce the fee for examining any one bank or trust company in accordance with his judgment and discretion without having to reduce the fees of all other banks operating under the supervision of this department. In other words, may I legally reduce the examination fees of the company under discussion without reducing the fees for all other corporations in like proportions?"

R. S., Art. 522, referred to by you, and which is Sec. 214, C. and H. Banking Laws, in so far as it may be necessary to consider the same, reads as follows:

"The expense of every general and special examination shall be paid by the corporation examined in such amount as the Commissioner of Insurance and Banking shall certify to be just and reasonable. Provided, such expenses shall be paid in proportion to the amount of capital stock of the various corporations as follows: Those with a capital stock of ten thousand dollars shall not pay more than twelve and one-half dollars; those with a capital stock of more than ten thousand dollars and not exceeding twenty-five thousand dollars shall not pay more than fifteen dollars; those with a capital stock of more than twenty-five thousand dollars and not exceeding fifty thousand dollars shall not pay more than twenty dollars; those with a capital stock of more than fifty thousand dollars and not exceeding one hundred thousand dollars shall not pay more than thirty dollars; those with a capital stock of more than one hundred thousand dollars and not exceeding two hundred and fifty thousand dollars shall not pay more than thirty-seven and one-half dollars; those with a capital stock of more than two hundred and fifty thousand dollars and

not exceeding five hundred thousand dollars shall not pay more than seventy-five dollars; those with a capital stock of more than five hundred thousand dollars and not exceeding one million dollars shall not pay more than one hundred and twenty-five dollars; those with a capital stock of more than one million dollars and not exceeding two million dollars shall not pay more than one hundred and fifty dollars; those with a capital stock of more than two million dollars and not exceeding four million dollars shall not pay more than two hundred dollars; and those with a capital stock exceeding four million dollars shall not pay more than three hundred dolars. The permanent surplus of any such corporation shall be reckoned in ascertaining the fees for examination as a part of its capital stock. All sums collected as examination fees shall be paid by the Commissioner of Insurance and Banking directly into the State Treasury, to the credit of the general revenue fund." Cureton-Harris Banking Laws of Texas, 276.

It is clear enough that the purpose of this provision is to enable the State to collect from the banks a just compensation for the services rendered by your Department in conducting examinations, and a maintenance of your Department for such purpose. The statute has, however, provided that in the payment of these expenses that the same shall be "paid in proportion to the amount of capital stock of the various corporations." Then follows a maximum schedule of fees to be collected, based upon capital stock. You will note that the amount to be collected is not, by this or any other statute, made proportionate to the business done by the bank, the amount of deposits carried, or the actual time of your examiners or of your Department necessarily devoted to the examination of any bank. The Legislature has established a statutory rule by which the proportionate amount of expenses shall be paid by the banks, and has made this dependent upon the amount of capital of each bank. We are not able to say that this Legislative rule is arbitrary or unjust, and in the absence of clear showing that such a provision is arbitrary, we must conclude that the Act is valid and one within the discretion of the Legislature.

The fees fixed by the Federal Statutes for the examination of national banks are based upon the capital stock of the banks, and not upon the business done by them, nor upon the deposits of such banks. 5 Fed. St. Ann., Sec. 5240. The National Bank Act has long been in effect, and has proven, in the main, satisfactory and just. The State in adopting such system has followed the National Bank Act, and to now say that examination fees based upon the capital stock are arbitrary would be to attack not only the State system, but the National system as well, and to take a position which cannot be supported either in fact or law.

It is quite true that in the instant case you present a state of facts which apparently shows an injustice to the trust company to which you refer, but this injustice does not arise out of the law, but out of the fact that the trust company limits its business. The company has, or could have and exercise under the law, all the powers of a bank, and the fact that it does not do so is due wholly to its own volition.

It is quite true that the Legislature ought to have prescribed a different rule for companies of this character, but it has not done so, and

since the statute expressly declares that the collections made by you shall be in proportion to the capital stock of the various corporations, you cannot do other than follow the statute.

The rule is that when a law is plain and unambiguous, whether it be expressed in general or limited terms, it should be held to mean what has been plainly expressed. State vs. Delesdenier, 7 Texas, 76; Anderson vs. Neighbors, 94 Texas, 236, and that where the Legislature has made no exception to the operation of a statute, the courts should make none. Summers vs. Davis, 49 Texas, 555; McAnally vs. Ward Bros., 72 Texas, 344.

The statute plainly says that the expenses paid by the banks of the State shall be in proportion to the amount of capital stock of the various corporations. This, of course, necessarily means that the proportion shall be the same, that is, if you fix one amount per thousand dollars of capital for one bank, you must charge the same amount per thousand dollars for all banks of that class, subject at all times to the maximum charges prescribed by the statute. You are advised, therefore, that you must charge the trust company to which you refer the same fees that you prescribe for and charge other banks with the same capital, and you cannot reduce the fees for this company without reducing the fees for all other banks with the same capital.

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

OP. NO. 1788—BK. 49, P. 416.

BANKS AND BANKING—ANTI-TRUST LAWS—MONOPOLY—STOCKHOLDERS' LIABILITY—CONSTITUTIONAL LAW.

Constitution, Art. 16, Sec. 16. R. S., Arts. 376, 552, 556, 7796, 7797. Acts of 1889, Anti-trust Laws.

1. The actual owners of stock in a state bank are subject to the double liability imposed by the Constitution and statute, regardless of whether their names appear as stockholders or not.
2. The proxy and trustee agreement quoted in the opinion is sufficient to show prima facie that the signers are stockholders in the state bank.
3. This being a trust agreement, the statute expressly makes the signers who are the beneficiaries subject to the stockholders' liability imposed by our Constitution and laws.
4. The facts stated show a violation of the anti-trust laws of the State.
5. The banking business in this State is subject to the provisions of the anti-trust laws.

July 19, 1917.

Hon. Chas. O. Austin, Commissioner of Banking, Capitol.

DEAR SIR: Your communication presenting the question for determination by this office reads as follows:

"The Farmers Guaranty State Bank of M., Texas, has a capital stock of $25,000. The First National Bank of M., Texas, has recently declared a special dividend in the sum of $15,000, and this sum has been used to pay for $15,000 par value of the stock of the Farmers' Guaranty State

Bank, and this stock has been issued to and is now held by G. W. N., as trustee for the respective stockholders of the First National Bank in the same proportion as their respective holdings in said banks sustains to the sum of $15,000, the par value of the stock purchased. So far as the records of the Farmers' Guaranty State Bank show, this $15,000 of stock has been issued to G. W. N., Trustee, and there is nothing to show the nature of his trust. Upon request of our bank examiner, Mr. N. has furnished us with a copy of an instrument purporting to be signed by various stockholders of the First National Bank and purporting to create him their lawful attorney and trustee for the purpose of purchasing and holding this stock. This is an unusual transaction for Texas banks, and this is the first instance of the kind that has cone before the department during the writer's connection therewith. The questions I desire to sumbit and upon which I beg to have your advice are:

"1st. Is this transaction, which was effected for the purpose of securing and holding control of the Farmers' Guaranty State Bank by the stockholders of the First National Bank, in your judgment a violation of the anti-trust laws of this State?

"2nd. Would the instrument executed by the stockholders of the First National Bank, appointing G. W. N. attorney in fact and trustee, be a sufficient acknowledgement of the ownership by the respective stockholders of the First National Bank of stock in the Farmers' Guaranty State Bank to make them liable for the double liability upon state bank stock, and in case of insolvency could we enforce their liability thereon, if there is no other evidence of ownership of the stock than appears above?

"You will understand that the practical effect of this arrangement is to cause the First National Bank to become the owner and controller and, in virtuality, the manager of the business of the Farmer's Guaranty State Bank.

"I enclose (1) copy of instrument executed by the stockholders of the First National Bank, (2) letter from cashier of the First National Bank to our examiner, and (3) list of stockholders in First National Bank who are the owners in fact of the stock now held in the name of G. W. N., trustee."

The copy of the instrument referred to in this letter and which is signed by the various parties whose names appear in the body of the instrument, reads:

"State of Texas,
County of ————.

"Know all men by these presents, that we (here follow the names of the stockholders of the First National Bank signing the instrument) do hereby make, constitute and appoint G. W. N. of M., Texas, our true, sufficient and lawful attorney, for us and in our name to apply our proportion of the special dividend declared by the First National Bank of M., Texas, on the nineteenth day of April, 1917, to the purchase of the capital stock of the Farmers' Guaranty State Bank of M., Texas, in the proportion of one share in said State Bank to every four shares we now hold in the First National Bank of M., or the fraction thereof, said stock so purchased to be issued to, and held by G. W. N. as trustee for us, who is hereby empowered to vote same and act for us as such trustee in all particulars in our place and stead; and to do and perform all necessary acts in the execution and prosecution of the aforesaid business in as full and ample a manner as we might do if we were personally present."

In addition to the facts disclosed in your letter, your Department has informed us that the capital stock of the First National Bank of M. is $60,000. The enclosures also show that J. P. A. is president, J. H D. is vice-president, S. J. M. is vice-president, and that G. W. N. is cashier, with J. G. O. assistant cashier of the First National Bank of M.

We will answer your second question first. Your second question is whether or not the instrument executed by the stockholders of the First National Bank, appointing G. W. N. attorney in fact and trustee, etc., is a sufficient acknowledgement of the ownership of stock in the Farmers' Guaranty State Bank to make them liable for the double liability provided by the Constitution and laws of this State in the event it should become necessary to enforce the same. We beg to advise you that this instrument is sufficient for the purpose stated. We will now state the method of reasoning by which we have reached this conclusion:

The constitutional provision of this State fixing the liability of stockholders in State banks declares:

"Each shareholder of such corporate body incorporated in this State, so long as he owns shares therein, and for twelve months after the date of any bona fide transfer thereof, shall be personally liable for all debts of such corporate body existing at the date of such transfer, to an amount additional to the par value of such shares so owned or transferred, equal to the par value of such shares so owned or transferred." Constitution, Article 16, Section 16.

The statute concerning this same subject reads:

"Section 206. Stockholders' Liability for Debts of Bank, etc., Defined.—If default shall be made in the payment of any debt or liability contracted by any bank, trust company, surety and guaranty company (or) savings bank, each stockholder of such corporation, as long as he owns shares therein, and for twelve months after the date of a transfer thereof, shall be personally liable for all debts of such corporation existing at the date of such transfer, or at the date of such default, to an amount additional to the par value of such shares so owned or transferred, equal to the par value of such shares so owned or transferred." (Revised Statutes, Article 552, Acts 1905, S. S. 511, Section 59.)

C. & H. Banking Laws, Sec. 206, 262.

You will note that both the Constitution and the statute are explicit about this matter. They declare without qualification that the stockholders of State banks shall be liable; no exceptions are made as to stock subscribed for or held in the name of another, nor does any exception arise out of any other contingency. These laws simply declare that the stockholders shall be liable. When once the ownership of the stock is established, the inquiry ends and potential liability attaches. This construction is consistent with the plain import of the language both of the organic law and the statute; the meaning being plain and no exception being specified, the letter of the constitutional and statutory provisions must be followed, for the courts will not declare an exception when the law declares none. State vs. Delesdenier, 7 Texas 76; McAnally vs. Ward Bros., 72 Texas 342.

This construction is in harmony with that given the National Bank Act upon which our constitutional and statutory sections are based. The true owner of the stock in a bank is the one to be charged with liability, and a shareholder cannot avoid statutory liability by listing his shares in the name of another. He may be charged, although his name has never appeared upon the books of the bank. Ohio Valley National Bank vs. Hulitt, 204 U. S. 162; Rankin vs. Fidelity Trust Co., 189 U. S. 252.

In the present case Mr. N. is clearly the trustee of the actual shareholders. In such a case the actual owners are made liable by Revised Statutes, Article 556, which reads in part as follows:

"No person holding stock in the corporation as executor, administrator, guardian or trustee, and no person holding such stock as collateral security shall be personally subject to any liability as stockholder in such corporation; but the person pledging such stock shall be considered as holding the same, and shall be liable as stockholder accordingly. And the estate and funds in the hands of such executors, administrators, guardians or trustees, shall be liable in like manner and to the same extent as the testator or intestate, or the ward or persons interested in such trust funds would have been if he had been living and competent to act and hold the same stock in his own name." (R. S., Art. 556.) C. & H. on Banking Laws, Sec. 207.

This last quoted statute is somewhat indefinitely framed, but is sufficient to declare in statutory form that liability which would exist even without this statute.

You are advised, therefore, that the actual owners of this stock are subject to the double liability imposed by the Constitution and laws of this State, and that the trust and proxy agreement entered into by these stockholders is sufficient evidence to prove prima facie their ownership of the stock in the State bank.

Your first question presents a matter of more difficulty. It appears from the facts before us that the First National Bank of M. and the Faremrs' Guaranty State Bank of that city were competitors in business, the former having a capital stock of $60,000 and the latter of $25,000. As shown by the agreement, all the stockholders of the First National Bank entered into a contract, voting, trust and trustee agreement by which Mr. N., the cashier of the First National Bank, was authorized to take a special dividend of $15,000 declared by the First National Bank, and purchase three-fifths of the capital stock of the Guaranty State Bank. The shareholders of a State bank have a right to vote by proxy duly authorized in writing. C. & H. Banking Laws, Sec. 205; Acts of the Legislature, 1915, p. 208, Sec. 4. Moreover, the stockholders of the bank have the right to enter into a combination and agreement by which they vote their stock for the purpose of electing a board of directors and controlling the bank. Withers vs. Edmonds, 26 Texas Civil Appeals 189.

We know of no law nor rule which would prevent the stockholders of a State bank from selecting some person as proxy holder, even for the purpose of consummating an agreement to control the affairs of the corporation. Likewise, we know of no law which would prevent the selection of one man as trustee to purchase stock and act as proxy holder for one or more persons. This is done every day by the employment of brokers, agents and attorneys. There is no law against the stockholders of a national bank owning shares or even a majority or all of the shares in a State bank. Considered thus far and giving the acts disclosed no larger meaning than that thus specified, no violation of the anti-trust or other laws of the State appears, but by consideration of the whole matter a very different situation becomes obvious, and we find ourselves upon dangerous ground.

Here, briefly, is the situation: The First National Bank and the Guaranty State Bank are competing banks in a medium sized, progressive city with sufficient business to sustain both banks. It is a matter of common sense and common knowledge that if these two banks come under the same management and submit themselves to one control, that in the nature of things competition between them is at an end.

With the foregoing general statements, we will proceed to examine the anti-trust statutes of this State. Revised Statutes, Article 7796, defining a trust, in so far as it is necessary here to be considered, reads as follows:

"Article 7796. 'Trusts' defined.—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.

"3. To prevent or lessen competition in the manufacture, making, transportation, 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." Revised Statutes, 7796.

"Monopoly" is defined by Revised Statutes, 7797, which reads:

"Article 7797. 'Monopoly' defined.—A monopoly is a combination or consolidation of two or more corporations when effected in either of the following methods:

"1. When the direction of the affairs of two or more corporations is in any manner brought under the same management or control for the purpose of producing, or where such common management or control tends to create a trust as defined in the first article of this chapter.

"2. Where any corporation acquires the shares or certificates of stock or bonds, franchise or other rights, or the physical properties, or any part thereof, of any other corporation or corporations, for the purpose of preventing or lessening, or where the effect of such acquisition tends to affect or lessen competition, whether such acquisition is accomplished directly or through the instrumentality of trustees or otherwise." Revised Statutes, Article 7797.

The first question for determination is whether or not the business of banking is limited, affected, or controlled by these articles of the statute defining, prohibiting and punishing trusts and monopolies. In the first anti-trust statute of this State, which was passed in 1889 and which corresponds with those portions of Article 7796 quoted above, we find the following:

"Section 1. Be it enacted by the Legislature of the State of Texas: That a trust is a combination of capital, skill, or acts by two or more persons, firms, corporations, or associations of persons, or of either two or more of them, for either, any, or all of the following purposes: First. To create or carry out restrictions in trade. Second. To limit or reduce the production, or increase or reduce the price of merchandise or commodities. Third. To prevent competition in manufacture, making, transportation, sale, or purchase of merchandise, produce, or commodities. Fourth. To fix at any standard or figure, whereby its price to the public

shall be in any manner controlled or established, any article or commodity of merchandise, produce, or commerce intended for sale, use, or consumption in this State."

You will note that the Act of 1903, which is the present law, quoted above, materially changed the meaning and application of the original Act of 1889. From reading the two it will be observed that the scope of the Act was broadened and made to apply not only to articles of trade and commerce, but to "aids to commerce"; also that the Anti-trust Act was made to apply to any act or combination, the purpose of which was "to create or carry out restrictions in the free pursuit of any business authorized or permitted by the laws of this State." These material and far reaching amendments to the law were made subsequent to the opinion of the Supreme Court of the State in the case of the Queen Insurance Company vs. The State, 86 Texas, page 250, in which case the court held that the business of insurance was not affected by the Anti-trust Act; that insurance was neither trade nor commerce, and, therefore, insurance companies could with impunity enter into combinations of any kind and character (86 Texas, 264-265). In the course of this opinion the Supreme Court declared that insurance was not trade, traffic or commerce, but that "it is an aid to commerce." Following this opinion and no doubt as a direct result thereof, the Legislature in 1903 amended the anti-trust and monopoly statutes, and made them apply not only to trade and commerce, but to aids to commerce and to any business authorized or permitted by the laws of Texas. The banking business is, of course, one authorized and permitted by the laws of Texas, and is, we believe, an "aid to commerce." The Supreme Court of the United States has held that a dealer in exchange supplies an instrument of commerce. Nathan v. Louisiana, 8 Howard, 73.

The business of a State bank, or rather the powers which it may exercise, is set forth in Revised Statutes, Art. 376, which reads:

"Section 72. Powers of Banking Corporations.—Every such corporation shall be authorized and empowered to conduct the business of receiving money on deposit, and allowing interest thereon, and of buying and selling exchange, gold and silver coins of all kinds; of loaning money upon real estate and personal property and upon collateral and personal securities at a rate of interest not exceeding that allowed by law; provided, that no bank organized under this title shall loan more than fifty per centum of its securities upon real estate; and no such bank shall make a loan on real estate of an amount greater than fifty per centum of the reasonable cash value thereof; also of buying, selling and discounting negotiable and non-negotiable paper of all kinds, as well as all kinds of commercial paper. (R. S., Art. 376; Acts, 1905, S. S., 490, Sec. 3.)" C. & H. Banking Laws, Sec. 72, 83.

Manifestly, a corporation exercising those powers and functions is aiding commerce and the country in a very practical and material way. Argument would seem superfluous. Commerce cannot exist without cash, credit and a system of quick, certain and inexpensive exchange. These things banks supply. They collect into great reservoirs the cash and credit of the country, from which it is distributed into industry and commerce in such amounts and at such times as

business may demand. Banks are not unlike lakes and reservoirs in which are collected surplus waters for redistribution for purposes of irrigation, and are as essentially aids to commerce as the latter to successful agricultural production. In fact, the Supreme Court of the United States has declared the safety of the business of banking to be one of the primary conditions of successful commerce. In the case of Noble State Bank vs. Haskell, 219 U. S. 111, that court, in referring to the guaranty of bank deposits, declares:

"It may be said in a general way that the police power extends to all the great public needs. Camfield vs. United States, 167 U. S., 518. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare. Among matters of that sort probably few would doubt that both usage and preponderant opinion give their sanction to enforcing the primary conditions of successful commerce. One of those conditions at the present time is the possibility of payment by checks drawn against bank deposits, to such an extent do checks replace currency in daily business. If then the Legislature of the State thinks that the public welfare requires the measure under consideration, analogy and principle are in favor of the power to enact it. Even the primary object of the required assessment is not a private benefit, as it was in the cases above cited of a ditch for irrigation or a railway to a mine, but it is to make the currency of checks secure, and by the same stroke to make safe the almost compulsory resort of depositors to banks as the only available means for keeping money on hand."

We conclude, on the whole, then, that the business of banking is within the protective, inhibitory and penal provisions of the anti-trust laws of this State, and that banks and bankers are as much bound to respect the anti-trust laws as are dealers in commodities. This conclusion is in harmony with the opinions of this office on the subject of banking, from the beginning. On January 11, 1912, the Attorney General of the State, in an opinion written by the Honorable John W. Brady, Assistant Attorney General, held that an agreement entered into between the banking institutions of a city prohibiting overdrafts, would be in violation of the anti-trust law; not that any bank on its own motion might not prohibit overdrafts, but that when two or more banks entered into a combination for this purpose, that such combination violated the anti-trust laws. This opinion was predicated upon the propositions that the banking business was an aid to commerce, and was a business authorized and permitted by the laws of this State and in which the statute prohibited any agreement tending to restrict the business. In this opinion Judge Brady in part said:

"The question now recurs: Does the practice of allowing overdrafts, of the character above named, constitute commerce or aids to commerce? There is strong authority for the proposition that bills of exchange, drafts, checks and other like paper are commercial instruments to facilitate commerce, and, if not part of the commerce itself, fairly come within the term, and may be designated as 'aids to commerce' (see 9 Mich., 241; Nathan vs. Louisiana, 17 U. S., 507); and the practice being legal, any agreement or understanding by and between two or more banks of a city prohibiting absolutely the granting of such privileges, upon the part of all the parties to the agreement, would in our opinion create and tend to create and carry

out restriction in commerce and aids to commerce and would therefore be violative of Section 1 of said Act.

"We are further of the opinion that such an agreement would create and carry out restrictions in the free pursuit of a business authorized or permitted by the laws of this State, within the purview of said statute. The banking business is one authorized and permitted by the laws of the State; and the making of loans in the way of overdrafts is a part of such business, and a usual and familiar feature of modern banking. Indeed, some of the authorities treat the same as a practical necessity in the conduct of such business, although this view is doubtless too broad. At all events, when pursued with a reasonable degree of prudence and according to the ordinary usage, it is free from illegality, under the present state of the law, and any agreement or understanding whereby banks, parties to the same, bind themselves not to grant this privilege to their customers, creates and carries out restrictions in the free pursuit of their business within the meaning of said statute. In the absence of such an agreement or understanding, the banks would each be free to allow this privilege to their customers; and, since they agree to discontinue the usage and practice, they thereby necessarily restrict their freedom to act in a matter of business, which they would otherwise be free to do. We cannot conceive how it could be held that under such an agreement each party thereto would not be restricting the free pursuit of the business of every other party thereto, as well as his own business. It follows from what has been said that an agreement of the character suggested would be illegal and would subject the parties thereto to the penalties of the Act." Vol. 25, Opinions of the Attorney General, 171-2.

Prior to this time, however, the Attorney General had held that the banking business was subject to the limitations of the anti-trust laws. On February 28, 1907, the Attorney General held that any agreement between banks to fix collection charges constituted restrictions in violation of the anti-trust laws. In that opinion the Attorney General in part said:

"You are respectfully advised that Subdivision 1 of Section 1 of the Anti-trust Act of 1903, defines a trust to be * * * a combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons, or either two or more of them for either, any, or all of the following purposes: 'To create or which may tend to create or carry out restrictions in trade or commerce or aids to commence or in the preparation of any product for market or transportation, or to create or carry out restrictions in the free pursuit of any business authorized or permitted by laws of this State.'

"Bills of exchange, drafts, and the character of paper to which you refer are commercial instruments to facilitate commerce, and if not a part of the commerce itself, clearly come within the term and may be designated 'an aid to commerce' (9 Mich., 241; Nathan vs. Louisiana, 17 U. S., 507); and any combination, agreement, or understanling between banks to fix the charge for collections, would, in my opinion, constitute a restriction in commerce and aids to commerce, in violation of said act.

"Again. The understanding, if adopted and acted upon by any two or more of the banks, would violate that provision of the same section quoted, which prohibits the creation or carrying out of the restrictions in the free pursuit of any business authorized or permitted by the laws of this State. Collections such as you have mentioned are a part of such business, and any understanding between banks to charge not less than a certain rate for collections creates a restriction in the free pursuit of that business within the terms of that act. The purpose of the law is to encourage the widest character of competition between all persons engaged in a similar business, and to prevent any understandings or agreements whereby any such person can not exercise his own free judgment in

carrying on his business, and perform the services incident thereto at whatever price he may see fit to charge." Reports and Opinions of Attorney General, 1906-1908, 393.

You are, therefore, advised that the business of banking in this State is subject to the anti-trust laws, and those corporations and individuals engaged in this business, violating the anti-trust laws, may be punished the same as other persons violating the same Acts.

We will next examine the agreement signed by the stockholders of the First National Bank, under and by virtue of which they purchased three-fifths of the stock in the State bank. We have heretofore quoted the agreement, and an analysis of it will disclose that the signers of the document agree:

(a) To appoint G. W. N. their attorney
(b) with authority to expend a special dividend of the First National Bank
(c) in the purchase of three-fifths of the capital stock of the Farmers' Guaranty State Bank of M.
(d) Such purchase to be in the same proportion that the contracting parties own shares in the First National Bank
(e) the stock to be issued and held by N. as trustee for the named shareholders of the First National Bank
(f) and to empower N. to vote such stock and act as trustee for the shareholders of the First National Bank
(g) and to do and perform all necessary acts in the execution and prosecution of the aforesaid business in as full and ample a manner as the shareholders themselves might do if they were personally present.

Now, who is G. W. N.? He is cashier of the First National Bank, subject to the direction and control of these identical shareholders of the First National Bank who have signed this agreement, and as such cashier he is the chief executive officer of the First National Bank, through whom its financial operations are conducted. Ledgerwood vs. Dashiell, 177 S. W. 1010; Memphis Cotton Oil Company vs. Gist, 179 S. W. 1090; First National Bank vs. Greenville Oil & Cotton Company, 60 S. W., 828.

What have we then? Clearly we have a combination between the signers of the contract heretofore quoted, for a combination is merely a union or association of two or more persons in a joint or common enterprise. Gates vs. Hooper, 90 Texas, 565; Brownsville Glass Co. vs. Apport Glass Co., 136 Fed., 245.

What have these parties combined? They have combined their capital, that is, at least $15,000 of it, and their acts, and, we may as well add, their skill as business men. What is the result of the combination? The result of the combination is that the direction of the affairs of the First National Bank and of the Guaranty State Bank have been brought under one management and control, and under the management and control of the agent and trustee of the contracting parties, to wit, Mr. N., in such a manner as necessarily to create and carry out restrictions in the banking business in the city of M.

These are precisely the things which the statutes prohibit. Article 7796 defines a trust, among other things, to be a combination of capi-

tal, skill or acts by two or more persons, firms, corporations or associations, for the purpose of creating or carrying out restrictions in "aids to commerce" or "to create or carry out restrictions in the free pursuit of any business authorized or permitted by the laws of this State." Article 7797, in defining a monopoly, declares that a monopoly is a combination or consolidation of two or more corporations for the purpose of creating a trust, as just previously defined, when such combination or consolidation is brought about by bringing the direction of the affairs of the two or more corporations under the same management, for the purpose of producing, or where such common management or control tends to create, a trust, as a trust has been previously defined by statute and in this opinion.

Under the facts before us, it cannot be doubted that the affairs of the First National Bank and the Guaranty State Bank have been brought under a common management, and as these two corporations having been previously competing ones, the necessary effect of such common management is to limit or destroy this competition, to create and foster restrictions in the operation of a lawful business and an aid to commerce.

You are, therefore, advised that the facts stated by you in your letter show a violation of the anti-trust laws of this State. Of course, an additional and thorough investigation of all the facts might possibly put a different meaning upon the acts which have been done, but, so far as the facts before us are concerned, the situation at the city of M. is one for your further consideration and investigation.

Yours truly,

C. M. CURETON,

First Assistant Attorney General.

OP. NO. 1789—BK. 49, P. 430.

CO-OPERATIVE SAVINGS AND CONTRACT LOAN COMPANIES—COMMISSIONER OF INSURANCE AND BANKING, POWER OF—CONSTRUCTION OF LAW.

Acts, Thirty-fourth Legislature, First Called Session, Chapter 5.

1. The Commissioner of Insurance and Banking does not have the right to examine corporations chartered under Chapter 5, Acts, First Called Session of the Thirty-fourth Legislature, except with the consent thereof.

2. This Act having described in detail the method of supervision and control to be exercised by the Commissioner, and having the right of examination, such right is impliedly denied.

July 20, 1917.

Hon. Chas. O. Austin, Commissioner of Insurance, Capitol.

DEAR SIR: Your letter of July 18, requesting interpretation of certain portions of the laws of this State governing co-operative savings and contract loan companies, reads substantially as follows:

"Chapter 5 of the General Laws of the First Called Session of the Thirty-fourth Legislature of Texas provides for the incorporation and conduct of cooperative savings and contract loan companies.

"Section 2 of this Act reads:

" 'All such corporations shall be under the supervision and control of the Commissioner of Insurance and Banking.'

"This statute is very adroitly and skillfully prepared in such a manner as to give a wonderfully broad scope of powers and functions to these corporations and a woefully narrow scope of supervisory authority to the Commissioner of Insurance and Banking. The transactions of the concerns now operating under this law have been the source of many complaints to this Department from those who have invested in their contracts, and, while these complaints appear in most instances to be such as naturally arise from the very nature of the business, the manner in which their contracts are sold and the people to whom they are sold, yet some of these complaints compel us to believe that these concerns are inclined to take advantage of the liberality of the statute creating them, and their freedom heretofore from close supervision by this Department.

"I beg to request your opinion as to whether or not Section 2 quotel above of the Act under discussion confers upon the Commissioner of Insurance and Banking the authority to make examinations of the books, accounts, securities and generally of the affairs and business of these corporations, and if such authority is not implied by the Section quoted, whether or not it exists by implication or otherwise in any part of the Act referred to."

Section 2 of Chapter 5, Laws of the First Called Session of the Thirty-fourth Legislature, is a general provision declaring: "All such corporations shall be under the supervision and control of the Commissioner of Insurance and Banking." The statute, however, does not content itself with this general direction. It describes in detail the supervision and control which the Commissioner is to exercise, and in our opinion his authority is limited in its exercise by the details specified in the statute. Of course, supervision and control merely means the right of oversight, with authority to exercise a restraining and governing influence over the corporations involved, for the purpose of regulating them. McCarthy vs. Board of Supervisors, 115 Pac., 459.

Under this statute, with its detailed provisions, the Commissioner can only do what he is specifically authorized to do. The general language of Section 2 has the effect only of designating the Commissioner as the supervising authority, while the remaining sections set forth the extent of this authority and the method and circumstances by which it may be exercised. This would not include the right of examination, except with the consent of the corporation, for the reason that the right of examination is not specifically named, though other rights are set forth in minute detail. These matters of detail so mentioned are clearly matters of supervision and control, and, the statute having thus undertaken to enumerate the particulars of this general duty and power of the Commissioner, the rule of construction is that it will be presumed that all matters of detail have been mentioned which the Legislature intended. It is elementary that the special intent in a law prevails over and limits the expression of a general intent. Wallace vs. Williams, 101 Texas, 397.

In construing an Act of the Legislature, whenever it is found that the Act makes a general provision apparently for all cases, and at

the same time contains a special provision for a particular class of cases, the special provision must govern as to the particular class. Perez vs. Perez, 59 Texas, 322.

The principle underlying the rule thus enunciated applies with equal force to the question here at issue. The rule "inclusio unius exclusio alterius est" is a sound one, and followed by the courts of this State. Mercein vs. Burton, 17 Texas, 210; and the Act before us having provided that your supervision and control is to be exercised in a particular way, it impliedly forbids that it is to be exercised in any other way. Etter vs. Missouri Pacific Railway Co., 2 White & Wilson, Sec. 58.

The construction here given this measure is shown to be a correct one by the caption of this Act. The caption, in defining this Act of the Legislature and undertaking to give its general meaning, after declaring that it is an Act to regulate the business of these corporations, further says that it is an Act "placing all such corporations, persons, firms, associations and joint stock companies under the supervision and control of the Commissioner of Insurance and Banking, *as specified herein.*" This caption has the effect of limiting the general provisions relating to supervision and control to the definite ones "specified," for the reason that the caption so expressly declares. In this State the courts hold that the title or preamble of an act, which we call the caption, may be resorted to in aid of the construction of the act. State vs. Delesdenier, 7 Texas, 107; Walraven vs. Farmers', etc., National Bank, 96 Texas, 331.

Aside from the foregoing matters discussed by us, you will recall that in all of the statutes of this State authorizing examination by the Commissioner of Insurance and Banking, specific and definite authority is given for such examination. This matter of legislative history and policy is an additional reason for our conclusion that the Legislature did not intend to confer the power of examination upon the Commissioner in the Act under discussion, for, otherwise, it would have provided specifically for such examination.

I may mention also another matter which, while inadmissible in the trial of a case, still may be considered by you. I refer to the inception of this measure and its legislative history. The writer of this opinion wrote a bill on this subject, of which the present law is a substantial copy, except in one respect. The measure prepared by this office specifically gave the Commissioner the right of examination in sections of the bill which were substantially paraphrases of the same character of authority conferred upon him with reference to State banks, but whoever introduced the measure or caused it to be introduced, omitted these sections of the proposed law when it was introduced or passed through the Legislature. These remarks are, of course, aliunde the record, but show, to my mind, that the omission of the right of examination by the Legislature was purposeful on its part and that the construction given the Act as it finally passed, to the effect that it does not grant the right of examination, is a correct one.

You are, therefore, advised that Section 2 of this Act does not confer upon the Commissioner of Insurance and Banking the authority

to make examinations of the books, etc., of these corporations unless the corporation will consent to such examination. It may be that in certain cases the Commissioner will be unable to obtain sufficient information to discharge his statutory duties unless the right is granted him to make the examination. If such a condition of affairs should arise, the Commissioner would have the right to decline to issue the necessary license or certificates until the information required is furnished him, which, of course, might necessitite an examination of the affairs of the corporation, but, so far as the statute is concerned, the right of examination is not granted.

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

OP. NO. 1793—BK. 49, P. 448.

BANKS AND BANKING—CRIMINAL LAW.

Penal Code, Article 523.

1. An advertisement by a State bank reading, "The State of Texas guarantees your deposit," is in violation of Article 523 of the Penal Code.

July 18, 1917.

Hon. Chas. O. Austin, Commissioner of Banking, Capitol.

DEAR SIR: We enclose you herewith complaint made to the Attorney General, together with an advertisement of a certain State bank, in which it is stated that such bank "Solicits your business on the following grounds.": Then follows an itemization of the grounds referred to, among which appears the following: "The State of Texas guarantees your deposit."

We have advised the party who gave us this information that the matter had been referred to your Department for your consideration. We attach to the file a carbon copy of our letter for your information. In this connection, however, we desire to advise you that this advertisement is in open violation of the Penal Code, Art. 523 (Cureton-Harris Banking Laws of Texas, Sec. 370), which reads as follows:

"Advertisement and Designation of Banks, etc.—All guaranty fund banks provided for by law are hereby authorized and empowered, if they desire so to do, to publish, by any form of advertising which they may adopt, or upon their stationery, the following words: 'The non-interest bearing and unsecured deposits of this bank are protected by the depositors' guaranty fund of the State of Texas. All bond guaranty banks provided for by law are hereby authorized and empowered, if they desire so to do, to publish, by any form of advertising which they may adopt, or upon their stationery, the following words: 'The depositors of this bank are protected by guaranty bond under the laws of this State.' Said banks are authorized to use the terms 'Guaranty fund bank,' or 'Guaranty bond bank,' as the case may be, but they are hereby prohibited from describing said forms of guaranty by any other terms or words than herein named. Any guaranty fund bank or bond security bank, or any officer, director, stockholder or other person, for any such bank who shall write, print, publish, or advertise in any manner, or

by any means, or permit any one for them, or for said bank, to write, print, publish or advertise any statement that the deposits of any such bank are secured otherwise than as permitted in this article, or who shall make or publish any advertisement or statement to the effect that the State of Texas guarantees or secures the deposits of any such bank or banking and trust company, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined not less than one hundred dollars nor more than five hundred dollars, or confined in the county jail for not less than three months nor more than twelve months, or by both such fine and imprisonment. Any person who shall write, print, publish or advertise the above statement, authorized to be used by bond security banks or guaranty fund banks, other than as herein authorized, shall be deemed guilty of a misdeameanor, and, upon conviction, shall be fined not less than two hundred dollars, nor more than five hundred dollars, or confined in the county jail for not less than three months nor more than twelve months, or by both such fine and imprisonment."

You will note that this Article of the Code prescribes the language which may be used in advertising the method which a State bank has adopted for the protection of its depositors, and then makes it an offense, punishable by fine or imprisonment or by both, for a bank or any of its officers, directors or other person, to advertise the method of protecting its depositors thus selected in any other way than that expressly provided by statute. It also expressly makes it an offense for anyone to advertise that the State guarantees or secures the deposits of any bank or trust company.

It appears to us that the advertisement before you plainly violates this statute, and we hand the matter to you for such consideraion and action as may be proper under the circumstances.

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

OP. NO. 1801—BK. 50, P. 15.

BANKS AND BANKING—CORPORATION—CONSTRUCTION OF LAWS.

Acts Thirty-fifth Legislature, Chapter 39.
Acts 1914, Third Called Session, p. 51, Section 10, 6, 10A.

1. Chapter 39, Acts Thirty-fifth Legislature, does not authorize State banks to incur obligations in excess of their capital stock.
2. The Acts of 1914, Third Called Session, p. 51, Section 10, limits the amount of indebtedness which State banks may incur to an amount equal to their capital stock, with certain exceptions contained in Section 10A of the same act.
3. Section 6 of the same act governs State banks in pledging securities.
4. These last named statutes, being banking statutes relating specially to State banks, must be held to control, modify and limit the general provision of the corporation law referred to in this opinion.

August 2, 1917.

Hon. Chas. O. Austin, Commissioner of Banking, Capitol.

DEAR SIR: We are in receipt of a letter from one of the State banks, requesting the advice of this department, as follows:

"I will thank you to advise me if the amendment to Article 1162 of Chapter 3, Title 25, passed by the Thirty-fifth Legislature, p. 66, Acts of Thirty-fifth Legislature, conferring upon corporations the power to borrow money in excess of the amount of their authorized capital stock, applies to State banks, and if, under it, State banks are authorized to borrow money in excess of their capital stock."

The Attorney General is not permitted to advise private individuals except where we have previously passed upon the qustion. For this reason, and for the additional reason that we think it proper that all advice to State banks should be directly by your Department, we are taking the liberty of writing an opinion to you in answer to this letter, and will also enclose the letter to you, in order that you may advise this bank directly as to the proper construction of the laws referred to.

The Act of the Legislature mentioned in the quotation above was passed by the Regular Session of the Thirty-fifth Legislature, and is Chapter 39 of the General Laws passed by that session. It reads as follows:

"Corporations shall have power to borrow money on the credit of the corporation, and may execute bonds or promissory notes therefor, and may pledge the property and income of the corporation."

In answer to the inquiry, we advise that this new Act of the Legislature applies to banks only in the most general sense, that is to say, it has the effect only of authorizing banks to borrow money and pledge its property for the payment of the debt thus created. As far as banks are concerned, it may be considered as a general expression only of the implied authority which banks, as corporations, would have without any statute and which rights are clearly implied from other provisions of the banking law.

The limitations on the amount of indebtedness which a bank may create and the manner of pledging its securities are governed by special provisions of the banking law, and, being made specially applicable to banks, supersede and control the general expressions of authority contained in Chapter 39, above mentioned. Perez vs. Perez, 59 Texas 322; Scoby vs. Sweatt, 28 Texas 713.

The banking laws of this State contain special provisions limiting the amount of indebtedness which may be incurred by a State bank. Our statutes provide:

"No banking corporartion incorporated under the laws of this State shall at any time be indebted or in any way liable to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, except on account of demands of the nature following:

"(a) Moneys deposited with or collected by it.

"(b) Bills of exchange or drafts drawn against money actually on deposit to the credit of the corporation or due thereto.

"(c) Liabilities to the stockholders of the association for dividends and reserve profits.

"(d) Liabilities incurred under the provisions of the Federal Reserve Act.

"(e) This section shall not apply to any guaranty executed by any trust company whose demand deposits are not in excess of its interest

bearing deposits, provided such trust company is not a member of a federal reserve bank.

"(f) Provided further, that upon a permit obtained in writing from the Commissioner of Banking any bank may borrow a sum not in excess of its unimpaired surplus in addition to its capital stock. (Acts 1914, Third Called Session, p. 51, Section 10."

C. and H. Banking Laws, Section 86.

The provision thus quoted clearly limits the amount of indebtedness which may be incurred by a State bank, and declares in effect that it cannot become indebted in an amount exceeding its capital stock, except on account of demands, the nature of which is stated above.

One other exception is also contained in the Acts of 1914, 3 S. S., p. 52, Sec. 10-A, C. & H. Banking Laws, Sec. 87. The same Act of the Legislature in Section 6, governs the pledge of securities as well. These last articles, being ones which relate to State banks, must be held to control, modify and limit the general provisions of the corporation law referred to in the communication to us.

You are advised, therefore, that State banks do not have authority to create debts in excess of their capital stock, except in the manner specified in the banking statutes quoted and cited.

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

OP. NO. 1855—BK. 50, P. 298.

BANKS AND BANKING.

Acts, Thirty-third Legislature, Third Called Session, Chapter 3.
Acts, Thirty-fifth Legislature, Chapter 202.

1. An unincorporated bank cannot be approved as a reserve agent for a State bank.
2. A State bank may keep funds on deposit in an unincorporated bank.
3. Such deposits are not subject to the loan limitations of the State banking law.

December 22, 1917.

Hon. Charles O. Austin, Commissioner of Banking, Capitol.

DEAR SIR: Your letter of December 17, requesting the advice of the Attorney General, presents the question to be determined as follows:

"An old and well established private banking house in Texas controls a small State bank, and the latter has been carrying large amounts of cash on deposit with the private bank for some time. The attitude of this Department is that any balance carried by a State bank with a private or unincorporated banking house cannot be counted as legal reserve by the State bank, but must be considered as a loan thereto and subject to the limitations of the statutes limiting loans to any individual, firm or corporation. Being controlled by the private bank, the management of the State bank refuses to comply with our request to reduce the balance with the private bank to within 25 per cent of their capital and certified surplus of the State bank.

"Kindly advise us if the State bank is within its legal rights in carrying balances with the private bank in excess of 25 per cent of its capital and surplus, or whether they may carry unlimited balances with the private bank, and, if so, whether or not the Commissioner would be authorized to approve the private bank as a legal reserve agent for the State bank."

Briefly stated, the questions for our examination are three:

First, may an unincorporated bank be approved by the Commissioner as a reserve agent for a State bank; second, may a State bank keep money deposited in an unincorporated bank; and third, may the amount deposited in an unincorporated bank be in excess of twenty-five per cent. of the capital and surplus of the State bank making the deposit:

In answer to the first question, we beg to advise you that an unincorporated bank cannot be approved as a reserve agent for a State bank chartered under the laws of this State. This was the ruling of this Department made in an opinion dated August 28, 1915, and published on page 731 of Banking Laws of Texas by C. and H. The exact page is 736 of said volume. From that opinion we quote the following, which is still applicable:

"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 this State.

"Section 3, Chapter 3, General Laws passed by the Third Called Session of the Thirty-third Legislature, in part, reads as follows:

" 'Twelve-twentieths of the reserve fund, or any part thereof, of a bank with a capital stock of less than $25,000.00, or nine-fifteenths of the reserve fund, or any part thereof, of a bank with a capital stock of $25,000.00 or more, together with the current receipts, may be kept on hand or on deposit payable on demand in any bank or banking association of the State of Texas, or any bank, banking association or trust company regularly chartered and operating under the laws of any State or under the laws of the United States, approved by the Commissioner of Insurance and Banking, and having a paid up capital stock of fifty thousand dollars or more; but the deposit in any one bank or trust company shall not exceed twenty per cent of the total deposits, capital and surplus of the bank making the deposit.'

"By the use of the phrase 'of any bank or banking association of the State of Texas, or any bank, banking association or trust company regularly chartered and operating under the laws of any State or under the laws of the United States, approved by the Commissioner of Insurance and Banking,' etc., the Legislature clearly meant incorporated banks, and did not mean private unincorporated banks.

"The section just quoted requires that such reserve agent shall have a paid up capital stock of $50,000.00 or more. The phrase 'a paid up capital stock' clearly applies only to institutions capable of issuing capital stock in the usual sense of those words, which can only refer to a corporation.

"You are, therefore, correct in your opinion that the law does not permit the Commissioner of Insurance and Banking to approve an unincorporated bank as reserve agent for either the commercial or savings departments of a bank chartered under our laws."

We, therefore, reiterate what we have heretofore said, and state that an unincorporated bank cannot be approved as a reserve agent for a bank chartered under the laws of Texas. Therefore, all sums of money deposited by the State bank in an unincorporated bank can-

not be considered by the Commissioner in determining the amount of reserve which the bank has on hand, but we are of the opinion that a State bank can deposit its funds in an unincorporated bank without the necessity of limiting the amount of the deposit to twenty-five per cent. You will note that Section 7 of Chapter 205, General Laws of the Thirty-fifth Legislature, on page 473, declares that the limitation on loans shall not apply to balances due from correspondents subject to draft; the loan limitation, therefore, does not apply where the amount on deposit in an unincorporated bank is, in fact, a mere deposit and balance due subject to draft. Of course, state banks are compelled to transact business with unincorporated banking firms, and in the transaction of such business they necessarily have balances on deposit with such unincorporated banks. Where this has been done in good faith, then the loan limit does not apply, but where a loan is in reality made to an unincorporated bank under the guise of a mere deposit accumulated or made in the ordinary transaction of business, then, of course, the loan limit does apply, and the simulated transaction would have no effect on the actual facts.

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

OP. NO. 1863—BK. 50, P. 325.

BANKS AND BANKING—FRANCHISE TAXES—TAXATION.

Revised Statutes, Article 7393.

The fact that a part of the capital, surplus and undivided profits of a corporation is invested in United States bonds which are non-taxable does not relieve the corporation from paying the whole of its franchise tax, calculated in the manner prescribed by statute.

January 14, 1918.

Hon. George F. Howard, Secretary of State, Capitol.

DEAR MR. HOWARD: Your letter of the 10th, accompanied by the letter of the Texas Bank & Trust Company of Galveston, presents for determination of the Attorney General the question as to whether or not the fact that the corporation named has a portion of its capital, surplus and undivided profits invested in United States bonds exempts it from paying any part of its franchise tax, as prescribed by the franchise tax act of this State.

Revised Statutes, Article 7393, prescribes the amount of franchise taxes payable by corporations chartered under the laws of Texas. This article reads as follows:

"Article 7393. Tax to be paid by domestic corporations.—Except as herein provided, each and every private domestic corporation heretofore chartered, or that may hereafter be chartered, under the laws of this State, shall on or before the first day of May of each year, pay in advance to the Secretary of State a franchise tax for the year following, which shall be computed as follows, viz: Fifty cents on each one thousand dollars, or fractional part thereof, of the authorized capital stock of such

corporation, unless the total amount of capital stock of such corporation issued and outstanding, plus its surplus and undivided profits, shall exceed its authorized capital stock; and in that event the franchise tax of such corporation for the year following shall be fifty cents on each one thousand dollars of capital stock of such corporations issued and outstanding, plus its surplus and undivided profits; provided, that such franchise tax shall not in any case be less than ten dollars; provided, that, where the authorized capital exceeds one million dollars, such franchise tax shall be fifty cents for each one thousand dollars up to and including one million dollars, and for each additional one thousand dollars, in excess of one million dollars, it shall be twenty-five cents."

The courts of this State have held that the tax prescribed by this article of the statute is a franchise or privilege tax, and not a property tax. Gaar-Scott vs. Shannon, 115 S. W., 363.

"Franchise" is the general franchise granted a corporation, giving it the right to exist and do business by the exercise of corporate powers granted by the State. Joyce on Franchises, Sections 5 and 6.

The franchise of a bank is separable from its corporate property, is of value to the members of the corporation, and is considered in law as separate and distinct from the property which the corporation may acquire. Joyce on Franchises, Section 34.

Ordinarily a franchise tax is the tax imposed by the State upon the privilege of being a corporation and exercising corporate functions, and is not, therefore, upon the property of the corporation. Joyce on Franchises, Section 425, page 755.

The franchise tax in this State is imposed on corporations without regard to the property in which the capital, surplus and undivided profits of the corporation are invested. The question is whether or not that portion of the capital, surplus and undivided profits in this State invested in Government bonds, must be deducted from the amount of the capital, surplus and undivided profits in estimating the amount of franchise tax due. We think not. We think that the Legislature has simply used the amount of capital, surplus and undivided profits as a method of measuring the franchise tax which the particular corporation should pay, and that it is not a property tax on the property of the corporation and, therefore, not a tax upon the property in which the capital, surplus and undivided profits are invested.

In the case of Home Insurance Company vs. New York, 134 U. S., 594, the facts were as follows: The capital of this company was $3,000,000, and a dividend of $150,000 was declared at the time named in the statement of facts, making altogether a ten per cent dividend on its capital stock. A portion of this capital was invested in United States bonds, to wit, about $2,000,000. The New York law at the time the controversy arose, levied a franchise tax in the following manner: If the dividend or dividends made or declared during the preceding year amounted to six per cent. or more upon its capital stock, then the tax rate would be one-fourth mill upon the capital stock for each one per cent. of the dividends. The purpose of the act was to fix the amount of the tax each year upon the franchise or business of the corporation by the extent of the dividends upon its capital stock, or, where there were no dividends, then upon the

actual capital stock during the year. The Supreme Court of the United States sustained this tax, holding that it was not a tax in terms upon the capital stock of the company, nor upon any bonds of the United States composing a part of that stock, and that reference was made to the capital stock and dividends for the purpose only of determining the amount of the tax to be exacted each year. Concerning the matter, the court in part said:

"The right or privilege to be a corporation, or to do business as such body, is one generally deemed of value to the corporators, or it would not be sought in such numbers as at present. It is a right or privilege by which several individuals may unite themselves under a common name and act as a single person, with a succession of members, without dissolution or suspension of business and with a limited individual liability. The granting of such right or privilege rests entirely in the discretion of the State, and, of course, when granted, may be accompanied with such conditions as its legislature may judge most befitting to its interests and policy. It may require, as a condition of the grant of the franchise, and also of its continued exercise, that the corporation pay a specific sum to the State each year, or month, or a specific portion of its gross receipts, or of the profits of its business, or a sum to be ascertained in any convenient mode which it may prescribe. The validity of the tax can in no way be dependent upon the mode which the State may deem fit to adopt in fixing the amount for any year which it will exact for the franchise. No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determne the amount it will charge for the privileges it bestows. It may well seek in this way to increase its revenue to the extent to which it has been cut off by exemption of other property from taxation. As its revenues to meet its expenses are lessened in one direction, it may look to any other property as sources of revenue, which is not exempted from taxation. Its action *in this matter is not the subject of judicial inquiry in a federal tribunal.* As was said in Delaware Railroad Tax Case, 18 Wall., 206, 231: 'The State may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation or its separate corporate property. Anl the manner in which its value shall be assessed and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion. It is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the Legislature of the State; our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction.' "

Continuing further, the court held that the case would not be affected if the entire capital was invested in non-taxable securities. It said in part:

"The tax in the present case would not be affected if the nature of the property in which the whole capital stock is invested were changed and put into real property or bonds of New York, or of other states. From the very nature of the tax, being laid upon a franchise given by the State, and revocable at pleasure, it cannot be affected in any way by the character of the property in which its capital stock is invested. The power of the State over the corporate franchise and the conditions upon which it shall be exercised, is as ample and plenary in the one case as in the other.

"In some states the franchises and privileges of a corporation are declared to be personal property. Such was the case in New York with reference to the privileges and franchises of savings banks. They were so declared by a law passed in 1866, and made liable to taxation to an amount not exceeding the gross sum of the surplus earned and in the

possession of the banks. The law was sustained by the Court of Appeals of the State in Monroe Savings Bank vs. City of Rochester, 37 N. Y., 365, 369, 370, although the bank had a portion of its property invested in United States bonds. In its opinion the court observed that in declaring the privileges and franchises of a bank to be personal property the Legislature adopted no novel principle of taxation; that the powers and privileges which constitute the franchises of a corporation were in a just sense property, quite distinct and separate from the property which, by the use of such franchises, the corporation might acquire; that they might be subjected to taxation if the Legislature saw fit so to enact; that such taxation being within the power of the Legislature, it might prescribe a rule or test of their value; that all franchises were not of equal value, their value depending, in some instances, upon the nature of the business authorized, and the extent to which permission was given to multiply capital for its prosecution; and that the tax being upon the franchises and privileges, it was unimportant in what manner the property of the corporation was invested. And the court added: 'It is true that where a State tax is laid upon the property of an individual or a corporation, so much of their property as is invested in United States bonds is to be treated, for the purposes of assessment, as if it did not exist, but this rule can have no application to an assessment upon a franchise, where a reference to property is made only to ascertain the value of the thing assessed.' And again: 'It must be regarded as a sound doctrine, to hold that the State, in granting a franchise to a corporation, may limit the powers to be exercised under it and annex conditions to its enjoyment, and make it contribute to the revenues of the State. If the grantee accepts the boon, it must bear the burden.'

"This doctrine of the taxability of the franchises of a corporation without refernce to the character of the property in which its capital stock or its deposits are invested is sustained by the judgments in Society for Savings vs. Coite, 6 Wall., 594, and Provident Institution vs. Massachusetts, 6 Wall., 611, which were before this court at December term, 1867. In the first of these cases it appeared that a law of Connecticult of 1863 provided that savings banks in that State should make an annual return to the Controller of Public Accounts 'of the total amounts of all deposits in them, respectively, on the first day of July in each successive year,' and should pay to the Treasurer of the State a sum equal to three-fourths of one per cent on the total amount of deposits in such banks on those days, and that the tax should be in lieu of all other taxes upon the banks or their deposits. On the first day of July, 1863, the Society for Savings, one of the banks, had invested over $500,000 of its deposits in securities of the United States, which were declared by Congress to be exempted from taxation by State authority, whether held by individuals, corporations, or associations. 12 Statutes, 346, Chapter 33, Section 2. Upon the amount of its deposits thus invested the seciety refused to pay the sum equal to the prescribed percentage. In a suit brought by the Treasurer of the State to recover the tax, the payment of which was thus refused, the Supreme Court of Connecticut held that the tax was not on property but on the corporation as such. The case being brought here, the judgment was affirmed, this court holding that the tax was on the franchise of the corporation and not upon its property, and the fact that a part of the deposits was invested in securities of the United States did not exempt the society from the tax. Said the court: 'Nothing can be more certain in legal decision than that the privileges and franchises of a private corporation, and all trades and avocations by which the citizens acquire a livelihood, may be taxed by a State for the support of the State government. Authority to that effect resides in the State independent of the Federal government, and is wholly unaffected by the fact that the corporation or individual has or has not made investment in Federal securities.' Pp. 606-607.

"It was contended in that case that the deposits in the bank were subjected to taxation from the fact that the extent of the tax was deter-

mined by their amount. But the court said: 'Reference is evidently made to the total amount of deposits on the day named, not as the subject matter for assessment, but as the basis for computing the tax required to be paid by the corporation defendants. They enjoy important privileges, and it is just that they should contribute to the public burdens. Views of the defendants are, that the sums required to be paid to the treasury of the State is a tax on the assets of the institution, but there is not a word in the provision which gives any satisfactory support to that proposition. Different modes of taxation are adopted in different States, and even in the same State at different periods of their history. Fixed sums are in some instances required to be annually paid into the treasury of the State, and in others a prescribed percentage is levied on the stock, assets or property owned or held by the corporation, while in others the sum required to be paid is left indefinite, to be ascertained in some mode by the amount of business which the corporation shall transact within a defined period. Experience shows that the latter mode is better calculated to effect justice among the corporations required to contribute to the public burdens than any other which has been devised, as its tendency is to graduate the required contribution to the value of the privileges granted and to the extent of their exercise. Existence of the power is beyond doubt, and it rests in the discretion of the Legislature whether they will levy a fixed sum, or if not, to determine in what manner the amount shall be ascertained.' P. 608."

This case and one of the authorities cited by it were approved by the Supreme Court of the United States in the case of Kansas City Railway vs. Kansas City, 240 U. S., 232. In discussing the case there before the court, which was a franchise tax act, the Supreme Court said:

"The authority of the State to tax this privilege, or franchise, has always been recognized and it is well settled that a tax of this sort is not necessarily rendered invalid because it is measured by capital stock which in part may represent property not subject to the State's taxing power. Thus, in Society for Savings vs. Coits, 6 Wall., 594, 606, 607, the power to levy the franchise tax was deemed to be 'wholly unaffected' by the fact that the corporation had invested in Federal securities; and in Home Ins. Co. vs. New York, 134 U. S., 594, 599, 600, it was held that a tax upon the privilege of being a corporation was not rendered invalid because a portion of its capital (the tax being measured by dividends) was represented by United States' bonds. These cases were cited with distinct approval, and the rule they applied in distinguishing between the subject and the measure of the tax was recognized as an established one, in Flint vs. Stone Tracy Co., 220 U. S., 107, 165."

It appears to us that it is unnecessary to cite additional authorities. The franchise tax levied by the Texas act has been declared by our own courts to be a franchise or privilege tax. The Supreme Court of the United States has held that this tax may be imposed, even though the capital of a corporation be invested in Government bonds or other nontaxable securities.

We, therefore, advise you that the mere fact that the corporation making inquiry of you has invested a portion of its capital, surplus and undivided profits in United States bonds which are nontaxable, would not exempt the corporation from paying any part of its franchise tax on its capital, surplus and undivided profits calculated as prescribed in the statutes.

Very truly yours,
C. M. CURETON,
First Assistant Attorney General.

OP. NO. 1865—BK. 50, P. 335.

BANKS AND BANKING—TAXATION.

R. S., Arts. 376, 380, 7521, 7522.
U. S. Statutes, Sec. 5219.
Federal Farm Loan Act. Sec. 26.

1. State Banks have authority to invest in Farm Loan Bonds of the Federal Land Bank at Houston.

2. Funds invested in such bonds enjoy the same immunity from taxation as United States Government bonds.

3. State Banks as corporations pay no taxes except taxes on their real estate, but each individual shareholder pays taxes on his shares of stock the same as he does on other personal property.

4. In determining the assessable value of each share of stock there should be first deducted from the bank's total assets the assessed value of its real estate, and then assign to each share its proportionate part of the residue; the result will be the assessable value of each share of the stock upon which its owner must pay taxes.

5. In determining the value of shares of stock in a State bank the assets of these corporations invested in Federal Farm Land Bank Bonds, or United States Government Bonds, should be considered and treated as any other portion of the assets of such banks for the purpose of taxation and should not be eliminated from the value of the total assets.

January 14, 1918.

To His Excellency, Hon. W. P. Hobby, Governor of Texas, Capitol.

DEAR GOVERNOR HOBBY: Your letter of December 14, requesting the advice of the Attorney General, reads in substance as follows:

"Will you kindly favor this office with an opinion upon the following questions:

"1. Can State and National banks lawfully invest their funds in Farm Loan Bonds issued by the Federal Land Bank of Houston, under authority of the Federal Farm Loan Act?

"2. If a State or National bank has invested a part of its funds in such Farm Loan Bonds, does such bank with reference to such investment, enjoy the same immunity from taxation as if such funds were invested in United States Government Bonds?"

Permit us to say before undertaking to answer your inquiry that we have some hesitancy in undertaking to make a ruling with reference to National banks for the reason that these corporations are directly and peculiarly under the administration of the Comptroller at Washington, and we would not desire, without the consent of this officer, to make a ruling on the question.

We will therefore confine our opinion to the questions propounded with reference to State banks.

We are of the opinion that State banks can invest their funds in Farm Loan Bonds issued by the Federal Land Bank at Houston for the reason that State banks are authorized by Article 376 Revised Statutes to buy and sell all kinds of commercial paper. This is the general corporation section relating to the powers of all State banks.

Article 380 Revised Statutes confers upon State banks incorporated as trust companies as well, specific authority to buy and sell bonds. But the first article of the Statute mentioned gives in general terms authority to State banks to buy and sell all kinds of commercial

paper and is sufficient to authorize State banks to invest in the bonds of the Federal Land Bank.

Your second inquiry is whether or not when the funds of a State bank are invested in Farm Loan Bonds these funds so invested would enjoy the same immunity from taxation as if these funds were invested in United States Government Bonds.

In reply to this, we beg to advise that the Farm Loan Act expressly exempts bonds of Federal Land Banks from taxation and that this exemption is sufficient to make them non-taxable under the Texas laws, and that these bonds cannot be taxed as such any more than can United States Government Bonds. However, were we to end this opinion at this point there might be some misunderstanding as to the effect on the question of taxation which an investment in these securities might have on a State bank. We beg therefore to direct your attention to the manner in which State banks are taxed.

Article 7522, Revised Statutes reads 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."

You will observe from the foregoing article that State banks as corporations pay no taxes except taxes on their real estate, but that each individual shareholder pays taxes on his shares of stock in the bank the same as he does on other personal property. However, each share of stock is taxed only for the difference between its actual cash value and the proportionate amount per share to which the bank's real estate is assessed. In other words, in determining the assessable value of each share of State bank stock you first deduct from the total value of the bank's property the assessed value of its real estate and then assign to each share of stock his proportion of this residue. The construction of the Statute just given is one made by the courts of this State.

In the case of City of Marshall vs. State Bank of Marshall, 127 S. W., 1083, the Court held that Article 7522, quoted above, operates to except incorporated State banks from the provisions of Article 7521 in so far as that article provides a basis of assessing the personal

property of such banks, and provides a means of taxing the personal property of State banking corporations in the hands of the shareholders so that a State bank as a corporation is not liable for any taxes except those assessed against its real property.

The next question then to be determined is whether or not in determining the value of shares of stock in a State bank for taxation the investments made by it in bonds of the Federal Land Bank should be deducted from the value of its personal property. We are compelled to answer this question in the negative. Our opinion is that the amount of the State bank's capital stock, or other assets, which has been invested in Farm Land Bank Bonds should be included in the value of the bank's assets just as much as any other part of its capital should be included.

Section 26 of the Federal Farm Loan Act exempts the bonds of Federal Land Banks and the income derived therefrom from Federal, State, municipal and local taxation, but it is no broader in its terms than the exemption governing United States bonds. They are all alike exempted from State, Federal, municipal and local taxation, but it is well settled that the fact that a State bank may have its assets invested in United States bonds does not prevent the State from taxing the shares of stock in the bank at the full value of the bank's assets less the value of its real estate, even though these assets are invested in United States bonds, which are non-taxable.

States derive their authority to tax shares of stock in National banks from Section 5219 of the United States Statutes, but the right to tax shares of stock in State banks exists independently of this statute for the State requires no leave to tax the stock in its own corporations.

Home Saving Bank vs. Des Moines, 205 U. S., 516.

It follows therefore that the holdings of the courts with reference to State banks where a portion of their assets are invested in non-taxable securities apply with equal force to State banks whose assets are invested in non-taxable securities.

The "proposition is that the State may value for taxation, shares of stock in national banks 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 superfluous." (175 S. W., 1126.)

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 Savings 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 an individual in respect to his shares in a corporation is not regarded as a tax upon the corporation itself. This distinction, now settled 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 corporate' 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 be 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 settled 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."

It appears to us that these authorities definitely settle the proposition that the State may tax the shares of stock in either a State or National bank and that such a tax is not one upon non-taxable securities in which the assets of the corporation may be invested. In the light of these authorities we have reached the conclusion that the tax on the shares of stock in a State bank is not a tax upon the capital stock, surplus, undivided profits or income derived from nontaxable securities even though the State bank does own Farm Land Bank Bonds or United States Bonds which within themselves are non-taxable.

We therefore accordingly advise that in determining the valuation of shares of stock in a State bank the assets of these corporations invested in Federal Farm Land Bank Bonds should be considered and treated as any other portion of the assets of such banks for the purpose of taxation and should not be eliminated from the assets thereof when it comes to a question of taxation.

We do not understand that this conclusion is at variance with the opinion of the Honorable Charles E. Hughes, former Justice of the Supreme Court of the United States, copy of which was furnished us for consideration in the course of this inquiry.

Yours truly,

C. M. CURETON,

First Assistant Attorney General.

OP. NO. 1864—BK. 50, P. 344.

BANKS AND BANKING.

Revised Statutes, Arts. 491, 503, 506, 508 and 1136.
A county judge, who is a director and cashier of a State bank which has adopted the bond security system of protecting its depositors, has authority to approve the bond executed by such bank for such purpose.

January 15, 1918.

Hon. Chas. O. Austin, Commissioner, Insurance and Banking Department, Capitol.

DEAR SIR: Revised Statutes, Article 491, provides that bonds executed by State banks protecting the depositors on the bond security system, shall be approved by the county judge of the county in which the bank is domiciled. The approval of the county judge of the bond is simply necessary in order for it to be filed by the Commissioner of Insurance and Banking. That the approval of the county judge is rather advisory for the benefit of the Commissioner of Insurance and Banking, than to be considered as a final passing on the solvency of the bond is clearly shown by Revised Statutes, Article 503, which provides that the Commissioner may examine into the solvency of the bond and make an appropriate charge against the bank for such purpose.

Revised Statutes, Article 506 further enforces this conclusion as does article 508, both of which provide for additional bonds, or additional security, upon the happening of certain contingencies. This is notably so as to Article 508, which provides that where a bond is found by the banking board to be insufficient, the board shall cause the filing of a new or additional bond. The conclusions reached by the Commissioner of Insurance and Banking and the State Banking Board, with reference to the sufficiency of a bond, are enforced by legal proceedings by the Attorney General.

Therefore, in considering the effect of the approval of the bond provided for by Article 491, we have reached the conclusion that the action is merely a preliminary action, rather for the advice of the Commissioner of Insurance and Banking and the State Banking Board, whose final duty it is to pass upon the solvency and sufficiency of such bond. Therefore, we do not attach to the approval of the bond by the county judge that importance and effect which might otherwise attach to it. We do not believe that it affects the validity of the bond, as an instrument sufficient to bind the bank and the sureties thereon, and, such being the evident purpose and effect of the approval of the county judge of these bonds, we have reached the conclusion that his act in approving the same is ministerial, rather than judicial. It is true that he is required to ascertain certain facts; that is to say, the facts as to the solvency of the sureties on the bond. In doing so, he exercises some judgment and some discretion, but the conclusions reached by him are not final and, as suggested above, are rather advisory in their nature for the information of the Commissioner of Insurance and Banking, than in the nature of a judgment or decree of the court. If his action, in approving the

bond, was a judicial act tantamount to a decree of the court then, of course, it could not be nullified or be set aside by the Commissioner of Insurance and Banking or by the State Banking Board. His act, in approving the bond, amounts to no more than a letter of advice from the county judge to the Commissioner of Insurance and Banking, and the effect of it is to say: "I have investigated the sureties on this bond and find they are solvent." It is true that this is a prerequisite to the right to file the bond in the office of the Commissioner, but it does not follow that the approval is the judgment and decree of a court, nor that the act of the judge in making the investigation and approving the same was one in the exercise of judicial authority.

Therefore, we do not believe that the Constitution and Revised Statutes, Article 1736, prohibiting the county judge from sitting "in any case," wherein the judge may be interested, has any application and, therefore, there is no provision in the statute for the appointing of a special judge to pass upon a bond where the county judge is interested in the bank. If the approval of such a bond was "a case" under the Constitution and laws of the State, then Judge Hunter, who is cashier of the Van Horn State Bank, (the bank tendering the bond in this case,) would be disqualified to act, for he is the cashier and a director. Williams vs. City National Bank, 27 S. W., 147.

As suggested above, the approval of this bond is not "a case," and, therefore, not within either the Constitution or the statute. Our opinion that the action of the county judge in approving this bond is simply an executive or ministerial function, requiring some measure of discretion, is sustained by the fact that this character of power is frequently conferred upon county judges. Clark vs. Finley, 54 S. W., 343.

Having reached the conclusion that the approval of a bond of this character is not "a case" under the Constitution and laws of this State providing for the appointment of a special judge, we will proceed to ascertain whether or not Judge Hunter had authority to approve this bond. We have reached the conclusion he did have. For the sake of argument, it may be granted that his relationship to the bank was such that but for the necessity of his approval, he would be disqualified. We do not find it necessary to say whether or not he was disqualified to act in an administrative or executive capacity in approving this bond. The fact about the matter is, the statute has provided for no one else to approve a bond of this character except the county judge, we having previously determined in this opinion that the approval of the bond was not "a case," wherein a special judge could be appointed.

It should be noted here that the interest of Judge Hunter, in the result of any action which may be taken on this bond, is small, to say the least of it. Under the statute, the bank is bound for all its debts anyway, and this bond adds nothing to the bank's burdens nor to what Judge Hunter might lose in the event of its insolvency. In cases of this character the authorities have held that an officer, who might otherwise be disqualified, may act, although he is interested, for the reason that there is no other person provided by law who may act.

The principle, as stated in Mr. Throop's Work on Public Officers, Section 609, is as follows:

"We must, however, notice here one exception to the common law rule, as it applies also in cases where the power to be exercised is of a quasi-judicial character. It relates to the case where a judge, although interested, is the only one who can administer justice between the parties. The rulings on this subject were fully reviewed by a distinguished judge of the Court of Appeals of New York, who declared his deduction therefrom as follows: 'That where a judicial officer has not so direct an interest in the cause or matter, that the result must necessarily affect him, to his personal or pecuniary loss or gain; or where his personal or pecuniary interest is minute, and he has so exclusive jurisdiction of the cause or matter, by constitution or by statute, as that his refusal to act will prevent any proceeding in it; then he may act, so far as that there may not be a failure of remedy, or, as is sometimes expressed, a failure of justice.'"

You are, therefore, advised that the approval of the bond in this case by the county judge was, in our opinion, valid.

Respectfully,

C. M. CURETON,

First Assistant Attorney General.

OPINIONS ON CORPORATIONS.

OP. NO. 1657—BK. 48, P. 136.

WAREHOUSE CORPORATIONS.

Acts Third and Fourth Called Sessions, Thirty-third Legislature, Chapter
A corporation chartered under the Permanent Warehouse Act cannot engage in the business of a cotton buyer.

September 2, 1916.

Hon. F. C. Weinert, and Hon. Peter Radford, Managers, Warehouse and Marketing Department, Capitol.

GENTLEMEN: You have transmitted to this department a letter from the Farmers' Union Warehouse Company at Hondo, Texas, with the request for an opinion of the Attorney General on the question propounded in that letter. The letter is in substance, as follows:

"I would like to have your opinion with reference to the following: I am buying cotton on the street from the farmers on limits furnished each day by wire from cotton merchants in Houston, Texas, and at six o'clock I wire in the number of bales that I have bought that day on the limits furnished. Of course, I buy it enough below the limit to make a small profit for the warehouse company, and I want to know whether or not I have the right to do this in the name of the warehouse company. I am also handling grain on the same plan."

We assume that the Farmers' Union Warehouse Co. is a corporation chartered under the permanent warehouse act of this State. We are of the opinion that the question should be answered in the ngative. A warehouse company incorporated under this act has no authority to buy cotton or other products, as is being done in this instance by its manager, in the name of the warehouse. The powers of a corporation are strictly limited to those granted by the statutes authorizing their incorporation. Railway Co. vs. Brownsville, 45 Texas, 88; Railway Co. vs. Morris, 67 Texas, 692 While natural persons may make any contract or perform any act not prohibited by law, corporations can only do things which by express grant or necessary implication, they are authorized to do, by the statute. Rue vs. Missouri Pacific Ry. Co., 74 Texas, 474. This rule applies to every class of corporation. Ry. Co. vs. Morris, 67 Texas, 692. The rule may be said to be statutory in this State, for section 2 of Article 1122 requires that the charter of a corporation shall set forth the purpose for which it is formed; while article 1140 authorizes a corporation to own personal and real property, such as its corporate purposes may require. These two articles of the statute make it quite clear that a corporation must have a purpose, and it can only own property appropriate for carrying into effect this purpose. However, Revised Statutes, Art. 1164, renders it certain that a corporation cannot use its assets except for its authorized purpose. This article reads:

"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."

This article of the statute has been amended, but not in so far as the language above is concerned, as applicable to the present inquiry.

From the authorities cited and the statutes quoted and referred to, it is apparent that warehouse and marketing corporations cannot engage in the purchase of cotton in the manner referred to in the letter enclosed, unless such right is granted by the statutes authorizing the chartering of this class of corporations. Section 19 of the Permanent Warehouse and Marketing Act in part reads as follows:

"Corporations chartered hereunder 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, and all weights, grades and classes shall be made in accordance with the standards of weights, grades and classes prescribed by law and by the board of supervisors."

Section 21 of the same act sets forth additional powers of corporations of this character, and in part reads:

"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. Such corporations shall also have the right to sell in the market all such 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. 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. 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; provided, that at least sixty per cent of the shareholders engaged in such business shall be engaged in farming, horticulture or stock raising as a business. Corporations chartered hereunder shall have the right to loan money upon products placed in their warehouses; provided, that the amount loaned thereon shall not exceed seventy-five per cent of the market value of the property so placed with them, except that they may loan eighty-five per cent of the then market value of cotton and wool placed with them. Corporations chartered hereunder shall have the right to loan money upon chattel mortgages, to their members only, for the purpose of enabling them to make and mature their crops, but such chattel mortgages shall always be upon property double the amount in value of money loaned thereon. Corporations chartered hereunder shall have authority to loan money on crop mortgages, but such crop mortgages must always be the first mortgage thereon exclusive of the landlord's lien, and shall always be secured by an acreage which under the ordinary general conditions would produce double the amount loaned thereon. Corporations chartered hereunder may invest their capital stock and surplus in a home office building. They may also invest such capital stock, surplus and undivided profits in United States bonds, Texas State bonds, county, city, district and municipal bonds and road bonds in the State of Texas; provided, such bonds are issued by authority of law and interest upon them has never been defaulted. Such corporations shall never have any right to receive deposits nor discount commercial paper

generally, but may make such character of loans and investments as are herein provided for; provided, however, such corporations shall never be permitted to loan money upon chattel mortgages, crop mortgages or personal security, except to their members, and then only to enable them to make, mature and gather their crops or market their ranch products."

The foregoing excerpts state substantially the powers and purposes of corporations chartered under the permanent warehouse and marketing act. You will note that these corporations are not authorized to buy cotton in the manner and for the purpose specified in your inquiry. Nor do we believe that the purchase of cotton in the manner suggested is incidental necessarily to any granted powers. On the contrary, we are of the opinion that the purchase of cotton in the manner suggested, by the corporation, and the use of its money for such purpose would be unauthorized and a misuse of the funds of the corporation. It is immaterial that the operation might be profitable to the corporation. Further authorities bearing upon this subject are:

R. S., Arts. 1140, 1164, 1167.
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.
Rue vs. Mo. Pac. Ry. Co., 74 Texas, 479.
Thomas vs. Ry. Co., 101 U. S., 81.
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 Am. Rep., 9.
Buffet vs. Troy Ry. Co., 40 N. Y., 176.

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

OP. NO. 1654—BK. 48, P. 141.

CORPORATIONS—COMMERCIAL CLUBS—STATE CHAMBER OF COMMERCE.

1. Corporations chartered under the laws of Texas may contribute to purely religious, charitable and eleemosynary institutions regardless of the extent of the activities of the latter, where such institutions are bona fide and have been in operation for one year prior to the contribution.
2. Corporations may contribute to local commercial organizations so long as these local organizations confine their activities to local affairs, and are free from any political purpose or connection.
3. While corporations have authority to contribute to local commercial organizations, yet they do not have authority to contribute to a local commercial organization which in turn makes contributions to a State commercial organization, for the reason that they would be doing indirectly that which they have no authority to do directly.
4. Corporations chartered under the laws of this State have no authority to contribute to a State chamber of commerce, or other State commercial organizations.

September 6, 1915.

Honorable James E. Ferguson, Governor, Capitol.

DEAR SIR: Your communication, together with the enclosures, presents for the determination of the Attorney General, a question, whether or not local commercial clubs to which contributions are made by corporations, can, without violating the laws of this State, contribute their funds to the Texas State Chamber of Commerce for the purpose of forwarding the purposes of that institution.

The letter of the Honorable Morris Stern, President of the Texas State Chamber of Commerce, enclosed by you, states:

"The Texas State Chamber of Commerce was the direct outcome of a meeting of some two hundred shippers of Texas held in Austin on May 31st to discuss proposed advances in rates. At that meeting, there developed an insistent demand for some sort of a state-wide organization that would be entirely free from political affiliation, which might devote its co-operative interests to the benefit of the State at large; an organization that might express profitably and intelligently public opinion on questions of state-wide interest that did not have a direct reflex in the political situation."

We conclude from other portions of Mr. Stern's letter, as well as the letter of Mr. Hanes of the Galveston Commercial Association, that the general purpose of the Texas State Chamber of Commerce is to do for the State at large what is ordinarily done by local chambers of commerce. Mr. Stern's letter also makes it plain in his communication, that it is the purpose of those organizing the Texas State Chamber of Commerce, to keep it free from political activities. The difficulties of the situation confronting Mr. Stern, and the conclusion of others having at interest the welfare of the Texas State Chamber of Commerce, is stated by him in part as follows:

"At the convention held in Dallas for the purpose of organizing the Texas State Chamber of Commerce, the objection was raised by Mr. Joe Hirsch, president of the Texas Bankers Association, that under this law with the word 'local' in it, it meant that no corporation could contribute to any association except those located within the city where the corporation has its domicile. Mr. McCormick, of the Chamber of Commerce of Fort Worth, stated that his chamber of commerce had been advised that under this law no chamber of commerce or commercial body in the State could contribute to the Texas State Chamber of Commerce. The Convention decided to organize and to determine whether, under this law, the organization could prove practical; or, if not, then to make an effort to have the law changed so that the Texas State Chamber of Commerce could work as a clearing house of the commercial bodies of the State.

"Since the convention, we have submitted this to several attorneys and have had their opinion that under this law corporations are permitted to contribute only to local commercial bodies not engaged in any way in political matters, and that these local bodies are not permitted to contribute to a central commercial body. We have furthermore been informed that under this law corporations can not contribute to any association until such association has been organized for more than one year prior to the contribution."

I.

Aside from our desire to comply with your request and the general importance of the question involved, the high standing and character of the officers of the Texas State Chamber of Commerce, have made us feel the importance of the matter and the duty we owe to determine the issues in such manner, that the conclusions reached may be safely followed.

II.

The question for determination may be re-stated as follows: Can corporations chartered under the laws of Texas contribute their funds to the Texas State Chamber of Commerce, either directly or through the instrumentality of contributions made by local chambers of commerce to which such corporations have in turn contributed?

III.

A correct answer to these question involves a consideration of various statutes of this State. Subdivision 4 of Article 1140, R. S., 1911, in prescribing the powers of private corporations authorizes them "to purchase, hold, sell, mortgage or otherwise convey such real and personal estate as the purposes 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."

Subdivision 7 of the same article grants authority to corporations "to enter into any obligation or contract essential to the transaction of its authorized business."

These sub-divisions of this article of the statute make it quite plain that corporations can only own such property and enter into such obligations as may be required for the success of the enterprise or the purposes for which they are chartered. It will be noted that subdivision 7 declares that corporations can only make such contracts and enter into such obligations as are essential to the transaction of their authorized business.

R. S. Article 1164, as amended by chapter 102, General Laws passed at the Regular Session of the Thirty-fourth Legislature, reads as follows:

"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 purpose whatever other than to accomplish the legitimate business of its creation, or those purposes otherwise permitted by law; provided that nothing in this section shall be held to inhibit corporations from contributing to any bona fide association, incorporated or unincorporated, organized for and actively engaged for one year prior to such contribution in purely religious, charitable or eleemosynary activities, nor to local commercial clubs or associations or other local civic enterprises or organizations not in any manner nor to any extent, directly or indirectly, engaged in furthering the cause of any political party, or aiding in the defraying the expenses of any candidate for office, or defraying or aiding in defraying the expenses of any political campaign, or

political headquarters, or aiding or assisting the success or defeat of any question to be voted upon by the qualified voters of this State or any subdivision thereof. Provided, that the provisions of this Act shall not in any wise affect any suit now pending in this State on the behalf of the State of Texas for any violation of unlawful contributions by any corporation.

"Sec. 2. If any officer, agent or employe of such commercial clubs, associations or other civic enterprise or organization, shall use or permit the use of any money contributed to such organizations by said corporations, to further the cause of any political party, or to aid in the election or defeat of any candidate for office, or to pay any part of the expenses of any political campaign, or political headquarters, or to aid in the success or defeat of any political question to be voted on by the qualified voters of the State or any subdivision thereof, such officer, agent or employe, shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than twenty-five nor more than one thousand dollars.

"Sec. 3. The fact that there is now no law whereby corporations may contribute to enterprises of the nature herein named, the crowded condition of the calendar and the near approach of the end of the session, constitute an emergency and an imperative public necessity requiring that the constitutional rule that bills shall be read on three several days in each House be suspended, and that this Act take effect, and be in force from and after its passage, and it is so enacted."

Article 1164, prior to its amendment by the Thirty-fourth Legislature, reads:

"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."

Articles 1165-1166 and 1167 of which group Article 1164, both before and since its amendment is a part, reads as follows:

"Art. 1165. Restrictions upon creation of debts.—No corporation, domestic or foreign, doing business in this State, shall create any indebtedness whatever except for money paid, labor done, which is reasonably worth at least the sum at which it was taken by the corporation, or property actually received, reasonably worth at least the sum at which it was taken by the corporation.

"Art. 1166. Contributions to political parties or candidate, etc., by corporation officers, etc., forbidden.—No corporation, domestic or foreign, doing business in the State shall, directly or indirectly, contribute or pay any part of its assets, property or funds to any political party, or to any officer or campaign manager of any political party, or to any person whatsoever, for or on account of such party, nor to any candidate for any office, before or after nominations are made, or to aid in defraying the expenses of any candidate for office, or to any person for or on account of aid in defraying the expenses of a candidate for office, or to any person whatsoever, for, or on account of aid in maintaining or defraying the expenses of any campaign or political headquarters, or to any person whatsoever, for or on account of the success or defeat of any question to be voted upon by the qualified voters of this State, or any subdivision thereof."

IV.

It appears to the writer that the simplest way to determine the questions involved, is to consider the status of corporations under the law, prior to the amendment of Article 1164 by the Thirty-fourth

Legislature, and having reached a conclusion under the old statute, to then determine what effect the amendment by the Thirty-fourth Legislature has uopn the general rights of corporations under the various statutes to be considered. We will inquire then, whether or not a corporation chartered under the laws of Texas had the right under the statutes existing prior to the amendment referred to, to contribute its funds and assets to a State Chamber of Commerce. A corporation owes its existence to the statutes of the State. An individual has an absolute right to freely use, enjoy and dispose of all of his acquisitions, without any control or domination, save only by the laws of the land, and may perform all acts and make all contracts which are not in the eyes of the law inconsistent with the welfare of society. But the civil rights of a corporation are widely different. The law of its nature, or its birthright, in the most comprehensive sense, is such, and such only, as its charter confers. The powers of a corporation are dependent upon the grant of the sovereign power, and it is well settled that a corporation has only such powers as are expressly granted in its charter, or which are necessary for the purposes of carrying out its express powers and the purpose of its incorporation. A corporation has no natural rights or capacities, such as an individual or an ordinary partnership has, and if a power is claimed for it, the words giving the power or from which it is necessarily implied must be found in the charter or it does not exist.

7 Ruling Case Law, 526-527.

The rule as stated above is the general one, and the language used in the foregoing proposition is a substantial paraphrase of the text of the authority cited and which is supported by cases from every jurisdiction in the country. The rule is stated with brevity and exactness by the Supreme Court of this State in the case of Rue vs. Missouri Pacific Ry. Co., 74 Texas 479 ,as follows:

"Natural persons may make any contract or perform any act not prohibited by law, while artificial persons, corporations, can do only those things which by express grant or necessary implications they are authorized or empowered to do by the State under which their charters were obtained."

We cite other authorities as follows:

Railway Company vs. Morris, 67 Texas, 699.
Fort Worth Railway 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 Hdw. Co. vs. Perry Stove Co., 24 S. W., 16.
Thomas vs. Railway Co., 101 U. S. 81.

In the case of Railway Co., vs. Morris, just cited, the Supreme Court of this State, among other things, said:

"The rule that a corporation has power to do only such acts as its charter, considered in relation to the general law, authorizes it to do, applies to every class of corporations."

In the case of Sabine Tram. Co. vs. Bancroft, supra, the Court of Civil Appeals, among other things, said:

"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. To permit corporations to enter into contracts which would practically destroy their identity, and create other managers and agents for them than those provided by law, would be contrary to public policy, and subversive of the laws of their creation. 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 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.' There is no provision in the statute that would give a corporation the authority to hide itself in a partnership, obscure its identity, shift its responsibilities, place its management in the hands of persons foreign to the law of its creation, and cripple its power to perform the duties incumbent upon it. It is true that in prescribing the powers of corporations, in Subdivision 7, Article 651, Revised Statutes, 1895, 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 contracts 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 interssts, or add to its prosperity or wealth—for contracts entirely foreign to the end of its creation might accomplish those 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 of its existence. As said in an English case (East Anglian Rys. Co. vs. Eastern Counties Ry. Co., 11 C. B., 811), and cited with approval by the Supreme Court of the United States: 'What additional power do they acquire from the fact that the undertaking may in some way benefit their line? Whatever be the object or prospect of success, they are still but a corporation for the purpose of making and maintaining the Eastern Counties Railway; and, if they cannot embark in new trades because they have only a limited authority, for the same reason they can do nothing not authorized by their act and not within the scope of their authority.'" Sabine Tram Co. vs. Bancroft, 40 S. W., 839.

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, but no more. Whatever may be a corporation's legitimate business, it may foster it by the usual means, but it cannot go beyond this. It may not under the prextext 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. vs. Worthington, 88 Texas, 562.
Indianola vs. Gulf Ry. Co., 56 Texas, 594.
Ency. of Law, Vol. 7, 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.
7 Ruling Case Law, 528.

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 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 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." (Pages 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. New York & 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 there 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.

In Ruling Case Law cited above the rule as to implied powers of corporations is stated as follows:

"In determining what business may be carried on by a corporation reference must be had to its charter, and unless the power to carry on a particular business is either expressly or impliedly conferred thereby, it does not exist. Though a statute declares that any person or incorporated company desiring to keep a public warehouse shall be entitled to do so upon receiving a permit therefor, it does not authorize the carrying on of the business of warehouseman by a corporation organized for an entirely different purpose. So a mutual insurance company has been held to have no implied power to do a business of reinsurance. Similarly, it has been held that charter authority to run a line of stages or carriages for the transportation of persons for hire does not include authority to carry or maintain for hire exterior advertisements on the vehicles. On the other hand a corporation organized to transact a particular business may have authority to engage in another business which is incident and auxiliary to its main business. The courts generally recognize its implied power to take over the business of the debtor and conduct it in order to collect its debt, though it would have no general power to engage in such business.

"A banking corporation may not own or operate a railroad or engage permanently in any other business than that for which it was chartered by the State. Such a corporation has no implied power to engage in the business of contracting for the construction of bridges. A railroad corporation, though it would have implied power to operate a line of boats in order to cross bodies of water intersecting its line, has not power to operate such a line to carry passengers and freight to a point wholly disconnected with the line of its railroad except in that it starts from a point on the line of the railroad, and the implied power of a railroad company to engage in the general business of a warehouseman has been denied. A railroad company has been held to have no implied power to transact the business of running an omnibus line for the distribution and collection of its passengers. So a corporation empowered to do business as a common carrier of passengers and freight has no power to enter into the general business of buying and selling the commodities which as a carrier it transports. Likewise a banking business is entirely foreign to the charter of a corporation formed for the purpose of building and maintaining a railroad. On the other hand it is not necessary that express power should be given to a common carrier of goods in its charter,

such as a railroad corporation, to assume the liabilities of a depositary of the goods to be carried; this is one of the ordinary incidents of such corporations, unless specially restricted; and the power of a railroad company to build or rent elevators for the purpose of loading and unloading freight has been conceded. So the power of a railroad to lease and maintain a summer hotel to further its transportation business and as an incident thereto has been upheld, though this power has been denied when it was not reasonably necessary for the convenience of its employes and passengers. The owning, and navigating of steamships being a distinct business from the docking and repairing of such vessels, a corporation formed solely for the latter business cannot lawfully engage in the former. A corporation organized in the whale fisheries and in the manufacture of oil and spermaceti candles has no power to engage in the business of buying and selling State bonds. A corporation authorized to do an insurance business has no power to do a general banking business; but the prohibition against banking goes to the business and occupation of banking and not to one or more of the usual acts of banking in detail. A society incorporated for religious worship has no power to contract for a steamboat excursion, to raise money for church purposes; nor has it power to enter into a contract for the purchase and sale of real estate as a matter of speculation merely. Such a corporation must derive its income, not from the conduct of any worldly business, but from such property as it may happen to own, and from voluntary contributions. It has been held that an agricultural society as an incident to the holding of fairs has no implied power to engage in the business of transporting persons to and from its fair grounds, nor has a street railway company implied power to engage in the business of developing for residential and business purposes a tract of land along its line; and conversely it has been held that a land company organized to develop a suburban tract has no implied power to engage in the business of operating a street railway though such operation would incidentally benefit its land project. A manufacturing corporation has no implied power to carry on the business of a warehouseman; and the power to engage in the business of trading in real estate is not implied in a building and loan association having power by its charter to raise funds to be loaned to its members, and to purchase realty upon which it holds an encumbrance, and freely deal with and dispose of the same. Where the declared objects of a corporation are the mining and manufacture of lime and putting the product on the market, it has no implied authority to carry on a general mercantile business, nor can it buy lime manufactured elsewhere for the purpose of trade, and to raise funds to carry on the corporate business. So it would seem that a corporation organized to carry on a boarding house or hotel business in connection with a saloon, though thereby the sale of its products might be increased."

The general rule to be deduced from the various authorities cited and quoted, seems to be that a corporation can only do those things for which it is chartered with implied power to do only that which is necessary to the direct and exclusive business of the particular corporation, and that though there might be incidental matters which would afford it a profit and might be conducive to its immediate or ultimate welfare, still the corporation in its activity is limtied to the exercise only of such powers as are necessary for the direct accomplishment of its chartered purposes.

It will be observed from a reading of the various authorities cited by us, that many of the rulings have been made limiting the powers of corporations even in the absence of statutes which limit these activities; still the opinions of the courts in these instances are in harmony with our own, for the reason, that our statutes in this respect are

merely declaratory of the common law which obtains generally throughout the United States and England.

Railway Co. vs. Gentry, 69 Texas, 632.
Fort Worth City Co. vs. Smith Bridge Co., 151 U. S., 301.

That provision of our statute to the effect that no corporation shall employ its assets and property directly or indirectly for any other purpose than to accomplish the legitimate objects of its creation, is stated by the Supreme Court of the United States in the case cited, to be in harmony with Common Law.

V.

There is of course no express power in our law authorizing corporations to make contributions to a State Chamber of Commerce, or to an organization of similar purpose, nor was there as to local chambers of commerce, until the act was amended by the Thirty-fourth Legislature. If corporations are authorized to make contributions to a State Chamber of Commerce, then that authority must arise from their implied powers, for it is not found expressed by the language of the statutes of the State.

In determining the rights and powers of corporations under the law, our purpose is to keep in mind the general rules of construction applicable to the charters of corporations and the laws under which such charters may be granted. The general rule is "the charter of a corporation is to be construed most strictly against the corporation and in favor of the public; that if the legislative intent is not ascertainable from the language used in the light of the surrounding circumstances, the doubt is to be determined in favor of the public; that where the object is to grant franchises to corporations, the law must be strictly construed against them; that a corporation should always be required to show a plain and clear ground for the authority it assumed to exercise."

Ency. of Law, Vol. 7, page 708.
East Line Ry. Co. vs. Rushing, 69 Texas, 314.
Morris vs. Smith Co., 88 Texas, 527.
State vs. So. Pac. Ry. Co., 24 Texas, 127.
Wharf Co. vs. G., C. & S. F. Co., 81 Texas, 494.
Victoria County vs. Victoria Bridge Co., 68 Texas, 62.
Williams vs. Davidson, 43 Texas, 1.
Empire Mills vs. Alston, 15 S. W., 200.
N. W. Fertilizer Co. vs. Hyde Park, 97 U. S., 659.
Turnpike Co. vs. Ill., 96 U. S., 68.
Sedgwick on Statutory Construction, 291.
Sutherland on Statutory Construction, Secs. 554 and 555.

In the case of the Fertilizer Co. vs. Hyde Park, *supra*, the Supreme Court of the United States, in passing upon rights of a corporation under its charter, stated:

"The rule of construction in this class of cases is that it shall be most strictly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded, but what is given

in unmistakable terms or by an implication equally clear, the affirmative must be shown. Silence is negation, and doubt is fatal to the claim. It is axiomatic in the jurisprudence of this court."

In Mr. Sutherland's Work, cited above, the rule is laid down as follows:

"(554.) The settled rule of construction of grants by the Legislature to corporations, whether public or private, is that only such powers and rights can be exercised under them as are clearly comprehended within the words of the act or derived therefrom by necessary implication, regard being had to the objects of the grant. Any ambiguity or doubt arising out of the terms used by the Legislature must be resolved in favor of the public."

"(555.) It results from these principles that a corporation cannot be brought into existence except by a statute immediately creating it, or authorizing proceedings for its organization. The charter serves a two-fold purpose: it operates as a law conferring upon the corporation the right or franchise to act in a corporate capacity, and furthermore it contains the terms of the fundamental agreement between the corporators themselves. The powers of a corporation organized under statutes are such, and such only, as the statutes confer. Consistently with the rule applicable to all acts, that which is fairly implied is as much granted as what is expressed; it is true that the charter of a corporation is the measure of its powers and the enumeration of those powers implies the exclusion of all others. Such acts are strictly construed and all ambiguities are resolved against the corporation."

In Mr. Sedgwick's Work, the rule is stated to be:

"The uniform language of the English and American law is that all grants or privileges are to be liberally construed in favor of the public, and as against the grantees of the monopoly, franchises or charter to be strictly interpreted. Whatever is not unequivocally granted in such acts is taken to have been withheld. All acts of incorporation and acts extending the privileges of incorporated bodies are to be taken most strongly against the companies."

"Corporate powers can never be granted by implication, nor extended by construction. No privilege is granted, unless it be expressed in plain and unequivocal words, testifying the intention of the Legislature in a manner too plain to be misunderstood. In the construction of a charter to be in doubt is to be resolved, and every resolution which springs from doubt is against the corporation."

These general rules which we have quoted from the best authorities are all incorporated within and endorsed by the Texas cases which we have cited, many of the cases using the substance and some the identical language of the authorities which we have quoted. So there can be no doubt that the rule of construction is that the charters and the laws under which they are granted must be strictly construed, and, in case of any reasonable doubt as to the rights of the corporation under the laws or under the charter, the doubt must be resolved against the corporation and in favor of the public.

VI.

We assume that the activities of a State Chamber of Commerce would be general in their nature and that the contributing corporation would be profited only as a part of the general business public;

that the benefits to any contributing corporation would not be direct, but necessarily remote, and in most instances problematical and speculative. It seems that we may with some profit, examine some of the cases bearing on the proposition underlying the question. The fact that any particular contribution by a corporation might be of benefit to it, does by no means show that it is within the authority of the corporation to make the contribution. This proposition is very well illustrated by the case of Holt vs. Winfield Bank, 25 Fed. 812. The opinion was rendered by Mr. Justice Brewer of the Supreme Court of the United States while he was on the Circuit Court. The facts were substantially these: The Winfield Bank, by its president, subscribed a thousand dollars towards the building of a creamery in Winfield. The question was, whether or not the bank was bound by that subscription. We may safely assume that the contribution was one of probable benefit to the bank, for otherwise it would not have been made. Judge Brewer held that the promise of the bank was beyond its powers and not binding upon it. Among other things, in the opinion rendered, he said:

"The doctrine is still true that a corporation created with certain defined powers cannot go outside of those powers and make a contract to bind. A corporation created for banking purposes can not go into the insurance business; and while the contract remains executory no contract of insurance can be invoked against it. And this is no technical, artificial, arbitrary rule. It is founded in the protection necessary to stockholders who invest their means in the corporation. They may be willing to trust their means in a certain class of business, and if the corporation is created for that class of business they have a right to rely upon the fact that it will not engage in any other business. * * * Starting a creamery is not a bank business. I have before me in Omaha, Nebraska, a case which illustrates the wisdom and necessity of keeping corporations within the proper limits of their power. There the parties started with a creamery; a creamery association was incorporated. That was too humble a business for the promoters. The corporation bought a bank and went into the banking business; rented a manufacturing company's property and went into manufacturing; started a broker's office and went into the loan business. As a consequence, and as might be expected, there was a terrible crash, and a host of hungry creditors are claiming relief.

"As much as I object to saying to anybody that he can get out of his promise, I think that the promise of the bank in this case was beyond its powers and not binding upon it." (25 Fed., 812-814.)

The case of McCrory vs. Chambers, 48 Ill. App., 445, illustrates the principle under discussion. The directors of the First National Bank of Charleston, on December 1st, 1892, by resolution authorized and instructed the president of said bank to subscribe for said bank five hundred dollars for the purpose of retaining the Bain Manufacturing Company in Charleston. Afterwards at a meeting of the directors, the president was instructed and authorized to pay over to the trustees selected to receive the funds subscribed for the purpose of retaining this company in Charleston, five hundred dollars and charge same to the expense account; the money was paid in accordance with the resolutions of the board and was a mere gift or donation to the company. Suit was brought by complaining stockholders for the recovery of this money; judgment recovered and the decree

awarding the judgment affirmed by the Court. In presenting the case throughout, the point was made by the defendants that the donaion viewed simply from a business standpoint, may have been decidedly advantageous to the financial interests of the bank; that the Bain Manufacturing Co. might add greatly to the business and population of Charleston, and might deposit larger sums of money in the bank, or might, as a borrower of money, become a customer of the bank, etc., and that the directors ought to be vested with the power of aiding and retaining such an institution in the city as incidental to the express power granted to it to conduct the general business of banking. Concerning the power of the bank to make this contribution the court held in effect that this right was not among the chartered powers of a national bank; that the directors could use the funds and property of the bank only for proper banking purposes and for the strict furtherance of the business objects and financial prosperity of the corporation; that the directors cannot make gifts from corporate funds nor use any of its money for objects of usefulness or charity or the like, however worthy of encouragement or aid; the incidental powers of the national bank are such as are necessary to the efficient exercise of its express powers and that a donation of its funds to induce manufacturing companies to remain in the town where such bank is located, is unauthorized and illegal. The Court in part said:

"We understand the rule to be that corporations have such powers as are expressly given them by the law which authorizes their creation, and such other powers as are necessarily incidental to the proper exercise of such express powers. The express powers are readily ascertained from the statute or the charter of the corporation. The right to make donations of money is not among them."

"The directors (of a national bank) can use the funds and property of the bank only for proper banking purposes, and for the strict furtherance of the business objects and financial prosperity of the corporation. They can not use any portion of the money for objects of usefulness or charity or the like, however worthy of encouragement or aid. They can not make gifts from the corporate fund. All their transactions must be strictly matters of business.' Morse on Banks and Banking, Vol. 1, Sec. 127, pp 258, 259.

"The incidental powers are such as are necessary to the efficient exercise of the express powers. A donation of the funds of a bank is prima facie unauthorized. Such power is not expressly given, nor is it apparent, in the absence of proof of special circumstances, that it is necessary to the proper and successful exercise of any express power. * * * It may be conceded to be apparent that the retention of the Bain Manufacturing Company at Charleston would be of general benefit and advantage to that city, but that the bank will be financially benefited, except so far as it may share in the general prosperity of the community, does not appear. That its pecuniary interest will be advanced and directly forwarded can not be assumed from the mere fact that a manufacturing company is induced to continue its business in the same city in which the bank is located.

"The presumption is that the mere donations are injurious to a bank and unwarrantable. If directors order such donations to be made they must be prepared to show the particular circumstances which called for and justified such a diminution of the funds intrusted to their care."

McCrory vs. Chambers, 48 Ill. App., 452-453.

The case of North Side Railway Co. vs. Worthington, 88 Texas, page 562, is a ruling case in this State and well illustrates the principles which govern us on reaching the conclusions on the issues involved in your inquiry. The facts so far as necessary may be stated as follows:

The Fort Worth Railway Company and the North Side Street Railway were both organized under the general laws of this State which provides for the creation of corporations, the purpose of the first as expressed in its charter, being "the purchase, subdivision, and sale of lands in cities, towns, and villages"; and that of the second, "the construction and maintenance of street railways." They were organized about the same time, the stock taken by the same persons and in about the same proportions. Their officers and directors were the same. The city company acquired title to a tract of land consisting of about fourteen hundred acres, lying north and northwest of the city of Ft. Worth and laid it out in streets, alleys, blocks, and lots, for the purpose of selling to settlers and building up the suburb. The street railway was projected to extend from a point in the city to and through the city company's property. There was testimony to show that the street railway was calculated to enhance the value of the lots, if not necessary to enable the city company to sell them at a profitable price; it was essential to build up the suburb in order to make the street railway a paying investment. The city company needed a large amount of money to pay off its indebtedness and for other purposes, and the street railway company needed funds for the construction and equipment of its line of street railway. Bonds to the extent of one hundred and fifty thousand dollars were issued jointly by the two corporations and secured by a mortgage on their property. The question at issue in the case, was, as to the validity of these bonds. The Supreme Court of the State held that while the bonds of the companies would be binding on each other to the extent of the value received by it, yet neither of the companies was bound as an endorser of the obligation of the other.

The court in quite an elaborate opinion written by Chief Justice Gaines, discusses the question there at issue and the principles underlying them in a manner so clear and comprehensive that we cannot do better than to adopt a portion of that opinion as a part of the opinion upon the questions here involved, and we do so, as follows:

"It is contended on behalf of the plaintiffs in error, that the execution of the bonds was ultra vires, and that therefore they are void. In determining this question, we may recur to a few leading principles. 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 a 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 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 purpose of the incorporation, they are within its powers; if they be unusual and tend in an indirect manner only to promote its interests, they are held to be ultra vires. For example, a railroad company may establish and maintain refreshment houses along its line for the accommodation of its passengers. Flanagan vs. Railway, L. R., 7 Eq., 116. Such establishments are not unusual, are strictly subordinate to the main purpose for which such companies are created, and tend immediately to increase their traffic. So it has been held, that a railroad corporation has the power to contract with the owner of a steam vessel to maintain a through traffic and carry beyond its line, and that it can recover of the owner of such vessel damages to goods resulting from its unseaworthiness for which the company has had to pay. South Wales Railway Company vs. Redmond, 10 C. B., N. S., 675. It is now generally recognized, that a railway company may contract to carry beyond its line, and it would seem to follow, that a reasonable traffic arrangement with another carrier for through transportation is legitimate. On the other hand, in Coleman vs. The Eastern Counties Railway Company, 10 Ber., 1, the performance of a contract by which the company sought to establish a line of steamships between a terminus of one of its branches and a foreign port, and by which it attempted to guarantee a dividend on the venture, was enjoined. Upon a hasty consideration, the two cases may appear not clearly distinguishable; but we think them entirely consistent, and that they will illustrate the rule which we have stated. In the former, the contract was subsidiary to the legitimate business of the company, and was such as was reasonable and appropriate to a railroad, one of the termini of which was upon the seashore. It tended directly to increase the traffic of the company. In the latter, the establishment of the line of steamships was not subordinate to the business of the railroad company, but was in its nature a distinct enterprise. It tended to increase the business of the port to which the company's branch line extended, and the increase of the business of the port tended to increase the traffic of the railroad; but this was a mediate, and not a direct result.

As illustrative of the principle which we have announced, we call attention to some cases in addition to those already cited.

In Davis vs. Railway, 131 Massachusetts, 258, it is held, that it is beyond the powers of a railway company, or of a corporation organized under the general statutes of Massachusetts for the manufacture and sale of musical instruments, to guarantee the payment of the expenses

of a musical festival. The opinion in that case is by Chief Justice Gray, and is a very able and exhaustive discussion of the question.

In Pearce vs. Railway, 21 Howard, 441, it was held, that two railroad companies which had consolidated were not authorized to establish a steamboat line to run in connection with their railroads.

In Plymouth Railway vs. Colwell, 39 Pennsylvania State, it was decided, that a railway company was not authorized by its charter to maintain a canal.

In Timkinson vs. Railway, Law Reports, 35 Chancery Division, 675, it was held, that a proposed subscription by the company to an institution known as the "Imperial Institute" was not prevented from being ultra vires by the fact that the establishment of the institute might benefit the company by causing an increase of passenger traffic over their line.

To these cases others might be added, but they are sufficient to illustrate the doctrine, that a corporation, created for the purpose of carrying on a business under a statute which merely states the nature of the business and does not further define its powers, may exercise such powers as are reasonably necessary to accomplish the purpose of its creation; and it may be such as are usually incidental in practice to the prosecution of the business, and no more. See Lime Works vs. Dismukes, 87 Ala., 344; Searight vs. Payne, 6 Lea (Tenn.) 283.

These principles, applied to the facts of this case, lead to the conclusion, that neither the Fort Worth City Company nor the Northside Street Railway Company had the power to extend its credit to foster the interest of the other company. Viewed in the light of the peculiar facts of the case, it is apparent that the building up and settlement of the suburb tended to increase the business of the street railway which connected that suburb with the city of which it was the outgrowth. On the other hand, it is equally clear that the establishment of the street railway tended to promote the enterprise of the other corporation. It is also clear, that the establishment and maintenance of a street railway is not an object which was expressed in the articles of incorporation of the city company, and that the building up of an addition to a city is not a purpose expressed in the charter of the other corporation. That the success of the one enterprise tended to promote the success of the other was not itself sufficient to authorize the one corporation to aid the other, for the reason that the benefit which was to accrue was not the direct result of the means employed.

The transaction in controversy, when properly analyzed and stripped of its form, is one in which the two corporations agreed to borrow a sum of money to be divided between them, and that each should become the surety for the other for the amount received by such other. It is too well settled to require the citation of authority, that a corporation of the character of those in question, in the absence of statutory authority, can not bind itself by accommodation paper executed for the benefit of another party. It follows, that if either corporation in this case is to be held bound for more than its proportionate amount of the debt incurred, it must be upon the ground that it had power to aid in the prosecution of the business of the other.

Did the street railway company have such power? If it is to be held, that because of the indirect benefits which would result to it from the success of the enterprise, it was authorized by the law to aid in building up the suburb of the city company, then it should also be held, that it had the power to employ its funds and its credit in fostering any other undertaking which was calculated to increase the population of the city of Fort Worth or any portion of the territory which lies along its line. The effect of that ruling would be to empower every business corporation not only to carry on the very business it was created to prosecute, but also to engage in every enterprise which would tend to increase the volume of its principal business and the revenues to be derived therefrom. This would leave the scope of its operations without any reasonable limit. That such is not the law, the authorities already cited are sufficient to show. Street railways are projected for the carriage for hire of people living within and near cities and towns. Street railway companies are chartered for the specific purpose of establishing and operating street railways, and not to increase the population of the towns and cities through which they are established—though their operation may have that effect, and though an increase of population may result indirectly to their benefit.

The same principles apply to the case of the Fort Worth City Company. The general law in force at the time this corporation was created provided, that a private corporation might be formed for the purpose, among others, of 'the purchase, subdivision, and sale of lands in cities, towns, and villages.' Laws 1885, p. 59. We construe this to give the power to purchase lands, and to lay them off into streets, blocks, and lots, and to sell them in subdivisions for the purpose of profit. Many enterprises suggest themselves which might be entered into by such a corporation, which would tend to promote the success of the undertaking. As a general rule, there is probably none that would be better calculated to produce that effect than the construction and maintenance of an ordinary railroad. But can it be said that such a corporation has the power to embark its capital in such enterprise? A limit must be laid down as to the implied powers of a corporation; and with reference to a company chartered for a business purpose, we think the proper line of demarcation is between those powers which are reasonably necessary to the business, or which are usually incident to its prosecution, and those which are not. * * * * Cities and towns have grown up without the aid of street railways. The origin of the latter is comparatively very recent. The law does not recognize them as a usual means of carrying out the purpose of a corporation organized to purchase and subdivide lands and to sell them in lots. They are provided for in the general law as a distinct purpose for which corporations may be created. The two enterprises may be of mutual assistance; and if the same persons desire to form two distinct corporations for the prosecution at the same time of two undertakings, with a view to the mutual benefit which may result from the concurrent operation of the two, no reason is seen why they should not do so. But each should confine itself to its

proper business, and should not divert its capital or extend its credit to the assistance of the other."

We may remark in passing without stopping at the present time to apply the principles stated in the foregoing quotation, but nevertheless paraphrasing the last paragraph therein, that cities and towns have grown up without the aid of a State Chamber of Commerce; that the origin of the latter class of corporations is comparatively recent and according to the information contained in Mr. Stern's letter, there are only some twenty-two in existence. The law does not recognize State Chambers of Commerce, nor local chambers of commerce, for that matter, as the usual means of carrying out the purpose of a corporation as chartered under our laws. The organization of chambers of commerce is provided for in Subdivision 56, R. S., Article 1121, as a distinct purpose for which corporations may be created in this State, which of itself, would seem to imply that the business of a chamber of commerce is one which is not incidental to the various corporate purposes provided for in that article of the statute of which Subdivision 56 is a part. It may be that the ordinary business corporation and a chamber of commerce would be of mutual assistance, and there is no reason why the same persons should not be shareholders or members of each class of corporations, or each class of business enterprises, but it appears to us that the language of the Supreme Court in the case cited and quoted from applies with propriety and force to the question before us, to wit: "But each should confine itself to its proper business and should not divert its capital, or extend its credit, to the assistance of the other."

In the case of Harriman vs. First Baptist Church, 36 American Rep., p. 117, the action was brought for breach of contract to furnish a steamboat for an excursion in the interest of the church, which was a corporation. The court held that a society incorporated for religious worship has no power to contract for a steamboat excursion to raise money for church purposes, and, therefore, could not recover for expenses or loss of anticipated profits by reason of defendant's breach of the contract. While adverting to the fact that the purpose of the contract was a lauable one in that it was sought to raise money for the church, still, said the court:

"The power to raise money for a proper object does not carry with it unlimited discretion as to the means of raising it. Every corporation must act according to its nature; a trading corporation must trade, a manufacturing corporation must manufacture, a banking corporation must bank, a transportation corporation must carry, and a religious corporation must preach, teach, minister to spiritual edification, and promote works of mercy and benevolence. A church incorporated as such can not engage, even for a day, in merchandising, or in spinning or weaving, or in banking or broking, or in transporting freight or passengers. It must derive its income, not from the conduct of any worldly business, but from such property as it may happen to own, and from voluntary contributions. However urgent its needs for money, it can not rent a farm to make a crop of corn or cotton, nor a store to buy and sell goods, nor a livery stable to let out horses and carriages, nor can it hire a vessel to transport the public upon rivers or the ocean. To charter a steamer, and sell tickets to the public for an excursion, is to enter into the responsibilities and hazards of a business, for gain and profit, not mentioned or hinted

at in 'the more efficient worship of God, the preservation and perpetuation of said church, and the better control and regulation of the property thereof.' * * * That church members, in their personal, individual capacity, have the right, if they think fit, to get up an excursion, as matter of business, for the improvement of the church finances, to charter carriages, ships, or railroad trains for the purpose, and to sell tickets to the public, there is no doubt; but it seems to us that an artificial entity which the law creates under the name of a corporation can do nothing of the kind without the authority to do it, is specially granted."

Harriman vs. First Baptist Church, 36 Am. Rep., 117.

In the case of Schurr vs. New York and Brooklyn Suburban Investment Co., the contract by the corporation which was organized for the purpose of purchasing, taking, holding, possessing, selling, improving and leasing real estate and buildings, the manufacture, purchase, lease, sale, use of building stone, lumber, and other building materials, by which contract it was agreed to pay for services in organizing stock companies to locate and engage in business upon the land for the corporation, was held to be ultra vires and void on the ground that it was beyond the powers of a corporation. Concerning the matter the court said:

"Upon the point of the competency of the defendant to make the contract, the argument of respondent is, 'that the object of the corporation being to improve, sell, and lease real estate, a contract with plaintiff to organize stock companies on its land so as to increase its value is certainly ultra vires.' Notwithstanding the confidence with which the conclusion is announced, we are of opinion that it is a non sequitur. 'In addition to the powers enumerated in the first section of this title, and to those expressly given in its charter, or in the act under which it is or shall be incorporated, no corporation shall possess or exercise any corporate powers, except such as shall be necessary to the exercise of the powers so enumerated and given.' 2 Rev. St., N. Y. (7th Ed.) p. 1530. And that this statutory definition of corporate power is but an enactment of the common law principle is settled by repeated adjudication.

Head vs. Insurance Co., 2 Cranch, 127.
Thomas vs. Railroad Co., 101 U. S., 71, 82.
Curtis vs. Leavitt, 15 N. Y., 9, 54.
Halstead vs. Mayor, 3 N. Y., 430, 433.

"Such being the limitation upon corporate power, in order to the validity of a corporate contract it must be either within the express terms of the constitutive instrument, or else implied, as 'necessary to advance the objects of the corporate creation,' (Legrand vs. Association, 80 N. Y., 638); or, less stringently, 'as incidental to the objects for which the corporation is created.' (Green Bay, etc., R. Co. vs. Union Steamboat Co., 107 U. S., 98, 2 Sup. Ct. Rep., 221.) That authority to engage in the business of organizing other corporations is neither necessary nor incidental to the charter objects of the defendant company is a proposition too plain for plausible dispute. No doubt the erection of factories on defendant's land would tend to enhance its value; but, obviously, not any and everything that so tends is necessary or incidental to the charter objects of the corporation. The contract in controversy was entirely beyond the scope of defendant's business and powers.

Moss vs. Averell, 10 N. Y., 449, 460, arguendo.
Packet Co. vs. Shaw, 37 Wis., 655.
Weckler vs. Bank, 42 Md., 581.
Barry vs. Merchants' Exp. Co., 1 Sandf. Ch. 280, 289.
Davis vs. Railroad Co., 131 Mass., 259.
Diligent Fire Co. vs. Com., 75 Pa. St., 291.
Le Couteaulx vs. Buffalo, 33 N. Y., 333.

Plank Road Co. vs. Douglass, 9 N. Y., 444.
Fertilizing Co. vs. Hyde Park, 97 U. S., 659.
Thomas vs. Railroad Co., 101 U. S., 71.
Schurr vs. New York & B. Suburban Investment Co., 18, N. Y. Supplement, p. 454."

In the well known case of the People of the State of Illinois vs. The Pullman Palace Car Co., 64 L. R. A., 366, The Supreme Court of that State held that the ownership by the Pullman Company, which was a manufacturing corporation of the city of Pullman, together with its streets, alleys, sewer system, tenement houses, churches, hotel, schools, dwellings, business buildings, etc., was beyond the powers of the Pullman Company; it likewise held in line with weight of current authority, that the Pullman Company had no implied authority to own stock in other corporations. It was urged with much emphasis that the Pullman Company was obliged to construct its tenement houses, and in fact the entire model town of Pullman, in order to properly carry forward its business and that therefore authority to do so was one of the necessary implied powers. Concerning this plea the Court, among other things, said:

"The averment of the plea, that the corporation was obliged to construct such houses and tenements, is but the statement of a conclusion, and we find the facts pleaded do not justify such a deduction. No reason existed, nor do we find in the pleas even a suggestion that there was reason or ground for the apprehension that individual enterprise and private capital would not at once, after the purpose and intention of the corporation became known, provide all necessary dwellings and tenements for the accommodation of the workmen, or that the wants of the community composed of such workmen would not at once be met by the location in its midst of schools, churches, dry goods and grocery stores, meat markets, etc., or that the necessary streets, alleys, and public ways would not be provided without any intervention whatever on the part of the corporation. The public laws of the State would have supplied the requisite school houses and teachers, and the inclinations of the individual members of the community could have been safely relied upon to provide church houses and rooms for imparting religious instruction. It is idle to argue that it became, in any sense, necessary or directly appropriate to the accomplishment of the lawful and chartered purposes or objects of the corporation that it should engage its efforts or capital in the construction of dwellings, tenement houses, store houses, streets, alleys, theaters, hotel, churches, school houses, waterworks, a system of sewers, etc. Workmen, if they have families, must have homes, or, if unmarried, must be accommodated with boarding and places of lodging. Homes, groceries, vegetables, bread, meat, clothing, furniture, light, heat, water, school books, medicine, the services of physicians, dentists, and other professional men, and many other things, become necessary to the health, comfort, or convenience of such workmen and their families; but the right and power to supply such wants had, in this instance, so far as the pleas show, no direct relation or connection with the successful prosecution of the specific object of the appellee corporation. The relation was but remote, indirect, and mediate—not direct and immediate. Implied power can not be invoked to authorize a corporation to engage in collateral enterprises but remotely connected with the specific purposes it was created to accomplish. A power which a corporation may exercise by implication must be bounded by the purposes of the corporate existence and the terms and intention of the charter, and acts which tend only remotely and by indirection to promote its interest and chartered objects can not be justified by implication of law, but are ultra vires."

People ex rel. Moloney vs. Pullman Palace Car Co., 64 L. R. A., 367.

In the case of Horrace Abbott vs. Baltimore and Rappahannock Steam Packet Co., Vol. 1, Maryland Chancery, 542, the action was for a receiver of the Packet Company. Among the claims presented, was that of Marshall. The obligation was given in aid of opening the Rappahannock River as to render it navigable to the basin in or near Fredericksburg, a point beyond the terminal point of the Packet Company as set forth in its charter. The Chancellor said that this claim could not be allowed because unauthorized by the corporation charter, and said:

"It has been already stated that this company was incorporated 'for the purpose of establishing and conducting a line of steamboats and stages or carriages between Baltimore and Fredericksburg, and the several ports and places on the Rappahannock, and on the rivers and waters of the Chesapeake Bay, for the conveyance of passengers and transportation of merchandise and other articles.'

"The object of the charter was to authorize the transportation of passengers and merchandise between Baltimore and Fredericksburg; but the purpose contemplated by the improvement, in aid of which the obligation under consideration was given, as declared upon the face of the instrument, was to open the Rappahannock River, and render it navigable, etc., to the basin in or near Fredericksburg. The improvement proposed to be made was above the Virginia terminus of the route, between which terminus and Baltimore the boats were to run, and was not, therefore, for that reason, within the authority conferred upon the company by their charter; but even if the improvement had been between the termini, I do not think it would have been within the powers granted by the act of incorporation."

Abbott vs. Balt. and Rapp. Steam Packet Co., Maryland Chancery, 1, p. 542.

In the case of Richmond Guano Co. vs. Farmers Cotton Seed Oil Mill and Ginnery Co., 126 Fed., p. 712, it was held that a corporation organized to build and operate a cotton seed oil mill and ginnery in connection therewith, and to compress cotton seed oil, to buy cotton seed; to sell their products; manipulate and compound cotton seed meal with other substances and elements so as to make fertilizers to be sold for fertilizing lands, and to gin and compress cotton into bales for the market, had no power to engage in the business of buying and selling a fertilizer made by another, and which was sold in the same condition as when bought, and that notes given by the oil mill company for the purchase price of such fertilizer to be so sold, were ultra vires and void.

We will not prolong the long list of authorities illustrating the principle that even though a business may be profitable, still a corporation is without authority to engage therein, unless authorized to do so by its charter; and that the mere fact that the use of its funds in some other business or occupation may bring about a return, does not bring the other business or occupation within the implied powers of the corporation. Many cases have been examined and briefly incorporated into the text by the writer of the article on corporations in Ruling Case Law, and we will content ourselves with quoting therefrom the following:

"In determining what business may be carried on by a corporation, reference must be had to its charter, and unless the power to carry on a particular business is either expressly or impliedly conferred thereby, it does not exist. Though a statute declares that any person or incorporated company desiring to keep a public warehouse shall be entitled to do so upon receiving a permit therefor, it does not authorize the carrying on of the business of warehouseman by a corporation organized for an entirely different purpose. So a mutual insurance company has been held to have no implied power to do a business of reinsurance. Similarly it has been held that charter authority to run a line of stages or carriages for the transportation of persons for hire does not include authority to carry or maintain for hire exterior advertisements on the vehicles. On the other hand a corporation organized to transact a particular business may have authority to engage in another business which is incident and auxiliary to its main bcsiness; and where one corporation, such as a banking corporation, becomes the creditor of one engaged in a particular business, the courts generally recognize its implied power to take over the business of the debtor and conduct it in order to collect its debt, though it would have no general power to engage in such business.

"A banking corporation may not own or operate a railroad, or engage permanently in any other business than that for which it was chartered by the State. Such a corporation has no implied power to engage in the business of contracting for the construction of bridges. A railroad corporation, though it would have implied power to operate a line of boats in order to cross bodies of water intersecting its line, has not power to operate such a line to carry passengers and freight to a point wholly disconnected with the line of its railroad, except in that it starts from a point on the line of the railroad, and the implied power of a railroad company to engage in the general business of a warehouseman has been denied. A railroad company has been held to have no implied power to transact the business of running an omnibus line for the distribution and collection of its passengers. So a corporation empowered to do business as a common carrier of passengers and freight has no power to enter into the general business of buying and selling the commodities which as a carrier it transports. Likewise a banking business is entirely foreign to the charter of a corporation formed for the purpose of building and maintaining a railroad. On the other hand it is not necessary that express power should be given to a common carrier of goods in its charter, such as a railroad corporation, to assume the liabilities of a depositary of the goods to be carried; this is one of the ordinary incidents of such corporations, unless specially restricted; and the power of a railroad company to build or rent elevators for the purpose of loading and unloading freight has been conceded. So the power of a railroad to lease and maintain a summer hotel to further its transportation business and as an incident thereto has been upheld, though this power has been denied when it was not reasonably necessary for the convenience of its employes and passengers. The owning and navigating of steamships being a distinct business from the docking and repairing of such vessels, a corporation formed solely for the latter business can not lawfully engage in the former. A corporation organized in the whale fisheries and in the manufacture of oil and spermaceti candles has no power to engage in the business of buying and selling State bonds. A corporation authorized to do an insurance business has no power to do a general banking business; but the prohibition against banking goes to the business and occupation of banking and not to one or more of the usual acts of banking in detail. A society incorporated for religious worship has no power to contract for a steamboat excursion, to raise money for church purposes; nor has it power to enter into a contract for the purchase and sale of real estate as a matter of speculation merely. Such a corporation must derive its income not from the conduct of any worldly business, but from such property as it may happen to own, and from voluntary contributions. It has been held that an agricultural society as an incident to the holding of fairs has no implied power to engage in the business of transporting

persons to and from its fair grounds, nor has a street railway company implied power to engage in the business of developing for residential and business purposes a tract of land along its line; and conversely it has been held that a land company organized to develop a suburban tract has no implied power to engage in the business of operating a street railway though such operation would incidentally benefit its land project. A manufacturing corporation has no implied power to carry on the business of a warehouseman; and the power to engage in the business of trading in real estate is not implied in a building and loan association having power by its charter to raise funds to be loaned to its members, and to purchase realty upon which it holds an encumbrance, and freely deal with and dispose of the same. Where the declared objects of a corporation are the mining and manufacture of lime and putting the product on the market, it has no implied authority to carry on a general mercantile business, nor can it buy lime manufactured elsewhere for the purpose of trade, and to raise funds to carry on the corporate business. So it would seem that a corporation organized to carry on a brewing business would have no implied authority to carry on a boarding house or hotel business in connection with a saloon though thereby the sale of its products might be increased."

Ruling Case Law, 7 R. C. L., 544.

VII.

It will be noted that in instances which we have referred to, the use of the corporate funds was in a manner calculated to produce a direct return for the corporation. Still, the courts have uniformly held that this fact did not bring the use of these funds within the implied powers of the various corporations involved and that the expenditures of the funds of the corporations in the manner suggested were ultra vires and void. We think it entirely sound that contributions by corporations of the State to a State Chamber of Commerce would tend only in the most remote manner to promote the interest of contributing corporations and that such expenditure of funds would be ultra vires and beyond the powers conferred upon the corporations of this State by our laws. It seems to us that the illustrations we have given of the misuse of corporate funds present much stronger cases of the right to use funds in the manner shown than does the proposition that a corporation may contribute to a State Chamber of Commerce. Take the case of the North Side Railway Company vs. Worthington, which we have heretofore cited. There the action of the corporations involved was of undoubted benefit to each of them and may reasonably be considered to have been essential to the success of the enterprise of each of the obligated corporations, yet the Supreme Court of this State held the endorsement of each others bonds for the purpose of obtaining funds, to be ultra vires and void.

Can it be doubted that the endorsement of the bonds of each other in the instance named was of more value and of more direct benefit than would have been contributions to commercial clubs?

We think there can be no doubt but in answering the question we must say, there is greater reason in favor of the right of these respective corporations to have issued their joint bonds than there is to support the proposition that they could use their funds to foster a State Chamber of Commerce, the benefits of which, to say the least, are indirect.

VIII.

We will next examine and see in what manner the Act of the Thirty-fourth Legislature enlarged the rights of corporations with reference to the use of their funds. This Act of the Legislature is a re-enactment of Article 1164, R. S., with a provision added thereto as follows:

"Provided that nothing in this section shall be held to inhibit corporations from contributing to any bona fide association, incorporated or unincorporated, organized for and actively engaged for one year prior to such contribution in purely religious, charitable or eleemosynary activities, nor to local commercial clubs or associations or other local civic enterprises or organizations not in any manner nor to any extent, directly or indirectly, engaged in furthering the cause of any political party, or aiding in the election or defeat of any candidate for office, or aiding in defraying the expenses of any candidate for office, or defraying or aiding in defraying the expenses of any political campaign, or political headquarters, or aiding or assisting the success or defeat of any question to be voted upon by the qualified voters of this State or any subdivision thereof."

Chapter 102, General Laws, Thirty-fourth Legislature.

When analyzed it will be seen that this proviso modified Article 1164, R. S., as it originally stood in the statutes in two respects only. First, it declares that this article of the statute shall not prohibit corporations from contributing to purely religious, charitable or eleemosynary associations; contributions to associations of the character named may be made, although these associations are not local in their character, but may be statewide or beyond the territorial limits of the statute. Provided, however, that these associations are bona fide ones and have been actively engaged in their respctive occupations for one year prior to the contribution.

Second: The effect of the proviso also is to declare that Article 1164 does not prohibit corporations from making contributions to *local* commercial clubs or associations, the purpose of which is free from a political object.

The Texas State Chamber of Commerce is of course neither a religious, charitable nor eleemosynary institution, therefore the enactment to Article 1164, R. S. would not permit contributions to it. It is equally plain, we think, that the Texas State Chamber of Commerce is one with State activities and is not local in its nature.

IX.

It would seem to be also, that inasmuch as the statute has limited the contributions which may be made by corporations to local commercial clubs, that it necessarily excludes the privilege and right of contributing to state commercial associations upon the familiar principle of corporation law that the specification of certain powers operates as a restraint to such objects only and is an implied prohibition of the exercise of other and distinct powers.

7 Ruling Case Law, p. 537.
N. Y. Fireman Ins. Co. vs. Ely, 13 Am., p. 100.
Doty vs. Am. Telephone Co., 130 S. W., 1053.

It is only an application of the rule inclusio unius exclusio alterius est, that the permission of one thing is the exclusion of another and where a statute provides that a thing may be done in a particular way, it impliedly forbids that it may be done otherwise.

Mercin vs. Burton, 17 Texas, 206.
Serbert vs. Richardson, 86 Texas, 295.

X.

In conclusion we beg to advise you, that corporations chartered under the laws of this State, have no corporate authority, * * *

1st. To contribute to a State Commercial Organization.

2nd. That while they have authority to contribute to local commercial organizations, yet they do not have authority to contribute to a local commercial organization which in turn makes contribution to a State commercial organization, for the reason, of course, that they would be doing indirectly that which they have no authority to do directly.

3rd. That corporations may contribute to local commercial organizations so long as these local commercial organizations confine their activities to local affairs.

4th. Corporations may contribute to purely religious, charitable and eleemoysnary institutions, regardless of the extent of the activities of the latter, where such institutions are bona fide and have been in operation one year prior to the contribution.

Yours truly,

C. M. CURETON,
First Assistant Attorney General.

OP. NO. 1693.

1. The Legislature has ample authority under the Constitution for the enactment of a law regulating telephone companies.
2. The Legislature has power to devolve on the Railroad Commission of this State the duty of administering such a law.

January 11, 1917.

Hon. W. L. Dean, Senate Chamber, Capitol.

DEAR SIR: I have your favor of the 9th inst., in which you say:

"I have in course of preparation a bill for the regulation of the long distance telephone companies as respects the rates they may charge, and otherwise, and I would very much prefer, in my bill, to place these companies under the jurisdiction of the Railroad Commission of the State. But there is some question as to the constitutionality of an act which would place the regulation of the long distance telephone companies in the hands of the Railroad Commission. Being in doubt upon this point myself, I write to request that you advise me at as early a date as is practicable, whether, in the opinion of your department, our Railroad Commission could legally be invested with the power and duty of supervising the long distance telephone companies and fixing the tariffs they may prescribe for conversations over their lines."

Replying to your inquiry, beg to say that our law authorizes the formation of corporations for the purpose of owning and operating telephone lines. (Article 1121, Subdivision 8, Revised Statutes).

The authority to charter a company for this purpose carries, of course, the power to collect tolls or fares. In fact, the right to collect tolls or fares is of the essence of the franchise.

These corporations are granted the right of eminent domain. See Chapter 13, Title 25, Revised Statutes. The provision of this Chapter authorizing telegraph companies to exercise the right of eminent domain has been construed by our courts to include telephone companies.

See 52 S. W., 106; 55 S. W., 117; 61 S. W., 407; 93 Texas, 313.

It follows, therefore, that a telephone corporation in its operation necessarily uses property devoted to the public.

That the Legislature has the constitutional right to regulate and control the operations of these public service corporations and to prescribe reasonable fares and tolls that may be charged for their service to the public, can scarcely admit of doubt.

Section 17 of the Bill of Rights, among other things, provides that "no irrevocable or uncontrollable grant of special privileges or immunities shall be made; but all privileges and franchises granted by by the legislature or created under its authority shall be subject to the control thereof."

Section 22 of Article 4 in defining the duties of the Attorney General, among other things, requires that he "shall especially inquire into the charter rights of all private corporations and from time to time in the name of the State take such action in the courts as may be proper and necessary to prevent any private corporation from exercising any power or demanding or collecting any species of taxes, tolls, freight, or wharfage not authorized by law."

Section 4 of Article 12 requires that the legislature shall provide a mode of procedure under which the Attorney General and district and county attorneys in the name of the State may "prevent and punish the demanding and receiving or collection of any and all charges, as frieght, wharfage, fares or tolls for the use of property devoted to the public, unless the same shall have been specially authorized by law."

Section 5, of Article 12, of the Constitution is as follows:

"All laws granting the right to demand and collect freight, fares, tolls or wharfage shall at all times be subject to amendment, modification or repeal by the Legislature."

The Legislature, in my opinion, can find ample authority in the above provisions of the constitution for the enactment of a law regulating telephone companies, such as you indicate in your communication.

The question as to whether or not the legislature can devolve on the Railroad Commission of this State the duty of administering such a law, should, in my opinion, be answered in the affirmative.

Section 2, Article 10, of the State Constitution, declares that railroads are public highways and common carriers and that the Legislature shall pass laws to regulate tariffs relative thereto, to correct abuses, prevent unjust discrimination and extortion in the rates of freight and passenger tariffs and enforce the same by adequate penalties.

The section then contains this provision:

"And to the further accomplishment of these objects and purposes may provide and establish all requisite means and agencies invested with such powers as may be deemed adequate and advisable."

Section 30 of Article 16 of the Constitution, which relates to the duration of public offices in this State, contains a provision as follows:

"* * * provided, Railroad Commissioners first elected after this amendment goes into effect shall hold office as follows: One shall serve two years, and one four years, and one six years, their terms to be decided by lot immediately after they shall have qualified. And one Railroad Commissioner shall be elected every two years thereafter. In case of vacancy in said office the Governor of the State shall fill said vacancy by appointment until the next general election."

The Railroad Commission of Texas was created under Section 2, Article 10, of the Constitution, adopted in 1890. The office of Railroad Commissioner was made elective and the length of time fixed by Section 30, above, in 1894. It will be noted that in neither of these constitutional provisions is the right of the Legislature limited as to the means or agency which it may employ to regulate railroads in this State; nor is there any provision which prohibits the means or agency employed being likewise employed for other executive or administrative purposes. The Railroad Commission, therefore, stands as does any other constitutional officer whose duties are undefined and over which legislative authority is not limited by the Constitution.

29th Cyc. 1431, speaking with reference to officers known to the common law and the mention of which carries with it the authority usually conferred upon such officers by the common law, says:

"Where mention is made of such officers in the Constitution it has been held that they thus acquire a constitutional right, of which the Legislature may not deprive them, * * * although the Legislature is not prevented from conferring upon them and taking from them new powers which have not been traditionally associated with the office."

The writer of this text cites in support of the proposition made by him the following cases:

People vs. Squires, 14 Cal., 12.
Warner vs. People, 43 American Decisions, 740.

A later California case than the one cited above—Miller vs. Kister, 68 Cal. 144—says:

"But it is well settled that salaried offices created by the Legislature are not held by contract or grant. The Legislature has full control over them unless restricted by the Constitution and may abolish them altogether or impose upon them new duties or reduce their salaries."
Citing Attorney General vs. Squires, 14 Calif., 12.
Christy vs. Board of Supervisors, 39 Calif., 3.

In the case of People vs. White, 54 Barbour, 628, the New York Supreme Court held that the president of a village could be compelled to perform additional duties imposed by the charter of the village, amended after he had taken the office.

In the case of M. K. & T. Ry. Co. vs. Shannon, 100 Texas 379, the Supreme Court of this State held valid the law creating the Intangible Tax Board, which made the Secretary of State and the Comptroller of Public Accounts members of said Board. It is true that the constitutional provisions creating the office of Comptroller and Secretary of State, after defining some of their duties provide that they shall perform such other duties as may be required by law. This last constitutional provision, however, was a mere grant of authority to the Legislature to put additional duties upon these two constitutional officers. It added nothing to the Legislature's rights, because the right of the Legislature to legislate is not derived from the Constitution of the State, but is limited only by the Constitution; so that the Comptroller and Secretary of State furnish parellel cases with the Railroad Commission of the State, and my view of the matter is that any additional administrative or executive duty may be imposed upon them. The imposition of additional duties on constitutional officers has always been exercised almost every session of the Legislature. For example: The Governor and Commissioner of Agriculture are members of the Board of Warehouse Supervision. Section 38 of Article 16 of the constitution provides for the creation of the office of "Insurance, Statistics and History." Long after the Legislature created this office the constitution was amended (Sec. 16, Art. 16) authorizing the incorporation of State banks, and, among other things, the amendment contained the following provision:

"Shall provide for a system of State supervision, regulation and control of said bodies, etc."

In the Enabling Act, passed by the Twenty-ninth Legislature, providing for the incorporating of State banks and trust companies, there was a provision devolving on the "Commissioner of Insurance, Statistics and History," the duty of administering the law. (See Sec. 38, Chapter 10, Acts First Called Session Twenty-ninth Legislature, page 501.)

Afterwards when the Legislature provided for the protection of depositors there was created a board composed of the Attorney General, the Commissioner of Insurance and Banking and the Treasurer of the State, known as the "State Banking Board," with authority to control and manage the depositors guarantee fund. (See Art. 446, Vernon's Sayles, Vol. 1.)

Many instances of this nature can be found in the legislative history of the State, as it is a common procedure for the Legislature to

devolve new duties on officers as is shown by the fact that each of the executive heads of the State Government is a member of a number of boards, entirely distinct from the customary duties of the office.

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

OP. NO. 1697—BK. 48, P. 418.

CORPORATE STOCK—WATER RIGHTS—PROPERTY.

Acts of 1913, Chapter 171.
Lawful appropriation of water granted by the State Board of Water Engineers is property within the meaning of the Constitution of the State, for which corporate stock may be issued to an irrigation company.

January 22, 1917.

Hon. C. J. Bartlett, Secretary of State, Austin, Texas.
Attention Mr. Cox, Chief Clerk.

DEAR SIR: Your communication concerning the incorporation of the Canadian Valley Irrigation Company, of Amarillo, Texas, reads in substance as follows:

"Attached hereto we are handing you the proposed charter of the Canadian Valley Irrigation Company, of Amarillo, Texas, which we find to be in good form and complying with all statutory requirements.

"However, in the affidavit accompanying same we notice that a portion of the capital stock is to be paid for, or has been paid, by conveying to the proposed corporation a certain right to appropriate public waters, granted by the State Board of Water Engineers to D. J. and W. D. Muncy, and that an arbitrary valuation of said water right is placed at $10 per acre.

"In view of the provisions of Section 6, Article 12, Constitution of the State of Texas, and the decision of our Supreme Court in the case of O'Bear-Nester Glass Company vs. Anti Explo Company, as cited in 101 Texas Reports, page 431, this department is doubtful whether a right to appropriate public waters can be conveyed to a corporation in payment of capital stock, hence we are handing you herewith all papers and instruments connected with this proposed charter, and will ask that you kindly advise this department as soon as practicable whether or not a right to appropriate public waters, granted by the State Board of Water Engineers is to be classed and termed as property actually received within the meaning of our Constitution and other laws applicable thereto."

The constitutional provision to which you make reference is Section 6, Article 12, which reads:

"No corporation shall issue stock or bonds except for money paid, labor done or property actually received, and all fictitious increase of stock or indebtedness shall be void."

Construing this provision of the Constitution, the Supreme Court has held that the phrase "property actually received" refers to something that is substantial and of a character that could be subjected to the payment of claims against the corporation. O'Bear-Nester Glass Co. vs. Anti Explo Co., 101 Texas, 432; 108 S. W., 967.

The only question at issue here is whether or not an appropriation of water made in the manner provided by the laws of this State is *"property"* within the meaning of the Constitution as interpreted by the courts of this State.

It is the opinion of this Department that such appropriation of water, lawfully made, is *"property"* within the meaning of this constitutional phrase, and that it may be lawfully conveyed to the corporation as a part of its capital stock and against which shares of stock may be lawfully issued.

Chapter 171 of the General Laws passed by the Thirty-third Legislature, at its Regular Session, undertakes to define the rights of the public in the unappropriated waters of the State, and prescribes the method by which the citizens may obtain priority to the use of the public waters and declares, "as between appropriators the first in time is the first in right." (Section 5, Chapter 171, Acts of the Thirty-third Legislature.)

It is unnecessary for us to set out in detail the statutory method of obtaining an appropriation of water. It is sufficient to say, for our immediate purpose, that the method is similar to that of other States, and is equally as comprehensive and certain. Section 47 of the Act declares, "A water right is the right to use the water of the State when such use has been acquired by the application for (of) under the statutes of this State and for the purposes stated in this Act."

As suggested above, this Act of the Legislature is a very comprehensive one and is similar to the laws of other States. That a water right of the charter granted under the laws of this State is property, is well settled by the authorities from all jurisdictions having occasion to discuss the subject. Moreover, it has been classified as real property. Without quoting from the authorities we will give a summary of the holdings thereof as made by Mr. Kinney in his recent comprehensive work on Irrigation, as follows:

"Section 768. A Water Right Is Property.—The distinct, exclusive usufructuary estate acquired by an appropriator to the use of water, by its lawful appropriation, is property of the highest order, and oftentimes of the highest value. The water right is protected by the law as such, and is subject to all of the usual incidents of property. This property right in water is as important, as valuable, and as extensive as the use to which it is applied, and especially so where that use is the irrigation of lands. The land is comparatively valueless without the water to irrigate it. Without the water it can be purchased for from $1.00 to $2.00 per acre; but with the water its value at once jumps from the above prices to $100.00 to $200.00 per acre, and sometime to a very much higher price. The property in a water right consists not alone in the amount of water claimed under an appropriation, but also in the priority of the appropriation. And it very often happens that the chief value of an appropriation consists in its priority over other appropriations from the same stream. Hence, to deprive one of his priority to appropriate would be to deprive him of a most valuable property right. A perfected water right is a vested property right and its value capable of estimation in money, and one which the law protects. A water right is such a property right that it comes clearly within the constitutional provisions that property shall not be taken or damaged for public or private use, except upon due process of law and upon just compensation. A water right is such property that it is capable of being estimated in money. And one who has acquired a legal water right can

only be deprived of it by his own voluntary act in conveying it to others, by abandonment, forfeiture under some statute, or by operation of law. And, as long as one is the owner of a valid water right it is such a property right that he has the right to exercise complete dominion, control, and management thereof. The owner may change the use of the water to any other beneficial use, so long as the change does not interfere with the vested rights of others.

"Having seen that a water right is a property right, we will now discuss the class of properey to which it belongs."—2nd Kinney on Irrigation and Water Rights.

"Section 769. A Water Right is Real Property.—Having seen that a water right is a property right of high order, it remains to determine the class to which it belongs. A water right has none of the characteristics of personal property, although some of the early statutes declared that it might be deemed such property. It is generally conceded by all of the authorities that a water right, or an interest in a water right, is real property, and it is so treated under all the rules of law appertaining to such property. It was held in a recent Idaho case that under the laws of that State a water right is real property, and one who actually diverted the water of a stream and applied the same to a beneficial purpose is in actual possession of such real property, and this possession constitutes actual notice to any subsequent appropriator of the water of the same stream, or to any person who subsequently applies to the State Engineer for a permit to appropriate and divert the water of the same stream, the court saying: 'But where one has actually diverted water, and is using it, the right to its use may, by analogy, be likened unto the doctrine that one purchasng real estate must take notice of the rights of those in possession, notwithstanding the recording statutes.'

"A water right is an inheritable estate, and, being real property, upon the death of the owner, passes to his heirs or devisees, subject only to the payment of his debts. Hence it therefore follows that an action to quiet title, or to recover possession, does not lie at the instance of the administrator. However, an inchoate or incomplete right is not real property. It is, therefore, held that a water permit granted under the laws of the State of Idaho is not real property, nor is it an appropriation of the public waters of the State, but it is simply the consent given by the State to make an appropriation, and therefore acquire real property. However, at the instance of the proper party a suit to quiet title to a water right for irrigation purposes, and to determine the right to divert the waters from a stream for such purposes, is in the nature of an action to quiet title to real estate. And, in an action to quiet title, brought by an irrigation company, it is immaterial whether the company owned the water right in question, or merely distributes the water to the stockholders, who were the owners of the right before the company was organized So, a water right being real property, a justice of the peace has no jurisdiction over an action for the diversion of the water. An injury to a water right or a wrongful diversion of the water is an injury to real property, and a proper action may be maintained for the same. And, where the injury and the property are both in the same county, an action must be brought in the county where the land is situated. But, where water is wrongfully diverted in one county to the injury of plaintiff's rights in another, it constitutes one cause of action and the plaintiff may elect in which county he will bring the action. Upon the question of the sale or transfer of a water right, it being a species of realty requires for its valid transfer the same form and solemnity as is necessary for the conveyance of any other real estate. It is also such a right that in the case of sale or transfer the rule under the statute of frauds applies, and a verbal sale is held to be void and to work an abandonment. The recording statutes applicable to the sale and conveyance of real property also apply to the sale and conveyance of water rights.

"Water rights may also be assessed and taxed as real property. However, in many of the States they are made exempt from taxation, separate and apart from the lands upon which they are used. This subject will be discussed in another portion of this work. Water which has been diverted from the natural stream or other works may be taxed as personal

property. The rules of the statute of limitations, as the same are applied to land, are also applied to water rights. And to acquire title to a water right the use must be continuous for the full period of the statute of limitations, in the State where the action is brought, governing actions for the recovery of other real property.

"It was said in a very recent Colorado case: 'That a water right is a "freehold," is not in doubt. * * * A water right has been held to be a freehold or "real estate" in the following cases.' " (Cases cited in note.)—2nd Kinney on Irrigation and Water Rights.

The Montana courts have held that a water right is property subject to taxation. Helena Water Works vs. Settles, 95 Pac., 838.

Even riparian rights to the use of the flow of a stream passing through the owner's land, although inseparably annexed to the soil, is a property right and entitled to protection as such.

Crawford Co. vs. Hathaway, 60 L. R. A., 889.
Northern Light and Power Co. vs. Stacher, 109 Pac., 896.
Waterford Electric Light, etc., Co. vs. Reed, 94 N. Y. Sup., 551.

Mining claims on public lands are universally regarded as property in the fullest sense of the word, and may be bought, sold, transferred, mortgaged and inherited.

Elliott vs. Elliott, 3 Alaska, 360.
O'Connell vs. Gold Mines Co., 131 Fed., 106.
Bradford vs. Morrison, 212 U. S., 389.
Nash vs. McNamara, 16 L. R. A. (N. S.), 168.

A mining right to drill for oil and gas in certain described premises in consideration of a fixed royalty is property within the meaning of the taxation laws.

Carrell vs. Bell, 19 L. R. A. (N. S.), 746.

The similarity of mining rights claims and the rights of riparian owners to water appropriations is apparent, and we have cited cases in support of our conclusion, if, in fact, any should be neeeded, after consideration of what Mr. Kinney has said on the subject.

You are, therefore, advised that the lawful appropriation of water granted under the laws of this State by the Board of Water Engineers is property within the meaning of the Constitution of the State permitting the issuance of corporate stock therefor.

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

OP. NO. 1718—BK. 49, P. 38.

CORPORATIONS—PROOF OF PAYMENT OF CAPITAL STOCK OF.

Revised Statutes of 1879, Articles 567, 568, 569, 578, 585, 591, 592 and 593.
Acts of Twenty-fourth Legislature, Chapter 125.

Revised Statutes of 1895, Article 642, Subdivision 56.
Acts of 1897, Chapter 130.
Acts of Twenty-seventh Legislature, Chapter 15.
Acts of Thirtieth Legislature, Chapter 166.
Revised Statutes of 1911, Articles 1121, 1125 to 1130, 1141 to 1144, 1169, 1170 and 1171.

1. Corporations named in Revised Statutes, Article 1129, in which is included corporations chartered under Subdivision 29 of Article 1121, are not required to make proof of final payment of their capital stock within two years, nor are their stockholders required to pay in the balance of their stock subscriptions within such period of time, so far as the statutes of the State are concerned.

2. The unpaid balances on stock subscriptions made to corporations of these classes are to be paid as the by-laws of such corporations may prescribe, which payments are to be collected by the Boards of Directors, who have authority under the statute to institute suits for the collection of such unpaid subscriptions and to declare in a statutory way a forfeiture of that which has already been paid, upon a failure to pay assessments on such subscription contracts, made by them in accordance with the by-laws.

March 20, 1917.

Hon. C. J. Bartlett, Secretary of State, Capitol; Attention of Mr. Cox.

DEAR SIR: Your letter, requesting the opinion of the Attorney General, reads as follows:

"Will you kindly advise this Department officially whether or not the corporation laws of this State, construed as a whole, require corporations organized under Subdivision 29, Article 1121, Revised Civil Statutes, 1911, to make proof of final payment of their capital stock within two years from date of filing of their original or amended charter with the Secretary of State.

"Your early attention and response to this query will be earnestly appreciated."

In order that we may answer this inquiry it will be necessary that we examine the history of the corporation laws of this State, in so far as this will throw light upon the subject.

The general corporation acts of this State begin in the Acts of the Legislatures in 1871, 1873 and 1875, but it is unnecessary that we discuss those measures in detail, as our modern laws may be said to begin with the compilation of the Revised Statutes made in 1879.

The Revised Statutes of 1879, in Title 19, which relates to private corporations, contains no provision specifying the amount of capital stock of corporations chartered thereunder, nor does it specify many things now essential under the statutes.

Article 567 thereof sets forth the requisites of the charter, among which is found the requirement that the amount of capital stock and the number of shares into which it is divided must be stated.

Article 568 provides that the charter shall be subscribed by three or more persons, two of whom must be citizens of the State. It likewise declares that the charter must be acknowledged, and Article 569 requires the filing of the charter in the office of the Secretary of State. Neither a minimum nor maximum amount of the capital stock is specified, nor is any provision made for the payment of the capital stock, either before or after incorporation. Likewise, there is no provision as to the amount which must be subscribed or paid in before the charter is issued.

Article 578 declares that when the full amount of the capital stock has not already been subscribed in good faith the directors may open the books for receiving subscriptions to the remainder of the capital stock.

Article 585 confides the general management of the affairs of the corporation to its directors, and authorizes them to dispose of the residue of the capital stock at any time remaining unsubscribed "in such manner as the by-laws may prescribe."

Article 591 declares that the directors "may require the subscribers of the capital stock of the corporation to pay the amount by them respectively subscribed, in such manner and in such installments as may be required by the by-laws."

Article 592 authorizes the forfeiture and the manner of its enforcement in the event a stockholder fails to pay any installment due on his subscription contract at the time of and in the manner required by the Board of Directors.

Article 593 authorizes suits by the corporation against its stockholders.

The status of the law then, as it existed in 1879, was that no particular amount of the capital stock of a corporation was required to be subscribed and paid in before the charter was granted, but the time, manner and amount of payment were to be fixed by the by-laws of the corporation and the funds to be collected in accordance therewith by the Board of Directors, for the enforcement of which collection previous stock payments could be forfeited and suits maintained.

In 1885 the corporation laws were amended by Chapter 61 of the legislative acts of that year, but no changes were made in the law in the particulars specified above.

Amendments were also made by an Act, approved March 23, 1887, but still the law relative to the matters set forth above remained unchanged.

The corporation laws were amended by Chapter 83, Acts of 1893, but no changes were made relative to the matters here under examination.

Our corporation acts were also amended by Chapter 125, Acts of the Twenty-fourth Legislature, and at this time the following provision was placed in the statute:

"The stockholders of all private corporations created under the provisions of this Act shall be required to subscribe at least fifty per cent and pay in at least ten per cent of its authorized capital stock before it shall be authorized to do business in this State; and whenever the stockholders of any such company shall furnish satisfactory evidence to the Secretary of State that at least fifty per cent of its authorized capital has been subscribed, and ten per cent paid in, it shall be the duty of said officer to receive, file and record the charter of such company in the office of the Secretary of State upon application and the payment of all fees therefor, and to give his certificate showing the record of such charter and authority to do business thereunder; Provided, that foreign corporations obtaining permits to do business in this State shall show to the satisfaction of the Secretary of State that fifty per cent of their authorized capital has been subscribed and that at least ten per cent of the authorized capital has been paid in before such permit is issued."

This was the first material change affecting the subject matter of your inquiry made in the corporation laws from 1879 to 1895. It will be noted from the above quotation that before a charter might issue fifty per cent of the capital stock of a proposed corporation was required to be subscribed and ten per cent of the authorized capital paid in. The fulfillment of these requirements and evidence thereof were made necessary before the Secretary of State was authorized to file and record the articles of association.

The corporation code was again amended in 1897, but in the respect here being reviewed no changes were made.

The foregoing section quoted from the Act of 1895 was incorporated into and became Subdivision 56 of Article 642, Revised Statutes of 1895.

This amendment is found in Chapter 130, Acts of 1897.

Subdivision 56 of the Act of 1879, which is quoted above as a part of the Act of 1895, becoming too restrictive in some respects, and particularly with reference to foreign corporations, the Twenty-seventh Legislature in 1901, by Chapter 15, amended this Subdivision 56, so that thereafter it read as follows:

"The stockholders of all private corporations created for profit and with an authorized capital stock, under the provisions of this chapter, shall be required to pay in at least $100,000 in cash, of their authorized capital stock, or to subscribe at least fifty per cent., and pay in at least ten per cent. of their authorized capital, before they shall be authorized to do business in this State, and whenever the stockholders of any such company shall furnish satisfactory evidence to the Secretary of State that at least $100,000 of its authorized capital stock has been paid in, in cash, or that at least fifty per cent. of its authorized capital has been subscribed and ten per cent. paid in, it shall be the duty of said officer to receive, file and record the charter of such company in the office of the Secretary of State upon application and the payment of all fees therefor, and to give his certificate showing the record of said charter and authority to do business thereunder; provided, that foreign corporations obtaining permits to do business in this State shall show to the satisfaction of the Secretary of State that at least $100,000 in cash of their authorized capital stock has been paid in, or that fifty per cent. of the authorized capital has been paid in, before such permit is issued."

The substantial modification made by the above enactment was that if a corporation had as much as $100,000 of its capital paid in in cash, still it might secure a permit to transact business in this State, or be chartered; this, notwithstanding the general provision that if it did not have this amount paid in in cash it must have fifty per cent of its capital subscribed and ten per cent paid in. This was the status of the law when in 1907 the Legislature of the State undertook to change and modify in material particulars the general corporation laws of the State, and enacted Chapter 166. General Laws of the Thirtieth Legislature. Sections 1 and 2 of this Chapter read:

"Section 1. The stockholders of all private corporations created for profit with an authorized capital stock under the provisions of Chapter 2, Title 21, Revised Statutes of the State, shall be required in good faith to subscribe the full amount of its authorized capital stock, and to pay fifty per cent. thereof before said corporation shall be chartered; and whenever the stockhoders of any such company shall furnish satisfactory

evidence to the Secretary of State that the full amount of the authorized capital stock has in good faith been subscribed, and fifty per cent thereof, paid in case, or its equivalent in other property or labor done, the product of which shall be to the company of the actual value at which it was taken, or property actually received, it shall be the duty of said officer, on payment of office fees and franchise tax due, to receive, file and record the charter of such company in his office, and to give his certificate showing the record thereof. Satisfactory evidence above mentioned shall consist of the affidavit of those who executed the charter stating therein (1) the name, residence and postoffice address of each subscriber to the capital stock of such company; (2) the amount subscribed by each and the amount paid by each; (3) the cash value of any property received, giving its description, location, and from whom and the price at which it was received; (4) the amount, character and value of labor done, from whom and price at which it was received; provided, that if the Secretary of State is not satisfied, he may, at the expense of the incorporators, require other and more satisfactory evidence before he shall be required to receive, file and record said charter; and provided further, that corporations created under Sections 21, 29, 37, 53, 54, and 61, of Article 642, Revised Statutes of this State, are exempt from the provisions of this Section; and provided, further, that the provisions of this Act shall not apply to corporations formed for the construction, purchase, and maintenance of mills and gins having a capital stock of not exceeding $15,000.00 nor to mutual building and loan associations; nor to water works, ice plants, electric light plants and cotton warehouses in cities of less than 10,000 inhabitants.

"Section 2. The stockholders of all corporations chartered as provided in Section 1 of this Act shall, within two years from the date of the filing of such charter by the Secretary of State, pay in the unpaid portion of the capital stock of such company; proof of which shall within said time be made to the Secretary of State in the manner provided in Section 1 for the filing of charter; and in case of the failure to pay the same and to make proof thereof to the Secretary of State within two years from the date of the filing of the Charter, shall, because thereof, forfeit the charter of said company, which forfeiture shall be consummated without judicial ascertainment, by the Secretary of State entering upon the margin of the ledger kept in his office relating to such corporations the word 'forfeited,' giving the date and reason therefor.

"The Secretary of State shall notify such corporation by mailing to the post office named as its principal place of business, or to any other place of business of such corporation, addressed in its corporate name, a written or printed statement of the date and fact of such forfeiture; a record of the date and fact of such notice must be kept by such officer; provided, that the stockholders of any such corporation whose charter has been forfeited as above provided who shall within six months from the date of such forfeiture, and not thereafter, pay in full the unpaid capital stock of such company and furnish to the Secretary of State proof of such fact as required herein, and in addition shall pay the Secretary of State as fees belonging to his office the sum of five ($5) dollars per month for each month and fractional part thereof between the date of forfeiture and settlement, the company shall be relieved from such forfeiture, and said officer shall write on the margin of said ledger the word 'Revived,' giving the date thereof; if the stockholders should fail to cause the charter powers of said corporation to be revived, as just provided, then and in such event the affairs of such company shall be administered and wound up as on dissolution; provided, however, the stockholders of any such company shall have the right, at any time within the two years given to make payment of the unpaid portion of the capital stock to reduce the same so that by reduction or reduction and payment the full amount of the capital stock authorized by such reduction shall be paid, and thus avoid a forfeiture of the charter, but no creditor of said company shall in any wise be prejudiced by such reduction of its

capital stock in any claim or cause of action such creditor may have against such company or any stockholder or officer thereof."

From an examination of the foregoing sections it will be seen that Section 1 has become and is now Articles 1125 to 1130, of the present existing Revised Statutes of the State; while Section 2 has become Revised Statutes, Articles 1141 to 1144, inclusive. This Act made material changes in the corporation laws of this State. In the first place it required that the full amount of the authorized capital stock for all corporations, except certain ones particularly exempted from it provisions, be subscribed and one-half thereof actually paid in before a charter might issue. Furthermore, it required that the unpaid portion of the capital stock should be paid in and proof thereof made within two years from the date of issuance of the charter. These provisions making this change are a part of one and the same act, being Sections 1 and 2 thereof, and as such must be construed together. Those corporations particularly exempted from its provisions were the ones to be created under Sections 21, 29, 37, 53, 54 and 61 of Revised Statutes, Article 642, which is, however, Article 1121 of the present statutes, as well as corporations formed for the construction, purchase and maintenance of mills and gins, having a capital stock not exceeding $15,000.00, and mutual building and loan associations and waterworks, ice plants and electric light plants and cotton warehouses in cities of less than ten thousand inhabitants.

These exceptions are provided for in Section 1 of the Act, and being a part of the entire law they are likewise excepted from the provisions of Section 2 of this Act, that is to say, corporations created under the sections above named and those others described in the exceptions are not required by this Act to pay in the unpaid part of their capital stock within two years, nor are they required to have their entire capital stock subscribed, nor have half thereof paid in. Corporations described in the exceptions referred to are excepted from the provisions of Section 2, with reference to the payment and proof thereof of capital stock within two years, for Section 2 expressly declares that "the stockholders of all corporations chartered as provided in Section 1 of this Act, etc., shall within two years pay in their unpaid stock subscriptions." How are they chartered as provided in Section 1 of this Act? Section 1 answers the question—chartered by having the full amount of their capital stock subscribed and one half of it paid in, etc.

It is true that Revised Statutes, Article 1141, modifies somewhat the language of Section 2 of this Act under examination, but it does not change its meaning, and if it did, under the authorities of this State the codification would not govern, but the original Act would. It is plain from the original act that the exceptional corporations specified in Section 1 are not required to make proof of final payment within two years, but as to them the matter was left as the law originally stood for all corporations, both as to the amount of stock required to be subscribed and the amount required to be paid in, as well as to proof of final payment. We have already quoted the law, as enacted in 1901, which at that time was made to apply to all corporations, but which is now Revised Statutes, Article 1130, and which

applies at the present time only to the excepted corporations specified in Section 1 of the Act of 1907, and which is now Revised Statutes, Article 1130. That is to say, corporations organized under Subdivisions 21, etc., as set forth in Article 1129, must in the organization of the corporation either have $100,000.00 cash of their capital paid in, or fifty per cent of the authorized capital subscribed and ten per cent paid in. As to these corporations, therefore, no changes were made by the Act of 1907, either as to the manner of organization or as to the final payment of stock subscriptions. We have already seen, in tracing the history of our corporation laws, that there had been no provision as to final payment of stock subscriptions until the Act of 1907, but that the time and amount of payment of stock subscriptions were left to the Board of Directors and the by-laws of the corporation. This is so now, as will be seen from the following article of the statute.

Revised Statutes, Article 1169, provides:

"Art. 1169. Directors may require payment of stock.—The board of directors or trustees of any corporation may require the subscribers to the capital stock of the corporation to pay the amount by them respectively subscribed, in such manner, and in such installments, as may be required by the by-laws."

From the foregoing it is seen that the time and manner, etc., of the payment of stock subscriptions to a corporation are to be specified in the by-laws of the corporation and to be paid upon direction of the Board of Directors; if it is not paid, that which has been paid may be forfeited, under Revised Statutes, Article 1170, for which purpose, as well as other purposes, the corporation under Article 1171 may sue its members. Having traced the history of our coporation law as relating to this subject,. this much is found:

That for many years there was no particular amount required to be subscribed before a corporation could be chartered, and no provision made for its payment, other than the general authority of the directors to collect the same under by-law provisions. This applied from an early date to all corporations of every character. It was finally modified, as will be seen, by a requirement previously quoted in this opinion, that fifty per cent of the authorized capital stock must be subscribed and ten per cent thereof paid in; still no provision was made requiring that the subscriptions should be paid within any particular time, this being left, under the statute, to by-law provisions enforceable by directors of the corporation. In 1907, however, the law was amended and provision was made that all corporations, except those incorporated under subdivision 21 and other exceptions named in Section 1 of the Act of 1907, must have all of their capital stock subscribed, fifty per cent of it paid in and the balance paid in within two years; but as to corporations chartered under subdivision 21 and other subdivisions in the exception clause to Section 1 of the Act of 1907, the law stands as it had for many years theretofore stood, that is to say, this class of corporations must have fifty per cent of the authorized capital subscribed, ten per cent of such capital paid in and the balance due on the subscription contracts is payable

as the by-laws may prescribe and collectible by the Board of Directors, under penalties of forfeiture and by right of suit. If it be said that no provision is made for final payment, except such provision as may be inserted in the by-laws and enforceable by the directors, the answer is that the policy of this State for more than a quarter of a century permitted these same discretionary provisions with reference to all corporations, and that the Act of 1907 changed this policy with reference to most corporations, but not as to those chartered under Subdivision 21 and the other exceptional corporations specified in Section 1 of the Act of 1907.

You are advised, therefore, that the following described corporations are not required to make proof of final payment of their capital stock and that stockholders are not required to pay in the balance of their stock subscriptions within two years, to wit:

"Corporations created under Subdivisions 21, 29, 37, 53, 54 and 60, of Article 1121, as well as corporations formed for the construction, purchase and maintenance of mills and gins, having a capital stock not exceeding $15,000.00; mutual building and loan associations and also waterworks, ice plants, electric plants and cotton warehouses in cities of less than ten thousand inhabitants."

But as to these the balance of stock subscriptions after the initial payment of ten per cent is to be paid as the by-laws of these corporations may prescribe, which payment may be required by the Board of Directors, under Article 1169, Revised Statutes, and for failure to pay the stockholders are subject to suit, under Revised Statutes, Article 1171, and to the forfeiture of the stock, as declared in Revised Statutes, Article 1170.

Yours very truly,

C. M. CURETON,

First Assistant Attorney General.

OP. NO. 1736—BK. 49, P. 138.

FEES OF OFFICE—CORPORATIONS—CHARTER FEES OF—WORDS AND PHRASES.

Acts of the Thirty-fifth Legislature, Senate Bill 95.
Revised Statutes, Article 3837.
Acts, First Called Session Thirty-third Legislature, Chapter 33.

1. The words "issued and outstanding" as used in this act throughout its various provisions merely mean such part of the authorized capital stock as has been subscribed for, and this regardless of the percentage of the capital stock which has or has not been actually paid in.

2. That portion of Senate Bill No. 95 which relates to building and loan associations is an amendment of a repealed law and as such is not a law, and has no effect whatever on Sections 25 and 30 of Chapter 33, Acts of the First Called Session of the Thirty-third Legislature.

April 12, 1917.

Hon. Church Bartlett, Secretary of State, Capitol.
Attention Mr. Cox.

DEAR SIR: Your letter presenting questions to be determined by this Department reads substantially as follows:

"I beg to submit herewith for your consideration several questions pertaining to the provisions of Senate Bill No. 95, passed by the Regular Session of the Thirty-fifth Legislature and approved by the Governor, and which becomes effective ninety days from adjournment:

"(1) What is meant by the term 'issued and outstanding,' as the same is used in this act relating to the ascertainment of the amount of filing fees? Does it mean the amount of authorized capital stock or does it mean that proportion of the authorized capital stock which has been paid for by the stockholders and actually issued to them and outstanding?

"(2) A portion of the act referred to reads as follows: 'For each and every charter, amendment, or supplement thereto, of a private corporation created for any other purposes intended for mutual profit or benefit, a fee of fifty dollars shall be paid when said charter is filed; provided, that, if the capital stock of said corporation *issued and outstanding* shall exceed ten thousand dollars, it shall be required to pay an additional fee of ten dollars for each additional ten thousand dollars of its *authorized capital stock*, or fractional part thereof, after the first; and provided further that such fee shall not exceed the sum of twenty-five hundred dollars.' Under this provision of the act, what would be the filing fee on the charter of a domestic corporation with an authorized capital stock of $100,000, $50,000 of which was actually paid in at the date of incorporation?

"(3) Does the provision 'and provided further that mutual and loan companies, so called, whose stock is not permanent, but withdrawable, shall pay a fee of fifty dollars for the first one hundred thousand dollars or fractional part thereof of its capital stock issued and outstanding, and ten dollars for each additional one hundred thousand dollars or fractional part thereof; and where the company is a foreign one, then the fee shall be based upon the capital invested in the State of Texas,' taken in connection and construed with Section 2, of the act, in effect repeal the provisions of Sections 25 and 30, Chapter 33, Acts, First Called Session of the Thirty-third Legislature of the State of Texas, relating to the filing fee applicable to building and loan associations?"

We will make one answer to the first and second interrogatories, as these are substantially one inquiry.

The statute quoted in the second interrogatory originally read:

"For each and every charter amendment, or supplement thereto, of a private corporation created for any other purpose, intended for mutual profit or benefit, a fee of fifty dollars shall be paid when said charter is filed; provided, that, if the authorized capital stock of said corporation shall exceed ten thousand dollars, it shall be required to pay an additional fee of ten dollars for each additional ten thousand dollars of its authorized capital stock, or fractional part thereof, after the first."

The changes made by the amendment were as follows:

In the first place, the filing fee is limited to twenty-five hundred dollars, regardless of the capital stock.

In the second place, in lieu of the phrase "if the authorized capital stock of said corporation," there is used the clause, "if the capital stock of said corporation issued and outstanding." The construction, therefore, to be given the act hinges upon the meaning of the phrase

"if the capital stock of said corporation issued and outstanding," etc. Our opinion is that the words "issued and outstanding," as used in this act throughout its various provisions, merely mean such part of the authorized capital stock as has been subscribed for, and that it is immaterial whether these subscription contracts have been or may be evidenced by certificates of shares. In other words, when the capital stock of a corporation has been lawfully subscribed for, then within the meaning of this act, as well as within the meaning of all the corporate rights of the subscriber, such capital stock has been issued and is outstanding.

The reasons leading to this conclusion will now be stated.

A share of stock in a corporation is the right which its owner has in the management, profit and ultimate assets of the corporation. 1st Cook on Corporations. Sec. 12. A certificate of stock is not the stock itself, but mere evidence of ownership of the stock in the corporation. It transfers nothing from the corporation to the stockholder, but merely affords to the latter evidence of his rights, or in the language of Mr. Cook—"it should be clearly understood that the certificate is not the stock but merely written evidence of the ownership of the stock." 1st Cook on Corporations, Sec. 13. A certificate of stock is not necessary to the complete ownership of the stock, nor is the payment of subscription necessary thereto. It is not necessary to the existence of a corporation that certificates of stock be issued. Without the certificate the stockholder has complete power to transfer his stock, to receive dividends and to vote, and he is individually liable as a stockholder. 1st Cook on Corporations, Sec. 13. These general principles taken from Mr. Cook's work on corporations are in entire harmony with the rules declared by the Texas Courts.

Our courts have held that the actual issuance of stock is not essential to corporate existence. Hamilton vs. Manufacturing Company, 39 S. W., 641; Rio Grande Cattle Co. vs. Burns, 82 Texas, 50.

Our courts have likewise held that the interest of one who has paid for his stock but received no certificate, is assignable. Rio Grande Cattle Co. vs. Burns, 82 Texas, 50. They have likewise held that transfers of unpaid stock of a corporation made in good faith with the consent of the corporation are valid. Nicholson vs. Showalter, 83 Texas, 99.

It is likewise elementary in this State that the subscription to the stock of a corporation fixes the liability of the subscriber and it is not necessary that the shares of stock should have been actually issued and delivered. Mathis vs. Pridham, 20 S. W., 1015. Dallas, etc., Mills vs. Clancey, 15 S. W., 194.

The right of a shareholder in a corporation is to participate according to the amount of his stock in the dividends of the corporation and on its dissolution in the assets remaining after the payment of debts. Olsen vs. Homestead Land, etc., Company. 87 Texas, 368: Aransas Pass Harbor Co. vs. Manning, 94 Texas, 563. These general and Texas authorities are sufficient to show that the law attaches no particular importance to the writing out and delivery of certificates of shares of stock in a corporation, and that these documents have no significance except as mere evidence of the ownership by the holder

of stock in the corporation. They may, or may not, be written out and delivered to the shareholders without either lessening or enlarging his rights and without in any way affecting the existence or the corporate powers of the corporation. We make these remarks for the purpose of showing that the phrase "capital stock of said corporation issued and outstanding" did not have reference to the mechanic process of writing out certificates of shares and delivering the same to subscribers to the capital stock.

The authorities hold, and particularly is this true on questions of stockholders liability and taxation, that stock is issued when it has been subscribed for. American, etc., Company vs. State Board, 56 N. J. Law, 389; 29 Atl., 160; San Francisco, etc., vs. Miller, 87 Pac., 630; Flower City National Bank vs. Shire, 88 N. Y. (Appellate Div.) 401; 77 N. E., 114. Knickerbocker, etc., Company vs. State Board, etc., 65 Atl., 913. Pietsch vs. Krause, 116 Wisc., 344.

The case of American, etc. Company vs. State Board, 29 Atl., 160, is exactly in point on this question. In that case the corporation was incorporated by a certificate filed under the general corporation laws, which set out that the total amount of the capital stock was $1,500,000 divided into 15,000 shares of the par value of $100.00 each. The entire amount of the capital stock was subscribed for, but only ten per cent. thereof had been paid in. No certificates of stock had been given to the subscribers, but receipts were given for the amounts which had been actually paid in. The company elected its directors and officers and with the capital stock paid in proceeded to engage in the business for which it was organized. On this state of facts the Supreme Court of New Jersey held that the company was liable to taxation on the full amount of the stock subscribed for as capital stock "issued and outstanding." The New Jersey statute imposing taxes upon certain corporations declared "that all corporations, incorporated under the laws of this State and not herein provided for, shall pay a yearly license fee or tax of one tenth of one per cent *on the amount of the capital stock* of such corporations." This section was later amended and the phrase "amount of capital stock" was made to read "*amount of capital stock issued and outstanding.*" Notwithstanding this amendment of the statute which is analogous to the statute and its amendment now before us, the court held that the clause "amount of capital stock issued and outstanding" meant the amount of capital stock which had been subscribed for. All that the court said in discussing this question is relevant and applicable to the instant case, and we shall quote it as our brief in this opinion. Upon the statement of facts previously made above the Supreme Court of New Jersey in part said:

"The certificate by which this company was organized was in conformity with the statute. It set out that the total amount of the capital stock of said company is to be $1,500,000, divided into 15,000 shares, of the par value of $100 each; and the amount of the capital stock with which said company shall commence business is $1,300,000, divided into 13,000 shares, of the par value of $100 each. The names and residences of the stockholders, and the number of shares held

by each are as follows, to wit: (giving the names of stockholders, 22 in number, the residence of each, aggregating 13,000 shares.) The proof in the case is that stock to the amount of $1,500,000 was subscribed for. Upon the stock so subscribed for, two assessments, of 5 per cent each, amounting to $150,000, have been made, and were paid by the subscribers. The contention is that capital stock subscribed for is not 'capital stock issued and outstanding,' within the meaning of the act of 1892. This contention is founded upon the fact that the subscriptions to the capital stock have not been fully paid up, and that no certificates of stock have been given to the subscribers. The certificate of incorporation was recorded in the Hudson county clerk's office, November 28, 1888, and in the office of the Secretary of State on the same day. The company was organized by the election of officers the latter part of the same month, and commenced business in May, 1889, and is still conducting its business. The general corporation act, under which this company was organized, treats the persons named in the certificate as the stockholders who hold the shares of the company's capital stock; and, throughout the act, persons who have become subscribers for stock are regarded as stockholders. By Section 38 the managers and directors are to be elected by the stockholders, and each stockholder is, at such election, entitled to vote for each share of stock held by him. By Section 47 no one is eligible to the office of director unless he be a bona fide holder of stock. The books of the corporation are made conclusive evidence of the right of a person to vote as a stockholder, and are prima facie evidence of the qualifications for the office of director. In re St. Lawrence Steamboat Co., 44 N. J. Law, 530. Nowhere in the act is there the faintest indication that payment in full of the par value of the stock subscribed for is a condition precedent to the status of a stockholder. On the contrary, the act contemplates that the companies organized under its provisions may organize, elect officers, and transact business with a capital less than the total amount of the capital stock, provided the amount of capital paid in be not less than $1,000. Provision is made by section 27 for assessments upon shares, from time to time, in such sums as two-thirds of the stockholders in interest shall direct, not to exceed, in the whole, the sum at which each share was limited by section 11. Nor is a certificate of stock necessary to consummate the ownership by a subscriber of the shares of stock he subscribes for, in respect to which he has complied with the terms on which subscriptions were received under the charter and by-laws of the company. Capital stock is the sum fixed by the charter as the amount paid in, or to be paid in, by the stockholders for the prosecution of the business of the corporation, and for the benefit of the creditors of the corporation. Cook, Stock & Stockh. 3. A share of stock represents the right which its owner has in the management and profits of the corporation. Id. sec. 5. The rights and obligations, as between the subscribers and the corporation, spring from the subscription for stock. A subscription to stock imports a promise by the subscriber to pay the face value of the shares of stock subscribed for, in compliance with assessments lawfully made, for the recovery of which the corporation may main-

tain a suit at law. Hotel Co. vs. I'Anson, 42 N. J. Law, 10; Braddock vs. Railroad Co., 45 N. J. Law, 363. And such subscriptions constitute a trust fund for the payment of the debts of the corporation. Wetherbee vs. Baker, 35 N. J. Eq., 501. A certificate of the number of shares subscribed for, or to which the subscriber is entitled, is not necessary to constitute the subscriber a shareholder, or to impose upon him a liability to pay the amount of his subscription. The certificate is merely an additional and convenient evidence of his ownership of stock, which he may require for his own satisfaction, or to enable him to effect a transfer of his interest. A subscriber for stock, who has complied with the terms of his subscription, and has paid the assessments on the shares subscribed for, may compel the corporation to give him a certificate by proceedings at law; and, without any certificate being issued, he is amenable to an action by the creditors of the corporation to compel him to contribute his proportional part for the payment of the debts of the corporation. Cook, Stock & Stockh, secs. 9, 192, and note 4: Farrar vs. Walker, 3 Dill. 506, Fed. Cas. No. 4, 679; Burr vs. Wilcox, 22 N. Y., 551; Wheeler vs. Miller, 90 N. Y., 363. For each one of the assessments upon the shares of stock subscribed for, a receipt was given by the treasurer of this corporation. These receipts were a sufficient voucher for the right of the subscribers to stock, and evidence that they became stockholders,—the holders of the shares of stock subscribed for.

"In the brief submitted by the counsel of the prosecutor considerable stress is laid upon the difference in the verbiage of the act of 1884, and part of the act of 1892. By several acts passed in 1878, 1879, and 1885 (Supp. Revision, pp. 151, 152), incorporated companies were empowered to increase or decrease their capital stock. In amending the fourth section of the act of 1884 by the act of 1892, the words 'issued and outstanding' were inserted after the words 'capital stock,' with a view to adapt that section more clearly to such changes in the capital stock of these corporations. This verbal change in expression made no material alteration in the meaning of the law. The word 'issued,' as used in this connection, has no technical meaning. 'To issue,' as defined by lexicographers, signifies to send out; to put in circulation. In a popular sense, a corporation engaged in organization is said to issue stock when it obtains subscriptions for it; and, in the construction of tax laws, words are to be interpreted in their popular sense. Evening Journal As'n vs. State Board of Assessors, 47 N. J. Law, 36. This construction harmonizes with, and, indeed, is required by the general corporation act, which recognizes the subscribers for stock as holders of the shares subscribed for, with all the privileges conferred, and subject to all the liabilities imposed, upon stockholders.

"In construing statutes imposing taxes, as well as other statutes, the object and purpose of the Legislature will control, and such a construction will be made, if permissible by the language of the enactment, as will give the effect to the legislative intent. The tax and license fees required to be paid by the act of 1892 are exacted by the State for the privilege of exercising the corporate franchises which are granted. Immediately on recording the certificate prescribed

by the statute, the corporation becomes organized; and, on the paying in of capital to the amount of $1,000 the company is authorized to transact business, and to exercise all the corporate franchises expressed in the certificate. The company is not required to call in the full amount of capital subscribed, and subscribers for the shares of the stock are under no compulsion to obtain certificates for the shares of stock for which they subscribe. In the meantime the company may lawfully exercise all its franchises, and, if the view of the prosecutor be correct, may do so without paying the tax and license fee which the act contemplates shall be paid for the exercise of those franchises. The construction of the act contended for by the prosecutor is not tenable. In fact, this company was engaged in the prosecution of its business, so far as the managers were enabled to obtain business, or thought it prudent to embark therein, and was actually in the exercise of the franchises acquired by recording and filing its certificate of incorporation. The company was, therefore, at the time of this assessment, in the exercise of those franchises, for the privilege and right to exercise which the franchise tax and license fees assessed were imposed. If actual exercise and enjoyment of the franchises derived from the incorporation be necessary to entitle the State to exact the tax and license fee therefor (which I am unwilling, at this time, to concede), that condition appears in this case. The assessment was lawfully made, and should be affirmed."

The above case is in harmony with others which we have cited, and its conclusions so well fortified in reason and common sense that all there said is applicable to the principles announced. If we were to construe the statute here under examination as meaning anything else than that the phrase "issued and outstanding" means stocks subscribed for, we would render the statute meaningless and absurd; a construction which under elementary rules is to be avoided.

We, therefore, advise you that the phrase "issued and outstanding," as used in the act under examination, both in that portion relating to domestic corporations and also foreign corporations, refers to and means stock which has been subscribed for, and this regardless of the percentage which has or has not been actually paid in.

In the case of an ordinary corporation, such as you refer to, the entire capital stock must necessarily be subscribed and the whole thereof is within the meaning of the term "issued and outstanding." Other classes of corporations do not require the whole of the capital stock to be subscribed, and in such case the phrase refers only to that which has been actually subscribed. This same phrase "issued and outstanding" is used in that portion of this amended law which relates to foreign corporations. It has the same meaning in that part of the law also and refers to that part of the capital stock of foreign corporations which has been subscribed for, and it is immaterial under this particular statute what amount of it has been actually paid for and whether or not any certificates of stock have been actually written out and delivered. The words "issued and outstanding" have no reference to the making and delivery of stock certificates, but have reference only to the contracts between the corporation and its sub-

scribers; that is to say, if one half of the capital stock of the corporation has been lawfully subscribed for, then as to that one half it is issued and outstanding, for it has passed beyond the control of the corporation and has become not only an obligation on the part of the subscribers, but an actual liability of the corporation to its stockholders, for which it may be made to account in the courts for all stockholders' rights and privileges, including dividends and a distribution of the corporation estate upon dissolution.

In reply to the third question, which relates to that portion of this act purporting to fix permit fees for building and loan associations, we beg to direct your attention to the fact that this law in so far as it related to building and loan associations, is an amendment of the old statute which refers to the same subject. However, the old statute, which is almost in the identical language of this alleged amendment was repealed by Chapter 33, General Laws of the First Called Session of the Thirty-third Legislature, which chapter in its sections 25 to 30 inclusive undertook to fix the fees and generally to regulate domestic and foreign building and loan associations providing in effect a code within itself, governing this class of corporations. Therefore that portion of Article 3837 relating to building and loan associations as it stood in the old statute had been repealed by Chapter 33, mentioned above, and was not in existence when the Thirty-fifth Legislature by Senate Bill No. 95 undertook to amend it. That portion of Senate Bill No. 95 which undertakes to fix fees, etc., relating to building and loan associations is an amendment of a repealed law, and as such has no effect, for the rule is that an amendment of a repealed law does not make a law, as the amendatory act has nothing to support it. Or as said in the case of Robertson vs. State, 12 Texas Court of Appeals, 541, a repealed law is not the subject of amendment.

In reply to your third inquiry, you are advised that that portion of Senate Bill No. 95 which relates to building and loan associations is not a law and has no effect whatever on sections 25 and 30 of Chapter 33 Acts of the First Called Session of the Thirty-third Legislature.

Yours very truly,

C. M. CURETON,

First Assistant Attorney General.

OP. NO. 1737—BK. 49, P. 151.

FOREIGN CORPORATIONS—FRANCHISE TAXES—FEES OF OFFICE.

Acts of Thirty-fifth Legislature, Senate Bill 94.

Revised Statutes, Article 7394.

1. The Secretary of State should continue to collect the franchise tax specified in Revised Statutes, Article 7394, until Senate Bill 94 becomes effective, and should disregard in every respect the fact that such amended law has been passed, until such law has in fact become effective.

2. The Secretary of State is not authorized to collect franchise taxes for any less period of time than one year, except under the circumstances set forth in Revised Statutes, Article 7395, which are not in issue under the present inquiry.

3. In the event franchise taxes due and payable under Revised Statutes, Article 7394, as it now stands, are not paid, then the Secretary of State will be authorized to assess the full statutory penalty for such dereliction; and the fact that Revised Statutes, Article 7394, has been amended by an amendment which will soon become effective, does not in any manner limit the right of the Secretary of State to bring into force the penal provisions of the statute for collecting taxes which accrued under the law, prior to its amendment.

4. In the event a foreign corporation should fail to pay the franchise tax provided for in Senate Bill 94 the penalties which would attach would be the penalties now prescribed by law for failure to pay franchise taxes.

5. None of the provisions of the franchise tax law are affected by Senate Bill 94, except Article 7394, except in so far as other provisions might refer to the old statutory method of determining the amount of the tax due, in which instance, of course, the method to be pursued is that set forth in Senate Bill 94.

6. Senate Bill 94 is to be construed as cumulative of, but not as suspending or repealing the provisions of the present laws requiring foreign corporations to file certain reports and pay franchise taxes within the prescribed period and providing penalties, etc. In other words, the only thing affected by Senate Bill 94 is the method of determining the amount of franchise taxes due.

7. Foreign corporations will be compelled to file their reports with the Secretary of State at the same time and in the same manner that they are now required to file reports and in the event they should fail the present statutory penalties apply. The only derelictions of duty for which statutory penalties will lie for failure to furnish reports are those defined by existing statutes.

8. The Secretary of State is authorized by Senate Bill 94 to demand additional reports, in order to enable him to determine the amount of franchise taxes due, but for a failure to furnish such additional information no penalty is provided by law, and the only recourse for the Secretary of State is to decline to issue franchise tax receipts until sufficient information has been furnished him.

April 18, 1917.

Hon. C. J. Bartlett, Secretary of State, Capitol.
Attention of Mr. Cox.

DEAR SIR: Your letter of the 11th, requesting the opinion of the Attorney General on certain questions, relative to a proper construction of Senate Bill No. 94, reads substantially as follows:

"I beg to submit herewith for your consideration several questions pertaining to the provisions of Senate Bill No. 94, passed by the Regular Session of the Thirty-fifth Legislature of the State of Texas:

"(1) Under the provisions of our present franchise tax law, all corporations, both foreign and domestic, are required to pay to this Department a franchise tax for the period of one year in advance, or be subjected to the penalty therein provided. Senate Bill No. 94, as herein referred to, becomes effective ninety days from adjournment of the Regular Session of the Thirty-fifth Legislature, and hence becomes effective June 20, 1917. Has this Department authority to continue to collect franchise tax from foreign corporations for the period of one year in advance at all times prior to the date upon which this Act becomes effective, and is it further authorized to assess the penalty now provided by law in the event such franchise tax is not paid on or before May 1, 1917, for the period of one full year in advance?

"(2) Under the provisions of this Act construed in connection with the other provisions of our present franchise tax law, when and at what time are foreign corporations required and compelled to file reports with the Secretary of State, from which the Secretary of State shall ascertain the amount of franchise tax due?

"(3) In the event a foreign corporation shall fail to file the report above referred to at the time provided by law, what penalty, if any, would attach to such failure?

"(4) In the event a foreign corporation should fail to pay franchise tax provided in this Act at the time provided by law, what penalty, if any, would attach to such failure?

"(5) What provisions of our present franchise tax law, save and except the provisions of Article 7394, are affected or repealed by the provisions of this Act?

"(6) Is this Act to be construed in general as cumulative of or as superseding and repealing the present provisions of our present franchise tax law requiring foreign corporations to file certain reports and to pay franchise tax within a certain prescribed period and providing certain penalties for the violation thereof?"

Senate Bill 94, referred to above, is an Act to amend Revised Statutes, Article 7394, and this Article is the only article of the statute which it directly purports to amend, although it repeals all laws in conflict with the amended section. It makes a material and substantial change in the method of calculating and levying franchise taxes on foreign corporations, but does not affect the law in any respect, as the same relates to franchise taxes on domestic corporations. This amended Act becomes effective June 20, 1917.

Your first inquiry is whether or not you should continue to collect the franchise taxes prescribed in the law as it now stands and prior to the taking effect of this amendment, for the full period of time of one year.

In reply to this we beg to advise you that you should continue to collect the tax for the full period of one year, as contained in Revised Statutes, Article 7394, until the amended Act becomes effective and should disregard in every respect the fact that such an amended law has been passed and will become effective, until such law has in fact become effective. You are not authorized to collect the franchise tax under the old law for any less period of time than one year, except under the circumstances set forth in Article 7395, which circumstances are not in issue in your inquiry.

Brooks vs. State, 58 S. W., 1032.

In the case cited, an occupation tax in the gross was levied against certain bankers in the city of Denison in Grayson County, Texas, under a statute then obtaining, amounting to $270.00. This was the sum levied against this firm as an occupation tax, under the law which was in effect on September 2, 1897; the tax was payable in advance for a year's time and became due on the date named. However, the Legislature had previously passed an Act which was to and did become effective on September 20, 1897, which amended the measure effective on September 2, 1897, and which reduced the occupation tax to $50.00. On the trial of the case the bankers contended that they were entitled to a reduction on the amount of the tax, by reason of the amendment referred to. The Court of Civil Appeals held against this and that the original tax, due under the law in existence on September 2, 1897, must be paid. The court in part said:

"The seventh assignment of error complains of the action of the court in rendering judgment against the defendants requiring them to pay $270 taxes for pursuing their occupation during the year beginning September 2, 1897. The statute in force on September 2, 1897, levied an occupation tax upon the occupation of banking, when conducted in a city having a population of 2,000 inhabitants, of $180, and the county was authorized to levy an occupation tax for one-half this sum. The statute made the tax payable annually in advance. This statute was amended, and by amendment, which went into effect on September 20, 1897, the amount levied by the State was fixed at $50, and the county was authorized to levy a tax for one-half that amount. General Laws (Called Session, Twenty-fifth Legislature p. 50.) The contention is that the defendants were entitled to a reduction on the amount of the tax by reason of said amendment. The statute in force on September 2, 1897, levied the tax for one year, and provided that it should be paid annually. The statute further required the tax to be paid in advance. 2 Sayles' Civ. St., Article 5049, Sub. 1; also Id., Art. 5054. As soon as defendants engaged in the occupation, the right of the State to the tax became fixed and vested. The statute was not repealed by the Twenty-fifth Legislature, but amended. General Laws (Called Session), Twenty-fifth Legislature, p. 50. The right of the State to recover the tax as levied by the old statute was not affected by said amendment. Blackw. Tax Titles, star page 473; End. Interp. St., Section 480. There is no merit in the seventh assignment." (58 S. W., pages 1034-1035.)

The Supreme Court of the State denied writ of error in this case and it was therefore authoritative and controlling. As shown above, the tax having become due and having accrued under the law of September 2nd, the right of the tax authorities to collect the entire amount was not affected by the Act of September 20th, greatly reducing the tax on such occupations. The case is exactly in point on your inquiry. The franchise tax law now in existence and which will continue in existence until June 20th provides for the payment in advance of a franchise tax for the period of one year and does not authorize a pro rata payment; Senate Bill 94, which becomes effective June 20th is not a repeal of the present law, but a mere amendment of it. Therefore, until June 20th of this year, franchise taxes become due and payable for one year's time, under Article 7394, as it now stands written on the statute books of the State and the entire amount there specified and required must be collected, as has always heretofore been done, and as though Senate Bill 94 was not in existence.

In reply to the second question embraced in your first interrogatory, as to whether or not you are authorized to assess the statutory penalty, in the event such franchise taxes are not paid, under the present existing law, within the statutory period, we beg to advise you that you are authorized and will continue to be authorized to assess full statutory penalty. The penal provisions of the statute are in no way changed or modified by the amendment of Article 7394, and if they were these provisions would still be effective to enable the State to collect a tax which had accrued under a previous existing statute.

The rule is laid down in Cyc., as follows:

"The repeal of a statute under which penalties for the non-payment of taxes have already accrued will not affect the liability of the owner for the amount of such penalties." (37th Cyc, 1543.)

The American and English Encyclopedia of Law states the same rule, as follows:

"The repeal of a statute imposing an occupation tax does not affect the liability of a person against whom the tax has accrued, nor does it stop proceedings which are pending for the recovery of the tax." (21st Am. and Eng. Ency. of Law, 828.)

We will next answer your fourth inquiry. In the event a foreign corporation should fail to pay the franchise tax provided for in this amended act the penalties which would attach would be the penalties now prescribed by law for failure to pay franchise taxes.

In reply to your fifth question we advise that none of the provisions of the franchise tax law are affected by this amendment, except Article 7394, except insofar as other provisions might refer to the old statutory method of determining the amount of the tax due.

In reply to your sixth question we will advise that the Act is to be construed as cumulative of, but not as suspending or repealing, the provisions of the present laws requiring foreign corporations to file certain reports and to pay the franchise tax within the prescribed period, and providing penalties, etc. In other words, the only thing affected by Senate Bill 94 is the method of determining the amount of franchise taxes due. In other respects the franchise tax law as to foreign corporations remains the same, except where the method of calculating the amount should be referred to in other articles of the statute, and in such cases such methods of calculation will be governed and controlled by Senate Bill 94, when it becomes effective.

In reply to your second interrogatory we beg to advise that foreign corporations will be required to file their reports with the Secretary of State at the same time and in the same manner that they are now required to file reports, and that in the event they should fail to file such reports the present statutory penalties would apply.

We have examined the statutes of the State, however, with reference to reports and those things required are not sufficient to enable you to determine the amount of franchise tax due, although the statutory requirements are unrepealed, vital and must be complied with. You are, however, especially authorized by the provisions of Senate Bill 94, to obtain additional information from companies before you issue them franchise tax receipts and you may require of them sworn reports, or you may use such other method as will satisfy you as to the status of the affairs of corporations desiring to pay their taxes, or which are required to pay their taxes, before you issue them a receipt. The reports now provided for by statute should still be made by these corporations and you should, in addition, prepare separate forms requiring such other information as you may need, in order to comply with the terms of Senate Bill 94. It is true that you cannot inflict any penalty for a failure to supply you with the necessary information in such additional forms, but you will not be required to license these companies until they have furnished you sufficient information to enable you to calculate the tax and if they should attempt to transact business in the State without having paid the franchise tax, or having received a receipt from you, as provided by law,

then the penalties for transacting business without the payment of the tax will accrue. The present laws of the State requiring reports from corporations should, of course, be amended, so that they will be sufficiently full to enable the Secretary of State to calculate the amount of franchise taxes due. But until this is done the only derelictions of duty for which statutory penalties will lie for failure to furnish you reports are thoe defined by existing statutes; and for a failure to furnish you the additional information made necessary by Senate Bill 94 there is no penalty provided by law and the only recourse for the Secretary of State to take is to decline to issue the franchise tax receipts, until sufficient information has been furnished him, and this you are advised to do.

Respectfully submitted,

C. M. CURETON,
First Assistant Attorney General.

OP. NO. 1867—BK. 50, P. 361.

CORPORATIONS, PAYMENT OF CAPITAL STOCK OF—TRADE MARKS.

State Constitution, Article 12, Section 6.
United States Compiled Statutes, Section 9495.

1. A trade mark of a personal nature can not be assigned nor sold by legal process; and can not be used as the basis of the capital stock of a corporation chartered under the laws of this State, as such a trade mark is not property actually received within the meaning of our constitutional provision.

January 19, 1918.

Hon. Geo. F. Howard, Secretary of State, Capitol.

DEAR SIR: That portion of your letter of January 16th, presenting an inquiry for the advice of the Attorney General, reads as follows:

"Mr. Cyrus W. Scott, of Houston, has made application to file a charter in this department to incorporate a company for the purpose of manufacturing, etc., as set out in Subdivision 14 of Article 1121, Revised Statutes, for the purpose of making overalls, shirts, etc.

"Mr. Scott desires to list among his assets his trade-mark "Scott's Very Best Overalls" at $50,000, to be a registered trade-mark under our State laws. I informed him that I did not see how I could possibly allow him to place any valuation on a trade-mark, but he insisted that he was right, and, therefore, I am requesting a ruling from your department and desire you to advise me if I can accept a trade-mark as a part of the paid up capital stock of a corporation."

In reply to this inquiry, we beg to advise you as follows: Section 6 of Article 12 of the Constitution of this State reads:

"No corporation shall issue stock or bonds except for money paid, labor done, or property actually received, and all fictitious increase of stock or indebtedness shall be void."

In the case of O'Bear-Nester Glass Co. vs. Anticxplo Co., 101 Texas, 432, the Supreme Court of this State held that the purpose of this section of the Constitution is to protect those who deal with corporations, and that the word "property," as used, is so qualified by he words "actually received," as to clearly show that it was the intention that the property should be of such character as could be delivered to the corporation, and that property actually received must be property which can be subjected to debts.

The court, in its opinion, in the case referred to, among other things said:

"The emphatic terms in which the section of our Constitution, above quoted, are expressed, that the payment of the stock shall be issued only for money *paid*, for labor *done*, or property *actually received*, clearly indicate that the intention was that the assets of corporations created in Texas should consist of property capable of being applied to the payment of debts and of distribution among the stockholders."

Clearly, under this construction of the constitutional provision, property could not be received by a corporation as the basis of issuing stock unless the property was of such character as could be applied to the payment of debts or, after the payment of corporate debts, be available for "distribution among the stockholders."

We take it that if the Constitution contemplates that the property received may be capable of being subjected to the payment of debts, then it means that it must be capable of being subjected to the payment of debts in the usual and ordinary way, which is by execution; or by creditor's bill, or through the instrumentality of a court of chancery; moreover, that in disposing of the property for the payment of debts, it may be disposed of to any person the same as other property.

Bearing in mind this constitutional provision and the construction given it by the court, we will next examine into the property qualities of a trade-mark. The particular trade-mark, presented by your inquiry, is: "Scott's Very Best Overalls."

This is, quite clearly, a personal trade-mark, or a trade-mark composed of, in part, the name of an individual. 28 Am. & Eng. Ency. of Law, p. 401. The rule as to this class of trade-marks is that they cannot be assigned. This rule has been stated as follows:

"If a trade-mark means to the public that the personal care and skill of a particular individual were exercised in the manufacture, selection, or production of the goods upon which it is used, it can not be assigned because it can never be truthfully used by another." 28 Am. & Eng. Ency. of Law, p. 379; Mayer vs. Flanagan, 34 S. W., 785.

In the Texas case cited, the court, substantially, adopts the text of the American and English Encyclopedia of Law, which we have cited. It announces this doctrine as follows:

"And if a trade-mark is a personal one, designating a particular person and his reputation and skill, it can not be truthfully used by any other person and, consequently, can not be assigned."

It should also be noted that in cases of insolvency, bankruptcy, or assignment, for the benefit of creditors, the trade-mark, if of a personal nature (such as the one now before us), cannot be sold for the reasons which have been heretofore mentioned. 28 Am. & Eng. Ency. of Law, p. 404.

It should also be recalled that a trade-mark cannot be seized and sold upon execution or attachment, apart from the business with which it has been used. 28 Am. & Eng. Ency. of Law, p. 405; Hopkins on Trade-marks (2 Ed.), p. 192.

It should also be recalled, too, that there is still a further limitation upon the assignability of trade-marks, and that is that they may not be assigned, except in connection with the good will of the business in which the mark is used. That the assignment must be in writing and duly acknowledged under the law, and, further, such assignment is void unless registered in the Patent Office within three months from date. U. S. Compiled Statutes, Section 9495; Hopkins on Trade-marks, p. 193.

It is quite true that a trade-mark may be said to be a sort or species of property in the same manner as a man's own name or his good repute, have certain property characteristics; that is, they may be protected by courts of law and equity. But a trade-mark is not by itself such property as can be transferred, and the right to use it cannot be assigned except as incidental to the transfer of the business or property with which it is used. McMahan Pharmacal Co. v. Denver Chemical Co., 113 Federal, p. 468. But even this limited assignability is not a right or characteristic of a personal trade-mark, such as the one before us, for we have just seen from the authorities that a personal trade-mark is not assignable at all because, in the hands of any one other than the one who has given his name to the trade-mark and made the good repute of the article, the use of the trade-mark would be deceptive as against the public and, any assignment for such purpose or having such effect, would be void.

It may be recalled that the protection given by a patent is far greater than that obtained by the use of a trade-mark. Hopkins on Trade Marks, Section 6; and that in this State the Supreme Court has heretofore declined to require the Secretary of State to file a charter where the capital stock of the proposed corporation was to be paid in part by letters patent.

As we have just seen, a trade-mark is of such limited assignability that it cannot even by contract be assigned where it is of a personal nature, as the one before you; that in no event could it be assigned separate and apart from the good will of the business; that it could not be sold under execution or through court proceedings, except in connection with the business itself, and not then when the trade-mark is of a personal nature.

It should also be recalled that any assignment of a trade-mark must be registered in the Patent Office at Washington within ninety days after the assignment. It is thus seen that a trade-mark is not only a most illusive and intangible character of property, but that its assignabiliy has such limitations that we cannot say that it may be subjected to the payment of debts in the usual way. It would follow,

therefore, that a trade-mark known as "Scott's Very Best Overalls," is not such a species of property as is contemplated by the Constitution of this State in providing that property may be accepted as a basis of capitalizing a corporation.

There is still another practicable objection to the use of a trade-mark for the basis of issuing corporate stock. The property contemplated by the Constitution must be property actually worth the money, and worth it on the market at the time; that is, it must be property which has a market value. Money is the basis of the capitalization of all corporations and, where the property is substituted for it, the substitution is permitted only because it is the equivalent of the money and, unless it does have a market value, it is not the equivalent of money. Tarker v. Wallace, 6 Daly (N. Y.), 365. In the case cited, the court said:

"Before a thing can be regarded as money or its equivalent, it must have an actual, positive and ascertained value. A value so thoroughly ascertained and fixed at the time that it can at once be changed into money of which it is regarded as the equivalent."

See also, Chisholm vs. Forney, 21 N. W., 664.

Van Cleave vs. Burkey, 428 L. R. A., 583.

In the case of a trade-mark, whether assignable or not, the difficulties which would confront you in ascertaining its money value need not be dwelt upon, because such a value, however, great or small it may be, is practically unascertainable. This but emphasises the conclusion which we have previously reached that the trade-mark in this case is not such character of property as may be made the basis for the issuance of capital stock of the corporation.

Yours very truly,

C. M. CURETON,
Assistant Attorney General.

OPINIONS ON COUNTY AND OTHER DEPOSITORIES.

OP. NO. 1706—BK. 48, P. 478

COUNTY DEPOSITORIES—BANKS AND BANKING—WORDS AND PHRASES.

Revised Statutes, Article 2440.

1. An individual who is partner in an unincorporated bank is not an individual banker within the meaning of Revised Statutes, Article 2440, and can not become a county depository, where the unincorporated bank is the only bank operated by him and is itself ineligible to bid.

2. The phrase, "individual banker," discusses and defined.

February 7, 1917.

Hon. Rector Lester, County Attorney, Canyon City, Texas.

MY DEAR SIR: The letter of your county judge, addressed to you which presents the question for determination reads as follows:

"Will an individual who is a partner in an unincorporated bank be eligible to bid on the county depository, as an individual banker, as set out under the county depository law. The bank as an institution in which they are members of the partnership is ineligible under the nepotism law. * * *"

In reply to this question I beg to advise you that an individual who is a partner in an unincorporated bank it not by reason of such partnership an individual banker, within the meaning of our statutes. The unincorporated bank would probably be an individual banker, but your statement is that the partnership is ineligible to bid under the nepotism law.

This state has no statute governing or defining individual bankers, and the phrase used in the depository law was evidently used as describing an individual or partnership engaged in a private banking business. This construction is consistent with the construction given the same phrase in states having individual banker statutes.

Ex Parte Wisner, 92 Pac., 958.
In re Samuel Wilde's Sons, 133 Fed., 567.

But in your case the individual to whom you refer is not an individual banker. He is not engaged in the banking business as an individual, but is a mere partner in an unincorporated bank, therefore he is not an individual banker and has no authority to act as a depository.

The word "individual," as used in the Federal Bankruptcy Statute, has been construed to be used in the sense of being descriptive of a single person, as incapable of division.

In re United Button Company, 102 Fed., 381.

You are advised, therefore, that an individual who is a partner in an unincorporated bank is not personally an individual banker

within the terms of the Revised Statutes, Article 2440, and that if his unincorporated bank is ineligible for selection as county depository the individual referred to could not bid, unless he should go into the banking business as an individual conducting an unincorporated bank, aside from his partnership business.

Yours very truly,

C. M. CURETON,
First Assistant Attorney General.

OP. NO. 1712—BK. 48, P. 496.

COMMISSIONERS COURT—PUBLIC OFFICERS—COUNTY DEPOSITORIES—BANKS AND BANKING.

Vernon's Sayles' Revised Statutes, Articles 2239 and 4622.

1. A bank of which a member of the commissioners court, whether a county commissioner or a county judge, is a stockhoder cannot be selected as county depository, and any such selection would be void.

2. Where the wife of a member of the commissioners court or of a county judge is a stockholder in a bank, owning the stock as her seperate property, nevertheless the commissioner or judge, as the case may be, is interested in the bank and such bank is ineligible for selection as county depository and any such selection on the part of the commissioners court laboring under these disabilities would be void.

Feburary 26, 1917.

Hon. J. O. Rouse, County Judge, Carrizo Springs, Texas.

DEAR SIR: Your letter of February 22nd, is as follows:

"One of the members of our commissioners court is a stockholder and active Vice President of one of the banks here. Can that bank be selected as county depository for the county? Would the contract be void or voidable?

"The wife of the County Judge is a stockholder in a bank (her separate property). Could that bank be selected as a county depository?

"I will appreciate your ruling upon this question."

We have decided to answer this letter by combining into an opinion previous opinions and rulings of this office upon the same or similar questions. We are adopting this course of reply as a matter of information to you and of convenience to this office.

On February 3, 1913, this Department wrote an opinion to Hon. A. M. Turney, County Judge at Alpine, Texas, in which the holding relative to one of the subject matters of your inquiry was stated as follows:

"Inasmuch as you are a stockholder of the bank at Alpine the commissioners court would not be authorized by law to accept the bid of such bank as county depository, your position as county judge being inconsistent with any authority upon your part, to accept such a bid, nor would non-action upon your part, or non-participation upon your part, with the commissioners court in reference to this matter relieve the situation of its vice or make legal the action of the court.

"Under no circumstances, so long as you are County Judge and at the same time a stockholder in the bank, can the commissioners court name the bank as county depository."
(Twenty-seventh Opinions of Attorney General, 305.)

On the same date we wrote an opinion concerning a similar inquiry to Hon. Richard P. Head, Balmorhea, Texas, in which this office made a ruling, as follows:

"In your letter of January 30th, you present to this Department the following question:
"In receiving bids for county funds, would it be legal for the county commissioner, who was also a director in a bank bidding for the funds, to be absent from the meeting of the commissioners, or to be present and not vote for his bank? Would not the fact that he is a commissioner prevent his bank from being eligible to become the custodian of the county funds, whether he be present at the meeting or not? Is there any possibe manner in which this could be evaded?"
"In reply to your several questions, we beg to say that there is no possible manner by which the provisions of the law, to which we have heretofore called your attention, can be evaded. A bank having as director one of the county commissioners, is simply not eligible to bid for or become the custodian of the county funds, and if it were to do so and the commissioners court awarded the funds to such a bank, it would be a violation of law and the parties subject to prosecution."
(Twenty-seventh Opinions of Attorney General, 306.)

On November 15, 1907, an opinion was rendered to Hon. W. Van Sickle, Alpine, Texas, in which a holding similar to those specified above was made by the then Attorney General, who was Hon. R. V. Davidson. This opinion, insofar as it relates to the subject matter of your inquiry is as follows:

"In your letter of the 11th inst., you make the following statement and inquiry:
"First. The commissioners court of Brewster County in regular session, November 11, 1907, accepted the bid of the First National Bank of Alpine as County depository. The record shows there were present in said court A. M. Turney, county judge, a stockholder in said bank; J. D. Jackson, commissioner of Precinct No. 2, a stockholder in said bank; M. A. Ernst and D. C. Bourland, two other commissioners.
"Under the law, is not such a contract void because a majority of the court not interested in said bank did not and could not select such depository, there being only three county commissioners present, one of them, together with the county judge, being disquaified to sit in court when such bid was acted upon.
"Such county judge, A. M. Turney, and county commissioner J. D. Jackson, participating in the said selection of the county depository, are they not subject to suspension from office, and also subjected themselves to a criminal prosecution for a violation of law and their oaths of office?
"Second. Revised Statutes, Articles 5157, prescribing the qualifications of sureties of the State Tax Collector's bond, and providing such sureties shall attach to such bond a schedule, under oath, all real property, describing the same in detail, and further declaring that when such bond is filed that a lien is thereby created on such real estate, does not the filing of such bond encumber such real estate described in such schedule accompanying such bond?
"Third. Session Laws, 1905, page 387, provides that when the county judge shall have advertised for bids for the county funds, that such bids must be filed on or before the first day of the term of the court at which such bids are to be considered. Is a bid filed under Section 21 of such

acts at 12:25 a. m. on the first day of the term of the court in time, even though such court convened at 10 o'clock a. m. on that day, and at that particular minute there was only one bid on file which was opened immediately and the award made, and at the time above stated there was no other bid on file with the clerk of the commissioners court which would have been considered by the court, and the contract awarded to the bank in which the judge of the court and one commissioner were stockholders."

This is, therefore, to advise you:

First. That if, as you state in your letter, the county judge and three commissioners only were present on the first day of the term at which the county depository was selected and that the county judge was and is a stockholder in said bank and one of the commissioners present was and is also a stockholder in said bank and that there were also only two other commissioners present who were not interested in said bank, then, in my judgment, all the proceedings of the commissioners court in selecting the bank in which these officers were interested as county depository were null and void. The county judge, being interested in the bank, was cleary disquaified to preside over the deliberations of the commissioners court, and neither the county judge nor the interested commissioner could legally participate in any of the proceedings of the court while the bid of such bank was before the court for consideration. There were, therefore, only two members of the court present who were qualified to act for the county in the selection of such depository and those two members were without authority to select a county depository.

A contract entered into between the county, through its county commissioners court, and a bank, by which such bank was to become the county depository of the county, when a majority or even an equal number of the members of the commissioners court present were interested as stockholders in such bank, is clearly against public policy and void.

Robinson vs. Patterson, 71 Mich, 149.

Brown vs. Bank, 137 Ind. 655.

Meguire vs. Corwine, 101 U. S. 108.

Rigby vs. State, 27 Texas App. 55.

Knippa vs. Stewart Iron Works, 66 S. W. 322.

Texas Anchor Fence Co., vs. City of San Antonio, 71 S. W., 301.

Not only is such a contract against public policy and void, but the same places such members of the commissioners court, including the county judge, who were interested as stockholders in such bank, in the position of violating their oath of office.

Revised Statutes, Article 1535, reads in part as follows:

"Before entering upon the duties of his office, the county judge and each commissoner shall take the oath of office prescribed by the Constitution, and shall also take an oath that he will not be directly or indirectly interested in any contract with or claim against the county in which he resides, except such warrants as may issue to him as fees of office."

You will, therefore, readily see that no member of the commissioners court, including the county judge, can remain a member of such court and retain his interest in such bank after the bank has become the county depository without doing so in direct violation of his oath of office.

I wish also to call your attention to Article 264 of the Criminal Code, which reads as follows:

"Any officer of any county in this State, or of any city or town therein, who shall contract, directly or indirectly, or become in any way interested in such contract, for the purchase of any draft or order on the treasury of such county, city or town, or for any jury certificate or other debt, claim or demand for which said county, city or town may or can in any event be made liable, shall be punished by a fine of not less than ten nor more than twenty times the amount of the order, draft, jury certificate, debt, caim or liability so purchased or contracted for."

This provision of the Criminal Code, you will observe, would render such county commissioner amenable to the criminal laws if the bank in which he is interested should purchase any of the claims described in this

article of the Code against the county, which would render it practicaly impossibe for such commissioner or county judge to retain his official position if the bank should at any time see proper, with or without notice to such commissioner, to purchase any claim against the county.

I also desire to call your attention to Article 266, Penal Code, which reads as follows:

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

This provision of the Criminal Code might appear to exclude the members of the commissioners court who might be interested as stockholders in a county depository selected by the county but for the construction given it by the Court of Criminal Appeals in the case of Rigby vs. State, 27 Texas App., 55, wherein the court uses the following language:

"But, when viewed in connection with the context, and with reference to the purpose which the Legislature intended to effect by the enactment of the statute, such an interpretation would, in our judgment, be too restrictive if not strained and unreasonable. Manifesty the Legislature, in enacting the statute, intended thereby to protect counties, cities and towns from official peculation. Such peculation was the evil sought to be suppressed, and the statute strikes at the very root of the evil by making it an offense for any officer of the county, city or town to become interested pecuniarily in matters wherein such corporations are pecuniarily interested. The purpose of the statute is to prevent official "rings" from being formed and operated to prey upon the treasuries of the counties, cities and towns; to prevent the officers of such corporations from using their official knowledge and influence to their individual pecuniary advantage in the financial transactions of such corporation."

It is, therefore, as above stated, my opinion that the orders of the commissioners court and the contract with the bank as a county depository is wholly void for the reasons herein stated; and it is further my opinion that if the other member of the commissioners court had been present, and not interested in the bank selected, and those three commissioners who were not so interested had selected such bank, then the county judge and the interested commissioner would still, for the reasons herein indicated, be disqualified to retain their official positions unless they severed their connection with the bank selected.

(Reports and Opinions of Attorney General, 1906-8, pages 622 to 625.)

On June 18, 1913, this Department rendered an opinion to Hon. F. M. Bralley, State Superintendent, on the question here at issue and this opinion, insofar as it relates to your inquiry is as follows, to wit:

This Department has your favor of recent date in which you propound the following questions for an opinion from this Department:

"(1) Can a bank whose president is a member of the school board of an independent district become the depository of such district, when said board receives and acts on the bids therefor?

"(2) If such bank does so become depository, is the contract binding, or is it the duty of the school board to again receive bids and select a new depository?

"(3) Can a bank whose president is a member of the county school board become county depository including both permanent and available

school funds, and if such bank has so become, is the contract binding, or is it the duty of the commissioners court to advertise for a new depository?

"(4) Would the resignation of such bank official from such school board, in either or both cases, render such contract for depository valid, or would the invalid character of the contract operate fom the beginning, and render the selection of a new depository necessary?

"(5) If a member of a school board which has in charge the erection of a school building, either through direct action or through a contractor, is a shareholder and officer of a private corporation, is it legal for such corporation to furnish labor or mateials to, or contract with, said school board or contractor?"

Replying thereto, we will discuss questions numbers 1, 2, 3 and 4 of your communication under one head, and upon these we beg to advise that an institution should not be designated as depository for a district or for a county where an officer of such banking institution is a member of the board of the district or county. This Department has heretofore ruled that any officer of a banking institution who was at the same time a member of the board or court making the selection of the depository woud be subject to prosecution. We do not think, however, that the fact that an officer of the bank was at the same time a member of the board designating the depository would make invalid the contract and the bond executed by the depository, as a general proposition. Of course, if it could be shown that the contract was awarded through some unfair or unjust method of the officer, or that the contract awarded was not the best obtainable, then at the suit of interested party, such contract could be canceled. In other words, the contract is not void, but would be merey voidable for good cause shown. The resignation of the bank officer from the school board after such bank had been designated the depository, would not affect the matter one way or the other, for the reason that whatever vice may have entered into the contract and the awarding of the depository would exist from the time of the inception of the contract, and the resignation of the bank official from the board awarding the contract would not cure the matter.

Replying to your fifth question, we beg to say that this Department has continuously held that under the provisions of Article 376, Criminal Code, it would be a violation of law for an official to purchase supplies or materials, or make a contract with a corporation in which such official owned stock. Of course, a member of the school board might have a very small percentage of stock in the corporation with which the school board was dealing, but at the same time to the extent of his stock he would have an interest in the contract made by the board.

We are of the opinion and so advise you, that it would be a violation of the law for a school board to make a contract with a corporation in which such member owned stock. Rigby vs. State, 10 S. W., 760.

(Thirtieth Opinions of Attorney General, 217.)

To the reasons given in the foregoing various opinions for holding that a bank in which any of the members of a commissioners court are stockholders can not become a county depository we beg to add the following:

Revised Statutes, Article 2239, sets forth the contents of the oath which the law requires county judges and county commissioners to take before entering upon the duties of their respective offices. This statute reads as follows:

"Before entering upon the duties of his office, the county judge and each commissioner shall take the oath of office prescribed by the constitution, and shall also take an oath that he will not be directly or indirectly interested in any contract with, or claim against, the county in which he resides, except such warrants as may issue to him as fees of

office, which oath shall be in writing and taken before some officer authorized to administer oaths, and, together with the certificate of the officer who administered the same, shall be filed and recorded in the office of the clerk of the county court in a book to be provided for that purpose; and each commissioner shall execute a bond, with two or more good and sufficient sureties, to be approved by the judge of the county court of his county, in the sum of three thousand dollars, payable to the treasurer of his county, conditioned for the faithful performance of the duties of his office."

(Article 2239, Revised Civil Statutes.)

It will be noted from the statute above quoted that each member of the court, including the county judge, is required to take oath "that he will not be directly or indirectly interested in any contract with or claim against the county in which he resides," etc.

The question is whether or not a stockholder of a State bank is directly or indirectly interested in the contract of a bank as county depository within the inhibitory terms of this statute; also whether or not such county judge or commissioner is thus directly or indirectly interested in the contract of a bank as county depository where the wife of such officer is a stockholder in the bank, the stock being her separate property.

The commissioners court is made by the organic law the executive board for administering the affairs of a county.

Webb County vs. Board of Trustees, 95 Texas, 131.

This court is likewise a part of the judiciary of the State and is within the sphere of its powers a court of general jurisdiction.

Ex parte Towles, 48 Texas, 431.
Wright vs. Jones, 38 S. W., 249.

This court in auditing, adjusting and settling accounts against the county and directing their payment exercises a judicial function.

School Trustees vs. Farmer, 56 S. W., 555.

Under the above authorities, therefore, the commissioners court is a part of the judiciary and is especially inhibited by the oath of office of its members from becoming interested, directly or indirectly, in any contract made by the court on behalf of the county. Any contract or agreement or action taken by a commissioner in violation of his oath is void.

Knipa vs. Stewart Iron Works, 66 S. W., 322.

Section 11, Article 5 of the Constitution of this State which relates to the judiciary, declares "no judge shall sit in any case wherein he may be interested, or where either of the parties may be connected with him, either by affinity or consanguinity within such a degree as may be prescribed by law."

It will be noted that the word "interested" is likewise used in this constitutional provision with reference to the judiciary in general,

and that the same word is used in the statutory oath of county judges and county commissioners, except that its meaning is there broadened to include not only a direct interest but an indirect one as well. The phrase, as used in the above section of the Constitution, has been construed and interpreted by the courts of this State. It has been held that this provision of the Constitution relative to the interest of judges sufficient to disqualify them should not receive a technical or strict construction, but rather one that is broad and liberal, and that the court ought not to be astute to discover refined and subtile distinctions to save a case from the operation of the maxim, when the principle it embodies bespeaks the propriety of its application. The immediate rights of the litigants are not the only objects of the rule. A sound public policy, which is interested in preserving every tribunal appointed by law from discredit, imperiously demands its observance.

Casey vs. Kinsey, 23 S. W., 818.

It has been held that a judge who is a stockholder in a national bank cannot try a case in which the bank is a party, because the judge is necessarily interested as a stockholder, and that this interest disqualfied him under the constitutional provision above referred to.

Williams vs. City National Bank, 27 S. W., 147.

The Court of Civil Appeals in this case, speaking through Judge Head, who at that time was on the bench for the Second District, in part said:

"It appears from a bill of exceptions that the judge who tried this case was a director in the national banking association which was the plaintiff in the court below. By the national banking act it is provided that 'every director must own in his own right at least ten shares of the capital stock of the association of which he is a director. Any director who ceases to be the owner of ten shares of the stock, or who becomes in any other manner disqualified, shall thereby vacate his office.' Rev. St., U. S., Section 5146. That this constitutes such interest as disqualifies a judge from trying a case in which the association is a party, we think there can be no question. City of Austin vs. Nalle, 85 Texas, 520, 22 S. W., 668, 960; 12 Am. & Eng. Enc. Law, 467."
(27th S. W. Rep., 148.)

If a judge who is a stockholder in a bank is disqualified from trying a case to which such bank is a party because he is "*interested*" in the subject matter in controversy, then it is conclusive, we think, that a member of the commissioners court who is a stockholder in the bank is disqualified from acting upon any subject matter before the court to which the bank is a party; for, in the first place, as a member of the commissioners court he is a part of the judiciary of the State; and, in the second place, his oath requires that he shall not be interested, either directly or indirectly. It is fundamental that the interest of a stockholder in a corporation is the immediate right to receive his share of the dividends, as they are declared, and the remote right to his share of the effects on hand at the dissolution of the corporation.

State vs. Mitchell, 58 S. W., 365; 104 Tenn., 336.
Olsen vs. Homestead Land, etc. Company, 87 Texas, 368.
Aransas Pass Harbor Company vs. Manning, 94 Texas, 563.

It was held at quite an early date in this State that stockholders in a corporation were interested therein within the rule of law then obtaining, that under certain circumstances those interested in the subject matter in controversy could not testify.

Kemper vs. Victoria Corporation, 3 Texas, 135 (141).

It is clear, therefore, from a consideration of the authorities, that a stockholder in a corporation is interested therein within the meaning of the oath required to be taken by county commissioners and county judges. The next question for determination is whether or not the fact that the wife of a county judge or county commissioner is a stockholder in the bank, which stock is her separate property, makes the husband interested directly or indirectly, within the terms of the oath above referred to. It is our opinion that it does do so. We think it entirely clear from the statutes of this State and constructions thereof by the courts and text writers that although the stock in such a bank may be he separate property of the wife, still nevertheless the dividends and earnings thereon become the community property, owned jointly by the husband and the wife, and therefore to this extent and in this way the husband is both directly and indirectly interested in the bank, and consequently in any controversy or contract which might arise to which the bank is a party. It will be noted from the authorities cited above that the right of a shareholder of a corporation is the direct right to receive dividends or surplus earnings on the shares of stock, this right the wife has by virtue of her ownership of the stock, but this right she must share with her husband, by virtue of the law of community property in this State, and his interest, therefore is direct in the earnings of the corporation, to the same extent as if he were the actual owner of the proprty.

Revised Statutes, Article 4622, declares:

"Art. 4622. (2968) Community property; what property shall be under control, etc., of wife, bank deposits.—All property acquired by either the husband or wife during marriage, except that which is the separate property of either one or the other, shall be deemed the common property of the husband and wife, and during coverture may be disposed of by the husband only, provided, however, the personal earnings of the wife, the rents from the wife's real estate, the interest on bonds and notes belonging to her and dividends on stocks owned by her shall be under the control, management and disposition of the wife alone, subject to the provisions of Article 4621, as hereinabove written; and further provided, that any funds on deposit in any bank or banking institution, whether in the name of the husband or the wife, shall be presumed to be the separate property of the party in whose name they stand, regardless of who made the deposit, and unless said bank or banking institution is notified to the contrary, it shall be governed accordingly in honoring checks and orders against such account. (Acts 1913, p. 61, Sec. 1)."

The fact that the amendment of 1913 gives the wife liberty of management and disposition as to income for certain of her separate prop-

erty does not mean that the property is any the less the estate of the community, and therefore not owned jointly by her and her husband. Concrning this question the Court of Civil Appeals for the Second District, in the case of Scott vs. Scott, 170 S. W. 273 (275), said:

"It is to be observed that by the amendment the personal earnings of the wife during the continuance of the marital relation constitute community property as before. The change is merely in the designation of the wife, rather than the husband, as the one who shall have the control, management and disposition thereof." * * *

"The rights of the husband and of the wife to community property at all times as yet are equal, and the original designation of the husband instead of the wife as the one to control and manage community property was a mere arbitrary direction, founded upon legislative policy."

(170 S. W., p. 275.)

Concerning community property and the effect of the Act of 1913 upon it, Speer in his work on Marital Rights in part says:

"While our statutory definition of community property of the husband and wife in this State is happily very terse, it is correspondingly broad. It includes all property acquired by either husband or wife during marriage except that acquired by gift, devise or descent, and except the increase of the separate lands. No limitations whatever as to source of title or means of acquisition are imposed, further than the exceptions note. Whether the new acquisition be the result of the husband's individual labor, skill, or profession, or of the wife's, the rule is the same. If the earnings be the fruits, revenues, hire, increase, profits, or interest derived from the individual estate of either spouse, or from the community estate, all come within the scope of the statute." * * * "The statutes of 1913, concerning the community property, make no changes in its character, but do make many changes in respect to its control, liability and the like, all of which features are noticed in their appropriate places."

(Speer's Law of Marital Rights in Texas, Section 310, pages 389, 390 and 392.)

Again Judge Speer says with reference to the subject of profits and investments made from the wife's separate funds:

"This phase of the subject has been discussed to some extent, and will again be noticed, but briefly. Whatever is acquired by husband or wife, by speculation with the wife's separate funds is community property. If there be gains, they are not acquired by gift, device or descent. They are the fortuitous result of a contract based upon a consideration—the profits of a venture. They do not represent the enhancement in value of a particular piece of property, but an amount additional to the original fund, for its use or as a compensation for the venture, and for the time and attention bestowed. The purchase of merchandise with the wife's funds, and their sale at a profit, constitute such profits community. They are the compensation for the use of the money and the time and labor of the spouses in the enterprise. The same is true as to profits of speculation with her funds in bonds, stocks, lands, or anything else."

(Speer's Law of Marital Rights in Texas, Section 319, pages 399 and 400.)

It is plain from these authorities, as well as from the statutes themselves, that dividends on bank stock were under the old statute community property and the husband was interested jointly therein with the wife, even though the stock was the separate property of the wife.

As shown, this rule has not been changed by the Act of 1913, and although the wife has a wider control over these interests still they are nevertheless community property and the status as to the marriage relation as declared in St. Mark still obtains, "and they twain shall be one flesh; so then they are no more twain but one flesh."

Mark, 10th Chapter, 8th verse.

In our opinion it is unnecessary to discuss definitely the question as to whether a contract entered into by the commissioners court with a bank as depository would be entirely void or would only be voidable. It is quite likely that so far as the liability of the bank is concerned the bank after having executed its bond and received the county funds would be held liable therefor, and be compelled to repay the same. In that sense, the contract would be enforcible, but in any other sense our opinion is that the contract would be void. A depository contract is a continuing one, covering the subject matter with which the commissioners must deal at all times, and therefore the disqualification of a member of the court applies not only to the original making of the contract, but also to every action which ought to be taken by the court with reference to the carrying out of the agreement. It is the opinion of the writer that the commissioners are absolutely prohibited from entering into a contract with a bank in which either one of them is a stockholder or in which the spouse of any one of them is a stockholder, and that such a contract being thus prohibited by law is absolutely void, although, as suggested above, if such an agreement should be entered into with the bank and the bank thereby acquire the funds of the county it could be made to return the funds to the county, either upon the contract or upon other principles of law unnecessary to discuss here.

In the case of Noble vs. Davidson, 90 N. E. 325, 177 Ind. 19, the statutes provided that any school trustee who shall while holding office be interested directly or indirectly in any contract or any work for the schools of any city shall be fined and imprisoned. When a contract was executed between the trustees of a city school and a heating company for a heating plant for the city schools the president of the company had a perfect title to the office of trustee, though he had not then qualified. The contract provided that in case a part should be performed while the president was trustee the company should employ, at its own expense, an expert, approved by the two other members of the school board, to act with the interested members to determine whether there was a compliance with the contract. The president qualified while the contract was being performed, and it was held that he was interested in the contract within the statute, so that it was void, notwithstanding the provision authorizing the employment of an expert at the heating company's expense.

See 2d Words & Phrases (Second Series) page 1136.

It seems to us that it is unnecessary to cite other authorities to make any additional discussion of these questions. The various opinions of this Department, together with the authorities cited and discussed.

and the additional discussion which we have made appear to us to be conclusive of the issue. You are therefore advised:

1st. That a bank in which a member of the commissioners court owns stock cannot be selected as county depository and that any such selection would be void.

2nd. Where the wife of a member of the court or of a county judge is a stockholder in the bank, owning the stock as her separate property, neverthless the commissioner or county judge, as the case may be, is interested in the bank and such bank is ineligible for selection as county depository and any such selection on the part of a commissioners court laboring under these disabilities would be void.

Yours very truly,

C. M. CURETON,
Acting Attorney General.

OP. NO. 1738—BK. 49, P. 159.

DEPOSITORIES—RETROACTIVE LAW—INDEPENDENT SCHOOL DISTRICTS.

Upon the selection of a depository by an independent district such depository is entitled to receive all the funds of the district and if such district has funds with the county depository, by reason of having theretofore been a common school district, it would be the duty of the county depository to transfer such funds to the depository selected for the independent school district.

Section 3, Article 7, Constitution.

Acts of Thirty-fifth Legislature, creating Sinton Independent School District.

April 19, 1917.

Hon. M. C. Nelson, County Attorney, Sinton, Texas.

DEAR SIR: The Attorney General is in receipt of your letter of April 17th, from which it appears that the Thirty-fifth Legislature created by special act the Sinton Independent School District; that such Independent District was created out of territory theretofore forming Common School District No. 1. It further appears that on the second Monday in February of this year the Sinton State Bank was selected by your Comissioners' Court as county depository for the ensuing two years.

You further state that Section 9 of this Act, creating the Independent School District, is in the following language:

"The Board of Trustees shall appoint as treasurer the person or corporation who offers satisfactory bond, as herein provided, and the best bid of interest on average daily balances for the privilege of acting as such treasurer."

The fact that funds of the Common School Districts are deposited in the county depository gives rise to the question propounded in your letter, as to whether or not the Legislature had legal authority to provide for the creation of a depository for an independent district, thereby depriving the county depository of the funds of the common school district, transformed into the independent district.

In other words, you wish to know if such act would have the effect of impairing the obligations of a contract, which is inhibited by Section 16, Article 1 of the Constitution.

The language used by the Thirty-fifth Legislature, as quoted above, relative to the selection of the depository for the bonds of the Sinton Independent School District is substantially that of the general law relating to independent districts of more than one hundred and fifty scholastics. A treasurer is selected in the last named classification of districts, under the following provision contained in Article 2767, R. S. 1911:

"The treasurer of the school fund 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."

A comparison of the language in the general law and that contained in your special law discloses that the special law was copied from the general law and therefore your special law does not break the harmony existing in the disposition of the funds of independent districts.

It is true that under our laws funds of common school districts are deposited in the county depository selected by the Commissioners' Court, upon competitive bids, as is provided by the depository law. It is likewise true that independent school districts under the general law have the right to select their own depositories. Any bank being selected as a county depository is charged with the knowledge of the fact that independent districts may be created either under the general law or by special act of the Legislature, and when so created they have the power to select their own depositories, and the contract with the county is made under these conditions.

In Mexican National Ry. Co. vs. Musette, 26 S. W. 1075, it is held:

"All instruments creating obligations not based on agreement of parties, but upon statutes, such as appeal bonds, are made in view of and in subordination to the fact, known to all, that the people may change the jurisdiction of existing courts, create others, and confer upon them such jurisdiction over cases arising before such legislation, or then, pending, as may seem for the best interests of all, and it ought not to be held that principal or surety to an appeal bond contemplated, in event of such change pending appeal, that their obligation would become inoperative."

The selection of a depository it is true is in the nature of the making of a contract, but it is such a contract as is expressly provided for by statute and does not clothe the depository with a vested right to receive the funds of the county, to the exclusion of the Legislature or the operation of general laws to create independent districts and thereby deprive the Commissioners' Court of the funds of those common school districts converted into independent districts.

In the case of Baldacchi et al. vs. Goodlet, 145 S. W., 325, it is held in substance that one procuring a liquor license accepts it charged with notice of the right of the State to revoke it, when, in the judgment of the Legislature, the best interests of society demand a revocation.

We therefore advise you that when a depository has been selected by the Sinton Independent School District, in accordance with the terms of the Act creating such district such depository would be entitled to the funds belonging to such district, and if the county deposiory has in its possession any of the funds belonging to the independent district it would be the duty of the county depository to deliver such funds to the depository of the independent district.

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

OP. NO. 1767—BK. 49, P. 306.

DRAINAGE DISTRICTS—DEPOSITORIES.

A depository selected by the commissioners of a drainage district is entitled to receive and it is the duty of the County Treasurer to turn over to it all funds belonging to such district, including the funds arising from the sale of bonds, as well as funds arising from taxes levied and collected for the purpose of paying the interest on such bonds and creating a sinking fund sufficient to discharge them at their maturity.

The drainage commissioners, in fixing the amount of the bond of the depository of such district, should fix the same in an amount equal to the funds on hand, arising from the sale of bonds, plus the amount of taxes arising during the preceding year; or, if upon the organization of the drainage district, a depository is selected, then for the amount of taxes anticipated for the first year of its existence.

Article 2608, Vernon's Sayles' Civil Statutes, Chapter 11, Acts of Thirty-fifth Legislature.

May 29, 1917.

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

MY DEAR SIR: The Attorney General has your letter of May 22nd, as follows:

"The Drainage Commissioners of Nueces County Drainage District No. 2 have demanded of the County treasurer, who is also treasurer of the drainage district, that he deposit all interest and sinking fund collected by the county for paying interest and redeeming said district bonds in the depository of said drainage district.

"The treasurer has deposited the proceeds of the sale of the bonds in the drainage district depository but does not find authority for delivering to said depository the funds accumulated for interest and sinking fund. Is the treasurer required to deposit money collected for interest and sinking fund in the drainage district depository or shall he keep it in the county depository as other county funds?

"If interest and sinking fund is turned over to drainage district depository is depository of drainage district required to give additional bond?"

In the opinion of this Department the depository selected by a Drainage District is entitled to all of the funds belonging to such District, without regard to the source of such funds. This being true, it would be the duty of the County Treasurer to deposit with the Drain-

age District depository all funds derived by taxation for the purpose of paying the interest on the bonds and creating a sinking fund sufficient to discharge such bonds at their maturity. Depositories are selected for Drainage Districts under the authority of Article 2608 of Vernon's Sayles' Civil Statutes, which for convenience we copy, as follows:

"Art. 2608. Treasurer's bonds; depository, bonds of depository and treasurer; compensation; surety company bonds; powers of drainage commissioners.—The county treasurer shall be the treasurer of such district, and shall execute a good and sufficient bond, payable to the drainage commissioners of such district, in a sum equal to the amount of bonds issued, conditioned for the faithful performance of his duty as treasurer of such district, which bond shall be approved by said drainage commissioners; provided, however, that such drainage commissioners, in their discretion, may provide for a district depository for the funds of such district, by complying in all respects with the laws of the designation of county depositories, and in case such depository shall be designated by the drainage commissioners and shall give a good and sufficient bond, approved by the drainage commissioners as is provided by law for depositories of county funds, then the county treasurer, as treasurer of such drainage district, shall be required to give bond for the faithful discharge of the duties of his office in accordance with the provisions of the general statute relating to such county treasuerers in counties where county depositories have been provided for county funds.

"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 district, 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; provided, that the county judge, county treasurer, county depository, contractor and all bonded officers of such district or districts may be officially bonded in some surety company approved by said drainage commissioners.

"All powers vested in the commissioners' court as to the designation of county depositories are hereby vested in the drainage commissioners as to the funds of drainage districts."

It will be noted that authority is given in the above Article for the Drainage Commissioners to provide for a depository for the funds of the District by complying in all respects with the laws for the designation of county depositories, and it is made the duty of the County Treasurer to give a bond for the faithful discharge of the duties of his office, as Treasurer of such Drainage District, conditioned that he will faithfully discharge the duties of his office in that regard, in accordance with the provisions of the general statute relating to such County Treasurers in those counties where depositories have been provided for the county fund. It will also be noted from the last paragraph of this article that all powers vested in the Commissioners' Court, as to the designation of county depositories are vested in the drainage commissioners as to the funds of the drainage district.

From the above it appears that a depository for a drainage district is selected under the same law and has the same rights and privileges and owes the same obligations and duties as the depository selected for a county, under the county depository law. It also appears that the County Treasurer is under the same duty and obligation, with reference to a drainage district depository as he is with regard to the

county depository, that is that he shall deposit all funds of the district in the district depository, just as he does the funds of the county in the county depository. The duty of the County Treasurer with respect to the funds belonging to a district having its own depository is made plain by Article 2444, R. S. 1911, as amended by Chapter 11, of the General Laws of the Thirty-fifth Legislature, wherein it is made the duty of the County Treasurer, upon the selection of a depository, to immediately upon making of the order transfer to said depository all the funds belonging to said county, and it is further provided by this amendment "as well as all funds belonging to any district or other municipal sub-division thereof not selecting its own depository."

It will be noticed that the Legislature in this enactment has used the expression "all funds belonging to any district or other municipal subdivision." This expression covers funds of every kind and character, which would comprehend funds arising from the sale of bonds or from the tax levy authorized to pay the interest and create a sinking fund sufficient to discharge said bonds at their maturity.

It is true that the tax levy for a drainage district is made by the Commissioners' Court, it is likewise true that the County Assessor and Collector and Board of Equalization assess, collect and equalize the taxes in such district, unless upon a petition an election is held whereat it is determined that the district shall have its own assessor, collector and board of equalization. To our minds, however, this is an immaterial matter, for the reason that the duty is imposed upon the County Treasurer upon receipt of the funds to deposit same with the depository of the district, irrespective of the method of the assessment and collection of such taxes.

Replying to your last question we beg to say that Article 2608 provides that the County Treasurer shall execute a good and sufficient bond, payable to the Commissioners, in a sum equal to the amount of the bonds issued. In this Article, however, which also carriers the authority for the Commissioners to select a depository, it is provided in that event that the depository selected by the Commissioner shall give a good and sufficient bond, approved by the Drainage Commissioner, as is provided by law for depositories of county funds. There is no mention in this Article of the amount of bond, other than as the amount of the county depository bond may be fixed by the statute.

By Aricle 2443, R. S. 1911, as amended by Chapter 11, Acts of the Thirty-fifth Legislature, it is provided that the bond of the county depository shall in no event be for less than the total amount of revenue of such county for the next preceding year for which the same was made. It is also provided by this Act, as will be found in Article 2443a, added by the act, that whenever after the creation of a county depository there shall accrue to the county or any subdivision thereof any funds or moneys from the sale of bonds or otherwise the county commissioners' court, at its first meeting after such special funds shall have come into the treasury or depository, or as soon thereafter as practicable, may make written demand upon the depository of the county for a special and additional bond as such depository, in a sum equal to the whole amount of such special fund, this bond to be kept

in force so long as such fund remains in such depository, then follows other provisions with reference to the special fund unnecessary to mention in this opinion.

Construing these two provisions of the county depository law, in connection with the provision of the drainage law, placing the depository of such district upon the same basis as a county depository, we conclude and so advise you that the Commissioners of the Drainage District in fixing the amount of the bond should fix the same at the amount of the proceeds of the bond issue, plus the amount of taxes to be derived during the year, or that was derived during the preceding year. This will work a harmonious construction and give to the Drainage Commissioners the authority the Legislature manifestly intended to confer.

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

OP. NO. 1778—BK. 49, P. 364.

COUNTY DEPOSITORIES.

Chapter 11, Acts of the Thirty-fifth Legislature, amending the County Depository Law, is a valid enactment, and requires county tax collectors to pay into the county depository State funds along with other funds, to be there held pending the preparation of his report of said collections and settlement with the Comptroller.

The amendment also requires the bond of the depository to be conditioned so as to protect the State fund, also the amendment requires the approval by the Comptroller of the bond of the depository.

The tax collector and the sureties on his bond are only relieved from liability for the safekeeping of the State funds during the time they are held on deposit in the county depository pending the making of his report and settlement with the Comptroller.

Article 2445, Revised Statutes, was merely re-enacted. It relates alone to the manner of handling county funds when no county depository has been selected, because of the existence of the facts therein stated. In case no depository has been selected for the reasons stated, State funds should be remitted by tax collectors to the State Treasurer, as provided in Article 7618, Revised Statutes.

June 27, 1917.

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

DEAR SIR: We have your letter of June 14, stating in substance that you have refused to approve any county depository bonds sent to your Department under Chapter 11, page 16, Acts of the Thirty-fifth Legislature; and that your failure to approve such bonds was caused by the fact that in your opinion the law directs the State funds in the hands of tax collectors to be placed in county depositories, and does not provide that the county depositories so designated shall give a bond to the State equal to the amount of the funds placed in their charge.

Then your letter proceeds as follows:

"I will thank you to render to this Department your opinion as to the validity of this law, and state whether or not you think it advisable for the State Comptroller to give his approval of such depository bonds under this law, relieving the tax collectors from further liability under their bond of the State revenue passing through their hands."

Replying thereto, we beg to state that we have examined the Act referred to, and consider it valid.

By the Act, Articles 2440 to 2445, inclusive, of the Revised Statutes are amended. The principal features of the Act are these:

Article 2440 is merely re-enacted.

Article 2441 is merely re-enacted, the only change being that the words "and deposit" are inserted before the word "offers." This makes no material change.

Article 2442 is merely re-enacted.

Article 2443 is amended only in the following respect: Article 2443 of the Revised Statutes of 1911 provided that the "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."

In the Act this portion of said article is amended so as to provide:

"Said bond or bonds shall in no event be for less than the total amount of revenue of such county for the next preceding year for which the same are made."

The language used is clear and unambiguous, and does not need construction. It simply means that the bond now required of a county depository shall be in an amount not less than the total revenue of the county for the year next preceding the time of the selection of the depository and the making of the bond, instead of an amount not less than the amount of the revenue of the county for the entire two years for which the same are made.

Said Act adds to the statutes Article 2443a, requiring special additional bonds to cover any and all special funds or moneys accruing to the county or any subdivision thereof * * * from the sale of bonds or otherwise * * * provided that any depository bond made under the provisions of this Act may be substituted for any prior existing depository bond at the time in operation or existence wherever the same may be agreeably done by and between such depository and the securities of such other existing depository bonds.

Article 2444, Revised Statutes is amended as follows:

The original article provided that:

"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, etc., as a depository of the funds of said county."

This article as amended provides:

"As soon as said bond be given and approved by the commissioners' court *and the State Comptroller of Public Accounts*, an order shall be made and entered upon the minutes, etc."

It is also amended so as to meet the conditions created by the adding of Article 2443a and to provide for the placing in the depository "funds belonging to any district or other municipal subdivision thereof not selecting its own depository."

Said article is also amended by adding thereto the following provisions:

"And thereupon, it shall also be the duty of the tax collector of such county to deposit all taxes collected by him, or under his authority, for the State and such county and its various districts and other municipal subdivisions, in such depository or depositories, as soon as collected, pending the preparation of his report of such collections and settlement thereon, which shall bear interest on daily balances at the same rate as such depository or depositories have undertaken to pay for the use of county funds, and the interest accruing thereon shall be apportioned by the tax collector to the various funds earning the same. The bond of such county depository or depositories shall stand as security for all such funds. If the tax collector of such county shall fail or refuse to deposit tax money collected as herein required, he shall be liable to such depository or depositories for ten per cent. upon the amount, not so deposited and shall in addition be liable to the State and county and its various districts and other municipal subdivisions for all sums which would have been earned had this provision been complied with, which interest may be recovered in a suit by the State.

"Upon such funds being deposited as herein required the tax collector and sureties on his bonds shall thereafter be relieved of responsibility for its safekeeping. All moneys subject to the control of the county treasurer or payable on his order belonging to districts or other municipal subdivisions, selecting no depository are hereby declared to be 'county funds' within the meaning of this chapter and shall be deposited in accordance with its requirements and shall be considered in fixing the amount of the bond of such depository."

These are radical changes in the law. The old county depository law did not require that any of the State funds should be placed in the county depository.

Prior to the passage of the Act under discussion, the duties of county tax collectors, so far as State funds were concerned, were prescribed in Article 7618, as follows:

"(1) At the end of each month the collector of taxes shall, on forms to be furnished by the Comptroller of Public Accounts, make an itemized report under oath to the Comptroller, showing each and every item of ad valorem, poll and occupation taxes collected by him during said month, accompanied by a summarized statement showing full disposition of all State taxes collected.

"(2) He shall present such report, together with the tax receipt stubs, to the county clerk, who shall, within two days, compare said report with said stubs; and if same agree in every particular as regards names, dates and amounts, he (the clerk) shall certify to its correctness. * * *

"(3) The collector of taxes shall then immediately forward his reports so certified to the Comptroller, and shall pay over to the State Treasurer all moneys collected by him for the State during said month, excepting such amounts as he is allowed by law to pay in his county, reserving only his commissions on the total amount collected."

The foregoing is a portion of an Act passed in 1893. In 1905 the State Depository Law was passed, providing for the selection of depositories for State funds and providing that tax collectors should place State funds collected by them in such depositories. This law was amended in 1907 and again in 1911. As amended in 1911, it provides:

"Art. 2428. All tax collectors in the State of Texas, and all officers charged with the duty of remitting to the State Treasurer State funds, shall, after the passage of this Act, be required to remit all State funds to the State Treasurer, as required by the law prior to the enactment of Chapter 164 of the General Laws of the State of Texas, passed at the Regular Session of the Twenty-ninth Legislature."

That is, the State Depository Law, as amended in 1911, required that State funds collected by tax collectors should be remitted to the State Treasurer, and not to State depositories. The manner and time of remitting is that set forth in the portion of Article 7618 above quoted.

Therefore, at the time the Act of the Thirty-fifth Legislature, under discussion, was passed, it was not the duty of tax collectors to make report of collections of State funds, or to pay the same over to the Treasurer, until the end of each month. That is, the collector was permitted to retain until the end of each month all State funds collected by him during such month, and he was not made liable for failure to deposit the same in any bank or depository, or for failure to receive interest on such funds during that time. There was no requirement that he should place State funds collected by him in any county depository, and there was no provision for any bond from the county depository to the State. In these respects the Act under discussion, Chapter 11 of the printed General Laws of the Thirty-fifth Legislature, makes radical changes. Said Act provides:

"It shall also be the duty of the tax collector of such county to deposit all taxes collected by him, or under his authority, for the State * * * in such depository or depositories, as soon as collected, pending the preparation of his report of such collection and statement thereof, which shall bear interest on daily balances at the same rate as such depository or depositories have undertaken to pay for the use of county funds, and the interest accruing thereon shall be apportioned by the tax collector to the various funds earning the same. *The bond of such county depository or depositories shall stand as security for all such funds.*"

The Act further provides that should the tax collector fail or refuse to so deposit such funds, he shall be liable to the depository for ten per cent of the amount not so deposited, and to the State "for all sums which would have been earned had this provision been complied with, which interest may be recovered in a suit by the State."

It is clear, therefore, that one of the main objects of this Act is to require collectors to deposit all State funds in county depositories as soon as collected, in order to obtain interest on the same from the time so collected until the end of the month, when they are to be remitted to the State Treasurer.

The Act provides that "the bond of such county depository or depositories shall stand as security for all such (State) funds * * *" and further provides:

"Upon such funds being deposited as herein required, the tax collector and sureties on his bonds shall thereafter be relieved of responsibility for its safe-keeping."

Another Act was passed at the Regular Session of the Thirty-fifth Legislature, the same being Chapter 146, printed General Laws of said session, requiring each tax collector to give a bond, payable to the Governor and his successors in office, based upon unincumbered real estate of the sureties, subject to execution, in a sum equal to forty per cent of the whole amount of the State tax of the county as shown by the last preceding assessment, such bond not to exceed one hundred thousand dollars, and to be conditioned as follows:

"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."

Reading these two acts of the Thirty-fifth Legislature together, we are of the opinion that it was the intention of the Legislature to relieve tax collectors and sureties on their bonds of liability merely for the safekeeping of State funds placed in county depositories during the time such funds remain in the depositories; that it was not the intention of the Legislature to relieve tax collectors and sureties on their bonds for any misappropriation by tax collectors of State funds, or for any failure on their part to faithfully perform the duties of their office "for and during the full term."

The act contemplates that the State Comptroller shall approve or disapprove the bonds of county depositories selected under its provisions. See Section 3.

You are, therefore, advised that by the terms of the Act, tax collectors and sureties on their bonds are not relieved of any liability after State funds are placed in depositories, except for liability for the safe-keeping of such funds while they are kept in such depositories "pending the preparation of his (the tax collector's) report of such collections, and settlement thereof." You are further advised that the bonds of depositories selected under the Act should be submitted to the Comptroller and should be approved or disapproved by him.

Your letter also makes the following inquiries:

"Is it your opinion, should a loss occur through the tax collector's account, after the money has been placed in the hands of the depository by him, and the tax collector at the time of giving checks settling his account, should the collector withdraw more funds than he should have withdrawn, in that event would the collector and his bondsmen, still be responsible for the deficiency or would the State be required to recover such loss from the county depository?"

This question has really been answered above. The tax collector and the sureties on his bond would be liable for any loss occurring

through a failure or refusal on the part of the tax collector to properly perform the duties of his office. As instances, if a tax collector should remit to the State Treasurer a less amount of State funds than he should have remitted, or should misapply any portion of the State funds, his bondsmen would be liable, because the loss occurred through him. So, also, if, after State funds are placed in the depository, the tax collector should fail to exercise proper diligence and care to make his report and settlement and transmit the proper amount of funds to the State Treasurer by the end of the month, and the depository should fail, and the funds should be lost, there perhaps might be liability on the part of the sureties on his bond for such loss.

Your letter also contains the following question:

"Would the State, in case of loss by said depository, be required to sue the depository in the county in which the same is located?"

In answer to this question, we call attention to Section 1 of said Act, which provides:

"Any suits arising thereon (meaning on the bond of the depository) shall be tried in the county for which such depository is selected."

We also have your letter of June 27, in which you make the following request:

"Referring to our letter to you under date of June 14, 1917, I would further request that you inform this Department fully with reference to Article 2445, Revised Civil Statutes, 1911, which refers to the duties of the commissioners' court where same refuses all bids tendered for county funds and awards the money to certain banks, requiring them to pay interest on the funds. * * * I would be glad that you include an answer to this in the opinion you are now writing on the depository law for this Department."

Art. 2445 of the Revised Statutes of 1911 was merely re-enacted under the same number in Chapter 11 of the General Laws of the Thirty-fifth Legislature. It is a sufficient answer to your question to here quote the provisions of said article, calling attention to the fact that it relates alone to the method of handling county funds when there has been no bid for such funds, or when all bids have been rejected and no depository is designated. The provisions of the Article are as follows:

"Art. 2445. If for any reason there shall be submitted no proposals by any banking corporation, association or individual banker to act as county depository, or in case no bid for the entire amount of the county funds shall be made, or in case all proposals made shall be declined, then in any such case the commissioners' court shall have the power, and it shall be their duty, to deposit the funds of the county with any one or more banking corporation, association or individual banker, in the county or in adjoining counties, in such sums and amounts and for such periods of time as may be deemed advisable by the court, and at the such rate of interest, not less than one and one-half per cent. per annum, as may be agreed upon by the commissioners' court and the banker or banking concern receiving the deposit, interest to be computed upon

daily balances due the county treasurer; and any banker or banking concern receiving deposits under this article shall execute a bond in the manner and form provided for depositories of all the funds of the county, with all the conditions provided for same, the penalty of said bonds to be not less than the total amount of county funds to be deposited with such banker or banking concern."

You are, therefore, advised that in case no bid has been made by any banking corporation, association or individual banker, to act as county depository, or in case there has been no bid for the entire amount of the county fund, or in case all bids made have been declined and no county depository has been selected and designated, the tax collector should remit all such funds collected by him to the Treasurer at the end of each month, as required by the terms of Art. 7618, R. S. In other words, the tax collector, where a depository has not been designated, because of the facts stated above, should not deposit or permit the commissioners' court to deposit State funds collected by him with banking corporations, associations or individual bankers with whom said court deposits county funds, except, of course, the collector himself may deposit State funds in any bank he chooses until the end of the month, when they should be sent to the State Treasurer.

Of course, in a case of this kind, where no depository has been selected, under the provisions of this Act the tax collector and the sureties on his bond would be liable all the while for the State funds.

Very truly yours.

J. C. WALL,
Assistant Attorney General.

OP. NO. 1917—BK. 51, P. 153.

DEPOSITORIES, STATE—STATE OFFICIALS—ATTORNEY GENERAL.

Under the Act of the Fourth Called Session of the Thirty-fifth Legislature it is the duty of heads of departments to make daily deposits in the State Treasury.

The moneys to be deposited daily are those actually earned, together with the exact amounts due the State from other sources received by the officer.

In instances where excess remittances are made it is the duty of the officer to deposit the exact amount due the State, reserving the excess and remitting the same direct to the sender.

The Attorney General is the legal adviser of State officials, and they should accept his advice. The advice of the Attorney General, however, does not control the courts of the State. It would not be a bar to a prosecution or suit for penalty in event such advice was erroneous. It would, however, mitigate the punishment. S. B. No. 1, Acts Fourth Called Session Thirty-fifth Legislature.

April 10, 1918.

Hon. W. P. Hobby, Governor of Texas, Capitol.

DEAR SIR: The Attorney General has your letter enclosing a copy of the depository act passed by the Fourth Called Session of the Thirty-fifth Legislature, upon which you propounded questions as follows:

"First: When a department makes its daily remittance to the Treasurer, will the Treasurer immediately pass this deposit to the credit of the fund to which it belongs?

"Second: If, in your opinion, he does not pass this to the fund to which it belongs when the daily remittance by the department is made and there is an excess in the remittance over the amount due the State and the department desires to make a refund, in what manner will the department be able to make such refund?

"Third: In case the State goes on a deficiency and daily deposits are made to the Treasurer, as provided in this bill, in what manner will the department remit to the people of Texas for excess remittances to the department?

"Fourth: If an occasion should arise where a corporation pays to the State Department a certain sum and after several weeks it is found that the State Department is unable to file the charter of said corporation, and the money has been passed to the fund to which it belongs, in what manner will the State Department make a return of this money?

"Fifth: If it is not passed by the Treasurer to the fund to which it belongs, in what manner will the State Department be able to remit to the party to whom the money belongs in case of deficiency?

"Sixth: In your opinion, do the words 'daily deposits' mean the actual gross receipts of a department on the day it is received, or 'daily deposits' of all items cleared and disposed of by it each day?

"If you are found to be incorrect in your opinion by the holding of the court, would your opinion be a bar to an action by the State against the department involved for the recovery of the five per cent penalty provided for in this Act, in the event your opinion should be that the 'daily deposits' meant a deposit of those items which have been cleared and disposed of."

We will answer your questions one to six, both inclusive, as one, and you are advised:

It is the duty of the State Treasurer to immediately pass to the credit of the fund to which it belongs any deposit made with him by any official. He has no authority to take money into his possession other than moneys belonging to the State. See Article 4372.

It appears to us that the real question involved in your questions two to six, both inclusive, is what funds the several heads of departments are required to deposit in the treasury.

Article 2437 R. S. 1911, as amended by the bill under consideration, is as follows:

"It shall hereafter be and is hereby made the duty of every person, whether public official or not, who comes into the possession of any funds belonging to the State, to deposit the same daily in the State Treasury, or the State depository designated by the State Treasurer, to furnish to the State Treasurer a statement showing the source from which such funds were derived, and if he fails to make such deposit he shall forfeit to the State five per cent per month as liquidated damages for such failure, and shall be subject to all other penalties now prescribed by law."

The above article requires every person, whether a public official or not, who comes into the possession of any funds belonging to the State to make a daily deposit of same into the State Treasury or a State depository designated by the Treasurer. A failure to comply with this requirement subjects the officer or person to a penalty of five per cent per month upon the amount in his hands. The duty of State officials under the above article depends upon the construction of the clause "funds belonging to the State." In other words, it must

be determined what funds it is made the duty of the heads of departments to deposit daily in the Treasury. The correct answer to this will solve all questions relating to excess remittances and the manner in which they may be returned. In our opinion we think there can be no question but that the amount of moneys to be deposited in the State Treasury daily by the head of a department is that amount of fees actually earned by the department and correct remittances of any amounts due to the State. As an illustration of our meaning, we will take the office of the Secretary of State. Under our statutes charter filing fees are payable in advance. See Article 3840 R. S. 1911. Suppose for instance that a prospective corporation to be organized in some city or town outside of Austin should send their proposed charter to the Secretary of State, together with the remittance of one hundred dollars, such remittance by bank draft payable to the order of Hon. George Howard, Secretary of State. Upon an examination of the charter Mr. Howard finds that the correct filing fee is only seventy-five dollars. Could it be contended even under the drastic provisions of this bill, that it would be Mr. Howard's duty to deposit the entire one hundred dollars in the Treasury and then endeavor to withdraw twenty-five dollars from the treasury to be returned to the incorporators? We do not believe this to be a sound proposition. The incorporators of this concern did not owe the State of Texas but seventy-five dollars. It was only that amount that became the property of the State, and which Mr. Howard under the bill was required to deposit in the Treasury. In our opinion it is the duty of the Secretary of State under this bill to deposit daily all actually earned fees. By earned fees we mean the fees upon all chartrs, as an illustration—examined and filed during that day. The excess of any remittances over the actual fees required does not become the property of the State, and it is not his duty to deposit same in the treasury. Having deposited only the amount due the State, then he may in such manner as he sees fit return any excess to the senders.

From what has been said above you will observe it is the opinion of this department that daily deposits are required under this law. This is expressly provided for by Article 2437 amended, wherein its provided that every person whether a public official or not coming into possession of funds belonging to the State shall deposit the same daily into the State Treasury or depository. Your sixth question involves a determination of whether or not it is the duty of an official to deposit remittances in the form in which they are sent, that is, whether in money, bank draft, postoffice or express money order or personal checks. In other words, would you have the right to deposit all remittances in a banking institution until collections could be made on any drafts or checks so deposited. In this connection we call your attention to the latter part of amended Article 2430, as follows:

"In any event said money, or any money due the State of any of its funds, may be sent by registered letter in due course of mail, by postoffice money order, express money order of any company authorized to do business in Texas, or by bank draft on any incorporated State or national bank authorized to do business in Texas; but, in such cases, the liability of the person sending the same shall not cease until said money is actually re-

ceived by the State Treasurer or State depository, in due course of business."

The above quoted portion of Article 2430 makes lawful a remittance in the following ways: Money sent by registered letter, postoffice or express money order and bank drafts on any State or National bank authorized to do business in Texas. This provision with reference to remittances is incorporated in the article providing that any *person* whose duty it is to pay over to the State any money belonging thereto may pay same to the State Treasury or to a depository. This language is not found in Article 2428 with reference to remittances by *officers* of the State. Just why the Legislature made provision for the manner in which persons other than officers might make remittances and made no such provision with reference to officers, we cannot determine. However, being contained in the one act it is an expression of the Legislature that all remittances whether by private parties or by officers may be made in the manner indicated by Article 2430. It would not be an unreasonable construction to place upon this act to hold that it would be the duty of the State Treasurer to receive and clear postoffice and express money orders and bank drafts.

We next call attention to that portion of amended Art. 2436 reading as follows:

"All State depositories shall collect, without cost to the State, all checks, drafts and demands for money."

It will be noted that the above quoted portion of Article 2436 makes it the duty of all State depositories to collect without cost all checks, drafts and demands for money. It follows therefore that the collecting officer may deposit with a depository all remittances received by him without regard to the form, that is, whether they be checks, drafts, money orders or other demands for money. It being the duty of the Treasurer to remit to the depositories within certain limitations, then it follows also that all demands for money deposited with him by any official may be by him forwarded to a depository for collection and on demand by the State Treasurer it is the duty of the depository to issue to the Treasurer free of charge a draft or exchange on any bank in this State designated by the United States or State authorities as a reserve bank. See Article 2436.

Under the above construction of the act checks and drafts and all other demands for money are cleared through the depositories either by deposit directly in the depository by the collecting agent or by transmitting the same to the Treasurer, who in turn clears them through the depository.

The above construction however does not in any way relieve the officers from making a daily deposit of the receipts of the office. They are not permitted under this law to deposit collections in any banking institution simply for the purpose of clearing the same. Deposits must be made daily either in a depository or the State Treasury.

We come now to the last question in your communication, same being not numbered. Answering same, the Attorney General is made the legal adviser of the Governor and heads of departments of the

State Government including heads and boards of penal and eleemosynary institutions and all other State boards, regents, trustees of State educational institutions and committees of either branch of the Legislature, giving them advice in writing upon any question touching the public interest or concerning their official duties. The Constitution of the State, Section 1, Article 4, makes the Attorney General one of the executive heads of the State Government. While it is his duty under the law to counsel and advise the officers named, necessitating a construction of the various acts of the Legislature, yet in such construction he could not usurp the functions of the judiciary of the State which would be the effect, if his construction of a statute would be binding upon the courts. The Attorney General is the lawyer for State officials. He advises them as the paid attorneys of a private citizen advises him, and while the advice of the Attorney General is not binding upon the courts, yet any State official acting in good faith upon his advice would not be subjected to the full rigor of the penal provisions of any statute. If a State official should act upon the advice of the Attorney General, and I might say that it is the duty of all State officials to accept the legal advice of this department, and the courts should determine that the advice given was erroneous, then such advice would in all probability serve to mitigate the punishment inflicted, but it would not be a bar to a recovery of the penalty prescribed for a violation of the depository act.

In the case of Dodd vs. State, 18 Ind. 56, a question almost identical with that propounded by your Excellency, was before the Supreme Court of that State. In passing upon this subject the court said:

"The sixth section of the Act, creating the said offices, is as follows: 'Whenever required so to do, by any officer of State, such Attorney General shall furnish the applicant a written opinion touching any point of law concerning the official duties of such officer, and to either branch of the General Assembly, when requested so to do by a resolution thereof, asking an opinion concerning the validity of an existing or proposed law, or conflicts thereof.'

"It is insisted that when an officer of State, in pursuance of this statute, calls upon, and obtains from, the law officer of the State, a legal opinion in reference to his duties, and proceeds in accordance with the same, that a suit will not lie upon his official bond, whether said opinion is sound law or not. And the question is asked, if this is not so, then what use is there in requiring the opinon?

"There are several reasons why ths position is not tenable. First, if this opinion can shield the officer from a civil suit, when he does wrong, then it ought to be binding upon him; and, of course, as it is expressed in as strong language, when called for, binding the Legislature. The auditor audits money accounts before the applicant can receive the same from the treasury. Suppose under a mistaken view of the law, based upon an erroneous opinion, he should refuse to allow a just account to a private citizen. Would that opinion be a bar to proceedings to obtain the amount so due? Would an unconstitutional law be held binding because an opinion had been given to the Legislature in advance that it was valid? The position is so plainly untenable that it is useless to pursue the subject.

"As to the question propounded. The opinion is for the information of the officer. He can follow it or not."

We therefore answer your last question by saying that while the erroneous opinion of the Attorney General is not binding upon the courts, it would serve to mitigate any punishment that might be inflicted.

We call your attention to the fact that the Constitution requires all fees of the Comptroller, Treasurer, Commissioner of the General Land Office and Secretary of State to be paid into the State Treasury.

Section 23, Article 4, of the Constitution, reads in part as follows:

"All fees that may be payable by law for any service performed by any officer specified in this section, or in his office, shall be paid, when received, into the State Treasury."

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

OPINIONS ON ELECTIONS AND SUFFRAGE.

OP. NO. 1687—BK. 48, P. 383.

THE BALLOTS IN A LOCAL OPTION ELECTION SHOULD NOT BE COUNTED UNTIL AFTER THE POLLS ARE CLOSED.

December 19, 1916.

Honorable Jno. W. Hornsby, County Attorney, Travis County, Austin, Texas.

DEAR SIR: You desire to be advised by the Attorney General's Department as to the time when the ballots in the local option election to be held in Travis County on the 21st day of December, should be counted.

You are advised that after careful consideration of the various provisions of the statute relating to the conduct of elections and construing all of said articles together, this Department is of the opinion, and so advises you, that the law prohibits the counting of ballots in a local option election until after the polls are closed.

In 1909, by a special act of the Legislature, a law was passed prescribing the form of ballot and making the general election law applicable to local option elections unless there is some conflict, and should there be a conflict, then the local option law shall prevail. The Act referred to is Chapter 29, of the Acts of the Regular Session of 1909, or, Sections 5719 and 5720 of Vernons' Texas Civil Statutes, 1914. Article 5720 is as follows:

"The officers holding said election shall, in all respects not herein specified, conform to the general election laws now in force regulating elections; and after the polls are closed shall proceed to count the votes, and within ten days thereafter make due report of said election to the aforesaid court.

"The general election law passed at the First Called Session of the Twenty-ninth Legislature, known as Chapter 11, page 520, of the General Laws of the Twenty-ninth Legislature, as amended by the Acts of the Thirtieth Legislature, shall govern in all respects as to the qualifications of the electors, the method of holding such elections and in all other respects, whenever said general law does not conflict with this title and whenever such general law can be made applicable to elections held under this title."

This article of the statute has been before the Court for construction, in the case of Arnold vs. Anderson, reported in 93rd S. W., p. 692. After quoting the article of the statute construed, the Court says:

"If the local option statute had contained any special provision or requirement upon these subjects, then doubtless under the doctrine announced in Ex Parte Keith, 83 S. W., 683; Hanna vs. the State, 87 S. W., 702, they would have been exclusive and we could not have looked to the general election law of 1903 in order to determine whether the election in question was properly held, but as said before, there are no provisions of the local option statutes that bear upon the questions that arise in this case."

This section was again before the Court for construction in the case of Cane vs. Garvey, 187 S. W. 114. The Court held that the act should be strictly construed. The Court said:

"The court ought to be guided by the language of the statute and to give expression to the free and natural meaning which the words convey."

The Court further commenting said:

"The provisions of said statute prescribing said form are mandatory and that the local option law is penal in its nature and the provisions must be strictly followed or the election thereunder is void."

If the vote should be counted during the day of the election and before the polls closed, it would clearly be in conflict with the latter part of the local option provision above quoted, which is as follows:

"And after the polls are closed shall proceed to count the votes."

This, being a special provision relating to the manner of holding local option elections, said provision is mandatory and exclusive, and you are therefore, advised, that it would be illegal for the election officers to begin the count of the votes in the local option election before the polls are closed.

Yours very truly,
W. A. KEELING,
Assistant Attorney General.

OP. NO. 1734—BK. 49, P. 135.

ELECTIONS—SCHOOL TRUSTEES—VACANCIES.

Vacancies in the offices of school trustees are filled by the remaining members of the Board.

The failure to hold the regular election for trustees of an independent district would cause the old members to hold over until their successors are elected and qualified.

Constitution, Section 17, Article 16.

Article 2889, Revised Statutes of 1911, as amended by Chapter 132, Acts of the Thirty-fourth Legislature.

Article 2893, Revised Statutes of 1911.

April 10, 1917.

Hon. J. E. Wheat, County Attorney, Woodville, Texas.

DEAR SIR: The Attorney General has your letter of April 8th, relative to the situation in the Woodville Independent School District, as follows:

"There was no election for school trustees for this district last year, so the three whose terms expired at that time have held over until now. In ordering the election for trustees, the old board issued an order for the election of four trustees, intending that the four elected should take the places of the four whose terms naturally expired at this time, but making no provision for the election of successors to the three holding over from last election.

"Then at the election yesterday, some voted for seven trustees and some for four; now the board have consulted me, desiring to know how many to declare elected and issue election certificates therefor. The board is of the opinion that they should declare four trustees, the four highest, elected; but as there is likely to be a contest over the result, they want to be correct."

In our opinion the legal effect of the election held on the first Saturday in April of this year is that only four trustees were elected, those to take the place of the four whose terms expired on that date, and that there was no legal election of successors to the three hold-overs whose successors should have been elected on the first Saturday in April, 1916.

Article 2889, Revised Statutes of 1911, as amended by Chapter 132, Acts of the Thirty-fourth Legislature, provides that the term of office of the seven trustees of independent school districts shall be for two years, with the proviso that the members first elected shall draw for the different classes, the four members drawing numbers 1, 2, 3 and 4 to serve for one year, or part thereof, and until their successors are elected and qualified, and the three members drawing the numbers 5, 6 and 7 shall serve two years, or until their successors are elected and qualified.

Section 17 of Article 16 of the Constitution provides that all officers within this State shall continue to perform the duties of their offices until their successors shall be duly qualified. The failure to hold an election on the first Saturday in April, 1916, for trustees of the Woodville Independent School District caused the then incumbents of the office to hold over under the above quoted section of the Constitution until their successors were duly elected and qualified.

The first Saturday in April of each year being the date designated by the statute for the holding of elections in all school districts created under the general laws an election held upon that day by the voters assembled at the usual polling places is valid, even though no election had been ordered by the proper authority. Buchanan vs. Graham, 81 S. W., 1237. This rule obtains, however, only as to the election of those officers whose election is specifically directed by statute to take place on a day fixed by law. Article 2928 provides that after the first election there shall be elected regularly thereafter on the first Saturday in April of each year four trustees and three trustees alternately for a term of two years, to succeed the trustees whose terms shall at that time expire. It appears, therefore, that the election held on April 7, 1917, was a general election fixed in law only for the election of four trustees to succeed those whose terms expired at that time, and consequently there existed no authority in law for the voters to cast their ballots for the election of any other officers. There was no warrant in law for the voters to voluntarily assemble and hold an election to fill the unexpired terms created by the failure to hold an election on the first Saturday in April, 1916, and the holding over of the three trustees and any attempt so to do would be ineffective and the result void. Therefore, the Board of the Woodville Independent District passed a proper order in calling an election for only four trustees, to be elected at the election held on the first Saturday in April, 1917.

We conclude, therefore, and so advise you, that at the election held on Saturday, April 7th, there were elected only four members of the Board of Trustees of the Woodville Independent School District, who are to succeed those members whose terms expired upon that date, and that the four names on the ticket containing seven names who received the highest number of votes would be elected and that the three thereon receiving the lowest number of votes could not in any sense be held to have been elected to fill the unexpired term of those holding over caused by a failure to hold an election on the first Saturday in April, 1916, and such three members would continue to hold over until their successors are duly elected.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

OP. No. 1813—BK. 50, P. 84.

ATTORNEY GENERAL'S OFFICE,
September 3, 1917.

Hon. W. L. Dean, President of the Senate Pro Tempore, Senate Chamber, Capitol.

DEAR SIR: I am in receipt of yours of the third instant, as follows:

"The Senate has just adopted a verbal resolution asking you for an opinion as to the legality of the election of Hon. V. A. Collins of the Fourteenth District, who was elected at an election held on August 27, in pursuance of a proclamation by the Governor on August 24. There is no contest presented to the Senate from the electors of the district—none of fraud—but merely a desire on the part of certain Senators to know the legality of said election."

Where an election provided for in the Constitution, as the one in question (Sec. 13, Art. 3), is called by the constituted authority and is held, ordinarily the candidate receiving a majority of the votes at said election and presenting proper evidence of his election would be seated; and especially would this ordinarily be the case in the absence of a contest.

However this may be, the questions, both of fact and of law, are for the determination of the Senate, and its decision will constitute the unalterable law of the case.

With respect to your membership, any election is valid which a majority of the senators present may, for any reason, adjudge to be so. This follows from the language of Section 8, Article 3, of the Constitution, wherein it is declared that "Each House shall be the judge of the qualifications and election of its own members." The specific grant of this power to each House is an express denial of it to the courts or to precedent or subsequent Legislatures. If the courts could control the matter, then the power of judging of "the qualifications and election" of the members would, plainly, be in the courts and it would not be in the House where it is placed by this

express language of the Constitution. Furthermore, if that were so, the judiciary would exercise a power expressly denied by Section 1 of Article 2, wherein it is said that "no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others." The fact that this power is placed in the two Houses by the Constitution itself demonstrates the further fact that it is "properly attached" thereunto. If this power should be controlled by existing statutes, the anomaly would be presented of one Legislature binding a subsequent one in a matter committed to the two Houses as they may exist when the question arises. Suppose the Thirty-fourth Legislature had enacted a statute prescribing the conditions under which the new members of the Thirty-fifth Senate should be filled, and the courts, under this statute, should prevent a person presenting himself from taking his seat, or should unseat him afterwards, or should hold that some act of the Senate was invalid because of his participation therein; in all such instances is it not clear that the Thirty-fifth Senate itself would be denied the exercise of the power clearly vested in it by the Constitution?

Judge Cooley, in his great work on Constitutional Limitations, at page 158 (Sixth Ed.), thus states the rule:

"There are certain matters which each house determines for itself, and in respect to which its decision is conclusive. * * * It decides upon the election and qualification of its own members."

See also:
Miller on the Constitution, 193.
McDill vs. Canvassers, 36 Wis., 505.
Luther vs. Borden, 7 Howard (U. S.), 1.
People vs. Mahaney, 13 Mich., 481.
State vs. Jarrett, 17 Maryland, 309.
Lamb vs. Lynd, 44 Pa. St., 336.
Opinion of Justices, 56 N. H., 570.
Covington vs. Buffett, 47 L. R. A., 622.
Wills vs. Newell, 70 Pac., 405.

In People vs. Mahaney, supra, it was held that the correctness of the decision by one of the Houses, that certain persons had been chosen members, could not be inquired into by the courts. In that case a law was assailed as void, on the ground that a portion of the members who voted for it, and without whose votes it would not have had the requisitive majority, had been given their seats in defiance of law, to the exclusion of others who had a majority of legal votes. In State vs. Gilmore, 20 Kan. 551, 27 Am. Rep. 189, it was held that the Legislature could not transfer to the courts its power to judge of the election or qualification of its members.

Upon reason and authority, therefore, I hold that the Senate itself is the exclusive judge of the validity of the election recently held in the Fourteenth Senatorial District. It may inquire into the fairness, vel non, of said election and seat the applicant for membership or not, as it may please. If the Senate decides to seat the applicant, this adjudicates the validity of the election. The election is valid or void accordingly as this decision may be made and in reaching its decision

upon the matter the Senate exercises its constitutional discretion, from which there is no appeal. Consequently, there is no question for the Attorney General or for the courts to decide.

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

OP. NO. 1885—BK. 50, P. 358.

1. Alien enemies cannot vote in Texas, even though they have taken out what are commonly called their "first papers."
2. Other aliens cannot vote where they have declared their intention and the time has expired within which to finish their naturalization.

January 18, 1918.

Hon. John W. Hornsby, County Attorney, Austin, Texas.

DEAR SIR: I beg to acknowledge receipt of yours of the 5th instant, reading as follows:

"Some important questions with reference to voting have been presented to me by numerous persons, and I will greatly appreciate a ruling from you on the following:

"1. Are those persons who have declared themselves alien enemies under the present selective draft laws entitled to vote?

"2. Are those aliens or foreign born persons who have only made a declaration of intention to become citizens but have failed to complete their naturalization within the time prescribed by law entitled to vote?

"Thanking you in advance for your usual prompt and efficient attention, I am, etc."

In reply, I beg to advise that our State Constitution confers the privilege of voting upon citizens of the United States and "every male person of foreign birth * * * who not less than six months before any election at which he offers to vote, shall have declared his intention to become a citizen of the United States in accordance with the Federal Naturalization Laws," provided, of course, such persons are otherwise qualified voters.

Under the laws of the United States, an alien may be admitted to become a citizen of the United States by declaring his intentions at least two years prior to his admission. Act of June 29, 1906, as amended June 25, 1910.

Not less than two years nor more than seven years after he has made such declaration of intention he shall make and file his petition in writing to become fully naturalized. Id., Sec. 2.

Section 4362, U. S. Compiled Statutes, reads as follows:

"No alien who is a native citizen or subject, or a denizen of any country, state or sovereignty with which the United States are at war at the time of his application shall be then admitted to become a citizen of the United States."

Having called attention to our constitutional provision with respect to aliens and the foregoing sections of the Federal Statutes, I submit the following as correct conclusions of law, not having time to discuss them more at length.

The provision of our State Constitution conferring the voting privilege upon those who have declared their intention to become citizens in accordance with the Federal naturalization laws, contemplates a valid and existing declaration—one upon which the alien has the right to complete his naturalization within the prescribed time.

A preponderance of the late decisions of the Federal Courts hold that an alien enemy who declared his intention to become a citizn of the United States before the declaration of war has no right to complete his naturalization. This by reason of Section 4362 above cited.

It has also been held that no alien enemy has the right to make his original declaration subsequent to the date of the declaration of war. Fed. Cas. No. 10,174.

An alien enemy not having the right to either make his original declaration subsequent to the date of the declaration of war, or to complete his naturalization where he declared his intention before that time, cannot be said to "have declared his intention to become a citizen of the United States in accordance with the Federal naturalization laws," within the meaning of the State Constitution. The declaration of intention is abrogated, or at least suspended during the war, and no rights can be based thereon.

It follows from the foregoing that no alien enemy has the right to vote in this State.

Answering your second question, beg to say that the same is answered by the foregoing, so far as alien enemies are concerned. As to other aliens, they are not permitted to vote if the time within which their naturalization may be completed has elapsed, because in that vent their declaration of intention is of no effect.

It would be a monstrosity to permit alien enemies to vote, especially in view of the fact that Germany passed a statute in 1914 which would authorize a divided allegiance between this and the Imperial German Government. This statute reads, in part:

"Citizenship is not lost by one who before acquiring foreign citizenship has secured on application the written consent of the competent authorities of his home state to retain his citizenship. Before this consent is given, the German consul is to be heard.

"The Imperial Chancellor may order, with the consent of the Federal Council, that persons who desire to acquire citizenship in a specified foreign country may not be granted the consent provided for in paragraph 2."

Respectfully submitted,
B. F. LOONEY,
Attorney General.

OP. NO. 1868—BK. 50, P. 368.

SUFFRAGE—PRIMARY ELECTIONS—VACATING PUBLIC OFFICE.

1. Article 6, Section 1, paragraph 5, of the Constitution provides that the following class of persons shall not be allowed to vote in this State, to wit: "* * * all soldiers, marines and seamen employed in the service of the army or navy of the United States."

2. This inhibition is a constitutional requirement, and can not be amended by legislative enactment so as to permit a person as above mentioned to vote in the primaries until the Constitution is amended, authorizing such enactment.

3. Such parties, if subject to a poll tax, are required to pay same, which can not be waived except that the Constitution be first amended authorizing such waiver.

4. Members of the Texas Legislature, who have accepted commissions in the National Army of the United States by the acceptance of such offices ipso facto vacate their offices as members of the Legislature, and the Governor of the State is authorized to issue a proclamation calling for a special election to fill such vacancy without the tendered resignations of such members, when the facts are ascertained by him. Section 12, Article 16, of the Constitution; Section 40, Article 16, State Constitution; Section 13, Article 3, State Constitution.

January 21, 1918.

Hon. Jno. D. McCall, Secretary to the Governor, Capitol.

DEAR SIR: Under date of the 18th instant, you wrote this department as follows:

"Certain questions have arisen in this office with reference to the status of the man who is now in the service of the United States, in the Regular Army, the National Army or in the Federalized National Guard. These questions may be presented in the following manner:

"1. Article 6, Section 1, paragraph 5 of the Constitution of Texas has the following language: 'The * * * following classes of persons shall not be allowed to vote in this State, to wit: "* * * all soldiers, marines and seamen employed in the service of the Army and Navy of the United States." ' Does this inhibition apply to one who is otherwise qualified in voting in primaries in this State.

"2. If this inhibition does apply, can the law be amended by legislative enactment so as to permit a person as above mentioned to vote in the primaries?

"3. Are such parties required to pay their poll taxes precedent to voting?

"(b) If poll tax payment is now required, can this provision be amended so as to waive this requirement, by legislative enactment?

"4. Several members of the Texas Legislature are reported to have accepted commissions in the National Army of the United States and possibly some members have accepted commissions in the Federalized National Guard. Does the acceptance of such commission ipso facto vacate their offices in the Legislature; and if so, at what time and at what stage does this action become such notice to the Governor that he would be authorized to call a Special Election to fill such vacancy without the tendered resignation of such member?"

Replying thereto we beg to advise you as follows:

1. The inhibition of the Constitution, Article 6, Section 1, paragraph 5, prohibiting "soldiers, marines and seamen employed in the service of the army or navy of the United States from voting in this States," applies to all such persons enlisting in the service of the United States in either the army or navy, who are otherwise qualified and who may desire to participate in the Democratic Primaries.

The term "Primary Election," means an election held by members of an organized political party, for the purpose of nominating the candidates of such party to be voted for at a general or special election, or to nominate the county executive officers of a party. Revised Statutes, Article 3085.

Primary elections held in this State are now regulated by law and are required to be held in accordance therewith, and only qualified electors, who have paid their poll taxes or procured their exemption crtificates at the time and in the manner required by law, are entitled to participate in such primaries and, since soldiers and sailors are debarred by the Constitution as well as the laws of this State from voting, they cannot lawfully participate in such primaries.

2. The law prohibiting soldiers and sailors from voting cannot be amended by statutory enactment, so as to entitle them to exercise the privilege of the franchise, as they are inhibited from voting in the first place by the Constitution, and the Constitution will, necessarily, have to be amended in this respect before the right to vote can be restored to such soldiers or sailors by statutory enactment.

3. All persons, subject to the payment of a poll tax, are required to pay the same at the time and in the manner required by law before they are entitled to vote.

(b) Owing to the fact that the payment of a poll tax, as a prerequsite to voting, is a constitutional requirement, it cannot be waived by legislative enactment until and after a constitutional amendment is adoped by the people of this State, authorizing such waiver.

4. Section 13 of Article 3 of the Constitution requires the Governor to call an election to fill a vacancy in either the House or the Senate, and should the Governor fail to issue a writ of election to fill such vacancy within twenty days after it occurs, the returning officer of the district shall be authorized to order an eletcion for that purpose.

The question you present is whether or not a vacancy, in fact, exists by members of the Legislature accepting commissions in the army. If so, does the acceptance of such commission ipso facto vacate their offices in the Legislature, and at what time and at what stage does this action become such notice to the Governor that he would be authorized to call a special election to fill such vacancy without the tendered resignation of such member.

The fact that an officer places himself in such a position that he cannot discharge the duties of such office, it may well be considered as a fact that he has abandoned the office, and this without regard as to whether he has accepted another office or not.

As to whether an office has been abandoned, is also a mixed question of law and fact but, in our judgment, it becomes almost conclusive where the officer, either by leaving the State or by accepting any employment which enforces absence, or in any other way so changes his residence or mode of living as that he cannot and does not discharge the duties of the office, it may be said that he has abandoned the office; and if so, a vacancy would exist upon the happening of such facts justifying the calling of an election either by the Governor or the returning officer of the district.

In a case where a member of the Legislature of this State joins the National Army and accepts an office therein, it is our opinion that his joining the army and accepting the office ipso facto creates a vacancy in the Legislature, and it becomes wholly immaterial whether he files a formal resignation or not.

Section 12 of Article 16 of the Constitution prohibits any person holding or exercising any office of profit or trust under the United States from accepting any office of profit or trust in this State. So it would seem from this that an officer of the United States army, which is both an office of profit and trust, could not, at the same time hold or exercise the office of representative in the Legislature, because it is both an office of profit and trust under the laws of this State.

But this is not all.

Section 40 of Article 16 of the Constitution directly prohibits the same person from holding two offices, except in cases of Justice of the Peace, County Commissioners, Notaries Public and Postmasters, and these provisions are emphasized and re-enforced by Section 33, Article 16, which prohibits the accounting officers of the State from drawing or paying warrants upon the treasurer in favor of any person for salary or compensation as agent, officer, or appointee, who holds, at the same time, another office or position of honor, trust, or profit, under this State, or of the United States.

We assume that you are familiar with the unbroken line of authorities and also of the text law, that the acceptance and qualification to an office by a person at that time holding another office ipso facto vacates the former office held.

For the reasons above stated, in our opinion, both as a question of law and as a question of fact, members of the Texas Legislature, who have accepted commissions in the National Army of the United States, have vacated their offices as members of the Legislature, which vacancies occurred at the time of their acceptance of their offices in the National Army, and, upon the ascertainment of these facts, the Governor is authorized and should issue the necessary writ of election in each legislative district which is so affected, regardless of whether or not such parties have tendered their resignations to the Governor as members of the Legislature.

However, we beg to call your attention to that provision of Section 8, Article 3, of the State Constitution, relating to the qualifications of members of the Senate and House of Representatives, in which it says that "each House shall be the judge of the qualifications and elections of its own members," and should a controversy arise before the Legislature, as to such vacancy, and a person elected as a successor, this matter would have to be submitted to and determined by such body and its judgment in the premises, by reason of the above constitutional provision, would be conclusive although the Governor would have the right and it becomes his duty to order a special election to fill the vacancy in the Legislature where a member, or members, vacate their offices by enlisting in the National army or navy and accepting offices therein, regardless of whether or not such party, or parties, tender their resignation as members of the Legislature to the Governor.

Yours truly,

W. J. TOWNSEND,
Assistant Attorney General.

OP. NO. 1918—BK. 51, P. 229.

WOMAN SUFFRAGE ACT—REGISTRATION.

First. The provision of the Woman Suffrage Act found in Section 2a that requires women residing in precincts other than in cities of 10,000 population, and over, to register as a qualification to vote in 1918, is unconstitutional and void as being in conflict with Section 35, Article 3 of the Constitution, in that such a purpose is not indicated in the caption, but is contradictory of the caption. Therefore, the only women required to register are those who reside in cities of 10,000 population and over.

Second. The tax collector is not authorized to appoint deputies to be stationed at different places away from the court house to receive registrations, but all women are required to appear in person, and in her own handwriting fill out the blanks, in person, in order to register and obtain her registration receipt.

ATTORNEY GENERAL'S DEPARTMENT,
April 30, 1918.

Hon. J. P. Word, County Attorney, Meridian, Texas.

DEAR SIR: We are in receipt of your letter of recent date in which you submit several inquiries, calling for a construction of the Woman Suffrage Act passed at the recent special session of the Legislature.

Your first question is as follows:

"Please advise if all women who desire to vote in the democratic primaries will be required to register."

The question, in our opinion, should be answered in the negative. The bill, as originally introduced, required women in cities of 10,000 inhabitants and over to register. Section 2a, which will be discussed later, was an amendment adopted, but it seems that neither the caption nor any other provision of the bill was made to conform to the provision injected by this amendment. If this section is valid, it will require all women to register as a qualification to participate in the primaries this year; that is to say, the provision of this section is that all women living in voting precincts, other than in such cities mentioned in Section 2, are required to register. We are of the opinion, however, that Section 2a is in conflict with the caption of the bill, is not authorized by it, and for this reason, under plain provisions of the Constitution, is void insofar as it applies to the registration of women who live outside of cities of 10,000 population and over. The caption of this bill is as follows:

"An Act to provide that women may vote in all primary elections and nominating conventions in Texas; prescribing qualifications for such voters; providing for registration in cities of ten thousand and over; and declaring an emergency."

That portion of the caption relating to registration limited the Legislature to the enactment of provisions requiring registration in cities of 10,000 in habitants and over, and is not sufficient to put any one on notice of the intention of the Legislature to require women living outside of said cities to register.

The Constitution of this State, Article 3, Section 35, omitting irrelevant parts, reads as follows:

"No bill * * * shall contain more than one subject which shall be expressed in its title. But if any subject shall be embraced in any 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."

It clearly appears that the subject of requiring women other than those who reside in cities of 10,000 and over population to register was not expressed in the title; hence under the terms of the Constitution must be disregarded.

This view is fully sustained by our Supreme Court in the case of Adams and Wocks vs. San Antonio Water Works Co., 86 Texas 485, In this case 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 avenues or alleys or for water mains or sewers that although the act contained the provision for the condemnation of ground for reservoirs or standpipes, 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, is not only 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."

A statute of New York had the following caption:

"An Act to amend Chapter Two Hundred and Sixty-one of the Laws of Eighteen Hundred and Eighty-five, entitled 'An Act in Relation to the Management of the Albany Penitentiary,' relative to the salary of the keeper of said penitentiary."

The body of the Act included, in addition to a provision fixing the method of arriving at the salary of the superintendent, a provision authorizing the commissioners whenever in their discretion it seemed to be for the best interests of the county of Albany, to dispense with the services of the superintendent and place the penitentiary in the custody and care of the sheriff, and, if deemed advisable, to close and discontinue the same and sell the lands and buildings. The court said the title did not support this provision, and used the following language:

"In the title of the statute before us it is stated that the purport of the act is not merely to amend 'An Act in Relation to the Management of the Albany Penitentiary,' but to amend it only in one particular and on one subject—the salary of the keeper of the penitentiary." (People vs. Howe, 177 N. Y., 499; 69 N. E., 1114; 66 L. R. A., 664.)

These cases are directly in point and for these reasons we are of the opinion, and so advise you, that all women who reside in cities of ten thousand and over are required to register according to the provisions of the bill, but the provision of Section 2a of the bill requiring women outside of such cities to register is void.

Your second question is as follows:

"Can the county tax collector appoint someone to represent him at the different towns or voting places in his county to register all women who may desire to vote in the primary elections?"

In view of the conclusion just expressed that only these women who reside in cities of ten thousand population and over are required to register, our further answer will be understood as having that meaning.

Under the provisions of this new law all women who possess the qualifications of an elector (except they are not required to have a poll tax receipt this year) may participate in the primary elections and conventions of the party to which they belong; that is, if they register at the time and in the manner provided for in this Act.

The following classes of persons are not entitled to vote in this State: first, persons under twenty-one years of age; second, idiots and lunatics; third, all paupers supported by the county; fourth, all persons convicted of any felony, except those restored to full citizenship and right of suffrage by pardon; and, fifth, all soldiers, marines and seamen employed in the service of the army or navy of the United States.

If women, therefore, subject to none of the foregoing disqualifications, who shall have attained the age of twenty-one years, who shall be citizens of the United States (native born or naturalized) who shall have resided in this State one year next preceding the election, the last six months within the district or county in which she offers to vote, may vote and participate in the primary elections and conventions of the political party to which she belongs held in the voting precinct of her residence. She will be expected of course to subject herself to the tests and take the party obligations such as are imposed upon the male members of the party.

Women may begin to register on June 26th, this year, and may continue to register up to and including July 11th, that being fifteen days before the primary election. This registration must occur in the office of the tax collector of each county, at the court house where his office is required to be kept and where all his official acts are required to be transacted, except the instances provided for in the collection of taxes mentioned in Article 7615 R. S., but as these exceptions are immaterial to this consideration they need not be mentioned.

It is made the duty of the commissioners' courts of the several counties to provide for the several county officers at the county seats (R. S., Art. 1397); it is made the duty of county officers to keep their offices at the county seats (R. S., Art. 1399); it is specifically made the duty of the tax collector to keep his office at the county seat (R. S., Art. 7616); hence it is necessary for all women who are required

to register to personally appear at the tax collector's office and personally, in her own handwriting, fill out the blank required and receive her registration receipt.

If she is unable to read and write the English language she can not register as this is a contingency not provided for in the law. She is not authorized to delegate to another authority to fill out the necessary blanks.

If she should lose her registration receipt, she may file her affidavit of its loss with the presiding officer holding the primary election, in the same manner as is provided for in the case of the loss of a poll tax receipt by a male voter.

Women can vote only in primary elections, or conventions. They are not entitled to participate in either a general or special election, or any election held under authority of law, except party primaries.

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

OP. NO. 1933—BK. 51, P. 288.

PRIMARY ELECTIONS—SECTION 184, TERRELL ELECTION LAW, PAGE 70, REVISED EDITION.

The Executive Committee of any political party has a right to prescribe an additional test, the effect of which would be to require that only white voters who pledge themselves to support the nominees of the primary, and declare that they supported (if they voted at all), all of the nominees of the democratic party at the last preceding general election.

June 7, 1918.

Honorable John W. Hornsby, County Attorney, Travis County, Austin, Texas.

DEAR SIR: You desire to be advised if the Democratic Executive Committee could lawfully require the following additional test of the voters who participate in the July primary election:

"I am a white democrat and pledge myself to support the nominees of this primary, and I further declare that in the last general election (if I voted at all), voted for the nominees of the democratic party from the president of the United States down to constable."

You are respectfully advised as follows:

The Terrell Election Law, Section 29 and 30, prescribes the qualifications of voters to participate in the general election of this State. It will be noted that the general election law also provides for any poltical party in this State to hold primary elections for the purpose of nominating its candidates to be voted on at the general election. The law has safeguarded and thrown around these primary elections many provisions in order to secure fair and honest primary elections as well as general elections. The prevailing idea of the Legislature seems to have been to permit any political party to have general control and management of the internal affairs of such political party,

gives to such political party the right to be the sole judge of its own principles and of its own reason for existence, and gives it the right to prescribe its own qualifications for membership. Any political party in this State has a right to place its own safeguard around its own organization, conditioned only, that the rules and regulations such party may prescribe must be consistent with the general election laws of this State. We do not think it was the intention of the Legislature to invade the internal workings of any political party and to say to such political party that it must admit into its ranks any class of citizens upon any other terms than such terms as said political party should see fit to prescribe; provided, of course, such terms would be consistent with and not contrary to the general laws upon the subject. Section 175 of the Revised Terrell Election Law authorizes the holding of primary election; Section 176 defines primary election; Section 184 prescribes the legal qualifications for participating in such primary elections, which section reads as follows:

"'No one shall vote in any primary election unless he has paid his poll tax or obtained his certificate of exemption from its payment, in cases where such certificate is required, before the first of February next preceding, which fact must be ascertained by the officers conducting the primary election by an inspection of the certified lists of qualified voters of the precinct, and of the poll tax receipts or certificates of exemption; nor shall he vote in any primary election except in the voting precinct of his residence; provided, that if this receipt or certificate be lost or misplaced, or inadvertently left at home, that fact must be sworn to by the party offering to vote; and provided further, that the requirements as to presentation of the poll tax receipt, certificate of exemption or affidavit shall apply only to cities of 10,000 population or over as shown by the last United States census; provided, that the executive committee of any party for any county may prescribe additional qualifications for voters in such primaries, not inconsistent with this title."

Section 187 of the Terrell Election Law provides for the character of tests which should be printed upon the ballot. Under the latter part of Section 184, which provides that the executive committee of any county may prescribe additional qualifications for voters, then the only further question we have to consider is, is the test suggested by you, which is an additional qualification for a voter, inconsistent with this title?

We do not think so. This title prescribes certain requisites and especially clothes the executive committee with power to prescribe other requisites. We can not understand what requisite could be prescribed by an executive committee which would be in the nature of an additional qualification which would be legal, if the one you suggest is not. This Department has heretofore held that the executive committee could prescribe in its test that the person offering to participate in such primary must have voted the democratic ticket at the last preceding election.

We think the executive committee derives this right out of its general powers to preserve the principles of its party and to safguard it from its enemies. The executive committee, therefore, can say that only those persons who are democrats can participate in the democratic primary election. Since the democratic executive committee

would have the right to permit only democrats to take part in the primary election, would it not have logically the authority to say that only those persons who are known to be democrats by having voted the democratic ticket at the last election (if they voted at all), could take part in the primary election? We think the executive commitee would clearly have this authority. Otherwise, the democratic party might find itself powerless to keep out of its ranks its enemies if it has not the right to keep out those persons who voted, we will say, the republican ticket at the last election. Republicans could with impunity come into the State Democratic party and help to make the democratic nominations and then vote against the nominees they helped to make. If the democratic executive committee has not the right to prescribe the test submitted by you under its authority to prescribe an additional test, we are at a loss to know what the Legislature meant in reiterating what qualifications to vote in the primary would be required and closing with the provision the executive committee may prescribe additional qualifications for voters in such primaries. This provision shows that the Legislature did not undertake to prescribe all of the qualifications for voting in party primaries, but only prescribe certain qualifications which must exist leaving the executive committee to determine whether or not additional qualifications should be prescribed, which qualifications should, of course, be consistent with those laid down by the Legislature. It also contemplated in the enactment of the primary law that a nomination does not necessarily mean an election; that it is only the party's method of selecting its candidates or adopting its legislative demands and a broad scope should be given all political parties in the manner and methods they should adopt in their own organization. Political parties should not be required by any rule of law to permit people to affiliate with them who are not in accord with such party upon governmental questions. If a political party should become unjust in its discriminations or arbitrary in the manner in which it conducts its own affairs it can be held to a strict accountability at the general election.

Nearly all of the States in the Union have now adopted primary election laws the effect of which is not to regulate by law the internal affairs of the several political parties but which laws are for the general protection of its members and of the public at large. The numerous primary election laws have been vigorously attacked upon constitutional grounds but have uniformly been sustained by the courts as a proper and reasonable police regulation.

The Louisiana primary law was severally assailed in the courts in the case of State ex rel. Labauve vs. Mitchell, Secretary of State, 46 So. 435. We quote from the case as follows:

"The qualifications of voters and of candidates, in all primary elections held under this act, shall be the same as now required by the Constitution and election laws of this State for voters at general elections, subject to an additional qualification which may be prescribed by the State central committees of the respective political parties coming under the provisions of this act. The respective State central committees of the respective political parties coming under the provisions of this act shall

meet within sixty (60) days after the promulgation of this act and then fix the said additional political qualifications as herein authorized.

"This section is said to be in violation of Article 197 of the Constitution, fixing the qualifications of voters, and of Article 16, which confides the legislative power to the Legislature. It is said that, these primaries being legal elections, a part of the election machinery of the State, the Legislature is without power to add to the qualifications of the voters as fixed in the Constitution, and that, even if this power resided in the Legislature, it would have to be exercised by itself, the Legislature, and could not be delegated to the State central committees of the respective political parties, as is attempted to be done in said Section 9.

"It is of the very essence of a primary that none should have the right to participate in it but those who are in sympathy with the ideas of the political party by which it is being held. Otherwise the party holding the primary would be at the mercy of its enemies, who could participate for the sole purpose of its destruction, by capturing its machinery or foisting upon it obnoxious candidates or doctrines. It stands to reason that none but Democrats should have the right to participate in a Democratic primary, and none but Republicans in a Republican primary. A primary is nothing but a means of expressing party preference, and it would cease to be that if by the admission of outsiders its result might be the very reverse of the party preference. If, therefore, there could not be a primary under our Constitution without the admission of outsiders, the consequence would be that under our Constitution such a thing as a primary would be impossible. The argument, therefore, that in a statute-regulated, or compulsory, primary the qualifications of voters can not be other than as fixed by the Constitution for the general election, would lead to the conclusion that such a primary was a legal impossibility.

"Our Constitution will be read in vain to discover any provision which, expressly or by implication, takes away from the Legislature the right to require that party nominations shall be by primary. Not only is such prohibition not to be found in the Constitution, but no reason can be suggested why it should have been inserted therein. We do not believe that any instance can be cited where a power has been taken away from the Legislature, except where such power has been abused in the past and there was danger of its being again abused in the future; and since, at the time of the adoption of the Constitution of 1898, there had never been any statute-regulated primaries in this State, it is certain that the Legislature had never abused its power in that connection.

"Whether the Legislature could itself undertake to fix the political qualifications of the voters at a primary is a question which need not be discussed in the case, since by the statute in question the Legislature has not undertaken to do so, but has wisely left the matter to the State central committees of the several parties.

"It is not true that it is by delegation from the Legislature that the State central committees hold the power of fixing the political qualifications of the voters at the primary. They hold said power virtue official, as being the governing bodies of the political parties. The Legislature has simply abstained from interference, leaving the power where it originally resided and naturally belongs. And in so doing it has but obeyed the constitutional injunction to pass laws to secure the fairness of primaries. A primary wherein the governing body of the political body holding it could not determine the political qualification of those who are to have the right to participate in it would not only be unfair, but would be a legal monstrosity.

"In conclusion, and as a general commentary upon this statute, we will say that it has been adopted in the exercise of the police power of the State, and that the reader of it can not but be impressed that its aim has not been to create conditions, or to confer rights or bestow benefits, or to take away rights, but simply to act upon and regulate existing conditions, with a view single to the public interest, that in nearly every State of the Union such a law has been adopted, and the assaults upon it have been repulsed everywhere, except in California alone; and that,

finally, as expressed by Judge Parker (People vs. Dem. Cen. Com., supra), the idea of such a law is 'to permit the voters to construct the organization from the bottom upwards, instead of from the top downwards,' and it would be strange indeed if the Constitution had made such a scheme impossible."

The New Jersey Supreme Court in passing upon the New Jersey primary law in the case of Hopper vs. Stack, 56 Atl. 1, sustained the right of the executive committee of a political party to prescribe a test, the effect of which was to make a party affiliation a condition of the right to participate in party counsels and establish as a test of such right the making of an affidavit as to actual cooperation in the immediate past and a present intention so to cooperate in the immediate future. This statute was assailed because it was alleged that it violated the constitutional right to a secret ballot, etc. The court held that the right to a secret ballot is not a constitutional right; that it could be given and taken away by the Legislature, citing the case of Ransom vs. Black, 24 Atl. 439.

Further continuing the court said:

"Moreover, as the voter is not required to say for whom he voted, but only that he voted for a majority of the candidates of the party with which he claims to act, it is difficult to see wherein such partial avowal is any more inimical to secrecy than is the open and avowed partisan cooperation that has hitherto constituted the voter's credential. Apart, however, from these considerations, the matter, as an incident of police regulation, is clearly within the legislative providence, as will appear when the subject of its police power is considered.

"Under this branch of the relator's argument, a number of provisions are criticized upon the ground that they tend to constrain the otherwise untrammeled conduct of citizens when seeking to give expression to their political preferences, which is said to be one of their natural rights. Assuming that specific instances of this have been shown, no constitutional question is involved, for the reason that it is of the very essence of the exercise by the Legislature of its police powers that citizens may, for the public good (which is what the word 'police' means in this context) be constrained in their conduct, even with respect to matters in themselves natural and otherwise right. Limitations of strictly natural rights and reasonable regulation of general constitutional rights are not incompatible with the valid exercise of the police power."

The Supreme Court of California in the case of Socialist Party vs. Uhl, 103 Pac., 188, held valid the primary law of that State and held that the Legislature had authority to prescribe tests both as to the electors and the candidates for office. The California Law contained a special provision requiring that candidates for office should accompany their application with a sworn statement of their party affiliation. The court in disposing of this question said:

"The right and duty of the Legislature to prescribe a test for electors voting at a primary cannot be questioned, nor do we perceive any reasonable ground for questioning the validity of a test as to candidates. The obvious purpose of a primary law is to preserve the integrity of parties. The necessity for maintaining the integrity of such parties is recognized in the constitutional provision with reference to primary elections. The right which once exclusively vested in a political party to supply its own tests as to the rights of one to participate in its primary elections has been modified under the constitutional provisions empowering the Legis-

lature also to prescribe tests, and it is the duty of the Legislature, when legislating upon the subject of primaries, to so legislate as to maintain the integrity of parties, and the integrity of any political party, and the success and furtherance of its principles and policies is best attained through legislation which will permit participation in its affairs by those only who are devoted to its principles and polcies. It is manifestly proper for the Legislature to permit only those to participate with a party at a primary election who are in sympathy with the aims of the party, those who are committed to its principles and in sympathy with, and loyal to, its tenets. In order to effect this end it is just as desirable to prescribe a test whereby the right of a person to become a candidate of a party at a primary election shall be determined as it is to furnish a test by which an elector shall be permitted to vote for a party candidate at such election. All these matters tend to sustain party integrity, which is one of the chief aims of a primary election law. If the indiscriminate right to vote with any party at a primary were given to electors, whether they were in accord with the principles of the party or not, it would soon tend to destroy all party organization. So to permit persons to become indiscriminately the candidates of any or all parties at a primary election would tend to have the same effect. A political party is an organization of electors believing in certain principles concerning governmental affairs, and urging the adoption and execution of these principles through the election of their respective candidates at the polls. The existence of such parties, the dominant party and the parties in opposition to it, lies at the foundation of our government, and it is not expressing it too strongly to say that such parties are essential to its very existence. The design of the primary law is not to destroy political parties, but, while carefully preserving their integrity, to work out reforms in their methods of administration. Such being the purpose of the law, it is not only proper to prescribe such a test, but the absence of such a test would tend to work the absolute disintegration and destruction of all parties, except for the saving power within the party itself of prescribing its own tests and regulations. The power of a political party to prescribe such a test for any of its members seeking preferment at its hands may not be doubted; and if the party can prescribe such a test, so also can the Legislature. Thus the Legislature, in the interest of party integrity, not only wisely, but as a duty, sought by test requirements to confine the right of electors to vote for candidates of a party to those who had registered as affiliating with the party, and likewise confined the right of a person to have his name printed upon the official ballot, as a candidate for nomination by a party at such primary election, to one who in his affidavit declared that he affiliated with such party at the last preceding general election, and who voted, if he voted at all, for a majority of the candidates of the party at such election, and intends so to vote at the ensuing election. Under the test provided in this act a person can have his name printed on the official ballot only as a candidate at a primary of the party with which he affiliated at the last general election. Likewise under the act an elector can only vote for persons to be candidates of the party with which he has registered that he affiliates. These provisions deny the indiscriminate right of a person to become a candidate upon the official ballot of all parties, or of any other party than the party with which he is affiliated, and it denies also the indiscriminate right of an elector to vote for persons as the candidates of any other party than the one he has declared his affiliation with. Both of these tests appear to us to be reasonable ones, and such as under the constitutional provision relating to primary elections the Legislature was authorized to provide."

The Illinois primary law in the case of Rouse vs. Thompson, 81 N. E., 1111, contains a like provision and provides that no person shall vote at a primary election who has signed the petition of a candidate of any party with which he does not affiliate with such candidate is to be voted for at the primary election, or who shall have voted at the primary election of another party within a year next

preceding the primary election, and who shall refuse to state his name, residence, and party affiliation to the primary judges. The court sustained this test and the Illinois primary election law also provided that the executive committee of that State was given certain other duties to perform in the nature of dividing up the counties into districts. This law was attacked on the ground that it delegated to the executive committee law making authority. The court held that this was not a delegation of legislative authority, and further said:

"The object of holding a primary election by a political party is to select party candidates, and it is too plain for argument that no voter should be permitted to vote at the primary election of a political party unless he is a member of such party, and unless provision is made to prevent persons voting at a primary election for the candidates of a party who are not affiliated with such party, the whole scheme of nominating party candidates by a primary election would fail, because of being incapable of execution. In view of the object for which the primary election is held, we have been unable to discover any constitutional right of which the voter has been deprived by any of the foregoing enactments. It is the duty of the Legislature to provide all such reasonable regulations as will make the provisions of the Constiution effectual, and laws to prevent fraud, undue influence, or oppression, and to preserve the equal rights of all from interference or encroachment, have universally been sustained by this court. Sherman vs. People, 210 Ill., 532, 71 supr. The members of the several political parties must be guaranteed by law the right to select their candidates for office with the same freedom as they have the right to choose them after they are nominated, or the primary election at which they vote for candidates is a delusion and a fraud upon the individual voter. If the independent voter or the voter affiliating with an opposition party can vote at the primary election of a party with which he has no political affiliation, and thereby control the nominations of a party with which he has no political affiliation, and thereby control the nominations of a party to which he is opposed, and whose candidates he will vote against at the polls, the freedom of the primary election is destroyed. What regulations should be had to secure fair primary elections must rest largely with the Legislature, and the courts should not override the discretion placed in that branch of the government by the Constitution, unless it clearly appears that the constitutional rights of the individual voter have been infringed upon. We are of the opinion that the provisions of the statute above referred to are not subject to constitutional objection."

One of the leading cases, and perhaps the best discussion of the whole subject is in the case of Ritter vs. Douglass reported in 109 Pac. Rep., 444, in which case the Supreme Court sustains in toto the validity of the entire primary election law of the State of Nevada. In this opinion the court said:

"The Legislature has the unquestioned right to prescribe a uniform test for electors who desire to participate in primary elections. The test provided in the present law 'as to his bona fide present intention to support the nominees of such political party or organization,' is a reasonable and fair regulation in maintaining the integrity of the various parties, and we can see no valid objection in requiring those who participated in a primary election from stating that they intend to support the candidates named by them for election."

The Court in this case quotes with approval from the case of Morrow vs. Wipf, 115 N. W., 1124. The Court in this case sustained this law, using in part the following language:

"The test prescribed for participating in a party primary is that the elector 'voted for a majority of the candidates of such party or association at the last election, or intends to do so at the next election.' The authority of the Legislature to prescribe any test whatever is challenged; that being a matter, it is contended, wholly within the discretion of the parties themselves."

The above test was held sufficient and reasonable. The first California primary act passed in 1899 was held invalid because no test was required at all, the holding of the court being that a test prescribed either by the Legislature or by the political party or partly by both is indispensable to maintain party organizations. The California Court in the case of Socialist Party vs. Ult, supra, said:

"The right and duty of the Legislature to prescribe a test for electors voting at a primary cannot be questioned, nor do we perceive any reasonable grounds for questioning the validity of a test as to candidates. The obvious purpose of a primary law is to preserve the integrity of parties."

It is well settled from the authorities directly in point on this same question that any reasonable test of party affiliation may be required by the Legislature of those who desire to participate in primary elections of the various parties. The following authorities are directly in point:

State vs. Nichols, 97 Pac. 728.
State vs. Nichel, 46 So. 430.
State vs. Drexel, 74 Neb., 776.
Nooker vs, Stack, 56 Atl. 1.

The New York primary law which contained a strict test as to party loyalty was sustained by the Supreme Court of that State, Judge Alden B. Parker rendering the opinion in the case of People vs. Democratic Committee, 58 N. E., 124.

Schostag vs. Cator et al., 91 Pac., 502 in commenting upon the California primary statutes said:

"The Legislature has prescribed a test or condition to be compiled with by all electors of every party who desire to participate in the primary elections and has empowered the several political parties to prescribe additional tests, if they desire to do so, for those who offer to vote for delegates to their respective conventions. There is no conflict between the two acts, and nothing in the Constitution which forbids even by implication provisions so reasonable and so just. The Legislature having the right to reserve the exercise of the power of prescribing tests to itself exclusively, or to delegate the power to the several parties, is invested with plenary control of the whole subject, and, if it deems some general test, applicable to all parties, necessary as a matter of wise state policy, it does not, by prescribing such a test, preclude the delegation of a right to prescribe more specific tests for the electors claiming to be members of a particular party. The State has a general interest in guarding the purity of primary elections, especially since party conventions have become an essential feature of our system of choosing public officers, and every party has a special interest in reserving to its own members the control of its own affairs. It would be a deplorable construction of the Constitution which would forbid the enactment of general laws in furtherance of the general interest of the State, except upon condition of denying to the governing bodies of the respective parties the right to exclude from participation in their primaries electors who, according to their

own standards of party fealty, are not entitled to act with them. This is a right which parties have always exercised heretofore without question, and is essential to their preservation."

Brittain vs. Board of Commissioners, 129 Cal. 337; 61 Pac. 1115; 518 Pac. 115.

In the case of Morrow vs. Wipf, supra, the court held valid a provision of the primary election law which permitted any person to challenge the right of a voter on the ground that he was not loyal to the party with which he was voting. Upon this challenge being made, the voter was then required to make an affidavit in the following form:

"That you are now in good faith a member of the ———— party and a believer in its principles as declared in its platform in the last preceding national and state conventions and that you do now in good faith intend to follow the principles of that party and the candidates nominated by it at the primaries now being held."

Persons upon being challenged and who refuse to take the oath so tendered would have his vote rejected. The court said:

"It is for the party to nominate; for the people to elect. The question is not who shall be chosen to any particular public office. That is for the voters of all political parties to determine at the polls. It is simply who shall represent the organization as its nominees, and certainly the determination of that question should be controlled by the action of the party itself; otherwise, party nominations are impossible. To what extent, if at all, the rights of organized political parties should be recognized and regulated by law, is a matter of public policy, to be determined by the Legislative department—a matter which does not concern this court. Its duty is done when it gives effect to the legislative will, as expressed in statutes which do not conflict with any provision of the Federal or State Constitution."

Quoting with approval State vs. Metcalf, 100 N. W., 923; 67 L. R. A., 331.

The court further said:

"It was the evident intent of the law making power to regulate, not to destroy; and, in order to accomplish its purpose, it was absolutely necessary that each party organization be permitted to establish its own rules regarding the qualifications of its members, or that a rule applicable to all be prescribed."

Ladd vs. Holmes, 66 Pac. 714; 91 Am. St. Rep. 457; Rouse vs. Thompson, 81 N. H. 1109.

It will be interesting in this connection to note especially the fact that the matter of the party test or primary election law is very similar to the Louisiana election law. The Louisiana primary election law with reference to the test is as follows:

"Sec. 9. Be it further enacted that the qualified voters and candidates in all primary elections held under this Act shall be the same as now required by the Constitution and election laws of this State for voters at general elections, subject to an additional political qualification which may be prescribed by the State Central Committee of the respective political parties coming under the provisions of this act. The respective Central Committee of the respective political parties coming under the provisions

of this Act shall meet within sixty days after the promulgation of this Act and then fix said additional political qualifications, as herein authorized."

As stated above, the Supreme Court of Louisiana in the case cited upholds the validity of the Louisiana statute with reference to prescribing party tests. In this particular the Louisiana statute is closely analogous to our own statute. Section 184 Terrell Election Law, cited above.

Under the authority given in Section 9, the Democratic Executive Committee passed a rule prescribing the qualifications of those who would be candidates, and provided in such qualifications that only white Democrats who possessed the other qualifications would be permitted to become candidates in the Democratic party. The Court sustained this as a valid and reasonable regulation of the Democratic Executive Committee in the following language:

"It is conceded that none but a white Democrat is entitled to become a candidate for a Democratic nomination in this State, under the rules adopted by the party central committee, pursuant to Section 9 of Act 49, page 69 of 1906 statute."

We, therefore, conclude from the authorities above cited and from a careful reading of the various provisions of the primary election law of this State that the Legislature was clothed with ample authority to prescribe a primary test and could likewise authorize any political party of this State to prescribe an additional test. This the Legislature has done. In Section 187, which 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 nominees of this primary;' and any ballot which shall not contain such test printed above the names of the candidates thereon shall be void and shall not be counted. Such ballot shall also contain the names and residences of the candidates."

And in Section 184, quoted above, the Legislature seems to have wisely provided a uniform test which must be printed upon the tickets and has clothed the executive committees of the various political parties with ample authority to prescribe additional qualifications, which the executive committee can do by proper resolution, which, after its adoption, should be certified to each election board in the county for their observance. Persons who offer to vote who do not possess the additional qualifications prescribed by the executive committee, if reasonable, should be denied the right to vote and any political party would have the right to require that only white citizens of the State who have paid their poll taxes or obtained their exemption certificates or registered as is required by law and who will pledge themselves to support the nominees of such political organization in the general election, shall be allowed to vote. The executive committee can also require a further test as to party fealty, that the person so offering to vote should have voted the party ticket at the last preceding election.

Yours truly,

W. A. KEELING,
Assistant Attorney General.

OP. NO. 1935—BK. 51, P. 303.

The legal residence of a married woman for the purpose of registration under the woman suffrage act is at the same place as that of her husband.

June 14, 1918.

Hon. Robert Maud, Tax Collector, Austin, Texas.

DEAR SIR: I have yours of the 10th inst., calling attention to Article 2941, Revised Civil Statutes, which is a part of the election laws of this State and deals with the subject of residence. Your question is as follows:

"Can the wives of the State employes appear before the tax collector of Travis County and make affidavits provided in Section 2 of said Act (woman suffrage act), or will they be compelled to return to their former residence and register with the tax collector of their former resident county?"

The article of the statutes you refer to declares that the residence of a married man is where his wife resides, or if he be permanently separated from his wife, his residence is where he sleeps at night. It also provides that the residence of one who is an inmate or officer of a public asylum or eleemosynary institute, or who is employed as a clerk in one of the departments of government at the capital of this State, or who is a student of a college or university, *unless such officer, clerk, student or inmate has become a bona fide resident citizen in the county where he is employed, or is such student,* shall be construed to be where his home was before he became such inmate or officer in such eleemosynary institution or asylum or was employed as such clerk or became such student; and if on payment of his poll tax he would be a qualified voter, he shall be permitted to return during the month of January in each year to his home to pay his poll tax or obtain his certificate of exemption, and shall be permitted to return again to his home to vote at any general or primary election, etc.

This article does no more than declare what was the law before the passage and independent of the statute. It says that a married man's residence is where his wife resides, but it does not attempt to define the residence of the wife. It provides that certain State employes have a right to go back to their home counties and vote unless they become bona fide resident citizens of the county in which they are employed. This would be the law if there was no statute on the subject.

So we must go to the common law to determine the legal residence of the wife.

At common law husband and wife were regarded as one person, and the legal existence of the wife was suspended during marriage, or, in other words, was merged in that of the husband. The husband had control, almost absolute, over the person of his wife; she was in a condition of complete dependence; could not contract in her own name; was bound to obey him.

At the present day the one-person idea of the common law no longer exists in all its strictness, but the husband is in law the managing

head of the family and as such has the right to fix the domicile, and the residence of the wife is therefore that of the husband.

15 Am. & Eng. Ency. of Law, 812.
13 R. C. L., 984.
Republic vs. Young, Dall. (Texas), 464.
Russell vs. Randolph, 11 Texas, 460.
Lacey vs. Clements, 36 Texas, 661.
Henderson vs. Ford, 46 Texas, 627.
Clements vs. Lacey, 51 Texas, 150.

The rule is stated in American and English Encyclopedia of Law, above cited, as follows:

"By marriage, a woman, whether a minor or an adult, loses her domicile and acquires that of her husband, and the general rule is that during coverture the domicile of the wife continues to be that of the husband and changes with his."

In Republic of Texas vs. Young, Dallam 464, the Court said:

"Mr. Justice Story, in his fourth rule on this subject, states (page 44, Conflict of Laws), that a married woman follows the domicile of her husband."

And in the case of Clements vs. Lacy, 51 Texas, 150, the Supreme Court of Texas used the following language:

"From the above and the direct authority of this case on the former appeal (36 Texas, 661), we deduce the familiar principle, that the domicile of the husband draws to it the legal domicile of the family."

Now as to whether the legal residence of the husband, and therefore of the wife, is in the county of his employment under the State Government or whether it is in what we may term his home county, this is a question of fact in each case and in the nature of things is governed largely by the intention of the person. A man may come to Austin to take a position at the State Capitol and not change his residence to this county, in which case he as well as his wife, would vote in the county from which they came and which they consider their legal residence. On the other hand, such a person has the right to take up his residence in the county and if he in fact does so, he and his wife would of course vote here.

You are therefore advised that if as a matter of fact the residence of a State employe is in Travis County, his wife should register with the tax collector of said county; but if he is simply residing here temporarily and has retained his residence in some other county, his wife should register in the other county.

Yours truly,

B. F. LOONEY,
Attorney General.

March 5, 1918.

Honorable W. I. Allen, Mayor, Waelder, Texas.

DEAR SIR: I beg to acknowledge receipt of yours of the second instant, reading as follows:

"Our little city is incorporated under the charter, as a town and village. We have 32 men who failed to pay their city poll tax. Can they pay the ten per cent penalty, and vote in the city election April 2, 1918. They contend that they can?

"Now if they fail to pay the city poll tax and pay their State and county can they vote at the general election? And another question, can they hold a city office? If a man fails to pay his city poll tax and pays his State and county tax if he is elected, can he qualify as a commissioner?"

Your questions may be stated thus:

1. Are those persons who failed to pay the poll tax, levied by the town of Waelder, before the first day of February authorized to vote, if otherwise qualified, in the city election April 2, 1918?
2. Can they vote at the general election if otherwise qualified?
3. Are such persons eligible to a city office?

I assume that your town is incorporated under the "Towns and Villages" Chapter of the Revised Statutes, which is Chapter 14 of Title 22, or under the Commission Form of Government statute of 1913 (Chapter 21), which contains the following provision:

"In incorporated towns and villages of more than five hundred and less than one thousand inhabitants, adopting the commission form of government under the provisions of this chapter, and in unincorporated towns and villages of more than two hundred and less than one thousand inhabitants, incorporating and adopting the commission form of government under the provisions of this chapter, the 'Board of Commissioners' shall have all authority and powers conferred under Chapter 14 of Title 22 of the Revised Statutes of Texas of 1911, except where same may conflict with some provision contained herein."

In either event your town would seem to be governed in the matter of taxation by Article 1050, R. S., which is in the following language:

"The board of aldermen shall have power to levy and collect an occupation tax of not more than one-half the amount levied by the State; also to levy taxes on *persons and property*, real and personal, within the corporation, subject to taxation by the laws of the State; but the tax on persons and property shall not, in any one year, exceed the rate of one-fourth of one per cent on the one hundred dollars valuation."

However, in order to be sure that the codifiers were correct in placing Article 1050 under the Chapter entitled "Towns and Villages," and that said article governs an incorporated town or village incorporated thereunder, and that Article 927 does not apply to towns and villages, I have traced the matter back to the beginning, with the following result:

An Act approved January 27, 1858, (Acts 1858, p. 69, Vol. 4, Gammell's Laws, p. 941), which authorized the incorporation "as a town" of a village containing three hundred free white inhabitants, contained the following provision:

"Sec. 18. The board of aldermen shall have power to levy taxes on persons and property, real and personal, within the town, subject to taxation by the laws of the State; but the tax on persons or property, shall not in any one year, exceed the rate of fifty cents on the one hundred dollars."

The Act of 1858 was amended by an Act approved May 26, 1873, (Acts 1873, p. 98, Vol. 7, Gammell's Laws, p. 550), so as to provide "that where a village or town may contain a population of two hundred souls, it may be incorporated as a town, in the manner prescribed by this Act." This Act made no change in Sec. 18 of the Act of 1858 with reference to taxation, above quoted.

March 15, 1875, an Act was approved (Acts 1875, p. 113, Vol. 8, Gammell's Laws, p. 485), which authorized the incorporation of and applied only to "any city within the limits of this State, containing one thousand inhabitans or over." Sec. 82 was as follows:

"To annually levy and collect a poll tax, not to exceed one dollar, of every male inhabitant of said city over the age of twenty-one years (idiots and lunatics excepted), who is a resident thereof at the time of such annual assessment."

The codifiers, therefore, in the preparation of the Revised Statutes of 1879, correctly placed the section first above quoted under the head of "Towns and Villages" (Chapter Eleven, Article 522), and the last quoted section under the subject of "Cities and Towns" (Chapter 5, Article 428). No change has been made in this section since that time, and it is carried forward as Article 489, Revised Statutes of 1895, and as Article 927, Revised Statutes of 1911, under the head, in each instance, of "Cities and Towns," and has not been amended as there written.

An Act which became a law in 1891 without the Governor's signature (Acts of 1891, p. 171, Vol. 10, of Gammell's Laws, p. 173), which was entitled "An Act to amend Article 522, Chapter 11, Title 17, of the Revised Civil Statutes of the State of Texas," amended said Article 522 so as to make it read as follows:

"The board of aldermen shall have power to levy and collect an occupation tax of not more than one-half the amount levied by the State; also to levy taxes on persons and property, real and personal, within the corporation, subject to taxation by the laws of the State; but the tax on persons and property shall not in any one year exceed the rate of one-fourth of one per cent on the one hundred dollars valuation."

In these exact words this section was carried forward as Article 595 in the Revised Statutes of 1895, under Chapter Eleven, which is entitled "Towns and Villages," and in Revised Statutes of 1911 as Article 1050 under the same head, and the same has not been amended since the revision of 1911.

If, therefore, the town of Waelder has any authority to levy a poll tax it must be derived from this article of the statute; and of course if it has no such authority those persons failing to pay same before February first would not be disqualified to vote in the city election mentioned.

What now constitutes Article 1050, R. S. 1911, was construed by the Supreme Court of this State in 1898 in the case of Morris v. Cummings et al., 91 Texas 618, 45 S. W., 383; and as the same was at that time in the exact language as it exists today, as was the statute authorizing "Cities and Towns" to levy a poll tax, the decision of the court is deemed to be conclusive upon the point decided.

The Court held that an incorporated town operating under the "Towns and Village" chapter is without authority to levy a poll tax, saying, among other things:

"But a tax upon persons by the head, sometimes called a capitation tax, is not an unusual means of raising revenue for the support of the government, and is commonly and technically known as a poll tax. It is so designated in our present Constitution (Article 8, Section 1, and Article 6, Section 3), and was also so denominated in the Constitution of 1869 (Article 9, Section 6). And we may say the same generally of our statutes which authorize the imposition of such taxes. The inference is therefore strong, that if it had been intended to authorize the towns in this State, organized under the general law, to levy a poll tax, the Legislature would have made use of that well defined term."

The court calls attention to the fact that the Legislature, in conferring authority upon cities and towns to levy a *poll tax,* used the term "poll tax," and states that the inference is therefore irrestible that if it had been intended to confer the power upon *towns* to levy a poll tax, the Legislature would have said so in so many words, as they did in reference to *cities* incorporated under the same law. Also that while the words "taxes on persons and property" may tend to show that it was the purpose to authorize a tax upon persons as distinct from a tax upon property, the words do not necessarily require that construction; that a tax upon property may not only be a charge upon the property, but it may also create a personal liability upon the owner which may be collected by a sale of property other than that upon which the tax is assessed, and for this reason it is not inaccurate to denominate such a tax, a tax upon persons and property. The court assigned other cogent reasons for its conclusion, but the arguments above set forth seem to me to be sufficient.

So, in view of this decision, and in reason, it seems that if the town of Waelder is incorporated so as to be governed by Article 1050 it has no authority to levy a poll tax, and hence the persons mentioned would not be disqualified to vote in the city election to be held April 2, 1918, by reason of non-payment of the city poll tax.

For the same reason they are not disqualified to vote in a general election.

Neither would such nonpayment disqualify them to hold a city office.

I note what Hon. J. C. Romberg, County Judge, at Gonzales, has to say on the subject, to wit, that where any voter is subject to pay a poll tax under the laws of the State or ordinances of any city or town he must have paid such tax before he offers to vote at any election in this State. It is true that a city poll tax must be paid as a condition precedent to the right to vote, where the city or town has authority to levy the tax, but as above stated the rule is otherwise where there is no authority to levy same.

In accordance with your request I herewith return the letter of the county judge.

Yours truly,

B. F. LOONEY,
Attorney General.

OPINIONS CONSTRUING INSURANCE LAWS.

OP. NO. 1662—BK. 48, P. 193.

INSURANCE—MUTUAL FIRE INSURANCE—INSOLVENCY.

Acts Thirty-third Legislature, Chapter 29.
Revised Statutes, Articles 1210-4723.

1. Mutual Fire Insurance Companies are subject to the general corporation laws of the State.

2. The members or policy-holders of a mutual fire insurance company are not responsible for the debts of the corporation, except to the extent specified in Chapter 29, Acts Thirty-third Legislature.

3. In addition to one annual premium the statute makes each policy-holder liable for another annual premium; this liability is absolute and can neither be waived nor avoided, when needed.

4. There is also an optional liability, which must be stated in the companies' by-laws; that is, the additional liability may be either three or five annual premiums if it is so stated in the by-laws.

5. This additional liability can only be used to pay losses and expenses, and is assessable at the discretion of the Insurance Commission, or by the company's board of directors, when needed.

6. The insolvency of a company does not terminate the obligation of the policy-holders to contribute by assessments to pay losses incurred prior to the insolvency.

7. If an unearned premium was due for policy canceled prior to insolvency then it may be paid out of assessment funds, but if the unearned premium is simply the amount unearned at the time of the insolvency, then it may not be paid out of funds collected by assessment.

8. The appointment of a receiver of a company on the ground of insolvency, cancels outstanding policies, and subsequent losses are not liabilities which may be enforced.

September 9, 1916.

Honorable Chas. O. Austin, Commissioner of Insurance and Banking, Capitol.

DEAR SIR: We are in receipt of an inquiry, the substance of which is as follows:

"Under the present laws of the State of Texas, if an incorporated mutual fire insurance company were to fail and its assets fail to satisfy its liabilities, would the policy-holders then become liable? If so, to what extent?"

The question is one of some importance and we have concluded to write an opinion on the question in order that the inquiry made to us may be appropriately answered and our view of the question may be on file in your Department for future inquiries.

It is elementary that the liability of one insured in a mutual insurance company, both as a member and insurer, is to be determined by the provisions of the contract contained in his policy as modified and controlled by the charter and by-laws of the company, and we may add, by the statutes.

21 Am. & Eng. Ency. of Law, 271.

Mutual fire insurance companies are authorized and in the main, governed by Chapter 29, Acts of the Thirty-third Legislature. Sec-

tion 15 of this Act declares that such mutual companies shall be amenable to and subject to the provisions of all laws governing stock fire insurance companies, insofar as they are not in conflict with this chapter. Stock Fire Insurance Companies, as well as Mutual Companies, are made subject to the general corporation laws by the provisions of R. S., Article 4723. R. S., Article 1210, a part of our general corporation laws, declares:

"No stockholder shall be liable to pay debts of the corporation beyond the amount unpaid on his stock."

From the foregoing statutes the conclusion is reached, that the share-holders, members, or stockholders, by whatever term they may be known, of a mutual fire insurance company, are not responsible for the debts of the corporation, except and to the extent specified in the act authorizing the incorporation of such companies.

We will now endeavor to ascertain the extent of their liability as stated in that act.

Section 7, Chapter 29, Acts of the Thirty-third Legislature, being the act authorizing the incorporation of and governing mutual fire insurance companies, 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."

(Insurance Red Book, Section 379, page 139.)

Section 8 of the same Act in part reads:

"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 note, such premium 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.*"

From the foregoing quotations from the law, it appears that the by-laws of a. mutual fire insurance company must state the extent of each member's liability to other members.

It is likewise clear from Section 7 quoted above, that in addition to one annual premium, the statute makes each member liable for another annual premium, that is, the statutory liability concerning which there is no option and which can neither be waived nor avoided. There is also an optional liability, that is, Section 7 declares that the company may provide a sum equal to three or five annual premiums. But it appears from Section 8, that if the liability is to be in excess of one additional annual premium which is the statutory liability, that such excesses must be stated in the by-laws. That is, if the member is to be liable for a sum equal to three or five annual premiums, that

provision must be stated in the by-laws, or otherwise there would be no such liability. It will be noted from Section 7, that the additional liability is made possible at the discretion of the Insurance Commissioner, or the Board of Directors, but that the use which may be made of this additional assessment is "for the members proportionate share of losses and expenses" and, of course, upon the insolvency of the company, the funds obtained from these assessments could not be used for any other than the statutory purposes.

Under the present laws of this State, if an incorporated mutual fire insurance company were to fail and its assets fail to satisfy its liabilities, the policy holders would, under the statute, be liable for another annual premium, and would also be liable for whatever additional liability which might have been stated in the by-laws, not to exceed five annual premiums. This would be the extent of the liability, provided however, that additional assessed liability could not be used except in the payment of losses and expenses. The insolvency of the company does not terminate the obligation of its policy holders, or members, to contribute to the payment of loss which has occurred prior to the insolvency, and those giving premium notes, or made liable by the statute or by-laws, would also be liable to assessment for the payment of all losses or expenses which occurred prior to the insolvency and, of course, for the expenses of winding up the insolvent estate.

22 Cyc., 1422.
Corey vs. Sherman, 36 L. R. A., 490.
Massachusetts Fire Ins. Co., 112 Mass., 116.
Sterling vs. Mer. Mutual Ins., 72 Am., 773.

There appears to be some conflict of authority as to whether or not the additional assessments provided for by law may be levied to pay amounts due on unearned premium, but it seems to me that the rule to be deduced from a consensus of the authority, may be stated as follows:

If the unearned premium due was for policy canceled prior to the insolvency of the company and while it is a going concern, then the amount due on unearned premiums is an obligation of the company for the payment of which money obtained from assessments may be used, but if the unearned premium is simply the amount unearned at the time of insolvency and the appointment of a Receiver, then it may not be paid out of funds collected by lawful assessments:

In re Minn. Mutual Fire Ins. Co., 51 S. W., 921.
Davis vs. Shearer, 62 N. W., 1050.
Dewey vs. Davis, 52 N. W., 774.
Detroit Mutual Fire Ins. Co., vs. Morrill, 101 Mich., 393.
Commonwealth vs. Mass. Ins. Co., 119 Mass., 45 (51-52).
21 Am. Cyc. of Law, 275.

In order to make the matter somewhat clearer I may say at this time, that on the appointment of a Receiver of a mutual fire insurance

company on the ground of its insolvency, the outstanding policies of the company are canceled by operaton of law and subsequent losses under such policies are not liabilities which may be enforced.

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

OP. NO. 1703—BK. 48, P. 462.

INSURANCE—FOREIGN INSURANCE COMPANIES—ACCIDENT INSURANCE.

Revised Statutes, Articles 4497, 4723 and 4724.
Acts Thirty-second Legislature, Chapter 117, Sections 2, 3, 5, 7, 22 and 26.
Chapter 108, Laws Thirty-first Legislature, Sections 1 and 40.
Austin's Insurance Digest, Sections 33, 68, 228, 248, 252 and 231.

1. Foreign insurance companies doing an accident business in order to obtain a permit to transact business in this State must have their entire capital stock paid up.

2. A foreign insurance company authorized to do a liability business for injuries by automobiles is an accident insurance company within the meaning of the laws of this State and must have its entire capital stock paid up.

3. Words and Phrases; Accident Insurance; Employers' Liability Insurance; Liability Insurance.

4. The National Indemnity Company in order to receive a permit to do a liability business or an accident business, as that term has been defined in this State and as herein interpreted by us, as applied both to injuries to the insured and to those for whose injuries he may be liable, must have all of its capital stock fully paid up.

January 31, 1917.

Hon. Charles O. Austin, Commissioner of Insurance, Capitol.

DEAR SIR: In your communication of January 29, you make the following statement:

"I have before me the annual statement as of December 31, 1916, of the National Indemnity Company, of Los Angeles, California, and its application to be licensed in the State of Texas to transact automobile and plateglass insurance. The authorized capital stock of this corporation, as per its charter, amounts to $500,000, while its paid up capital stock on December 31, 1916, is given in the annual statement as $346,516.50."

You desire the advice of the Attorney General as to whether or not this company may be granted a license to transact the business named above in this State. The charter of the corporation is before us, and we are informed that the business which the company desires to be licensed to transact is that defined in Sections (c) and (i) of the charter, which read:

"(c) To do a general plateglass insurance business, including within its meaning all insurance against breakage of glass, whether local or in transit."

"(i) To do a general automobile insurance business, including within its meaning the insurance of the owners of or dealers in automobiles

against any and all hazards incident to ownership, maintenance, operation and use of such automobiles."

We are informed that the meaning of Subdivision (c), just quoted, is to authorize the insurance of the owners for damages or injury to their property, to the property of others and also against liability for injury to the persons of others due to the ownership, maintenance, operation or use of automobiles. The provision, however, is broad enough to include personal injuries to the owner himself; but for the purpose of this opinion we will assume that the subdivision means only those things suggested of it; and we made this assumption for the reason that in the application this meaning could be limited to the interpretation stated to us.

The only question for determination is whether or not the laws of this State require the capital stock of this company to be paid up in full before a permit or license is granted to it.

It will be noted above that one purpose of the application is to authorize this company to do a liability business in this State, or indemnify the assured for any liability due to the injury, disablement or death of persons resulting from the ownership, maintenance, operation and use of automobiles.

In our opinion the laws of this State require that the capital stock of this company be paid up before a license may be issued to it.

The Revised Statutes, Article 4497, which was Section 40 of Chapter 108 of the General Laws passed by the Thirty-first Legislature, and which is Section 33 of Austin's Digest of Insurance Laws of this State, in part, reads:

"Should the Commissioner of Insurance and Banking be satisfied that any company applying for a certificate of authority has in all respects fully complied with the law, and that, if a stock company, its capital stock has been fully paid up * * * it shall be his duty to issue to such company a certificate of authority, under the seal of his office, authorizing such company to transact an insurance business, naming therein the particular kind of insurance, for the period of not less than three months nor extending beyond the last day of February next following the date of such certificate."

The provision just quoted is a part of Section 40 of Chapter 108, General Laws passed by the Thirty-first Legislature, and being, as disclosed by its caption.

"An Act to authorize the incorporation of life, accident and health insurance companies and defining same; and to authorize such companies to transact business in the State of Texas; to authorize other like companies incorporated under the laws of other States, territories and countries to transact business in this State; to regulate the business of such companies; to define the duties and powers of the Commissioner of Insurance and Banking and give to him authority to issue, suspend and revoke permits to such companies to transact business in this State and to apply for the appointment of a receiver for such companies when they become impaired; defining the method of arriving at the value of personal proprety of such companies for purpose of State, county and municipal taxation, and exempting such companies from an occupation or gross receipts tax; to fix the situs of personal property of such companies for purpose of taxation; to permit the deposit of securities in the office of

the State Treasurer; fixing venue of suits and providing the method and manner of service of process; providing penalties for violation of the provisions of this Act; repealing all laws in conflict herewith; and declaring an emergency."

It will be noted that this provision declaring that the capital stock of companies applying for admission into this State must be fully paid up before they may be lawfully licensed is a part of the Act described in the caption above, providing for the incorporation of life, accident and health insurance companies and defining same, and to authorize such companies incorporated under the laws of other States to transact business in this State.

We have heretofore held that a foreign life insurance company, in order to obtain a permit to transact business, must have all of its capital stock paid up. This holding was made in departmental opinion No. 954, dated August 27, 1913, and recorded in Vol. 32 of Opinions of the Attorney General, page 203.

We enclose a copy of this opinion for your information, and as likewise being applicable to accident insurance companies, and, as we shall hold, applicable to the company now seeking a permit to transact business in this State.

The problem, then, is reduced perhaps to the simple question as to whether or not the International Indemnity Company desires to do an accident insurance business in this State, and is to be regarded for the purpose of its application as an accident insurance company.

Section 1 of Chapter 108 referred to above is Article 4724 of the Revised Statutes, and is digested in Austin's Digest of Insurance Laws as Section 68. This Section undertakes to define the various terms as used in said Chapter 108, of which Section 40 above referred to is a part. It defines life insurance, accident insurance and health insurance. The definition there given of an accident insurance company is as follows:

"An accident insurance company shall be deemed to be a corporation doing business under any charter involving the payment of money, or other thing of value, conditioned upon injury, disablement or death of persons, resulting from traveling or general accidents by land or water."

It will be noted that this definition is not the limited one frequently given of accident insurance companies; for, otherwise, instead of using the phrase "disablement or death of persons," it would have used the limited phrase, death or disablement of the assured.

The definition, therefore, is broad enough in its scope to embrace insurance companies doing a liability business, and in our opinion it does embrace companies doing that class of business; and that, therefore, the application of the International Indemnity Company brings it within the definition of an accident insurance company, as defined by the statutes of this State.

Moreover, this construction of the statute is in accord with the authorities and trend of judicial thought at the time of its enactment, and since that date. A standard authority on the subject says:

"Accident insurance was originally confined to accidents to the person of the injured, but it has lately been extended to cover contracts of in-

demnity of the assured against losses by injuries to persons in whom he has an insurable interest because of legal liability for the consequences of the accident." I Am. and Eng. Ency. of Law, 285.

Employers Liability Assurance Corporation vs. Merrill, 155 Mass., 404; 29 N. E., 529.

State vs. Aetna Life Ins. Co., 69 N. E., 608.

It is quite elementary that employers' liability insurance is a form of accident insurance. 15 Cyc., page 1035.

Liability insurance, using the term in its comprehensive sense, is also a form of accident insurance. 25 Cyc., page 224.

In the case of Employers Liability Assurance Corporation vs. Merrill, 155 Mass., 404, cited above, it was held that the Massachusetts statute authorizing the formation of companies "to insure against bodily injury and death by accident" was sufficient to authorize a corporation chartered thereunder to issue policies against claims for accidental personal injuries, for which the assured might become legally liable as follows: Injuries to others than employes by horses, teams or vehicles owned by the assured, if engaged in his business and in charge of his employes; injuries caused by an elevator owned and operated by the assured; injuries to workmen employed by other contractors, or to the public caused by the assured and by his own workmen.

It will be noted that the Massachusetts statute was in effect and meaning the same as the present Texas statute defining accident insurance, and as shown by the authority its meaning was not restricted to injuries to the assured, but was extended to injuries to other persons, for which the assured was legally liable.

In the case of the State vs. Aetna Life Insurance Company, 69 N. E., 608, the question at issue was whether or not a life insurance company could, under the laws of Ohio, engage in the business of employers' liability insurance. The statutes of Ohio authorize life insurance companies transacting business in that State to make insurance "against accidents to persons." (69 N. E., 609.)

The Supreme Court of Ohio held that this language was sufficient to authorize foreign life insurance companies to transact employers' liability insurance within the State, holding that employers' liability insurance was accident insurance within the contemplation of the statutes. Among other things the Court, in part, said:

"Whether, then, the defendant company is clothed with authority to engage in the business of employers' liability insurance within this State, depends upon whether or not that particular kind of insurance is embraced and included in the authority so given and permitted, to make insurance and take risks connected with and appertaining to accidents to persons. If it is, then, admittedly, the defendant, in making such insurance, was and is acting clearly within the scope of its delegated powers. That this kind of insurance (employers' liability insurance) may, from its very nature, appropriately be classified with, and peculiarly belongs to, what is commonly known and designated as 'accident insurance,' must, we think, be conceded, inasmuch as such insurance has for its primary purpose indemnification against the effects of accidents resulting in bodily injury or death. It is said by Barker, J., in Employers' Assurance Corporation vs. Merrill, 155 Mass. 406, 29 N. E., 530: 'In one sense, there can be no doubt that an employers' liability policy is

accident insurance. Such policies cover accidents to others than the assured, but the assured must stand in such relation to the person accidentally injured or killed as to be legally liable for the result of the accident, and it is only an accident causing bodily injury or death which creates a right to the insurance.' But it is argued by relator that this character of insurance is not within the provisions of Section 3596, and could not have been within the contemplation of the Legislature at the time Section 3596 was enacted, for the reason, as claimed, that such insurance was then unknown in this State. This statement is challenged by counsel for defendant, who assert that employers' liability insurance was not only known, but was extensively written, in Ohio, for several years prior to the enactement of this statute. Whatever the fact may be as to this, if the language employed in Section 3596 is sufficiently comprehensive in character to include such insurance, then, under the established rules of construction, it must be held to authorize and permit it. In Endlich on the Interpretation of Statutes, Section 112, the rule is stated thus: 'Except in some few cases where a statute has fallen under the principle of excessively strict construction, the language of a statute is generally extended to new things, which were not known and could not have been contemplated by the Legislature when it was passed. This occurs when the act deals with a genus, and the thing which afterwards comes into existence is a species of it.' And this rule of statutory extension has been recognized and followed by this court in numerous cases. In Corwin's Lessee vs. Benham, 2 Ohio St., 43, Ranney, J., says: 'I am aware that the usual import of words is sometimes to be restricted, when it would otherwise obviously extend beyond the subject-matter and spirit of the whole enactment. But this cannot be done because the Legislature did not foresee or contemplate every case upon which it might operate. The wisest legislators would fall far shart of such foresight. If within the language, it must appear clearly to the court that the case would have been excluded from its operation if foreseen.' And in Stetson vs. Bank, 2 Ohio St., 175, speaking of this rule, it is said: 'Falling within the positive provisions of the law, it is not enough to exclude this case from its operation to say it was not contemplated when the law was enacted. We must be able to see some reason to suppose it would have been excluded in positive terms if it had occurred to the minds of the assembly at the time.' To the same effect are Goshorn vs. Purcell, 11 Ohio St., 649; Morris vs. Williams, 39 Ohio St., 558; and Railway Co. vs. Telegraph Ass'n., 48 Ohio St., 423; 27 N. E., 890, 12 L. R. A., 534, 29 Am. St. Rep., 574, 69 N. E., 610.

These authorities, we think, are conclusive of the question that liability insurance, whether general or special, is accident insurance and fully embraced within the general definition of accident insurance contained within our statutes; which definition, as we have seen, is a part of the identical Act which requires a company seeking to be admitted into this State, for the purpose of doing an accident insurance business, to have all of its capital stock paid up.

The suggestion has been made that the business sought to be done by the applying company is permitted by Chapter 117 of the Acts of the Thirty-second Legislature, relating to the incorporation of domestic casualty insurance companies. This Act is Chapter 11 of Austin's Digest of Insurance Laws of Texas. This Act of the Legislature, however, contains no provisions for the admission into this State of foreign casualty companies; consequently, such companies, if doing a life, health or accident insurance business, would be admitted under the General Statutes we have heretofore been discussing as applicable to life, health and accident companies. However, companies chartered under our casualty insurance Act are treated

as "accident or casualty insurance companies." Acts Thirty-second Legislature, Chapter 117, Section 2; Section 228, Austin's Digest of Insurance Laws.

This Act of the Legislature applies only to corporations created under it; but it is cumulative of the other insurance laws of this State and all other laws concerning the same subject and where not in conflict with the special provisions this Act would apply to and govern companies chartered under it. See Secs. 22 and 26 of Chapt. 117 of Acts Thirty-second Legislature, Secs. 248 and 252 Austin's Dig. of Ins. Laws.

However, even companies incorporated under the Casualty Act must have all of their capital stock fully paid up. You will note that Section 3 of the Act, which is Section 229 of Austin's Digest, in part, provides:

"When such articles of incorporation are filed with the Commissioner of Insurance and Banking, together with an affidavit by two or more of its incorporators, *that all of the stock has been subscribed in good faith and fully paid for.*"

the Commissioner, etc., shall issue the charter.

Section 5 of the Act (which is Section 231 of Austin's Digest) also declares:

"*All of which said capital stock shall be paid up* or invested in bonds of the United States. * * * Upon such company furnishing evidence satisfactory to the Commissioner of Insurance and Banking that the capital stock as herein prescribed has been all subscribed and paid up in cash," etc.

It is unnecessary to discuss further the question of the capitalization of companies incorporated under the Casualty Act. The plain language is, that the capital stock must all be subscribed and paid up.

The form of statement prescribed by Section 7 of the Act, being Section 233 of Austin's Digest of Insurance Laws, which provides for showing

"(b) The amount of capital stock. (c) The amount of capital stock paid in."

is probably due to a mere elision of the legislative mind, arising no doubt from an attempt to copy the statement requirements from some other act, and is not sufficient to overcome the plain provisions of other sections of the act which require the payment of the capital stock in full.

This discussion of the Casualty Act probably has no necessary relevancy to the inquiry before us. Still it supports the conclusion we have previously arrived at, that the capital stock of casualty companies seeking admission into this State must be fully paid up.

The General Corporation laws relative to the admission of foreign corporations and relative to the formation of corprations do not apply to insurance companies where there are special provisions which govern them. This, of course, is an elementary rule of construction; be-

sides, the Revised Statutes, Article 4723, makes the General Corporation laws applicable to insurance companies only

"Insofar as the same may not be inconsistent with the provisions of this title."

You are, therefore, respectfully advised that in the opinion of this Department the International Indemnity Company in order to receive a permit to do a liability business or accident business, as that term has been defined in this State and as herein interpreted by us as applying both to injuries to the insured and to those for whose injuries he may be liable, must have all of its capital stock fully paid up, and that in the present status of its affairs you should decline to license the company upon its application.

Respectfully submitted.

C. M. CURETON,
Assistant Attorney General.

OP. NO. 1770—BK. 49, P. 318.

SURETY COMPANIES—INSURANCE.

Revised Statutes, Articles 4930, 4932 and 4935.
Austin's Insurance Digest, Sections 260, 262 and 265.

1. Deposits made by a surety company, under Revised Statutes, Article 4930, are placed with the State Treasurer for the benefit of the holders of all of the obligations of the company, wherever they may be.

2. Revised Statutes, Article 4932, authorizes service of process on the Commissioner of Insurance as the statutory representative of foreign insurance companies, and the revocation of a company's power of attorney does not affect this statutory provision.

3. Article 4935 of the Revised Statutes is not sufficient to authorize the Treasurer to sell the securities on deposit with him and obtain money with which to pay the obligations of defaulting surety companies.

4. In such case, however, the holders of the obligations of the company can apply to a court of equity for a receiver, which court may proceed to carry into effect the original purposes of the trust.

5. Where a foreign insurance company, doing a surety business under the provisions of the Revised Statutes, Article 4930, has been taken charge of by the Commissioner of Insurance of the State of its domicile, the creditors of the company in Texas may have a receiver appointed for its effects in this State, or the Commissioner of Insurance of the State of its domicile may take out an ancillary receivership in the courts of this State.

June 7, 1917.

Hon. Chas. O. Austin, Commissioner of Insurance and Banking, Capitol.

DEAR SIR: I am herewith returning your file with reference to the affairs of the Casualty Company of America, and with reference thereto I beg to advise as follows:

The deposit made by this company with the State Treasurer was made by virtue of the provisions of Article 4930 of the Revised Statutes and the securities on deposit are held for the benefit of the holders of all of the obligations of the company, wherever they may be;

that is, the deposit is a general one and is to be paid out without preference to all of the creditors of the company in the event it becomes necessary to resort to this fund in the settlement of its obligations.

I enclose copy of opinion rendered by this office construing this article of the Statutes in the manner above suggested.

We note that the company's secretary has filed with you a revocation of the authority of attorneys, etc., to accept service. You will note that the Revised Statutes, Article 4930, which is Section 260 of your digest of the insurance laws, not only makes provision for the appointment of an attorney, but without this necessity it declares that by virtue of the statutes service of process may be upon the Commissioner of Insurance of this State. Of course, the company's revocation of powers of attorney could not affect this statutory provision exigencies of the present situation. The Revised Statutes, Article 4932 (Section 262, Austin's Digest of Insurance Laws), which it has not done.

With reference to how the securities in the hands of the Treasurer may be made available to the creditors of the company, we beg to advise you that the statutes of this State are insufficient to meet the exigencies of the present situation. Revised Statutes, Article 4935 (Austin's Digest, Section 265), is the only statute we have providing for the use of the fund deposited with the Treasurer. This article reads as follows:

"Art. 4935. Defaulting Company; Claims Paid, How.—Should any company of the character named or enumerated in this chapter fail or refuse to pay any loss by it incurred in this State within sixty days after its liability thereupon shall have been by suit finally determined, upon satisfactory proof, to the Treasurer of this State, of such liability and of its non-payment, said Treasurer shall, out of the deposits so made with him, as by this chapter provided, pay said loss, and, when he shall have done so, he shall, at once, certify to theCommissioner of Insurance and Banking the fact of such default on the part of said company; whereupon said Commissioner shall forthwith cancel and annul the certificate of authority of such company to do business in this State; provided, that such payment shall not operate to release the company from payment of any balance which it still may owe after such payment by the Treasurer of this State has been made."

You will note that the above statute provides that the Treasurer may pay judgments against a surety company under the conditions there named; but in the present instance the surety company is in course of liquidation, and such payment would be a preference not allowable, as we believe, under the statute under which the securities were deposited. Moreover, the funds in the hands of the State Treasurer do not consist of money but are United States Bonds, and the Treasurer has no authority to convert these bonds into cash for the purpose of making such payment.

We have, therefore, the situation before us of the Treasurer holding these securities in trust for the benefit of this company's obligations but without sufficient authority, under the law, to execute the trust.

In such case the holders of the obligations of the company are not without remedy, for a court of equity will take charge of the trust fund and proceed to carry into effect the original purposes of the trust.

We advise, therefore, that the creditors of the company, or the Commissioner of Insurance of New York as the statutory representative of the company's creditors, will have authority to institute action in the Texas courts, have a receiver appointed, and upon a proper order have the securities now with the State Treasurer delivered to the receiver for the use and benefit of the holders of the obligations of the company and with the purpose of carrying out the trust imposed upon these securities and the company by the statutes of the State.

As to whether or not the creditors should institute a receivership is a matter within their discretion. We are of the opinion that you should at least inform the creditors of their rights in the matter so that they may, if they so desire, take such steps as they may deem necessary for the protection of their interests. It may be that when the Superintendent of Insurance of New York knows the situation he will have authority to institute an ancillary receivership in the courts of this State. If so, we are inclined to the opinion that this would be the appropriate course for the reason that when a receiver is appointed he would be compelled to act in conjunction with the liquidating officer in New York.

Very truly yours,
C. M. CURETON,
Assistant Attorney General.

OP. NO. 1792—BK. 49, P. 435.

INSURANCE—MUTUAL INSURANCE COMPANIES, ASSESSMENTS BY.

Acts Thirty-third Legislature, Chapter 29.

1. Under Section 7 of this chapter, it is not necessary to levy the assessment for an entire annual premium, but only for so much thereof as may be necessary.

2. The fact that one assessment has been made during the year will not preclude subsequent assessments so long as the total amount does not exceed the limitation provided by the by-laws of the company.

July 20, 1917.

Hon. Chas. O. Austin, Commissioner of Insurance, Capitol.

DEAR SIR: In your recent communication you request the opinion of the Attorney General as to whether or not the assessment provided for in Section 7, Chapter 29, General Laws of the Regular Session of the Thirty-third Legislature, must be made by requiring the payment of an entire additional premium, or whether so much may be called for only as is necessary to pay the members' proportional share of losses and expenses, should the company's funds become impaired. Your letter reads in part as follows:

"We have a company organized under the provisions of this act and now doing business in the State with an annual premium income of approximately $100,000, but which shows an impairment of reserve of about $40,000. The only available means by which this impairment may be restored is by an assessment, and the writer has suggested that an assessment be called upon the members of the company for an amount sufficient to restore the company to a condition of unquestioned solvency, plus a reasonable margin to take care of assessments that might not be paid, but the question has been raised as to whether or not such an assessment could be legally made by the directors of the company, it being contended that the company will be forced to make an assessment equal to the full amount of one annual premium, and no more and no less, in view of the fact that the by-laws provide for an assessment equal to one annual premium. * * * I am, therefore, propounding to you the question as to whether or not in your opinion an assessment upon the members of a mutual insurance company to restore such company to solvency must be the full amount of the liability of the members provided for in the by-laws, irrespective of the fact that such assessment would produce about twice the amount of money necessary to be raised for the purpose. Of course, I understand that in no event would the liability of the members exceed that fixed by the by-laws."

Section 11 of this Act of the Legislature reads:

"Sec. 11. In determining the solvency of any mutual company organized for any purpose mentioned in this act, and in determining the profit or saving to be distributed among members, 40 per cent of the actual cash premiums paid on policies in force for one year and a pro rata of all premiums received on risks that have more than one year to run shall be deemed to be a sufficient reserve under the said policies and no dividends to members shall be paid out of this reserve."

I assume from the facts stated in your letter that the reserve fund provided for in the section just quoted has been used in the payment of losses incurred, and that what you now desire to do is to levy such an assessment as may be necessary under Section 7 for the payment of such losses and making good the impaired reserve fund.

The only question presented by your inquiry is as to the amount of the assessment which should be made, that is, should the assessment be for the amount of an additional annual premium, or should it be for an amount sufficient merely to pay incurred losses and a reasonable allowance for expenses and for failures to make collections. In reply to this inquiry, we beg to advise you that the assessment may, and properly should be, sufficient in amount to enable the company to pay the just claims against it, and may include a reasonable allowance for expenses and for failures to make collections. 21 Am. & Eng. Enc. of Law, 262. If the assessment should exceed an amount sufficient for the purposes just named, it would be invalid, notwithstanding the fact it would include only the one additional annual premium provided for in the by-laws. 21 Am. & Eng. Enc. of Law, 262. In other words, while a full annual premium may be collected by assessment, if necessary, still you have no authority to collect such a full annual premium except when it is necessary; in the present case a full premium not being necessary, the company has authority to collect only such part of such additional annual premium as may be necessary for the lawful purposes of the company. This conclusion is supported by the authorities cited, and in addition arises out of the

fundamental purpose of mutual insurance, that is, to make the insurance substantially at cost and the collection of no larger amount of funds than may be necessary to pay the losses and expenses of the company.

The fact that one assessment has been made during the year will not preclude subsequent assessments so long as the gross amount does not exceed the limitations provided for in the by-laws of the company.

Yours truly,

C. M. CURETON,
First Assistant Attorney General.

OP. NO. 1858—BK. 50, P. 306.

SURETY COMPANIES—INSURANCE.

Revised Statutes, Articles 4932, 4875, 4955.
Acts 1905, Chapter 80.
Acts 1875, Chapter 31.
Acts 1909, Chapter 108.

1. Revised Statutes, Article 4875, limiting the amount of insurance which an insurance company can write in any one risk, and requiring surplus lines to be insured in a company authorized to transact business in Texas, has no application to surety companies.

2. Revised Statutes, Article 4955, which purports to make all laws applicable to fire insurance companies applicable to all other insurance companies, has been held by the courts of this State not applicable to surety companies.

January 7, 1918.

Honorable Chas. O. Austin, Commissioner, Insurance and Banking Department, Capitol.

DEAR SIR: The question presented by you for consideration of the Attorney General is contained in your letter reading, substantially, as follows:

"The National Surety Company of New York is duly licensed to transact business in this State. In the course of its business it has assumed a fidelity risk for $15,000 upon the paying teller of one of our State banks. It appears that this is a larger risk than the company cares to carry upon its books and has, therefore, endeavored to reinsure a part of it in other surety or fidelity companies licensed to do business in the State of Texas, but that it has only succeeded in reinsuring $2500 of the risk with such companies, and now applies to this department to ascertain whether or not it would be permitted under our insurance laws to reinsure part of this risk in companies not admitted to do business in Texas, such reinsurance to be effected through the home office of the National Surety Company in the city of New York.

"We find no statute specifically applying to reinsurance by surety or fidelity companies, and beg to inquire whether or not, in your opinion, the National Surety Company may reinsure any part of its risks in companies not licensed by this State."

We have examined carefully the statutes of the State, and find none which, under the decisions of the courts of this State, require fidelity and surety companies to reinsure the risks in licensed companies.

It is true that when a surety company surrenders its permit to transact business in this State and undertakes to withdraw from the State, that it may, at its option, reinsure its risks in some surety company authorized to do business in this State (Revised Statutes, Article 4932), but this provision applies only when the purpose of the company is to cease to do business in the State and withdraw from the State and obtain a return of the deposit made by it, in order to qualify it to transact business.

This statute does not apply to the reinsurance of surplus lines referred to in your letter. Revised Statutes, Article 4875, reads as follows:

"Art. 4875 (3075). Reinsurance.—No fire, fire and marine, marine or inland insurance company doing business in this State shall expose itself to any one risk, except when insuring cotton in bales and grain, to an amount exceeding ten per cent of its paid up capital stock, unless the excess shall be insured by such company in some other solvent insurance company legally authorized to do business in this State.

"2. Every fire, fire and marine, marine or inland insurance company doing business in this State, may reinsure the whole or any part of any policy obligation in any other insurance company legally authorized to do business in this State. The Commissioner of Insurance and Banking shall require every year from every insurance company doing business in this State a certificate sworn to before an officer legally qualified to administer oaths in the State of Texas, to the effect that no part of the business written by such company in this State has been reinsured in whole or in part by any company, corporation, association or society not authorized to do business in this State. Every insurance company doing business shall also furnish the Commissioner of Insurance and Banking with a list of all reinsurances during the year in authorized companies, showing the name, amount and premiums effected in each company.

"3. Any insurance company authorized to transact the business of fire, fire and marine, marine and inland insurance in this State, failing to comply with the provisions of this article, shall forfeit its authority to do such business for a period of one year; and it is hereby made the duty of the Commissioner of Insurance and Banking to investigate any complaint as to violation of said article; and, upon satisfactory proof that any company authorized to transact the business of fire, fire and marine, marine or inland insurance in this State has violated the provisions of this article, the said Commissioner shall revoke the certificate of authority of the offending company.

"4. The Commissioner of Insurance and Banking, upon the payment of license fee of twenty-five dollars shall issue to an agent who is regularly commissioned to represent one or more fire, fire and marine insurance companies authorized to do business in this State, a certificate of authority to place excess lines of insurance in companies not authorized to do business in this State; provided, that the party desiring such excess insurance shall first file with the Commissioner of Insurance and Banking an affidavit that he has exhausted all the insurance obtainable from companies duly authorized to do business in the State.

"5. Before receiving license provided for in Section 4 of this article, party applying for same shall file with the Commissioner of Insurance and Banking a bond in the sum of one thousand dollars, payable to the Governor of the State, for the faithful observance of the provisions of this article. Said bond to be approved by the Commissioner, and to be for the benefit of the State of Texas.

"6. Every agent so licensed shall report, under oath, to the Commissioner of Insurance and Banking, within thirty days from the first day of January and July of each year, the amount of gross premiums received by him for such excess insurance, and shall pay the said Commissioner a tax of five per cent thereon. The agent procuring a license as provided

in this article shall keep a separate record of all transactions herein provided open at all times to the inspection of the Commissioner, or his legally appointed representative. In default of the payment of any sums which may be due the State under this article, the said Commissioner may sue for the same in any court of record in this State. (Act Feb. 17, 1875, p. 34, sec. 8; Amended Acts 1905, p. 112.)"

Revised Statutes, Article 4955, reads as follows:

"Art. 4955. Shall Apply to All Companies.—All the provisions of the law of this State applicable to the life, fire, marine, inland, lightning or tornado insurance companies shall, so far as the same are applicable, govern and apply to all companies transacting any other kind of insurance business in this State, so far as they are not in conflict with provisions of law made specially applicable thereto. (Id., sec. 55.)"

Of course, it is quite true that fidelity, guaranty and surety companies are everywhere recognized as insurance companies. Frost on Guaranty Insurance, Sections 1 and 2.

It would appear, therefore, that if Revised Statutes, Article 4955, applies to surety companies, then Article 4875, above quoted, would be made to apply, and a surety company could not write a policy in excess of ten per cent of its paid up capital, unless the excess line were insured in some other solvent insurance company authorized to do business in this State. However, the courts of this State have held that Revised Statutes, Article 4955, is not applicable to surety companies.

Revised Statutes, Article 4875, was enacted in 1905, Chapter 80 the Session Laws of that year. On its face, it purports to apply only to fire, fire and marine, and marine and inland insurance companies transacting business in the State. This act of the Legislature is within itself an amendment of various laws relating to the same subject, or a part of the same subject, which have their origin in Section 8 of Chapter 31, Acts of 1875, which act was "an Act regulating fire and marine insurance companies, and providing fines and penalties for its enforcement." 8 Gammell's Laws, page 403. This original act applied only to fire and marine companies, and had no application to any other insurance company. The succeeding legislation on the same question was of the same character and remained applicable only to fire and marine companies. This was the status of the matter until 1909. In 1909, the Legislature passed what became Chapter 108 of the Session Laws of that year. In Section 55 of this chapter provision was made for making of the laws applicable to life, fire, marine, etc. insurance companies likewise applicable, and to govern all other companies transacting any other kind of insurance in the State, and this Section 55 became Article 4955, above quoted. If this Section 55, Article 4955 were to be given the meaning once attributed to it, it would make the limitation of Article 4875 apply, but the courts have held that Article 4955 (Section 55, Chapter 108), not applicable to surety companies. National Surety Company vs. Murphey-Walker Company, 174 S. S., page 997. The court held that the purpose to make this section applicable to all other insurance companies was not germane to subjects which were expressed in the caption. The court likewise held that the fact that Section 55 was afterwards incorpor-

ated in the Code of 1911 as Article 4955, was not an enactment or reenactment of the section so as to relieve it of its invalidity, and that this Section 55, which is now Revised Statutes, Article 4955, was unconstitutional and void in so far as it sought to make the other insurance laws of the State applicable to surety companies.

You are advised, therefore, that there is no statute in this State limiting the amount of the policy which a surety company may write, nor requiring it to reinsure only in insurance companies having a permit to transact business in this State.

Yours truly,

C. M. CURETON,
First Assistant Attorney General.

OP. NO. 1884—BK. 50, P. 379.

INSURANCE—FRATERNAL BENEFIT SOCIETIES.

Acts Thirty-third Legislature, Chapter 113.
United States Constitution, Fourteenth Amendment.

1. A foreign fraternal benefit society, seeking admission into the State, may be admitted, although its funds in hand do not equal its policy valuations and although the rate of premium on old policies is not in compliance with the statutory rate.

2. But all business written by the company after its admission must be written at a premium equal to or in excess of that based on the National Fraternal Congress table of mortality.

3. As to its old business, the terms of Section 32a, Chapter 113, of the Acts of the Thirty-third Legislature, must be complied with.

4. A joint life fund provided for by a fraternal benefit society policy, by which one-half of the amount specified in the policy upon the death of the policy holder becomes "payable to the first and oldest outstanding certificate in force in the same division and class of members of corresponding age, etc," is unauthorized by the laws of this State, is what is called a wagering contract, and is contrary to the public policy of this State, and a company writing such a contract can not be admitted into this State.

January 25, 1918.

Hon. Chas. O. Austin, Commissioner Insurance and Banking, Capitol.

DEAR SIR: Your letter, requesting the advice of the Attorney General, reads as follows:

"A fraternal benefit society organized under the laws of Alabama has filed an application to this department for license to do business in the State of Texas. It shows a condition of solvency, viz., proportion of assets to liabilities, of 71 plus per cent. In other words, its assets are approximately 29 per cent deficient with respect to meeting its liabilities when calculated upon the basis of the National Fraternal Experience Table.

"I desire to obtain your opinion as to whether or not under provisions of Chapter 113, Acts of the Thirty-third Legislature of Texas, a foreign fraternal benefit association may be admitted to do business in this State when it fails to show 100 per cent solvency.

"In the event of the death of a member the beneficiary named in the certificate will be entitled to receive $500 for each certificate held. In addition thereto 'the first and oldest outstanding certificate in force in the same division and class of members corresponding age, with whom joined at the same time of becoming member, as shown by the records of the home office, shall be entitled to a joint life fund distribution of $500 on

each certificate.' In other words, the company issues certificates of the face value of $1,000, say, and 'all certificates pay $500 each either to the beneficiary or as a joint life distribution, but they are called $1,000 certificates because $1,000 is distributed between the beneficiary and the other member joined with the deceased.'

"In other words, in addition to paying $500 or more to the beneficiary as a death fund, the association also pays an equal amount to some living member who holds the oldest outstanding certificate issued in the same division and class of members, etc.

"I desire to obtain your opinion as to whether or not a company conducting this class of business may be admitted to do business in this State under the provisions of the Act above named.

"Is the joint life fund distribution above referred to a death benefit within the meaning of the law, or if not, what is it? If it is a death benefit, is it prohibited by the provisions of Section 6 of the Act above referred to?

"Inasmuch as we have several applications now pending by foreign fraternal benefit associations for licenses and all of which show a condition of insolvency according to the requirements of the National Fraternal Congress table, we are anxious to be advised as to our duty with respect to the issuing of licenses at as early a moment as meets with your convenience."

In the first place, a foreign fraternal benefit society is required to bring itself within the laws governing domestic societies in order to grant it a permit to transact business in this State. This is expressly provided by Section 16, Chapter 113, Acts of the Thirty-third Legislature, which, in part, declares:

"Any fraternal society desiring admission to this State shall have the qualifications required of domestic societies organized under this Act," etc.

Section 28 of the same chapter and act of the Legislature makes a similar provision. It provides that when the Commissioner of Insurance and Banking is satisfied that any fraternal society has failed to comply with any provision of the act, he shall take certain actions against the society to bring it within the law. These two sections referred to are Sections 495 and 509 of your Digest of the Insurance Laws for 1917.

Having concluded that fraternal societies for the purposes of this inquiry are required to have the same qualifications as domestic ones, we will next inquire into the question of solvency.

Section 23, Chapter 113, Acts of the Thirty-third Legislature, which is Section 502 of your insurance laws, in part, reads:

"The valuation herein provided for shall not be considered or regarded as a test of the financial solvency of the society, but each society shall be held to be legally solvent so long as the funds in its possession are equal to or in excess of its matured liabilities."

From this it appears that a fraternal benefit society is to be regarded as solvent so long as it has funds with which to meet its matured liabilities. This is consistent with the general rule as to the solvency of corporations which are said to apply to fraternal benefit societies. See 2nd Bacon on *Life and Accident Insurance,* Sections 661, 654. It is the rule which applies to corporations generally under the Texas statute.

State vs. Trinity Life and Annuity Co., 127 S. W., 1174.
San Antonio Hdw. Co. vs. Sanger, 151 S. W., 1104.

So it appears that a fraternal benefit society under the laws of Texas is not insolvent so long as it has sufficient funds with which to pay its matured liabilities. In determining its matured liabilities, there must be included deferred payments or installments of claims, which are payable upon contingencies. Digest of Insurance Laws, Section 488; Section 9, Chapter 113, Acts Thirty-third Legislature. But there should not be included, in determining the solvency of the corporation, the policy valuations provided for in Section 502 of your insurance digest, which is Section 23, Chapter 113, Acts of the Thirty-third Legislature. This for the reason that this section expressly declares:

"The valuation herein provided for shall not be considered or regarded as a test of the financial solvency of the society."

It is our opinion then that even though the reports of the company or as examination may disclose that its assets are equal only to 71 per cent of the valuation of the policy as determined under the law, still if the company has sufficient assets to meet its matured obligations and where it provides for and collects funds through stated periodical contributions sufficient to provide for meeting the mortuary obligations contract, when valued as provided by the laws of this State, and if it complies with other laws of the State, it is entitled to admission.

In the case of State vs. Bankers Union of the World, the Supreme Court of Nebraska had before it a case in which the claim was made that a fraternal benefit society was insolvent. Concerning this matter, the court said:

"The plan of its organization, if carried out, will apparently furnish ample funds to meet all its just liabilities, and the managing officers have been active and vigilant in the prosecution of its business. It has apparently during the last year paid from the assessments collected for death claims occurring during the year more than the total amount of losses for the same period. The assets of such societies do not consist of tangible property and cash in hand alone. Its members pay assessments when called upon to meet the loss occasioned by the death of one of their number. If its plan of operation is feasible, its ability to meet its liabilities depends upon the good faith and solvency of its members. It cannot be said that it will not be able to meet its death losses as they occur." (99 N. W., p. 534.)

I assume that the present rates of assessments of this company comply with Section 488 of your insurance digest by levying a sufficient amount to provide for meeting the mortality obligations of the company when valued on the basis of the National Fraternal Congress Table of Mortality. I mean by this that the present assessments are based upon this table. I do not mean that the assessments need be so high as to bring in at one time a sufficient amount of assets to enable the company to have on hand the amount equal to the valuation of its policies to be made under Section 502. The law does not appear to contemplate that the society need have on hand one hun-

dred per cent of the valuation of its policies, but only that whatever valuation is shown on December 31, 1917, it must maintain. Austin's Insurance Digest, Section 503. It would follow then that a fraternal benefit society which has sufficient assets on hand to pay its matured claims and which is collecting premiums at the rate demanded by an adherence to the statutory table of mortality and which maintains the proportion of assets to its policy valuations which it had on December 31, 1917, is not insolvent under the laws of this State, and as to the question of solvency is entitled to admission.

Since writing the foregoing on the question of solvency the Insurance Department has called our attention to the qualifications required of domestic companies when chartered and suggests that the provisions of Section 16, which require a foreign company to have the same qualifications as a domestic one, chartered under the act, require a construction at variance with the conclusions above reached. We will ascertain what qualifications a domestic corporation must have in order to obtain a charter. These requirements are found in Section 12 of the act under construction, and being Section 491 of your digest of the laws. The requirements prescribed in this section, in so far as we need notice them, are first, a domestic company must have insurance on or contracts for insurance on at least five hundred lives, aggregating $500,000. The company must have not less than ten subordinate lodges. It must have not less than $2500 in cash, and it must have a rate of stated periodical contributions which will be sufficient to provide for meeting the mortuary obligations contracted when valued for death benefits upon the basis of the National Fraternal Congress Table of Mortality, or some higher standard The rates required by this section of the law must, of course, relate to contracts to be written in the future, because the company, in the course of its organization, would have only future contracts to write. So that as to future contracts a domestic company is required to write its business at the standard statutory rate.

If we apply the letter of this section of the statute to foreign companies, then we must conclude that a foreign company would be required to write all contracts written after its admission into this State at least at the statutory rate, but the language of the section referred to would not be sufficient to make the same requirement as to business and contracts previously written.

It will be noted that Section 16 of the act, which is section 495 of your digest of the laws, provides that when a foreign company is admitted, it must show that benefits are provided for by periodical payments, but in this particular section relating to the admission of foreign companies, no requirement is made that these periodical payments, as to either past or future business, must be made according to the fixed statutory rate.

If we say that because a foreign company's funds in hand do not equal its policy valuation and its rate on policies heretofore issued is insufficient and that for these reasons it can not be admitted, while at the same time we permit foreign companies already in the State when the law was passed to remain here, although their funds do not equal their policy valuations, and as to old business they do not

write or collect premiums equal to the fixed statutory rate, then we are confronted with a very serious constitutional question as to whether or not the law discriminates in favor of foreign corporations already admitted, for we can not conclude that the Legislature intended to create or permit a discrimination in violation of the federal constitution.

It is within the power of the State government to impose on a foreign life insurance company as a condition for doing business within the State any condition so long as the company is not deprived of any rights secured to it under the federal constitution. But it is elementary that among those rights secured to it is that which protects it from greater burdens than are laid upon any other corporation of the same class and condition. Taylor on "Due Process of Law," Section 457.

The equal protection of the law, as the Supreme Court of the United States has frequently decided, means subjection to equal laws applying alike to all in the same condition, or as expressed by the court in the case of Barbier vs. Connerly, 113 U. S., 31, equal protection of the laws means "that there shall be no arbitrary deprivation of life or liberty, or arbitrary spoilation of property, but that equal protection and security shall be given to all under like circumstances in the enjoyment of their personal and civil rights, but no greater burdens should be laid upon anyone than are laid upon others in the same calling and condition." In other words, what the equal protection of the law requires is equality of burdens upon those in like situation or condition. Taylor on "Due Process of Law," Section 457.

I have not found a case precisely on all-fours to the present matter, yet there are many similar in principle and the holdings of the courts are, it appears to us, applicable to the facts here. For instance it has been held that in assessing taxes or prescribing franchise taxes a difference in the rate or method of assessment, where the corporations are of the same class, denies the due process of law and equal protection of the laws protected by the Fourteenth Amendment to the Constitution of the United States. In this case to which we refer, the court held that the provisions of the Fourteenth Amendment are not to be confined to the acts of the State through its Legislature, or through its executive or judicial departments, but that these provisions relate to and cover all the instrumentalities by which the State acts. Raymond vs. Chicago Edison Co., 207 U. S., 20.

In the case of Barbier vs. Connerly, 113 U. S. 31, the Supreme Court of the United States declared:

"No impediment should be interposed to the pursuits of any one, except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition."

In Missouri vs. Lewis, 101 U. S., 31, the court declared:

"No person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and in like circumstances."

There are many cases exemplifying and amplifying the doctrine just stated, and we will cite two or three leading cases:

Connerly vs. Union Sewer Pipe Co., 184 U. S., 540.
G. C. & S. F. Ry. Co. vs. Ellis, 165 U. S., 152.
So. Ry. Co. vs. Green, 216 U. S., 417.

It is unnecessary to conclude or say that the Texas statute is unconstitutional, but it is necessary and proper that its doubtful language should be so construed as to make it in harmony with the federal constitution. The construction we give it makes it so, and any other construction makes it an extremely doubtful statute.

Our view of the matter is that a foreign fraternal company coming into the State may be admitted, although its funds in hand do not equal its policy valuations and although the rate of premium on old policies is not in compliance with the statutory rate to which we have heretofore referred; but on all business written by the company after its admission to the State it must collect a premium based on the National Fraternal Congress Table of Mortality, or some higher standard. As to its old business in existence when it enters the State, the terms and provisions of Section 32a, which is Section 503 of your digest, must be complied with.

The next question presented by you is one of more serious concern in the present inquiry. The question is whether the joint life fund provided for by this company, by which one-half of the amount of benefits specified in each policy upon the death of the member becomes payable to "the first and oldest outstanding certificate in force in the same division and class of members of corresponding age, etc." The question is whether or not this method of distributing the funds of the company is a legal one authorized and permitted by the laws of this State. We think not. Our opinion is that this character of policy provision is unauthorized by the statutes of this State, and the company writing insurance policies containing such provisions can not be granted a permit to transact business.

It is fundamental that the powers of a fraternal benefit society depend primarily upon the statutes under which it is organized. 29 Cyc., page 47. It is equally elementary that where classes of persons to whom benefits may be paid are described by statute neither the member nor the society, nor the two combined, can divert the fund from the classes prescribed. The society has no power to issue a certificate payable to a person not belonging to one of these classes. 29 Cyc., page 108, and cases cited in Notes 17, 18 and 19.

In the case of Gray vs. Sovereign Camp Woodmen of the World, 106 S. W., 178, the Court of Civil Appeals of this State in an opinion, upon which the Supreme Court denied a writ of error, held that a beneficiary not within the classes provided by the statutes of the State could not collect on a certificate issued in his favor by fraternal benefit societies.

The next inquiry then is, under our laws what benefits may be paid? The question is answered by the statutes. Section 5, Chapter 113, Acts of the Thirty-third Legislature defines the benefits

which may be paid by a society of this character. This section is Section 478 of the insurance digest, and reads as follows:

"Every society transacting business under this act shall provide for the payment of death benefits, and may provide for the payment of benefits in case of temporary or permanent physical disability, either as the result of disease, accident or old age; provided, the period of life at which the payment of benefits for disability on account of old age shall commence shall not be under seventy years and may provide for monuments and tombstones to the memory of its deceased members, and for the payment of funeral benefits. Such society shall have the power to give a member, when permanently disabled or on attaining the age of seventy, all or such portion of the face value of his certificate as the laws of the society may provide; provided, that nothing in this act contained shall be so construed as to prevent the issuing of benefit certificates for a term of years, less than the whole of life which are payable upon the death or disability of the member occurring within the term for which the benefit certificates may be issued. Such society shall, upon written application of the member, have the power to accept a part of the periodical contributions in cash, and charge the remainder, not exceeding one-half of the periodical contribution, against the certificate, with interest payable or compounded annually at a rate not lower than four per cent per annum; provided, that this privilege shall not be granted except to societies which have readjusted or may hereafter readjust their rates of contribution, and to contracts affected by such readjustment.

"Any society which shall show by the annual valuation hereinafter provided for, that it is accumulating and maintaining the reserve not lower than the usual reserve computed by the American Experience Table and five per cent interest may grant to its members extended and paidup protection, or such withdrawal equities as its constitution and laws may provide; provided, that such grants shall in no case exceed in value the portion of the reserve to the credit of such members to whom they are made."

A reading of the foregoing section of the law discloses that a fraternal benefit society may pay death benefits, physical disability benefits, accident or old age benefits, funeral benefits and for the payment of monuments and tombstones. Certain other benefits are provided for, outside of these, but we need not here discuss them.

The only one of the benefits enumerated within which this joint life fund distribution plan could come is that of death benefits. This plan contemplates two beneficiaries. In the first place, there is the beneficiary named in the certificate of the deceased, and in the second place, there is the beneficiary named by the by-laws of the company, which is the first and oldest outstanding certificate holder, etc. The benefit, however, is payable upon the event of death and is therefore to be considered a death benefit, if it comes at all within the benefits which may be paid under the statutes.

Treating it then as a death benefit, we next inquire who may be beneficiaries under the Texas statutes. This question is answered by Section 6 of the act we are now considering, which is Section 479 of your digest of insurance laws, and reads:

"The payment of death benefits shall be confined to wife, husband, relative by blood to the fourth degree, father-in-law, mother-in-law, son-in-law, daughter-in-law, stepfather, stepmother, stepchildren, children by legal adoption, or to a person or persons dependent upon the member; provided, that if after the issuance of the original certificate the member shall become dependent upon an incorporated charitable institution, he shall have the privilege, with the consent of the society, to make such

institution his beneficiary. Within the above restrictions each member shall have the right to designate his beneficiary, and from time to time have the same changed in accordance with the laws, rules and regulations of the society, and no beneficiary shall have or obtain any vested interest in the said benefit until the same has become due and payable upon the death of the said member; provided, that any society may, by its laws, limit the scope of beneficiaries within the above classes."

It will be observed by reading the foregoing quotation that the payment of death benefits is confined to the relatives and actual dependents of the members, and that by no form of construction could we say that "the first and oldest outstanding certificate in force, etc.," is within the statutory beneficiaries contained in this act. The proceeds of the certificate therefore could not be paid to such "oldest member," described by you in your letter.

The insistence is made that Section 9 of the Act now before us, which is Section 488 of your digest of the laws, permits the manner of distribution inquired about in your letter. We can not accede to this construction. This Act has undertaken, in Sections 5 and 6, to define the benefits which may be paid and to set forth the classes of beneficiaries to whom these benefits can be paid, and it is not to be presumed that the Legislature, in another section of the same Act, would set forth a provision which destroys the integrity and meaning of those just referred to and quoted in this opinion. It is the duty of the courts to construe the various sections of an act so that they will harmonize throughout, and the meaning of one is not to be so construed as to destroy the meaning of another. The intention of the Legislature, as has been said many times, is to be deduced from the whole and every part of a statute when considered and compared together.

Cannon vs. Vaughan, 12 Texas, 402.
Michie's Texas Digest, page 695.

It has been said many times that statutes *in pari materia* should be so construed as to preserve all their provisions, though apparently in conflict, rather than that one should be held destructive of another. Duncan vs. Taylor, 63 Texas 645.

This same doctrine applies with equal force to the several provisions of the same Act. Section 488, referred to above, reads:

"Any society may create, maintain, invest, disburse and apply an emergency surplus or other similar fund in accordance with its laws. Unless otherwise provided in the contract, such funds shall be held, invested and disbursed for the use and benefit of the society, and no member or beneficiary shall have or acquire individual rights therein or become entitled to any apportionment or the surrender of any part thereof, except as provided in Section 5 of this act. The funds from which benefits shall be paid, and the funds from which the expenses of the society shall be defrayed shall be derived from periodical or other payments by the members of the society and accretions of said funds; provided, that no society, domestic or foreign, shall hereafter be incorporated or admitted to transact business in this State which does not provide for stated periodical contributions, sufficient to provide for meeting the mortuary obligations contracted, when valued upon the basis of the National Fraternal Congress Table of Mortality as adopted by the National Fraternal Congress, August 23, 1899, or any higher standard, with interest assumption not more than

four per cent per annum, nor write or accept members for temporary or permanent disability benefits except upon tables based upon reliable experience, with an interest assumption not higher than four per cent per annum.

"Deferred payments or installments of claims shall be considered as fixed liabilities on the happenings of the contingency upon which such payments or installments are thereafter to be paid. Such liability shall be the present value of such future payments or installments upon the rate of interest and mortality assumed by the society for valuation, and every society shall maintain a fund sufficient to meet such liability regardless of proposed future collections to meet any such liabilities."

That portion of this section upon which reliance is placed is that part of the same which says that "unless otherwise provided in the contract, such funds shall be held, invested and disbursed for the use and benefit of the society, and no member or beneficiary shall have or acquire individual rights therein or become entitled to any apportionment or the surrender of any part thereof, except as provided in Section 5 of this Act." This does not mean that the company has plenary authority by so providing in its contract for a distribution of the funds of the society in any other way than that set forth in Section 5 of this Act. It merely means that unless these funds are to be paid out in the manner provided in Section 5 of the Act, which is Section 478 of your digest, that then the funds are to be invested and disbursed for the use of the society in the general operation of its business. It is not a grant of authority to the society itself to distribute the funds as it sees fit, but it is a limitation on the company's authority by declaring that its membership can not be entitled to these funds, except they be paid as benefits provided for in Section 5 of the Act. That this is so is shown by the cogent provisions of Section 488, which immediately follows the clause just quoted. These provisions refer to only two methods of expending the benefits of the society; that is, in the payment of benefits and expenses. The exact language is:

"The funds from which benefits shall be paid and the funds from which the expenses of the society shall be defrayed, etc."

Not only is the payment of a portion of the policy contract to a surviving member, under the plan before us, unauthorized and in violation of the statutes of this Sate, but it is, besides, a wagering policy and void as being contrary to public policy.

In the case of Golden Rule vs. The People, 118 Ill. 492, the Golden Rule, in its constitution, provides that:

"The Supreme Council shall establish, by voluntary contributions from the members of the order, a relief fund, from which, upon the death of a member, an amount not exceeding $1500 shall be paid to such person or persons as shall have been designated by such deceased member, and a sum not to exceed $500 shall be distributed in accordance with the custom and laws of the order; and the subordinate councils shall have authority to establish a charity fund, by voluntary contributions from the members of the order, to be devoted to the relief of worthy distressed members."

Its by-laws further declared:

"The relief fund shall consist of contributions received from its members, upon the death of a member. The amount so raised shall be distributed as follows: Seventy-five per cent—not to exceed $1500—to the widow, orphan or other dependent, as deceased member shall have directed in his or her application for an interest fund; and twenty-five per cent—not to exceed $500—equally between the two members holding valid and existing certificates, next in number, both above and below, the number of the certificate of such deceased member. If there is an excess in the amount so raised, it shall remain in the relief fund, and when said fund contains $2000, then it shall be used to pay the beneficiaries, and no contributions shall be asked. Out of the amount contributed for the relief fund, the Supreme Council may appropriate a sum—not to exceed ten per cent—to the expense fund of Supreme Council. The Supreme Council shall cause to be paid to the beneficiaries of deceased members, the contributions received, within sixty days after due notice of death."

It is seen from these provisions that this concern issued a policy very much like the one before us. When the member died, his relatives, who could be beneficiaries under our statute, were paid three-fourths the face of the policy and the remaining one-fourth was distributed equally between two members, the one holding a membership in number above and one holding a membership below that of deceased. The Supreme Court of the State of Illinois held that this entire policy was void, because it was a wagering policy or contract. The court in discussing it, in part, said:

"But here the declared object is the benefit of members, and the pecuniary benefits are enjoyed, not by the widows, etc., of deceased members, and by members who have received a permanent disability, but by the appointees of deceased members, the beneficiary named in the application, and by certain of the members generally, and not members who had received a permanent disability.

"It is urged that there are no assessments made on members to pay the benefits—that the relief fund is contsituted solely by the voluntary contributions of members. When a death occurs, of a member entitled to the benefits of the relief fund, the secretary is required to give notice of the fact to each member of the order of the Golden Rule, who is asked to make contribution to the relief fund; but no penalty whatever attaches for not contributing, it being entirely voluntary to do so or not. Although there be no compulsory means of raising this relief fund, and it consists solely of donations made as thus stated, there is certainly expectation that the fund will be raised, and when raised, there is an absolute obligation to distribute it to the persons named. This relief fund forms an important part of the society's scheme, and is doubtless a main inducing reason for becoming a member of it, rendering it highly improbable that it will not be provided in the mode pointed out. When the contributions are received, seventy-five per cent of the amount (not exceeding $1500) is required to be paid to the beneficiary named in the certificate of the member, and twenty-five per cent (not exceeding $500) is to be divided equally between the two members holding certificates numbered next above and below the number of the deceased member's certificate. Although the constitution of the society provides that this amount of seventy-five per cent shall be paid to such person or persons as shall have been designated by the deceased member, and the certificate states that it shall be paid over to the person named in such person's application, it is said the person named must, under the laws of the order, be a widow, orphan or dependent. The foundation for this statement appears to be the provision in the by-law that the money shall be distributed to the widow, orphan or other dependent, as the deceased shall have directed in his application. Even under this provision, a dependent may be designated; and a dependent is not necessarily of the class of persons designated in the above named Section 31 of the law under which the corporation was created, to wit:

widows, orphans, heirs and devisees. But, passing this feature of the payment, the requiring of twenty-five per cent of the amount to be paid to the two members who happen to hold certificates next in number to that of the deceased member, marks the transaction as unlawful life insurance business, as to be deemed such, under said Section 31 of the statute. These two members are not members who, as named by this section, have received a permanent disability, nor are they members who 'receive no money, as profit or otherwise, except for permanent disability,' They become entitled to the money simply by chance—from holding certificates which happen to bear certain designated numbers. The affair is in the nature of a wager policy."

The public policy of this State is announced by our courts and is necessarily exemplified by the statutes regulating fraternal benefit societies, in defining benefits and beneficiaries, is the same as that declared by the Illinois court.

In the case of Price vs. Knights of Honor, 68 Texas, 361, the Supreme Court of this State held that a party having no insurable interest in the life of another can not receive an assignment of a policy of insurance issued upon the life of another by the Knights of Honor, which was a fraternal beneficiary society. In discussing the question our court said:

"It is almost universally conceded that policies procured by persons having no interest in the life of the insured are void at common law as against public policy. The policy holder has nothing to lose for which he can claim indemnity; on the contrary, his interest is in the early death of the insured; when that occurs, he ceases to pay premiums, and receives the amount of the policy. This creates a temptation to destroy human life, and the common law forbids the contract. These are the grounds upon which such policies are held to be void. Are they applicable to a case where the policy is first taken out by the person whose life is insured, and then transferred by him to one who has no interest in his life?

"It is pretty generally held that if a person effects insurance upon his own life, and, in pursuance of a previous agreement, immediately and without consideration, transfers the policy to one who has no interest in his life, but who agrees to pay the premiums upon the policy, it will be void. (Snick vs. Ins. Co., 2 Dill. C. C., 160; Stephens vs. Warren, 101 Mass., 564; Mowry vs. Ins. Co., 9 R. I., 346.) And it has been held by the Supreme Court of the United States, that a transfer would not be enforced under such circumstances though the insured were indebted to the assignee in a small sum disproportionate to the amount of insurance on his life; but the policy would be deemed a security for the debt, and such advances as might afterwards be made on account of it. (Cammack vs. Lewis, 15 Wall., 643.) Is there such difference between the principle upon which these decisions rest, and those applicable to the sale of a policy already procured, to an assignee having no interest in the assured, as to make the latter lawful, whilst a policy procured without interest, and an assignment in pursuance of a pervious assignment are held invalid?

"The Supreme Court, United States, in the case of Wornock vs. Davis, 104 United States, 775, says that it can not see any such difference; and, proceeding upon this view, many of the State courts have held such assignments void, or treated the assigned policies as mere securities for the moneys actually advanced by the assignee. (Ins. Co. vs. Hazzard, 41 Ind., 116; Ins. Co. vs. Sefton, Id., 380; Ins. Co. vs. Sturges, 18 Kans., 93; Gilbert vs. Moose, 104 Pa. State, 74; Basye vs. Adams, 81 Ky., 368.) This, too, is the conclusion to which many eminent text writers have arrived. (May on Insurance, Sec. 398; Greenwood on Pub. Pol., 288.)

On the contrary, the courts of some States have held such assignments valid though the assignee could not have taken out in his own benefit an original policy upon the life of the assignee. (Clark vs. Allen, 11 R. I., 439; Marcus vs. Ins. Co., 68 N. Y., 625; Clarck vs. Durand, 12 Wis., 223; Ins. Co. vs. Allen, 138 Mass., 24.)

"We think those decisions which hold these assignments invalid are based upon the more satisfactory reasoning. When the policy is transferred it becomes the property of the assignee. He is subject to all the obligations imposed by it, and entitled to all its benefits. He becomes the holder of a policy upon the life of a person whose early death will bring him pecuniary advantage. The temptation to bring about this death presents itself as strongly to him as to a party who originally effects insurance for his own benefit upon the life of another. Public policy removes the temptation to take human life, and it can not matter how the temptation is brought about. If by reason of a contract between two persons, the one is tempted by pecuniary interest to destroy the other, the form of the contract is of no importance in testing its validity. The law looks to the substance of the matter, the relation which the parties will bear to each other after the contract is executed, and if its natural effect is to encourage crime it will be void, no matter in what shape it may be presented. Those courts holding a contrary view say that a policy of insurance is a chose in action, and the owner may dispose of it as he pleases. But when it is asserted that the owner of property may dispose of it at his pleasure, the assertion must be taken with the qualification that he does not violate any provision of law or contravene public policy."

This case announces the public policy of this State and its reasoning condemns the character of policy here under consideration.

We conclude therefore that the joint life fund distribution of $500 on each certificate by this company is not only invalid, in that it is not authorized nor permitted by our statutes, but that it is void because contrary to the public policy of the State—the chance and unknown beneficiary not having insurable interest in the life of the certificate holder, but on the contrary his whole interest being that the certificate holder shall die rather than live.

You are advised therefore that the company to which you refer may be admitted so far as the question of solvency is concerned, provided its rates are in accordance with those prescribed by the statutory mortality tables, provided it has sufficient assets to pay its matured liabilities, and provided its assets now have the same ratio to its policy valuations as was had on December 31, 1917. But you are further advised that the joint life fund distribution plan is not in accord with the laws of this State, and for that reason it can not be admitted.

I note, from the very able brief filed with us in this case by Mr. Landman, the Attorney for the Heralds of Liberty, that attention is directed to a conversation had between your Mr. Johnson and the writer at a previous time, in which it is stated that I remarked that this company was entitled to be admitted into the State. You will recall that the only question asked me for determination was the question of solvency, and that question I have now determined as I then determined it. I was asked no question as to the validity of the joint life fund distribution plan and I expressed no opinion as to that, for it was a question with which I was wholly unacquainted and had never considered, nor was I then called upon to consider it.

On April 15th, 1913, this Department wrote an opinion concerning the renewal license to the Heralds of Liberty, and I enclose you a copy of that opinion, as well as a copy of both that opinion and this one for Mr. Landman.

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

OP. NO. 1898—BK. 51, P. 87.

WORKMEN'S COMPENSATION—INSURANCE.

Acts, Regular Session, Thirty-fifth Legislature, Chapter 103.
Employers of labor operating under the Workmen's Compensation Act can not cover part of their employes, and leave part of them uncovered where such employes are engaged in the same general business or enterprise.

March 23, 1918.

Hon. Charles O. Austin, Commission of Insurance and Banking, Austin, Texas.

DEAR SIR: Your inquiry requesting the opinion of the Attorney General reads substantially as follows:

"May, in your judgment, employers of labor operating under the provisions of the Employers' Liability Act, effective March 28, 1917, cover part of their employes by workmens' compensation insurance and leave part of them uncovered; assuming of course that the uncovered employes are eligible for coverage under the act and not coming within that class of employes expressly excluded by the law."

Replying to this, we beg to advise you that in our opinion employers of labor operating under the provisions of the Workmen's Compensation Act cannot cover a part of their employes with compensation insurance and leave part of them uncovered where such employes are engaged in the same general business. This conclusion has been reached after some correspondence with the Attorney General of Massachusetts and is based primarily upon the wording of our act and the construction of the Massachusetts act made in the case of Wardwell D. Cox, 225 Mass., 220. You will no doubt recall that the Texas act was originally and in most respects is yet a substantial copy of the Massachusetts law. The case referred to was decided by the Supreme Judicial Court of the State of Massachusetts on November 28, 1916. The proceeding under which the case arose was under the workmen's compensation act of the State of Massachusetts. The statement of the case was made by the Court, substantially as follows:

The evidence was that Cox had been employed to work in a shoe store in Boston. He was notified to report for work on September 13, and the injury was received on September 17. His position at the moment of his injury, although not quite clear, was the equivalent in right of that of manager. He was to be manager of the store, but

his predecessor was still in the store and was to conclude his service the next day here. He was getting through when Cox came to work, but at Cox's request was relieving him of the duty of making out the daily report at the time of the injury. Cox was working overtime taking account of stock. He was injured by falling downstairs at eight o'clock in the evening while answering a telephone call from his daughter, who asked him when he was coming home. The evidence would warrant the conclusion that it was the duty of Cox to answer telephone calls even outside the usual business hours. If this was his duty, then the circumstance that the call happened to be one which interested him personally would not prevent his conduct in attending to the call from being service arising out of and in the course of his employment. There is nothing to indicate that the time spent at the telephone was longer than necessary to answer a call. The finding in this respect cannot be said to be without substantial foundation in the evidence.

The employer and subscriber was the Framingham Shoe Company, a manufacturer of shoes apparently upon a somewhat extensive scale, with a factory at Framingham. That corporation and its manager operate from seventy-five to one hundred shoe stores, all those in this Commonwealth being owned and operated by the corporation. It was insured in accordance with the workmen's compensation act by a policy which, under the heading "Classification Schedule of Business Operations," and subheading, "Location of each Building, Factory, Shop, Yard, or Place where the Trade, Business, Profession or Occupation will be conducted," contained these words: "Framingham, Mass." Under the further subheading, "Kind of Trade, Business, Profession or Occupation (Manual Classification)," were these words: "Boot & Shoe Mfrs. Military Goods Mfrs. (no metal Stamping). Drivers and Drivers' Helpers, Rates 30c and 80c respectively with 4% specific discount."

In discussing the question presented by the facts the court had occasion to say that the workmen's compensation act does not permit an employer to become a subscriber as to one part of his business and remain a non-subscriber to the rest of his business, which is in substance and effect conducted as one business and it is this conclusion which we desire to endorse and to which we adhere in this opinion to you. It will be noted that the conclusion reached applies only to a business which is in substance and effect conducted as one business. It is quite possible that an employer might conduct two entirely separate and distinct business enterprises and entirely different classes of business and might place employes of one enterprise and class of business under the law without placing the other one thereunder. This particular question we do not find it necessary to discuss, but the suggested conclusion seems warranted by the case to which we refer. Where a man's business is conducted as one business all his employes engaged in that particular enterprise must be under the workmen's compensation act, if any of them are under the act. In discussing this business the Massachusetts court went carefully into the matter and since all that it said applies with equal force to the

Texas Act, we quote it as an authority for and as a part of this opinion:

"The question is whether, under these circumstances, the business of conducting the retail shoe store in Boston is under the workmen's compensation act. We are of the opinion that it is. The workmen's compensation act does not permit an employer to become a subscriber as to one part of its business and to remain a non-subscriber as to the rest of a business which is in substance and effect conducted as one business. It has been decided that insurance as to one class of employes of a farmer, engaged as drivers and helpers in the distribution and marketing of his produce, does not require insurance of farm laborers who are expressly exempted from the act. Keaney's Case, 217 Mass., 5. We do not include within the scope of this decision transportation companies carrying on interstate commerce and in this regard wholly subject to the acts of Congress (Corbett vs. Boston & Maine Railroad, 219 Mass., 351, Northern Pacific Railway vs. Washington, 222 U. S., 370), but subject to State law as to intrastate business, nor those conducting two wholly different and distinct kinds of business quite disconnected with each other in place, nature and management. Such cases, if and when they arise, are to be considered on their own merits. We are dealing here with a case where one employer is conducting under a single general administration the business of 'manufacturing, jobbing at the factory and selling at retail in the factory and in stores.' The circumstance that at the retail stores are sold other shoes and rubbers beside those manufactured at the factory, does not render the retail stores a business separate from the general business which is carried on as a unit made up of numerous parts.

"The general purpose of the act was to substitute its provision for the pre-existing rights and remedies under the law respecting injuries sustained by those engaged in industrial pursuits, with exceptions not here material. Although not compulsory in its application, inducements were held out to facilitate its voluntary acceptance both by employers and employes. It was an humanitarian measure enacted in response to a prevailing public sentiment that actions of tort at common law and under the employer's liability act did not give the measure of protection against injuries and relief for accidents which present economic conditions demanded. Its general adoption throughout the Commonwealth was the legislative aim. Young vs. Duncan, 218 Mass., 346, 349. This would be frustrated to a certain extent if employers might be insured under the act as to a part of their employes and remain outside the act as to others.

"A critical examination of the statute discloses no purpose to permit partial insurance by employers. On the contrary, its framework and its details manifest a design to treat the employer wholly within or wholly without the act. 'Subscriber' means 'an employer who has become a member of the association' or insured under the act, while 'employe' includes 'every person in the service of another under any contract of hire, express or implied, oral or written.' Part V, Section 2. It is provided by Part IV, Section 20, that 'Every subscriber shall, as soon as he secures a policy, give notice, * * * to all persons under contract of hire with him that he has provided for payment to injured employes:' by Section 21, as amended by St. 1912, Chapter 571, Section 16, that 'Every subscriber shall give notice * * * to every person with whom he is about to enter into a contract of hire that he has provided for payment to injured employes. * * * If an employer ceases to be a subscriber he shall * * * give notice thereof * * * to all persons under contract with him * * *;' and by Section 22, that 'If a subscriber * * * is required by any judgment of a court * * * to pay to an employe any damages on account of personal injury * * *, to an employe any damages on account of personal injury * * *, the association shall pay to the subscriber the full amount of such judgment.' By Part III, Section 17, if a subscriber enters into a contract for the doing of its work the employes of such contractor or his subcontractor are

protected by the act and entitled to its benefits. By Part II, Section 1, every employe who has not given notice of his intention to retain his common law rights, who receives an injury arising out of and in the course of his employment, shall be paid compensation 'if his employer is a subscriber.' By Part I, Section 3, it is provided that the limitation of certain defences in actions by employes for personal injuries shall not apply to actions 'for personal injuries sustained by employes of a subscriber;' and by Section 4, that the employers' liability act 'shall not apply to employes of a subscriber;' while by Section 5, 'an employe of a subscriber shall be held to have waived his' common law rights unless he gives certain notices.

"It is clear from those provisions that the act is not designed to be accepted in part and rejected in part. If an employer becomes a subscriber he becomes a subscriber for all purposes as to all branches of one business with respect to all those in his service under any contract of hire. All the terms of the act are framed upon the basis that the employer is either wholly within or altogether outside its operation. There is no suggestion or any phrase warrating the inference that there can be a divided or partial insurance.

"The practical administration of the act renders it highly desirable that a single rule of liability should apply throughout any single business. Otherwise difficult and troublesome questions often might arise as to liability or non-liability dependent upon classifications of employes and scope of their duties. Litigation as to the line of demarcation between those protected by the act and those not entitled to its benefits would be almost inevitable. Instead of being simple, plain and prompt in its operation, such division of insurance would promote complications, doubts and delays."

Respectfully,
C. M. CURETON,
First Assistant Attorney General.

OP. NO. 1907—BK. 51, P. 114.

INSURANCE—INSOLVENCY—MUTUAL FIRE INSURANCE—WORDS AND PHRASES.

Acts Thirty-third Legislature, Chapter 29.

Austin's Digest of Insurance Laws, 1917 Edition, Sections 399, 403, 405, 407, 408 and 409.

1. In determining the solvency of a mutual fire insurance company, its liabilities will consist of all its debts, including policy obligations which have been adjusted or fixed by judgments or which are of such a nature that the amount has been determined, and in addition thereto the pro rata of unearned premiums specified in Section 407 of Austin's Insurance Digest. The assets of such company are not limited to those designated as "admitted assets," but the value of the entire property of the company of every kind and character should be considered, and to this should be added the value of that which may be realized by the company by the exercise of the power of assessment prescribed in its by-laws and by the statutes.

2. So long as the assets of the company, as above determined, exceed its liabilities, as just defined, the company would not be insolvent.

3. The words "admitted assets," as used in Sections 408 and 409 with reference to the largest single risk exceeding the admitted assets of the company, mean all those securities of the company which are defined in Austin's Digest, Section 405, and, in addition, include cash and policy notes authorized and permitted by the statutes, and generally any valid obligation due the company, provided always that such assets have real

value. However, that which might be realized by assessment under the statute and under the by-laws would not be considered an admitted asset for the purpose of determining whether or not any single risk exceeded the admitted assets of the company.

4. The fact that a company may have written a policy in excess of its admitted assets has no bearing on the general solvency of the company. Sections 408 and 409 are extra conditions imposed upon mutual companies, and may not be violated without incurring the possibility of forfeiture, even though the company should be, under the general corporation laws, comparatively solvent.

March 29, 1918.

Hon. Charles O. Austin, Commissioner of Insurance and Banking, Capitol.

DEAR SIR: In reply to your letter concerning mutual fire insurance companies, we beg to advise you as follows:

A mutual insurance company is said to be insolvent when its resources are not sufficient to meet its obligations. 22 Cyc., page 1420. This is the doctrine which obtains in this State with reference to corporations generally. State vs. Trinity Life and Annuity Society, 120 S. W., 1174; San Antonio Hardware Co. vs. Sanger, 151 S. W., 1104.

Authorities have held that the premium notes of a mutual insurance company are a part of its assets, and are to be considered in determining the question of its solvency. 22 Cyc., page 1420.

Such an insurance company, however, can not be said to be insolvent so long as its assets are more than sufficient to meet all losses of which the company has any notice, information or suspicion. 22 Cyc., page 1420.

Under our statutes the contingent obligations of a company may be evidenced by premium notes. Austin's Digest of Insurance Laws, Section 399.

Or such additional liability may remain assessable at the discretion of the company's board of directors, or at the instance of the insurance commissioner, for the payment of losses and expenses. Austin's Digest, Section 403.

This additional liability, whether evidenced by premium notes or dependent upon statutory assessment, is available for the payment of debts, and is, therefore, an asset which may be used for such purpose. Nor would the insolvency of the company prevent the levy of assessments to pay losses which occurred prior to the insolvency. Moreover, these assessments may be made available for the payment of unearned premiums on business done while the policy holder was a member. 22 Cyc., page 1422.

It would follow from what is here said that, in determining whether or not a mutual company is insolvent, we must consider not only its actual admitted assets, such as funds invested in statutory or other valid securities, but we must consider the value of its power of assessment as well, and unless the liabilities of the company exceed the admitted assets plus the amount which may be realized under its power of assessment, then the company, under the usual definitions, is not insolvent.

In determining what obligations are to be considered in determining the solvency of a company, we should ascertain its debts,

included in which must be its policy obligations which have matured and been adjusted or placed in judgment. This class of obligations may be designated, for convenience, as commercial obligations. In addition to its commercial obligations, a company would, of course, necessarily owe its unearned premiums, but that would be a contingent liability, unless matured by insolvency, but for the fact that the statute in this State gives it a status as a liability of the company.

Austin's Digest of Insurance Laws, Section 407, declares that in determining the solvency of a company, forty per cent of the actual cash premiums paid on policies in force for one year and a pro rata of all premiums received on risks that have more than one year to run, shall be deemed a sufficient reserve. The effect of this statute is to create a statutory liability, to be reckoned in determining the question of solvency instead of the contingent and unmatured liability due policy holders for unearned premiums.

From what has been said, it will follow that in determining the solvency of a mutual fire insurance company, you should place on the one side all its debts, including policy obligations which have been adjusted or fixed by judgment of a court or which are of such a nature that the amount has been determined, and to this add the pro rata of unearned premiums specified in Section 407, above referred to. This would constitute the liabilities of the company. On the other hand, you should consider all of the property which the company has which has any value, and for this purpose you are not limited to considering only "admitted assets." To the value of the entire property of the company, you should add the value of the premium notes held by it and the value of that which might be realized by the company by the exercise of the power of assessment prescribed in its by-laws and by the statute. This would constitute the company's resources, and so long as the company's resources, as thus determined, is in excess of its liabilities, as above defined, the company would not be insolvent.

Many reasons might be assigned for the conclusion which has just been reached, but we believe that one citation will be sufficient. Sections 408 and 409 of Austin's Insurance Digest declare that if at any time the "admitted assets" of a company shall come to be less than the largest single risk, then that the company shall, as there provided, take the necessary steps to meet this difficulty, in lieu of which it is made the duty of the Commissioner to report this matter to the Attorney General, with instructions to proceed against the company. This is a special and specific direction as to when proceedings shall be instituted against the company. It is different from the general corporation statute referring to insolvency, and must be regarded as specially and peculiarly applicable wholly to mutual companies.

We must infer, therefore, that when proceedings are to be had against the company by reason of any other insolvency than that just referred to, that insolvency is to be determined according to the general laws of the State, except the statutory reserve referred to in Section 407 is to be considered.

If a different construction should be given to what may be considered as assets of the company in determining the question of in-

solvency alone, then Sections 408 and 409 become incongruous as a part of this law.

For this reason and other cogent ones which might be suggested, we have endeavored to construe this act and give a meaning to all its provisions. In order to do so, we have rightly considered, we believe, the power of assessment as one of the resources of the company, to be considered in determining whether or not, under the general corporation laws of the State, the company is insolvent. However, in Sections 408 and 409 you will note that the words "admitted assets" are used. These words are used with reference to the special statutory insolvency referred to in Sections 408 and 409, which is, when the largest single risk exceeds the admitted assets of the company. The words "admitted assets" used in these special Sections 408 and 409, mean those securities in which the company is authorized to invest, which are defined in Austin's Digest, Section 405. The phrase also includes cash and policy notes permitted and authorized by the statute and generally any valid obligation due the company, provided always the assets have real value. However, in our opinion, the statutory power of assessment is not to be considered an admitted asset for the special purposes of Sections 408 and 409, above referred to. The words "admitted assets," as used in Section 406 in reference to all the admitted assets of the company, do not refer simply to those assets in excess of its surplus assets. In other words, where the largest single risk of the company exceeds its total admitted assets, then Section 408 prescribes your duty.

The fact that the company may have written a policy in excess of its admitted assets has no bearing on its general solvency. Sections 408 and 409 are extra conditions imposed upon mutual companies, which the company must obey and which it may not violate without incurring the penalty of forfeiture, even though the company should be under the general corporation laws entirely solvent.

Very truly yours,

C. M. CURETON,
First Assistant Attorney General.

OPINIONS CONSTRUING LIQUOR LAWS.

OP. NO. 1675—BK. 48, P. 316.

When a petition is presented to a commissioners court, in proper form, asking that a local option election be called in a number of justice precincts in said county, although the justice precincts may be situated in different commissioners' precincts and in some of the justice precincts the prohibition law is already in effect, the commissioners court has the authority to order the election It is mandatory upon the court to order said election when so petitioned.

Article 5715 of the Revised Civil Statutes of Texas, 1911.

November 16, 1916.

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

DEAR SIR: In your communication of November the 8th you propound to this Department two questions, as follows:

"1. Assuming that a petition is presented to a commissioners court in proper form asking that a local option election be called in a number of justice of the peace precincts lying in different commissioners precincts in the same county, some of these justice precincts being now under local option law, and some allowing the sale of intoxicating liquors; has the commissioners court the authority, upon the presentation of such a petition, to order this election to be held in said justice precincts as a whole?

"2. Would it be mandatory upon the said court to order said election, or would it be within the discretion of the court to order or refuse to order the same?"

Article 5715 of the Revised Civil Statutes, 1911, which article contains all of the amendments down to and including those passed in 1897, among other things provides:

"The commissioners court of each county in the State, whenever they deem it expedient, may order an election to be held by the qualified voters of said county, or of any commissioners's or justice's precinct, or school district, or any two or more of any such political subdivisions of a county, as may be designated by the commissioners court of said county, to determine whether or not the sale of intoxicating liquors shall be prohibited in such county, or commissioner's or justice's precinct, or school district, or any two or more of any such political subdivisions of such county, or in any town or city; provided, it shall be the duty of said commissioners' court to order the election as aforesaid whenever petitioned so to do by as many as two hundred and fifty voters in any county, or fifty voters in any other political subdivision of the county or school district, as shall be designated by said court, or in any city or town, as the case may be. * * * "

In the case of Cantwell vs. The State, 47 Crim. Rep., 511, 85 S. W., 19, the court held that the commissioners' court had authority to order an election for the entire county, regardless of the fact that some of the political subdivisions of the county had already adopted prohibition. Such political subdivision would have the right to participate in the election throughout the entire county—this notwithstanding the fact that should the county vote wet the political subdivision having theretofore adopted prohibition would remain dry.

This same doctrine is clearly set forth in the case of Cofield vs. Britian, 109 S. W., 493, and also in the case of Kidd vs. Truett, 68 S. W., 310, also in Ex Parte Rippy, 68 S. W., 687, and Martin vs. Mitchell, 74 S. W., 565.

In the case of Oxford vs. Frank, 70 S. W. 427, the court made a very clear statement of the law while discussing the proposition, as to whether or not the commissioners' court could order an election for other than political subdivisions of the county, made it clear that the commissioners' court had full and complete authority, since the enactment of the amendment of 1897, to order elections in all political subdivisions of a county or any two or more of such political subdivisions of a county, although the commissioners court could not define a district in which it would be legal to order an election.

If there was any doubt left in the construction placed upon this act by Judge Connor that doubt is clearly removed in the case of Cofield vs. Britian, *supra*. This decision, together with the authorities therein cited, in addition to being authority for the right of the commissioners' court to order an election in two or more political subdivisions of a county, also makes it clear that one or more of these political subdivisions may be dry territory.

The case of Canales vs. Mullen, 185 S. W., 421, is authority for the right of the commissioners' court, on its own motion, to order an election in any political subdivision of a county, and likewise holds that it is mandatory on the court to order the election when petitioned by the requisite number of signers, which, in that particular case, was 250 because it was for the entire county. If the court relies upon the petition as its authority for ordering the election, the petition must contain the requisite number of qualified voters. If, on the other hand, the court in its own discretion should, at any time, deem it wise to order an election, it has the authority to do so in the entire county, in any political subdivision of a county, or in any two or more of such political subdivisions.

In accordance with the authorities here cited, you are advised:

(1) That when a petition is presented to a commissioners' court, in proper form, asking that a local option election be called in a number of justice precincts in said county, although the justice precincts may be situated in different commissioners precincts, and in some of the justice precincts the prohibition law is already in effect, the commissioners' court has the authority to order the election; and,

(2) It is mandatory upon the court to order said election when so petitioned.

Yours very truly,

W. A. KEELING,
Assistant Attorney General.

OP. NO. 1846—BK. 50, P. 261.

SALE OF ETHYL ALCOHOL.

Construing Chapters 17, 18 and 19, Second and Third Called Sessions, Thirty-fifth Legislature, prescribing forms for application for license to sell ethyl alcohol in dry territory.

No retail druggist can sell ethyl alcohol without first paying the tax and filing bond required by law.

Wholesale druggists cannot sell ethyl alcohol to any retail druggist who has not qualified to sell same in dry territory.

December 7, 1917.

Hon. L. W. Tittle, Acting Comptroller, Capitol.

DEAR SIR: I beg to acknowledge receipt of your inquiry of December 5, 1917, in which you request a construction of Chapters 17, 18 and 19 of the Second and Third Called Sessions of the Thirty-fifth Legislature, 1917, in order that you may determine the character of occupation tax receipts to be issued and to whom you are authorized to issue said receipts.

The three Acts of the Legislature contained in Chapters 17, 18 and 19 of the Second and Third Called Sessions are companion Acts and have for their general purpose to make it possible for wholesale druggists, located in dry territory, to sell and transport alcoholic stimulants to retail druggists, and authorizing retail druggists to receive alcoholic stimulants in dry territory.

Chapter 17 amends Article 598 of Chapter 7, Title 11 of the Revised Penal Code of The State of Texas, which said Article is identical with Article 5716, Title 88 of the Revised Civil Statutes of Texas; and, in substance, provides that alcoholic stimulants may be sold as medicine in dry territory by retail druggists, under certain regulations contained in said chapter. Said article further authorizes the sale of ethyl alcohol in quantities of a gallon or more by wholesale druggists to retail druggists employing registered pharmacists, and where said ethyl alcohol is intended for the purpose of being used in such retail drug business; and the Act further provides that no retail druggist shall be permitted to sell alcoholic stimulants, nor shall wholesale druggists be permitted to sell to such retail druggists unless such retail druggist shall have first procured a license and filed a bond conditioned as is required by Article 7475, Revised Civil Statutes.

Chapter 18 is designed to permit orders for ethyl alcohol to be taken in local option districts, and to permit shipments of intoxicating liquors into such districts when consigned to drug stores or other institutions and concerns authorized by law to receive same. Section 1 of said Act contains the proviso "that nothing in this Act shall make it unlawful for any person, firm or corporation, licensed under the laws of the State of Texas to sell ethyl alcohol to the owner, proprietor or some agent of his, or its, who may be by him, or it, appointed by power of attorney, duly executed by him or in the manner prescribed by law for the execution of deeds, and file with the county clerk of such county, to make such purchases, to take orders for ethyl alcohol, when such sales are made in compliance with the laws of this State."

Said chapter contains the requirements made of retail druggists before they will be authorized to receive ethyl alcohol to be used in their business. The first requirement of retail druggists is that such druggist must have paid the tax required by law, received a license and filed a bond. Such druggist shall then designate some person, who shall have the exclusive right to purchase alcohol. Such person

so designated, shall accompany the order for the alcohol with an affidavit, stating his status, and giving the quantity of alcohol so ordered, and such person shall be required to send the original of such affidavit to the clerk of the district court of the county where such intoxicating liquor is to be delivered.

Chapter 19 levies a tax, and provides for licensing wholesale druggists doing business in local option districts and making sales of ethyl alcohol to retail druggists. It is required in said chapter that at the time of paying the license tax the wholesale druggists shall procure from the county clerk of the county where such business is located, a license which shall be dated as of the date of issuance, and which shall authorize such person, firm or corporation to sell ethyl alcohol to the retail drug trade for use in their business in quantities of one gallon or more at the place set forth in the application for such license.

We suggest the following as a proper form, setting forth the requisites for an application for a license as a wholesale druggist:

The State of Texas,
County of .....
To the County Clerk:

I,....., a member of the firm of....., or officer in....., a corporation doing business under the laws of the State of Texas, at .....(Street number of city or town)....., in the city of....., county of....., Texas, represent that said.....has been regularly engaged in the wholesale drug business at.....(Street number of city or town)....., in....., in the county of....., for a period of three months next before filing this application. That the value of the average amount of ethyl alcohol carried in the stock of, or used in the business of.....has not, does not, and will not exceed five per cent of the reasonable market value of the entire stock of goods carried in stock or used in the business of such applicant.

The names of the members of this firm (officers of corporation, president and secretary) are as follows:

.....
.....
.....

I am personally cognizant of all of the above facts.

Subscribed and sworn to before me, the undersigned authority, on this the.....day of....., A. D. 1917.

.....
.....

Upon the payment of the tax, and filing the application in the above form, the county clerk would be authorized to issue a license for a period of one year only, and such license, together with the occupation tax receipt and the internal revenue receipt issued by the United States, shall be posted by the license in a conspicuous place in his, or their, place of business.

It should be noted in connection with the construction of these three chapters that only retail druggists, who qualify as druggists authorized to sell intoxicating liquors under the provisions of the Revised Statutes by paying the license tax and filing a bond, will be authorized to purchase ethyl alcohol in dry territory.

Wholesale druggists, who qualify under Chapter 19 of said Act, are only authorized to sell ethyl alcohol in dry territory to such druggists as have qualified as aforesaid. Shipment and transportation of

ethyl alcohol into dry territory, is only authorized when said alcohol has been shipped by a wholesale druggist, who has qualified under the law to sell same, and when the shipment is made to a retail druggist, who, likewise, has qualified under the law to receive same.

Yours very truly,
W. A. KEELING,
Assistant Attorney General.

OP. NO. 1908—BK. 51, P. 144.

INTOXICATING LIQUORS—CONSTRUING ZONE LAW.

April 9, 1918.

Hon. Lamar Bethea, County Attorney, Bryan, Texas.

DEAR SIR: You present to this Department the following inquiry:

"The A. & M. College of Texas is located on the tract of land containing about 2,400 acres of land. The college campus proper and the ground on which the buildings of said college are all located practically on the east end of this 2,400-acre tract of land. It is something like two miles from the main building on the campus to the western edge of the land set apart for the A. & M. College, continuing on in a westerly direction across the river (Brazos River). In Burleson County is a series of saloons and beer joints. These fellows owning and running these places are desirous of complying with the new ten-mile zone law, but they do not know from what point to make their measurements, whether from the extreme property line on the west or from the campus enclosure. You will understand that all of the western part of this college land is used solely for farming purposes and some of it is in the woods and not used at all for any purpose. The soldiers only occupy and use the land on and near the campus and do not have anything to do with that part of the land on the extreme western edge of said land. Please give me your ruling as to where they should make their measurements from."

In reply, we advise you that House Bill No. 9, passed by the fourth called session of the Thirty-fifth Legislature, commonly known as the zone law, prohibits the sale, barter and exchange of spiritous, vinous or malt liquors, or medicated bitters, capable of producing intoxication *within ten miles* of any part of the land or buildings occupied or controlled by the government of the United States, or any department thereof, and used as a fort, arsenal, training camp, quarters or place where soldiers are or may hereafter be camped, stationed or quartered, aviation schools where soldiers, sailors, marines or aviators are being quartered, drilled or trained for service in any branch of the United States army or navy, except for sacramental and medicinal purposes.

It is the opinion of this Department that the zone law absolutely prohibits the sale, barter and exchange of intoxicating liquors within ten miles of any part of the 2400-acre tract of land upon which is situated the college, campus, buildings and other improvements of the A. & M. College. In view of the fact that the law designates within ten miles of the land, we think that a proper construction means within ten miles of any part of the land constituting the body of land

used by the government for the purpose of training men and equipping soldiers for service in the army.

Should the military authorities desire the use of any part of this 2400-acre tract of land for drilling, trench digging or other purposes, from the map and statement of facts it appears that they would have authority to so use it, and, having this authority, the whole body of land must be treated as one tract and no intoxicating liquors must be permitted to be sold or carried within ten miles of any part of this body of land.

The rule for computing the distance must be to measure in feet or yards the direct or air line distance. The law does not mean by the nearest practical route. This rule of construction, while applying in cases providing compensation upon a mileage basis to officers for serving process, would not be a correct basis for determining the operation or effect of a law, which by its terms would prohibit the sale of intoxicants within ten miles of any part of the land. This language is too plain for construction, and if any intoxicating liquors are sold in or transported or delivered within ten miles of any part of the campus or lands used for the purpose of training soldiers for service in the army of the United States, such act would constitute a felony and would be punishable by confinement in the State penitentiary.

I also desire to call your attention to the fact that this zone law prohibits absolutely the transportation or carrying of intoxicating liquors into said zone for personal use, and in fact for any other use except for sacramental and medicinal purposes. The law, however, does not prevent shipment of intoxicants situated within the zone outside of same. In other words, after the law goes into effect there is nothing to prevent any person who should be overstocked with liquors from shipping same outside of the zone. The language of the bill prevents all shipments *into* the zone, but there is no language which will tend to show that it was the purpose of the legislature to prevent liquor from being carried or shipped outside of the zone.

Yours very truly,

W. A. KEELING.
Assistant Attorney General.

OP. NO. 1936—BK. 51, P. 306.

The Statewide prohibition law supersedes the so-called zone law and the Statewide anti-shipping law supersedes that part of the Statewide law which relates to transportation into and within the State of Texas.

June 19, 1918.

Hon. P. E. Carter, El Paso, Texas.

DEAR SIR: You request a general construction by this Department of the various laws now in force dealing with the liquor traffic with reference to ascertaining what laws will be in force on and after the 26th day of June in this State.

In order to determine this matter we will review briefly the several acts passed by the Legislature with reference to the purpose and intent of their passage.

Let it be remembered that the greater portion of the State of Texas at the time of the passage of these several acts was under local option. The Legislature not being satisfied with the local option method of dealing with the liquor traffic and deeming it wise to exercise its legislative functions to effectively deal with new conditions that had arisen, several acts were passed by the Fourth Called Session of the Thirty-fifth Legislature beginning with what is commonly known as the zone law, namely, an act prohibiting the sale and transportation of intoxicating liquors to any point within a radius of ten miles of any military camp, cantonment or training school. This act was passed with the emergency clause and became a law upon its passage, March 16, 1918, and became effective and operative on the 15th day of April, 1918. This law was passed as a regulatory measure and as a military measure, as was declared in the emergency clause and as such it has been sustained by the Court of Criminal Appeals.

Next in order of its passage was the state-wide prohibition law which prohibits absolutely the manufacture and the sale of all intoxicating liquors within the State of Texas, except for medical, scientific, mechanical and sacramental purposes. The bill likewise prohibits the transportation within or the importation into the State in any manner all intoxicating liquors except for medicinal, scientific, mechanical and sacramental purposes. This measure purports to be and is, a complete and exhaustive measure with every phase of the subject of intoxicating liquors operative by its terms throughout the entire State of Texas, was approved by the Governor, March 21, 1918, and became effective ninety days after adjournment or at midnight on the 25th day of June, 1918.

Contemporaneous with the passage of both of these measures the Legislature carried on the calendar of both of its branches another measure dealing exclusively with the transportation of intoxicating liquors which is commonly known as an amendment to the original Allison law. This act was approved by the Governor on March 23, 1918, and will become a law ninety days after adjournment or at midnight on the 25th day of June, 1918. We might say that these three pieces of legislation were in the course of making at the same time and were in the minds of the Legislature at the same time. In other words, the legislators were voting on each of the three propositions at the same time and were necessarily mindful of the provisions of each of them and we therefore must conclude that the Legislature intended each piece of legislation to perform a separate and distinct function. We think therefore that the reasonable conclusion of the matter would be that in the passage of the so-called zone law the Legislature intended this piece of legislation to afford immediate protection to the soldiers then being trained on Texas soil for service in the United States army, it appearing that many of the large cantonments in the State were situated in places where the sale of intoxicating liquors were permitted by the laws of this State.

The Legislature deemed it advisable to pass an act to become effective immediately, which would furnish a better measure of protection to the soldiers in training. The caption of this bill and its emergency clause clearly bear out this idea. The Legislature at the time they were passing this zone law as an immediate relief was also carrying on as a companion to it a more exhaustive measure to become effective at a still later date dealing with the entire subject of prohibition and at the same time the Legislature still mindful of the purpose and intent of the zone law was considering and passing a law dealing more exhaustively with the subject of transportation of intoxicating liquors within and into the State of Texas dealing both with intrastate and interstate shipments of intoxicating liquors. It seems to be clearly the legislative intent that the statewide prohibition laws and the exhaustive statewide antishipping laws were to become the permanent laws on the subject of intoxicating liquors in the State of Texas It will be noted that the zone law and the statewide law both deal with the sale and the transportation of intoxicating liquors, while the anti-shipping law deals alone with the transportation. Since the statewide law in many particulars cover the same subject matter but deals with it a little differently from the zone law, we conclude that in those particulars in which the statewide and antishipping laws are irreconcilable with the zone law it was the intention of the Legislature to have the statewide law and the antishipping law supersede such provisions. We reach this conclusion because by reasonable and necessary implication it is obvious that it should do so, but we conclude that the statewide law and the antishipping law supersede the zone law only to the extent of the repugnant provisions thereof. This seems to be the well settled doctrine of our State and other jurisdictions.

Stirman vs. State, 21 Texas, 734.
Daviess vs. Fairbairn, 3 Howard (U. S), 636, 11 L. Ed., 760.
Pacific Mail Steamship Co. vs. Joliffee, 69 U. S., 452; 7 L. Ed., 807.
Words and Phrases, 6103.
Hornaday vs. State, 65 Pac., 656.
Gilbert vs. Craddock, 72 Pac., 871.
Pacific Railroad Co. vs. Cass County, 53 Mo., 17.
State vs. City of Memphis, 26 S. W., 828.
Jesse vs. DeShong et al., 105 S. W., 1011.

We likewise decide that to the extent that the antishipping law is in irreconcilable conflict with the provisions of the statewide law that the antishipping law supersedes that statewide law, but it must be understood that it is only to the extent of the conflict.

It therefore follows that the statewide law just as it was passed by the Legislature, which is the full and complete law on the subject of manufacture, sale and transportation of intoxicating liquors throughout the entire State of Texas, and the antishipping law, as amended by the last Legislature, which is the full and complete law of the State of Texas relating to the transportation of intoxicating liquors within and into the State of Texas, together constitute the system of laws governing this subject except in cases where the zone

law is not in necessary conflict with them. It should be noted here that the antishipping law as amended left in full force and effect the following sections of the act of the First Called Session of the Thirty-third Legislature, viz.: 6, 7, 8, 8a, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19. When the above sections are read into and made a part of the antishipping law of the last Legislature, we will have the complete law of the State of Texas relating to the subject of transportation of intoxicating liquors within and into the State.

Yours truly,

W. A. KEELING,
Assistant Attorney General.

OPINIONS ON PUBLIC LANDS AND MINERAL RIGHTS.

OP. NO. 1655—BK. 48, P. 182.

PUBLIC LAND—MINERALS—TRANSFERS.

The Mineral Law of 1913 makes no provision for the transferring of the rights in a portion of the area included in a permit, and such transfer should not be filed in the General Land Office.

September 6, 1916.

Hon. J. T. Robison, Commissioner General Land Office, Austin, Texas.

DEAR SIR: In a recent letter you state that the records of your office show that a permit was issued by your department on a survey of 1,000 acres under the mineral act of 1913, and that the person to whom the permit was issued has transferred to one person his rights in 500 acres of the land and to another his rights in the other 500 acres of the land, and that these two transfers have been tendered to your office for filing. You desire to know whether you are authorized to file such transfers.

The only portion of the mineral law of 1913 pertaining to the assignment or transfer of any rights under a permit is the last part of Section 7 of the act, which is as follows:

"An assignment by deed or other form of transfer and also a lien of any form may be executed upon any claim to any person, association of persons, corporate or otherwise, that may be qualified to obtain a permit or lease in the first instance; provided that deed or other evidence of sale, assignment or lien shall be recorded in the county where the property or a part thereof is situated and shall be filed in the Land Office within sixty days after the date thereof, accompanied by a filing fee of one dollar. If such instrument shall not be filed in the Land Office within the time required such deed or evidence of transfer or evidence of lien shall not have the effect to convey the property nor shall the obligations incurred therein be enforceable."

No provision is made for the assignment or transfer of the rights in a portion of the land covered by a permit or for the filing of a deed conveying the rights in such portion. There is nothing in the law regulating the development under such permits when the right in a portion of the area included in the permit has been transferred and there is nothing regulating the issuance of leases under such circumstances.

Section 8 of the law provides, in substance, that if within the life of the permit petroleum oil or natural gas is developed in commercial quantities, the owner of the permit shall have the right to lease all or part of the area included in the permit. As indicated in our opinion to you of January 17, 1914, the mineral law appears to contemplate that there shall be a uniformity in the permits and the leases, or rather, an identity of the lands covered by the permits and the leases. If transfers of the rights in portions of the area included in the permits were permitted and if oil were developed on one part of the original area complications would arise as to the issuance of leases and in the development required by the statute.

It is to be remembered that the permit issued under the mineral law, while it may have value, does not give to the owner of the permit an interest in the land or even in the oil, but it is merely a privilege or right to prospect for oil without even the right to take or carry away the oil until the lease has been obtained. If it had been intended by the law that the owner of a permit could assign his rights under the same to a portion of the lands covered by the permit and that the assignee be substituted in the land office for the original owner, the law would have contained some provisions to that effect.

Of course, there is nothing in the law which would prohibit the owner of a permit from transferring to another an undivided interest in the permit. The law contemplates that the rights in minerals acquired under it may be owned either by one person or by an association of persons, corporate or otherwise.

For the reasons above stated, we advise you that the transfers referred to in your letter should not be filed by you.

Yours very truly,

G. B. SMEDLEY,
Assistant Attorney General.

OP. NO. 1819—BK. 50. P. 118.

CONSTITUTIONAL LAW—PUBLIC LAND.

Senate Bill No. . . ., Third Called Session Thirty-fifth Legislature.

Senate Bill No. . . ., by Buchanan of Scurry and Hudspeth, which gives to owners of certain public school land a preference right to purchase the same after forfeiture, does not violate the section of the Constitution which prohibits the granting of relief to purchasers of school land. Judkins vs. Robison, 160 S. W., 955.

September 17, 1917.

Hon. Jess Baker, Member of the House, Capitol.

DEAR SIR: As a member of the House Committee on Public Lands, you have requested this Department for an opinion on the constitutionality of a Senate bill which gives to the owners of certain public land forfeited for non-payment of interest a preference right to purchase the land after forfeiture.

We have carefully examined this bill and find that in all important particulars it is the same as the Act of the Thirty-third Legislature, approved April 18, 1913. When that act was first introduced in the Legislature, the Attorney General was requested for an opinion on its constitutionality and on January 25, 1913, wrote an opinion to Judge N. P. Ross, then county judge of Andrews County, advising him that the act was constitutional and did not grant relief to purchasers of school land within the meaning of Section 4, Article 7 of the Constitution, which provides in substance that the Legislature shall not have the power to grant any relief to purchasers of school land.

After that Act, with some amendments, was passed by the House and the Senate, Governor Colquitt requested this Department for an opinion on its constitutionality before approving it, and on June 9, 1913, this Department wrote an opinion to Governor Colquitt holding that the act was constitutional.

Later, after the act had become a law and after much land had been reappraised and repurchased under it, its constitutionality was directly attacked in an application for mandamus in the Supreme Court in the case entitled Judkins vs. Robison, 160 S. W., 955. The Supreme Court in that case, in a very carefully written opinion by the present chief justice, expressly and directly held that the act was not unconstitutional and did not grant relief to purchasers of school land within the meaning of Section 4, Article 7 of the Constitution. This case is directly decisive of the question which you ask. It is true that in the Judkins case the land involved had been re-appraised at a price higher than the purchase price before forfeiture, but the opinion clearly shows that that fact was not responsible for the result of the court's opinion and that the result would have been the same if the land involved had been reappraised at a lower price. The question as to the constitutionality of the law was fully and thoroughly considered by the Supreme Court and fully discussed in the opinion, and the law was held constitutional as a whole.

Judge Phillips, in his opinion, recognized the fact that the law would possibly result in lowering the price of much of the land, and stated, in substance, that if the act *by its terms* had disclosed a purpose to diminish the price of the land, it would have been clearly unconstitutional. The court held that the constitutionality of the law could not be determined by its unexpressed purpose or possible operation, thus stating the rule:

"The only safe or just rule for courts to follow, therefore, is that which determines the validity of a law according to its written words and its necessary effect, as distinguished from an unexpressed purpose or a possible operation. Tested either by its provisions or its necessary effects, the act is not violative of the constitutional provision."

It clearly appears from this opinion, therefore, that the constitutionality of the bill recently introduced in the Legislature is not to be determined, either by the intention of those who may be urging its passage or by the possible results if the bill becomes a law. The intention of the bill must be arrived at from its written words, and it can not be held unconstitutional because perhaps those who are urging its passage desire to secure a reduction in the price of the land, or because the bill, if enacted into law, may result in a reduction of the price of the land. There is nothing in the bill recently introduced which discloses a purpose to reduce the price of the land, and since the board which is to reappraise the land is directed to reappraise it at its reasonable value, it can not be said that the necessary effect of the bill, if it becomes a law, will be to reduce the price of the land.

On the authority, therefore, of the Judkins case, which directly held constitutional a similar act of the Legislature, and on the test applied by the Supreme Court in that case, the bill recently introduced in the Legislature is constitutional. This opinion, of course, is confined to the question of the constitutionality, and we are not concerned in the wisdom or unwisdom of the proposed legislation.

Yours very truly,

G. B. SMEDLEY,
Assistant Attorney General.

OP. NO. 1841—BK. 50, P. 223.

PUBLIC SCHOOL LAND—NOTIFICATION AS TO EXPIRING LEASE.

Articles 5408, 5452, 5453 and 5454, Revised Statutes of 1911.
An award of school land made after the expiration of a lease is valid even though the Commissioner of the Land Office failed to give to the county clerk the ninety days' notice provided by Article 5408, Revised Statutes of 1911.

November 22, 1917.

Hon. J. T. Robison, Commissioner General Land Office, Austin, Texas.

DEAR SIR: You have requested the Attorney General to advise you whether an award of the north one-half of Section 221, Block 9, G. H. & S. A. in Jeff Davis County, to J. A. Anderson on his application to purchase said land filed September 4, 1917, was valid.

It appears that this tract was classified and appraised by the Commissioner of the Land Office on May 21, 1912, and notice of such classification and appraisement was mailed to the county clerk of Jeff Davis County on that date. The tract was leased on August 12, 1912, for a period of five years from August 10, 1912, to W. T. Henderson. The lease expired on August 10, 1917, but, for some reason, the Commissioner had failed to mail to the county clerk a notice as to the expiration of the lease. At 10 o'clock a. m. on September 4, 1917, which was the hour on which applications to buy land coming on the market September 1st should be filed, W. T. Henderson and J. A. Anderson each filed applications to purchase said tract of land. It was awarded to Mr. Anderson, he having made the higher bid.

It appears that some question has been raised as to the validity of this award because of the failure of the Commissioner of the Land Office to notify the clerk of the expiration of the lease in accordance with Article 5408, Revised Statutes of 1911. That article is a part of the law of 1905, and reads as follows:

"Advertisement of Land.—*In cases where lands may be leased and the same shall come on the market by reason of the expiration of such lease, it shall be the duty of the Commissioner to notify the county clerk ninety days, when practicable, before the expiration of such lease of the date of such expiration.* When a lease is for any cause canceled, he shall notify the county clerk of that fact and fix a date not less than ninety days thereafter on and after which applications to purchase may be filed. All notices of expiration and cancellation of leases shall be forthwith recorded as required for notices of classification and valuation. *The Commissioner shall adopt such means as may be at his command that will give the widest publicity as to when land will be on the market for sale by reason of expiration of any lease. Such publicity shall, when practicable, be given ninety days in advance of such expiration.* When a lease is canceled for any cause, the land shall not be for sale until ninety days thereafter. *Immediately after the cancellation of a lease or leases the Commissioner shall proceed to give publicity to the fact, the same as is herein required with reference to publicity of expiring leases.* If there are not other satisfactory or sufficient means at the command of the commissioner that will give the necessary publicity, he shall have printed at the expense of the State, to be paid out of the appropriation for public printing, a list or lists

of the lands, and send them out in the mail to every person requesting them. Such lists shall also contain a brief statement as to how one shall proceed to purchase the land."

The article quoted, particularly that portion of the same which is in italics, shows that the Legislature intended that the Commissioner of the Land Office, for the sake of publicity and to obtain competition in bidding for the land, should give notice of the expiration of all leases. The language used however, with reference to the notices of expiring leases, is directory rather than mandatory. This is apparent from the use of the words "when practicable," and it is also made more apparent by reason of the fact that the language as to notices of canceled leases is mandatory. The language as to expiring leases, above underlined, also shows that the Legislature assumed that land under lease would come on the market automatically by reason of the expiration of the lease.

This article was under consideration by the Supreme Court in the case of Estes vs. Terrell (99 Texas, 622, 92 S. W., 407). In that case the survey of land involved had never been leased. The Commissioner classified and appraised the land and mailed to the county clerk a notice of such classification and appraisement, which notice was received by the county clerk and recorded by him in the month of November, 1905. In the notice, however, the Commissioner stated that the land would not be on the market for sale until January 1, 1906. On December 1, 1905, the relator filed his application to purchase the land. The question before the court was whether the Commissioner of the General Land Office under the law of 1905 had the authority to postpone the sale of such land to a date subsequent to the receipt by the county clerk of the notice of classification and appraisement. The court held that the law of 1905 gave the Commissioner no such authority and that the land was on the market when the clerk received the notice. In reaching its conclusion the court discussed Section 2 of the Law of 1905, which is Article 5408 above quoted, and in discussing it used the following language, which is directly applicable to our question:

"Some of the provisions of this section are worthy of notice. (1) *When a lease is about to expire, the Commissioner is to notify the county clerk of the day on which it shall cease to exist—from which, it seems to us, it was contemplated that the land should be upon the market at the expiration of the lease.* (2) When a lease is canceled, the clerk is also to be notified and the Commissioner is required 'to fix a date' not less than ninety days from the day of the cancellation, on which applications to purchase may be filed."

This language clearly shows that in the opinion of the Supreme Court land included in a lease comes upon the market automatically at the expiration of the lease and that the notice to the county clerk, provided for by the law under consideration, is not a necessary condition precedent to the offering of the land for sale by the State.

In that case it was argued that the Commissioner had the authority to fix a date for the sale after the receipt of notice by the county clerk, for the reason that it was the purpose of the law of 1905 to

secure competititve bidding. In answer to such argument, the court said:

"It is argued that since it was a main purpose of the Act of 1905 to secure competitive biddings for the school lands and thereby to benefit the school fund, and since in a case like the present one this could only be accomplished by fixing a future day for sale and giving publicity to the fact for the benefit of such as might desire to purchase, it is to be inferred that it was intended that the Commissioner should pursue the same course as in the case of other lands which are expressly mentioned. The policy of selling the school lands to the highest bidder is a wise one and it is probable that it did not occur to the Legislature at the time that the Act was passed that a case like the present would arise. It is to be remembered that at that time nearly all of the surveyed school lands of the State which were not under lease had been surveyed, classified and appraised and were upon the market for sale. The Act itself suspended the sale of these lands until the 1st day of September next after its passage, when they all came upon the market at the same time and were subject to competitive offers. *So in case of leased lands, where the lease was kept in good standing, they were left subject to sale on the day after the lease expired—which itself fixed a day for competitive applications to purchase.* For lands leased, but which might come upon the market by a cancellation of the leases, rules to secure competition were provided; and it is probable that if it had occurred to the makers of the law, that there were other lands which would come upon the market at a time not fixed, they would have been included in the list of those in which the Commissioner is empowered to fix the day on which they should be subject to sale, but this the Legislature has not done."

The language used by the court is equally applicable to the contention which has been made that notice by the Commissioner of the time of the expiration of a lease is essential in order to secure competitive bidding. The Legislature did not provide that such notice should be essential, and since it did not so provide and since the language used in the law which has been quoted clearly indicates that the land comes on the market at the expiration of the lease, it can not be successfully contended that such notice is necessary to secure competitive bidding.

In this connection, we call attention to Article 5452, Revised Statutes of 1911, which makes it the duty of a lessee of public school land of the State to deliver his lease to the clerk of the county court of the county in which the land is situated, and makes it the duty of such clerk to record in a well bound book kept in his office, open to public inspection, a memorandum or abstract of said lease, showing the land leased, the name of the lessee, the date of the lease, and the number of years it has to run. Thus a public record of every lease is made in the county where the land lies, and from an examination of such record any prospective purchaser can learn when any lease expires and when, therefore, the land comes on the market.

In the case of Curry vs. Marshall (180 S. W., 892), the Court of Civil Appeals for the Eighth District, in discussing Article 5408, construed it to mean that the Commissioner, in case of the expiration of a lease has no authority to defer until a future day the date when the land comes on the market, for the reason that under the law land included in a lease comes on the market at the expiration of the letter. In that connection, the court said:

"It is to be noted in the case of a canceled lease that the Land Commissioner by this article is given the authority to defer until a future day the date upon which the land would come upon the market so as to afford him an opportunity to give due publicity of the fact that the land is subject to resale. *In the case of a lease expiration no such authority is given, and the land is upon the market at the date of expiration, but due publicity of this fact is obtained by the requirement that the Commissioner shall give the county clerk previous notice of the expiration date, and adopt such means as may be at his command so as to give the widest publicity as to when the land will be on the market by reason of the lease expiration, which previous notice to the clerk and publicity is to be given ninety days, when practicable, in advance of such expiration.*"

Article 5454, Revised Statutes of 1911, which is also a part of the law of 1905, expressly prohibits the Commissioner from considering an application to lease land prior to ninety days from the expiration or cancellation of the lease, showing a purpose that the land shall be on the market during such period.

Indeed, it has been the policy of all the laws of this State with reference to school land that lands under lease shall come upon the market immediately at the expiration of the lease. This is the basis and the logic of the "Lap Lease" Cases. See

Ketner vs. Rogan, 95 Texas, 559; 68 S. W., 774.
Blevins vs. Terrell, 96 Texas, 411; 73 S. W., 515.
West vs. Terrell, 96 Texas, 548.

Another article of the statutes, however, is directly decisive of the question under investigation. It is Article 5453, Revised Statutes of 1911, and particularly the following portion of the same:

"*On the expiration of any lease in the absolute lease district, the lands shall remain subject to sale for a period of ninety days, and, if it has been previously classified and valued by the Commissioner of the General Land Office, and notice given to the county clerk, it shall not be necessary to give the clerk any further notice in order to put the land on the market, but it shall be considered as already on the market and subject to sale. During said period of ninety days, the Commissioner of the General Land Office shall suspend action upon any application to lease said land, and shall award it upon any legal application to purchase made during said time.*"

That article is a part of the law of 1901. It has never been expressly repealed. An examination of the language which has been quoted and a comparison of that language with Article 5408 shows that there is no necessary inconsistency between the two articles. If the language of Article 5408, as to the notices with reference to expiring leases, had been mandatory, it would have been inconsistent with a portion of Article 5453 above quoted, but the language used is clearly directory and is intended to make it the duty of the Commissioner of the Land Office to send out the notices when practicable, and is clearly not intended to prevent the land from coming on the market at the expiration of the lease in the absence of such notices.

We have examined all of the laws with reference to school lands subsequent to the law of 1901, and find nothing in any of them inconsistent with that portion of the law of 1901, above quoted. It is settled by a number of decisions that the different school land laws

are cumulative, the one of the other, and that the later laws do not repeal any portions of the former laws unless there is a clear inconsistency or repugnancy. See the following cases:

Houston vs. Koonce, 106 Texas, 50; 156 S. W., 202.
Sayles vs. Robison, 106 Texas, 430; 129 S. W., 346.
Gaddes vs, Terrell, 101 Texas, 574.
Clarke vs. Terrell, 100 Texas, 277.

In the late case of Pruett vs. Robison (Sup, 192 S. W., 537), the court quoted and treated as in full force and effect the portion of Article 5453 which has been quoted above. There is nothing in the act approved April 5, 1915, showing a purpose to repeal either Article 5453 or Article 5408. The Act of April 5, 1915, had but three primary purposes, namely: to designate three sale dates a year for surveyed lands, to change the law with reference to settlement and occupancy on lands, and to change the law with reference to the quantity of lands sold to one person .

For the reasons which have been set out, we advise you therefore that the land referred to in your letter was on the market at the expiration of the lease, or more correctly speaking, on the first sale date after the expiration of the lease, and this notwithstanding the fact that the usual notice of the expiration of the lease was not given to the county clerk. Of course, it is the purpose of the law that such notice shall be given in all cases and, we understand, it is your custom to give such notices. However, the failure of the Commissioner to give such notice will not prevent the land from coming on the market after the expiration of the lease.

Yours very truly,
G. B. SMEDLEY,
Assistant Attorney General.

OP. NO. 1850—BK. 50, P. 283.

PUBLIC LANDS—MINERALS—MINERAL ACT OF 1917.

Mineral Act of 1917.
The owner of a permit to prospect for oil and natural gas on public lands issued after the Mineral Act of 1917 went into effect has twelve months after the date of the permit within which to begin work of development, although his application for the permit was filed before the Mineral Act of 1917 went into effect.

December 15, 1917.

Hon. J. T. Robison, Commissioner General Land Office, Austin, Texas.

DEAR SIR: The Mineral Act of 1913 was repealed by the Mineral Act passed at the Regular Session of the Thirty-fifth Legislature. It appears that applications to prospect for oil and gas on the public lands of the State were filed in the General Land Office before the Mineral Act of 1917 went into effect, but the permits on such applications were not issued until after the Act of 1917 went into effect.

You desire to know whether the owner of a permit issued under such circumstances has six months, as provided by the Mineral Act of 1913, or twelve months, as provided by the Act of 1917, within which to begin the work of development under the permit.

We think it clear that a person who filed a proper application under the Act of 1913 thereby entered into contractual relations with the State, and that, notwithstanding the repeal of the Act of 1913, he would be entitled to perfect his right to the minerals by taking the steps prescribed in the Act of 1913. The State could not take away such right by the repeal of the law under which it was acquired, nor could the State, by amending such law, impose additional duties and burdens upon the applicant. See the following cases:

Jumbo Cattle Co. vs. Bacon & Graves, 79 Texas, 5.
Pence vs. Robison, 102 Texas, 489.
Houston Oil Co. vs. McGraw, 107 Texas, 220.

Under the Mineral Act of 1913, the owner of a permit was allowed six months within which to begin the work of development. The Act of 1917 changed this provision by extending the time to twelve months. The Legislature could not have so amended the law as to require applicants who had already filed under the existing law to begin the work of development within a period shorter than that allowed by the law in force at the time their applications were filed. We see no reason, however, why the Legislature might not have extended the period allowed. Such action would not impose additional burdens or duties upon those who had already filed applications. It would be rather in the nature of an indulgence or an extension of time in their favor, and therefore could not be said to impair the obligation of the contract between the applicant and the State.

The language used in Section 6 of the Mineral Act of 1917 is as follows:

"Before the expiration of twelve months after the date of the permit the owner thereof shall in good faith begin actual work necessary to the physical development of said area. * * *"

This language is sufficiently broad to apply to all permits issued after the Act went into effect, including permits issued on applications filed before the act went into effect.

An examination of the whole of the Mineral Act of 1917 indicates that its primary purpose was to extend the rights of the prospectors for minerals and to encourage the development of minerals on all public lands. In view of the language of the act which has been quoted and in view of what we believe to have been the primary purpose of the act, and for the sake of uniformity, we believe that a reasonable construction of the language of the Act of 1917, above quoted, is that it applies to all permits issued after the act went into effect.

We therefore advise you that one who filed an application to prospect for oil under the Act of 1913, but whose permit was not issued until after the Act of 1917 went into effect, may begin development under his permit at any time within twelve months after the date of the permit.

Yours very truly,

G. B. SMEDLEY,
Assistant Attorney General.

OP. NO. 1878—BK. 50, P. 445.

PUBLIC LANDS—MINERALS—WORDS AND PHRASES—ACT APPROVED MARCH 16, 1917.

The ordinary meaning of the word "when" is "at the time that," rather than "after."

The provision of the Mineral Act of 1917, that areas on which permits to prospect for oil and gas have been forfeited are subject to application by another when the notice of forfeiture "has had time to reach the county clerk through due course of mail," construed to mean that the land is subject to application at the very time the notice is received by the county clerk, rather than after the notice has been received.

February 6, 1918.

Hon. J. T. Robison, Commissioner General Land Office, Austin, Texas.

DEAR SIR: In your letter of January 17th to the Attorney General, you state that certain questions have arisen as to priority between applications for permits to prospect for oil and gas, when one application is filed in the office of the county clerk at the very time the notice of forfeiture of a permit theretofore issued on the same area is received by the clerk, and when another application is filed immediately after the notice of forfeiture has been received by the clerk.

Section 19 of the Mineral Act approved March 16, 1917, authorizes the Commissioner, for certain causes, to forfeit permits which have been issued to prospect for oil and gas, and directs the Commissioner to mail to the county clerk a notice of the fact of forfeiture and provides that "the area shall be subject to the application of another than the forfeiting owner when notice has had time to reach the county clerk through due course of mail." From your letter we take it that you have construed the language of Section 19, which has been quoted, to mean that the area is not subject to another application until the notice of forfeiture actually reaches the county clerk. We believe that this is the only practical construction that can be given to this language, for if the language were literally followed there would be no certain time when the area would be subject to another application.

Your letter indicates that at times applications for permits are received by the county clerk in the same mail in which the Commissioner's notice of forfeiture is received, and that at times applications are delivered by hand simultaneously with the delivery of the mail containing the notice of forfeiture from the Commissioner. The question arises whether permits should be issued on applications thus received by the clerk simultaneously with the receipt of the notice of forfeiture, or whether permits should be issued on the first application received after the clerk has received the notice of forfeiture.

The language of the law quoted indicates a purpose to make the area subject to application *when* the notice is received by the county clerk. It is our opinion that the ordinary meaning of the word "when" is "at the time that," rather than "after."

The word "when," as a relative conjunction, is defined in the Century Dictionary as meaning "at the or any time that; at or just after the moment that; as soon as."

In Bouvier's Dictionary, Volume 3, page 3452, the word "when" is defined as meaning "at which time; at that time."

The definition of the word "when" given in *Words and Phrases* indicate that the ordinary meaning of the word is "at the time." See Volume 8, *Words and Phrases*, 1st Edition, page 7438; Volume 4, *Words and Pharses*, 2nd Series, page 1274.

In a number of cases the Supreme Court has held that public school land is not on the market for sale until the county clerk has received, under the Acts of 1895 and 1905 regulating sales of school land, the notice from the Commissioner of the General Land Office of the classification and appraisement of the land. While we have not been able to find any decision under those laws exactly decisive of the question under investigation, the language of the courts in several cases indicates that the land comes on the market at the very time when the clerk receives the notice, rather than after the notice is received. For example, in the case of Estes vs. Terrell, 99 Texas, 622, Chief Justice Gaines said:

> "We are of the opinion that when notice of the classification and appraisement was sent to the county clerk, and was received by him the tract was subject to sale."

We believe that the construction which we have given to the act in question, that the area is subject to another application filed at the very time the notice is received, will cause less difficulty than would the construction that the area is subject to application filed immediately after the notice is received, for under the latter construction, the question would immediately arise "how long after," and rival applicants would undertake to draw fine distinctions, measured by half minutes or seconds.

You also desire to know whether your office, in determining when an application was filed with the county clerk, would be required or authorized to go behind the county clerk's "returns," by which, we presume, you mean the county clerk's file mark, or other evidence furnished by the county clerk as to the time when the application was received in his office.

It is our opinion that the orderly administration of the mineral law requires that the evidence furnished by the county clerk of the time when an application is filed in his office should be treated by the land office as correct. The burden of proving the incorrectness of the county clerk's file mark, or other evidence furnished by him as to the time when applications are filed, should be on the contesting applicants, rather than upon the Commissioner of the General Land Office. Such applicants have their remedy if the county clerk's file mark, or other record, is not in accordance with the facts. We suggest to you that under Section 26 of the Mineral Act of 1917, which authorizes you to adopt rules and regulations in the administration of the act, you would be fully justified in adopting a rule to the effect that the file mark of the county clerk will be treated by you as

prima facie evidence of the time when applications of this character are filed.

Answering in their order the several questions propounded at the end of your letter, we advise you as follows:

(1) An application is not premature if delivered by hand simultaneously with the mail containing the notice of forfeiture.

(2) An application is not premature if received by the clerk in the mail which brings to him the forfeited notice.

(3) You should accept the clerk's return as *prima facie* evidence of the time when the applications were received.

(4) The ordinary meaning of the word "when" is "at the time that," rather than "after."

Yours very truly,

G. B. SMEDLEY,
Assistant Attorney General.

OP. NO. 1883—BK. 51, P. 24.

PUBLIC LAND—SURVEYS MADE UNDER CONFEDERATE CERTIFICATES.

Discussion of the effect on the rights of the owner of a confederate certificate of his failure to make a survey for the school fund within five years.

March 1, 1918

Hon. J. T. Robison, Commissioner General Land Office, Austin, Texas.

DEAR SIR: Sometime ago you wrote a letter to the Attorney General stating that the holders of confederate certificates in many instances had surveys made for themselves under the certificates within five years from their issuance, but wholly failed, within such time, to have any land surveyed for the school fund. You ask to be advised whether the survey made for the individual under such circumstances should be treated as wholly void or whether you could permit a division of the land surveyed for the individual into two equal parts, one for the owner of the certificate and one for the school fund.

From communications received from persons interested in this question, we have learned that your question relates primarily to several surveys in Brewster County, and in order to arrive at a proper understanding of the facts and the manner in which the surveys were made, and to prevent a possible misunderstanding of our opinion, we have made careful examination of the files in the General Land Office relating to those surveys. We find that your question, so far as it relates to most, if not all, of the surveys in Brewster County, the files for which we have examined, is answered by our opinion to you of October 9, 1914, written in response to your letter to the Attorney General of October 7, 1914. In that opinion, you were advised that when the holder of a certificate requiring him to survey an equal amount of land for the school fund made the survey for the school fund in good faith, but made it in conflict with a prior location, an adjustment should be made under the terms of Articles

53, 56 and following of the Revised Civil Statutes, 1911, dividing the survey made for the holder of the certificate into two equal parts, one for the owner of the certificate and one for the school fund.

There is this difference, however, as to some of the surveys in question in Brewster County, namely: that after it was found that the surveys for the school fund conflicted with prior locations certificates for the unlocated balance were issued by the Commissioner of the Land Office and the correct amount of land surveyed for the school fund. Some of these surveys were made after the expiration of five years from the date of the original certificate. Our examination of the files above referred to does not show that any of the holders of the certificates wholly failed to make a survey for the school fund before the expiration of five years from the issuance of the original certificate. However, since your letter indicates that there may be some such instance, it becomes necessary to determine the effect upon the survey made for the individual of the failure of the owner of the certificate to make any survey for the school land before the expiration of the five years.

Section 2 of Article 14 of the Constitution provides that "all genuine land certificates hereafter issued by the State shall be surveyed and returned to the General Land Office within five years after issuance, or be forever barred." The law authorizing the issuance of the confederate certificates contains the stipulation that: "The certificate granted under the provisions of this act shall be located as follows: The locator shall also locate a like amount of land for the benefit of the permanent school fund before either shall be patented."

The holder of a land certificate is not entitled to the land granted him by the certificate until he has performed all of the obligations imposed upon him by the law under which the certificate is issued. It is apparent from the section of the Constitution and from the law above referred to that the owner of a confederate certificate did not earn his land until he had within five years from the date of the certificate surveyed the quantity of land to which he was entitled and a like quantity for the State and returned the certificate to the General Land Office.

In the case of Von Rosenberg vs. Cuellar (80 Texas, 249), in which a very similar question was involved, Chief Justice Stayton said:

> "If it were contended that appellant ought to be permitted to hold one-half of each survey sued for and thus be entitled to maintain this action as a tenant in common, the answer to this would be that it was incumbent on him to segregate from the vacant public domain and from that which might become his own a like number of acres for the school fund as for himself. *This was the consideration he was bound to give before he could become entitled to any land under such certificates.*"

In that case, also, the court directly held that by reason of the failure of the owner of the certificates to return them to the General Land Office within five years from their issuance, as required by the Constitution, he had forfeited any right to land surveyed under them.

Likewise, it was held in the case of New York & Texas Land Company vs. Thompson (83 Texas, 169), that when the owner of a certificate fails to return his certificate to the Land Office within five

years from its issuance his location is void and the land is subject to location by another. We quote the following from the court's opinion:

"If the owner of a certificate should file upon land and cause the same to be surveyed, but should fail to have his field notes and the certificate returned to the Land Office before the expiration of the five years, it will require no action on the part of the State to forfeit the location, but it would be the duty of the Commissioner of the General Land Office to refuse to take any step looking to a patent. *The survey would become void, with nothing to support it, and any one might show its nullity in any proceeding.*"

See also Adams vs. Ry Co., 70 Texas, 252.

The section of the Constitution requires that the certificates must be both *surveyed and returned* within the five years. Part of the consideration which the owner of the certificate is bound to give before he is entitled to his land is to survey for the school fund a quantity of land equal to his own and such survey must be made within five years. It must follow, therefore, that when the owner of such certificate wholly fails to make the survey for the school fund within the five years fixed by the Constitution, he has failed to give the consideration for the land and has not earned his land and therefore is not the owner of the land which he had surveyed for himself.

We will next consider what is the effect, if any, upon the rights of the owner of the certificate when a survey is made for the school fund within the five years, but in conflict with a prior location, and another survey for the school fund is afterwards made, but after the expiration of the five years, upon a certificate for the unlocated balance or a certified copy of the original certificate.

The language of the Constitution is positive, that the surveys must be made within five years after the issuance of the original certificate or the certificate shall be forever barred. Judge Stayton, in his opinion in the case above referred to, said:

"A survey upon certificate valid at time survey was made can confer no right after the certificate becomes barred."

If this is correct, then even more certainly is it correct that a survey under a certificate barred at the time the survey was made can confer no right. We believe it clear that a survey made for the school fund after the expiration of five years from the issuance of the certificate is a nullity, as far as the rights of the owner of the certificate are concerned. It is true that the land so surveyed is set apart to the school fund, but this occurs not because of the survey made by the owner of the barred certificate but by virtue of Section 2 of Article 7 of the Constitution and the Acts of February 3, 1883, May 22, 1889, and February 23, 1900, which appropriate all such land to the public school fund.

The fact that the survey was made within five years from the issuance of the unlocated balance certificate, or certified copy of the original certificate, adds nothing to the rights of the owner, for such unlocated balance certificate or certified copy is but evidence of the

original certificate, and it neither imposes additional obligations on the owner nor increases or extends the rights granted him by the original certificate. See New York & Texas Land Co. vs. Thompson, 83 Texas, 169.

We therefore conclude that the fact that a survey was made for the school fund after the expiration of five years from the issuance of the original certificate can not be considered in determining or measuring the rights of the owner of the certificate in the land which was surveyed for the owner.

You also desire to be advised whether surveys made for the school fund after five years from the issuance of the original certificate should be treated, for the purpose of sale, as surveyed or unsurveyed public school land.

We think it clear that such lands should be sold as surveyed school lands. While they were not surveyed within the time required by the Constitution, they were in fact surveyed, and the land within the bounds of the surveys so made was segregated from the public domain. Furthermore, they were in fact surveyed for the school fund. The opinion in the case of Mills vs. Needham, 67 S. W., 1097, indicates that the section of land involved in that case, although the survey was made under a certificate probably void, was sold as surveyed public school land. The title of the purchaser was upheld in that case. The first section of the Act of 1895 regulating the sale of surveyed public school lands provides that "all lands heretofore or hereafter surveyed and set apart for the benefit of the public free schools * * * shall be sold and leased under the provisions of this act."

The first section of the Act of 1887 is written in the same language. It is evident that the lands in question were both surveyed and set apart for the benefit of the public free schools. The later laws with reference to the sale of surveyed school land use the words "surveyed school land." We know of no reason why school land that has been surveyed in fact with field notes on file in the General Land Office should not be considered surveyed land within the meaning of the laws regulating the method of sale of surveyed public school lands.

To summarize our conclusions, we advise you as follows:

(1) That when the owner of a confederate certificate wholly failed to make a survey for the school fund within five years from the issuance of the original certificate, he forfeited all rights to the land which he had surveyed for himself under the certificate.

(2) That when the owner of a confederate certificate in good faith and within five years from the issuance of the original certificate surveyed for the school fund substantially the quantity of land required, but such survey was either partially or wholly in conflict with prior locations, the land surveyed for the owner of the certificate, together with that part of the land surveyed for the school fund, if any, out of conflict, should be divided in accordance with Article 5356 and following, Revised Statutes, 1911, and one-half set apart to the school fund and the balance to the owner of the certificate. This in accord-

ance with our opinion to you of October 9, 1911, and for the reasons therein stated.

(3) That in making such division or in determining the rights of the owner of the certificate, no consideration should be given to surveys which may be made for the school fund after the expiration of five years from the date of the original certificate.

(4) That surveys made for the school fund under confederate certificates after the expiration of five years from the issuance of the original certificate should be treated for purposes of sale as surveyed public school land.

This opinion is written on the assumption that the lands in question have not been patented. If any of the surveys made for the individual have been patented the rights of the owner of the land under the patent can not be questioned by anyone, except by the State, on direct attack, or except by someone claiming under a right existing prior to the issuance of the patent.

Yours very truly,

G. B. SMEDLEY,
Assistant Attorney General.

OP. NO. 1946.

BOUNDARIES—WATER COURSES.

Discussion of the Boundary Between Oklahoma and Texas along the Red River.

The bank of a river is the bank which confines it in time of ordinary high water rather than a bluff remote from the channel which confines the water in case of unusual floods.

September 2, 1918.

Honorable J. T. Robison, Commissioner, General Land Office, Austin, Texas.

DEAR SIR: In your letter of August 30th to the Attorney General you request advice with reference to the boundary between Oklahoma and Texas along a portion of the Red River in or adjoining Wichita County. It appears that in the particular location the water of the river is confined in normal times by a well defined but low bank on the south, that a few hundred yards back from this low bank (in some places, so I am imformed, as far as 1400 varas) is a high bluff by which the waters of the river are confined in case of unusually high water or floods; that the land between the low bank and the high bluff is "fine earth covered with grass of an undulated topography, sometimes sloping toward the channel along which the water flows," that on this land "grass and trees grow, grazing is good, and occasionally this area is inhabited by people who have their homes established between the high bank and the waters edge as it flows along the channel." The question presented is whether the land above referred to is within Texas or Oklahoma. I understand that certain persons in Oklahoma are contending that the south bank of the Red River is the boundary between Texas and Oklahoma. This contention is perhaps based upon the language used in the decree of the

Supreme Court of the United States in the case of United States vs. Texas, 162 U. S., 1, 91, by which it was adjudged that Greer County was not a part of the State of Texas and in which decree the southern boundary of Greer County was described as following the south bank of the Red River. In that case, however, there was no controversy as to the title of the bed of the river, the question being whether the south fork or the north fork of the river constituted the boundary.

It has been generally conceded that the boundary between Texas and Oklahoma is fixed by the terms of the Treaty of 1819 between the United States and Spain. By Section 3 of that Treaty the boundary between the two countries was thus defined:

"The boundary line between the two countries, west of the Mississippi, shall begin on the Gulf of Mexico, at the mouth of the river Sabine, in the sea, continuing north, along the western bank of that river to the 32nd degree latitude; thence, by a line due north to the degree of latitude where it strikes the Rio Roxo of Natchitoches, or *Red River; then following the course of the Rio Roxo, westward, to the degree of longitude* 100 *west from London and* 23 *from Washington;* then, crossing the said Red River, and running thence, by a line due north, to the river Arkansas; thence, following the course of the southern bank of the Arkansas, to its source, in latitude 42 north; and thence by that parallel of latitude, to the South Sea."

The Courts of this State have held that the boundary was fixed by the Treaty above referred to at the middle of the river. The Texas Court of Appeals so held in the case of Spears vs. State, 8 Texas Ct. of Appeals, 467, and the Supreme Court of Texas, as late as 1905, so held expressly approving the judgment and opinion of the Court of Appeals in the case above referred to. See Parsons vs. Hunt, 98 Texas, 420, 424. However, for the purpose of determining the ownership of the land between the low banks and the high bluffs referred to in your letter, it is not necessary to discuss the correctness of the opinions of the Texas Courts. At most it can only be contended that the Treaty in effect designated the south bank of the river as the boundary. Granting for the argument that such was the effect of the Treaty, it is our opinion that the land in question is within the State of Texas for two reasons which will be briefly discussed.

First, it is a general rule that when the bank of a stream is described as the boundary the title will extend to the margin of the stream unless there is something to limit it to the top of the bank. See Farnham on Water Rights, Section 857, and the cases there cited. See also:

Halsey vs. McCormick, 13 N. Y., 296.
Yates vs. Van DeBogert, 56 N. Y., 526.
Lamb vs. Ricketts, 11 Ohio, 311.
Flemming vs. Kenney, 27 Ky., 155.

There is nothing in the Treaty showing a purpose to make the top of the river bank or the top of the highest river bank the boundary. On the contrary, the language of the Treaty, which has been quoted, makes no reference to the bank, but describes the east boundary as

running to the river and the north boundary as following the course of the river. This language, if given the construction most favorable to Oklahoma, means, under the rule above referred to, that the boundary of Texas extends as far north as the margin of the river which is the edge of the water under ordinary conditions or the line to which the water usually stands when free from disturbing causes. Such line has also been described as the water line without reference to the extraordinary freshets of winter or spring or the extreme drouths of summer or autumn.

This rule is sustained by the opinion of the Supreme Court of the United States in the case of State of Alabama vs. State of Georgia, 13 Howard, 505, in which was involved the boundary between Georgia and Alabama along the Chattahoochee river. There the boundary had been defined by a contract of cession between Georgia and the United States as running up the river and "along the western bank thereof." The Court fixed the boundary at the water line of the acclivity of the western bank. That is at the water line without reference to extraordinary freshets or unusual drouths. The language used by the Court in fixing this boundary was as follows:

"We also agree and decide that this language implies that there is ownership of soil and jurisdiction in Georgia in the bed of the river Chattahoochee, and that the bed of the river is that portion of its soil *which is alternately covered and left bare, as there may be an increase or diminution in the supply of water, and which is adequate to contain it at its average* and mean stage during the entire year, without reference *to the extraordinary freshets of the winter or spring, or the extreme drought of the summer or autumn.*

"The western line of the cession on the Chattahoochee river must be traced on the water-line of the acclivity of the western bank, and along that bank where that is defined; and in such places on the river where the western bank is not defined, it must be continued up the river on the line of its bed, as that is expressed in the conclusion of the preceding paragraph of this opinion."

The second reason for our opinion that the land in question is within the State of Texas, is, that the ordinary meaning of the word "bank" is the elevation of land which confines the river at ordinary high water, or the elevated land between ordinary high and ordinary low water. See Daniels vs. Cheshire, R. Co., 20, N. H. 85.

Stone vs. City of Augusta, 46 Me., 127.
Johnson vs. Knott, 13 Oregon, 308; 10 Pacific, 418.
Sundial Ranch vs. May Land Co., Oregon, 205; 119 Pac., 758.
Houghton vs. Chicago, etc., Ry. Co., 47 Iowa, 370.

In the language of some of the authorities, "the banks of a river or stream are understood to be that which contains it in its ordinary state of high water." See Minor's heirs vs. City of N. O., 115, L. A., 301; 38 So., 999.

Ensley Development Co. vs. Powell, 147 Ala., 300; 40 So., 137.

The low bank on the south side of the Red River which confines the river in its ordinary state of high water rather than the high

bluffs to which the water of the river extends in case of unusual floods, is, in our opinion, the south bank of the river.

The banks of a stream are immediately adjacent to its bed. The banks confine the waters within the bed. The land referred to in your letter cannot be considered a part of the bed of the river, particularly in view of the character of its soil, its vegetation, its use and its extent.

For the reasons above set out, and as we understand the facts, we advise you that the land referred to in your letter between the low banks, which confine the stream in its ordinary condition, and the high bluffs is within the State of Texas.

Very truly,

G. B. SMEDLEY,
Assistant Attorney General.

OPINIONS ON PUBLIC OFFICERS.

OP. NO. 1710—BK. 48, P. 275.

All official communications required or permitted by a public officer are absolutely privileged under the libel laws of the State of Texas.

Reports and publications of bulletins required or permitted by the Dairy and Food Commissioner are absolutely privileged.

Hon. R. H. Hoffman, Food and Drug Commissioner, Capitol.

DEAR SIR: You state to this Department that you are now in the course of preparation of your report to the Governor of the State, which report is required by law to be made by you, and you state that in the course of your year's work it has been necessary to make divers investigations and many analyses of food and drug products offered for sale in this State. You state that you desire to incorporate in your report the result of your investigations together with the analyses of the various food and drug products, stating in your report the value of the food or drug products analyzed and whether or not such food and drug products so analyzed are beneficial or injurious or neutral in their effect upon the human system. You desire to be advised if you should find certain food or drug products to be either impure, worthless or found to contain little or none of the ingredients advertised, or if you should find that the food or drug product from the method of its advertisements and its composition constitutes a fraud, would you be privileged under the Libel Laws of this State to make a full, true and correct statement of your findings together with your recommendations to the Governor and would you be privileged under the laws to embrace your report in the form of a bulletin for public distribution.

In order that your question can be properly answered it is necessary at this juncture to examine into the duties and powers your office has conferred upon you. For the purpose of this opinion we will quote Sections 16, 18, 20 and 21 of the Food and Drug Act:

"Sec. 16. It shall be the duty of the Dairy and Food Commissioner, or any inspector or deputy appointed by him, to carefully inquire into the quality of the foods and drug products offered for sale in this State, and they may in a lawful manner procure samples of the same and make due and careful examination and analysis of all or any of such food and drug products, to discover if the same are adulterated, or misbranded, impure, or unwholesome, in contravention of this Act, and it shall be the duty of the Commissioner to make complaint against the manufacturer or vender thereof, in the proper county, and furnish the evidence thereon and thereof to obtain a conviction for the offense charged. The Dairy and Food Commissioner, or his inspectors, or any person by him duly appointed for that purpose, shall make complaint and cause proceedings to be commenced against any person for the violation of any of the laws relative to adulterated, misbranded, impure or unwholesome food, and in such case he shall not be obliged to furnish security for costs; and he shall have power in the performance of his duties to enter into any creamery, factory, store, salesroom, drug store or laboratory, or place, where he has reason to believe foods or drugs are made, prepared, sold or offered for sale or exchange, and to open any cask, tub, jar, bottle or package containing or supposed to contain any article of food or drug and examine or cause to

be examined the contents thereof, and take therefrom samples for analysis. The persons making such inspection shall take such sample of such article or product and he shall mark or seal such sample and shall tender at the time of taking it to the manufacturer or vender of such product or to the person having the custody of the same the value thereof, and a statement in writing of the reason for taking such sample. It shall also be the duty of the Dairy and Food Commissioner to formulate, publish and enforce such rules and regulations as may be necessary to enforce this Act, and he shall adopt the standards for foods, food products, beverages, drugs, etc., and the methods of analysis authorized as official by the United States Department of Agriculture in so far as they are applicable in the light of modern discovery and scientific research.

"Sec. 18. The Commissioner shall make an annual report to the Governor on or before the 31st day of August in each year, which shall be printed and published at the expense of the State, which report shall cover the entire work of his office for the preceding year, and shall show, among other things, the number of manufactories, and other places inspected and by whom, the number of specimens of food and drug articles analyzed, and the number of complaints entered against any person or persons for the violation of the laws relative to the adulteration of foods and drugs, the number of convictions had and the amount of fines imposed therefor, together with such recommendations relative to the statutes in force as his experience may justify.

"Sec. 20. The Commissioner is hereby empowered with authority to issue bulletins quarterly, or as often as in his judgment he may deem advisable, showing the work of the Commissioner. And he shall give notices of the judgments of the courts, by publication, in such manner as he may prescribe by the rules and regulations, and the expense of such publication shall be paid by the State.

"Sec. 21. That any article of food or drug that is adulterated or misbranded within the meaning of this Act shall be liable to be condemned, confiscated, and forfeited by a suit to be brought in the district court of the county where said article of food or drug is located, by a suit to be filed in said court in the name of the State of Texas as plaintiff, and in the name of the owner thereof as defendant, if said owner be known; if he be unknown, then in the name of said article of food or drug, and service shall be obtained in said cases in the same manner that the law provides that service shall be obtained in civil cases. That upon a trial of said case, if it be determined by the court or jury trying said case that said articles of food or drug is misbranded or adulterated, or of a poisonous or deleterious character within the meaning of this Act, the same shall be disposed of by destruction or sale in accordance with the judgment of the court, and the proceeds thereof, if sold, less the legal cost and charges, shall be paid into the treasury of this State. And it is hereby made the duty of the different district and county attorneys in this State to file forfeiture and condemnation suits under this Act at the request of the Dairy and Food Commissioner, and said district or county attorneys, as the case may be, shall be entitled to a fee of $15.00, to be paid out of the proceeds arising from the sale of the property condemned, said fee to be in addition to all other fees allowed by law, and shall be over and above the fees allowed under the General Fee Act of this State. It is further provided, that upon payment of the costs of such forfeiture or condemnation proceeding by the owner of the property proceeded against and by his executing and delivering a good and sufficient bond in double the value of the goods proceeded against, payable to the State of Texas, conditioned that said articles shall not be sold or otherwise disposed of contrary to the provisions of this Act, the court may by order direct that said goods be delivered to the owner thereof. In all proceedings begun under this section, either party may demand trial by jury, of any issue, of fact in any such case, and all such proceedings shall be at the suit of and in the name of the State of Texas."

The duties of your office constitute you a quasi-judicial officer. This function arises from the fact that there is a large part of discretion in the enforcement of the food and drug laws of this State, which is lodged in you and your assistants. You are, from the terms of the act, empowered to make examinations, to analyze food and drug products; you are empowered to put into action rules and regulations to preserve a proper standard of food and drugs; you are authorized to formulate, publish, and enforce rules and regulations having for their purpose the enforcement of the food and drug laws; you are empowered to determine when, in your judgment, the laws have been violated; you are instructed to proceed with prosecutions both civil and criminal to enforce the laws. These various duties when discharged by you give to your office a quasi-judicial function. In the case of Baldacchi vs. Doodlett, 145 S. W., 328, in which case a writ of error to the Supreme Court was denied and the doctrine of which case was afterwards approved in the case of the State vs. DeSilva, 145 S. W., 330, it was held that the powers conferred upon the Comptroller to forfeit a liquor dealer's license were not judicial within the meaning of the term as designating one of the three great powers of government set forth in the Constitution, but that the power conferred upon the Comptroller was quasi-judicial. The holdings of the Texas courts are in accordance substantially with all other authorities on the question and in accord with the ordinary definition of quasi-judicial functions.

In the case of Mitchell vs. Clay County, 96 N. W., the court with accuracy and clearness defines quasi-judicial functions in the following language: "When the law commits to an officer the duty of looking into facts and acting upon them not in a way which it specifically directs, but after a discretion in its nature judicial, the function is quasi-judicial."

The case of DeWoose vs. Smith, 97 Federal, 309, gives the following definition:

"That action of the Comptroller of the Currency in ordering an assessment of the stockholdrs of an insolvent national bank involves a determination of the necessity for such assessment, which is quasi-judicial and is conclusive on the stockholders."

The same principle is invoked with reference to the authority of the Commissioner of Insurance and the laws which invest him with discretionary powers to see that all laws relating to insurance companies are enforced. It was held in the case of the American Casualty Insurance Company vs. Fieler, 25 American State Report 337 that in as much as the Commissioner's duties were quasi-judicial a mandamus would not lie against him to compel the issuance of a certificate of admission to a foreign insurance company which had been refused after a hearing.

The doctrine set out in the above cases was closely followed in the case of Sargent vs. Little, 72 N. H.

Pittfield vs. Exeter, 69 N. H., 336.
Bradley vs. LaConia, 63 N. H., 260.
Broody vs. Watson, 64 N. H., 162.

People vs. Jones, 54 Barbour, 312.
Ramagano vs. Crook, 85 Alabama, 229.
Dunbar vs. Frazer, 72 Alabama, 538.
State vs. Common Council, 101 N. W., 1063.

Joyce on Intoxicating Liquors, Section 287, states the rule as follows:

"The action of members of the license board on passing on an application for a license is in its nature judicial, at least to the extent of relieving them of liability for damages for a refusal to issue the license."

From the decisions of the courts and the rules stated by textbook writers we therefrom derive the following rules:

(1) That the writing and the publication of any matter required by an officer to be done by law, or which in the proper administration of his office it is proper for him to do, is absolutely privileged matter and could not, whether the same be true or false, form the basis of an action for defamation.

(2) That if the matter was not absolutely privileged and was written and published by an officer in the absence of proof of express malice the matter would be prima facie privileged. Continuing this proposition it may be said that there are two classes of privileged communications.

(a) Those which are absolutely privileged and for the publication of which an action can not be maintained, no matter what the motive of the author may be. Illustrating this class might be mentioned accurate publications of the proceedings of the courts of record and legislative bodies, the statement of judges, witnesses and jurors made on trials in courts of record and all official communications made by heads of executive departments when engaged in the discharge of duties imposed upon them by law.

(b) Those which are prima facie privileged. Among this class are statements of one having interest in the subject matter of a communication made to another having interests in the same matter. This class of privileged communications which we will designate as prima facie privileged communications may be again subdivided into two kinds.

1. Those which relate to matters of public interest, and,
2. Those which relate to purely private interests.

A third class may be also designated as those which relate to both public and private interest, being an interblending of the first two named.

For convenience, the leading cases make clear the rules above deduced will be cited here.

Spalding vs. Vilas, 161 U. S., 483.
Sanders St. Bank vs. Hawkins, 142 S. W., 84.
Cooley on Torts (3rd ed.), p. 431.
Larkin vs. Noonan, 19 Wis., 93.
Pratt vs. Gardner, 48 Am. Dec., 652.
Rains vs. Simpson, 50 Texas, 495.
McVea vs. Walker, 31 S. W., 839.
Taylor vs. Goodrich, 40 S. W., 515.
Anderson vs. Roberts, 35 S. W., 416.

The case of Spalding vs. Vilas is directly in point upon the principle here insisted upon and shows clearly that this report in the form and manner in which you proposed to make it is absolutely privileged. The suit in question arose in the following manner:

The plaintiff Spalding was a citizen of the District of Columbia and had been practicing law in the City of Washington for more than twenty years, while the defendant Vilas was postmaster general of the United States from March 4, 1895, to January 16, 1898. The plaintiff alleged substantially that beginning with the year 1871 and from time to time down to 1886 he had been employed by various postmasters at postoffices throughout the United States to collect, for them from the postoffice department certain claims for salary due them under the law. It is unnecessary for us to enter into the details of the matter, but it is sufficient to say that Spalding stated in his pleadings that there were four thousand of these postmasters who became his clients. He performed various and sundry duties in the matter and finally, either directly or indirectly, through his efforts the Congress made an appropriation to pay these back claims. After the appropriation had been made, Mr. Vilas as Postmaster General paid the claims directly to the postmasters, sending with each draft an official letter which the plaintiff Spalding claimed was defamatory of his character; "unnecessary, malicious and without reasonable or probable cause and intended to deceive the claimants and to thereby induce them to repudiate the contracts they had made with the plaintiff." The plaintiff claimed that he was damaged twenty-five thousand dollars in actual damages in the form of loss and expense and $75,000 to his good name and reputation, making $100,000 involved in the suit, all told. The Supreme Court of the United States, speaking through Chief Justice Harlan, held; that the action against Mr. Vilas could not be maintained and that the lower court acted correctly in dismissing his petition, saying:

"We are of opinion that the same general considerations of public policy and convenience which demand for judges of courts of superior jurisdiction immunity from civil suits for damages arising from acts done by them in the course of the performance of their judicial functions, apply to a large extent to official communications made by heads of executive departments when engaged in the discharge of duties imposed upon them by law. The interests of the people require that due protection be accorded to them in respect to their official acts. As in the case of a judicial officer, we recognize a distinction between action taken by the head of a department in reference to matters which are manifestly or palpably beyond his authority, and action having more or less connection with the general matters committed by law to his control or supervision. Whatever difficulty may arise in applying these principles to particular cases, in which the rights of the citizen may have been materially impaired by the inconsiderate or wrongful action of the head of a department, it is clear—and the present case requires nothing more to be determined—that he cannot be held liable to a civil suit for damages on account of official communications made by him pursuant to an Act of Congress, and in respect of matters within his authority, by reason of any personal motive that might be alleged to have prompted his action; for, personal motives cannot be imputed to duly authorize official conduct. In exercising the functions of his office, the head of an executive department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of

inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government, if he were subjected to any such restraint. He may have legal authority to act, but he may have such large discretion in the premises that it will not always be his absolute duty to exercise the authority with which he is invested. But if he acts, having authority, his conduct cannot be made the foundation of a suit against him personally for damages, even if the circumstances show that he is not disagreeably impressed by the fact that his action injuriously affects the claims of particular individuals. In the present case, as we have found, the defendant, in issuing the circular in question, did not exceed his authority, nor pass the line of his duty as Postmaster General. The motive that impelled him to do that of which the plaintiff complains is, therefore, wholly immaterial. If we were to hold that the demurrer admitted, for the purpose of the trial, that the defendant acted maliciously, that could not change the law."

It will be noted from the foregoing extract from the opinion of the Supreme Court of the United States that the court places the exemption from liability of a head of a department of the Government for the publication of defamatory matters upon exactly the same grounds that such exemptions are placed with reference to courts and court proceedings. The real basis of both is that it is to the interest of the people that due protection be accorded the heads of the departments in respect to their official acts. In other words, in the exercise of the functions of his office the head of an executive department should not be under apprehension that the motives which control his conduct may at any time become the subject of inquiry in a civil suit for damages. If such were the law it would seriously cripple and effect the administration of public affairs—notably so in this State in respect to the affairs of the Comptroller relative to regulating the liquor traffic and of the Commissioner of Insurance and Banking relative to his relation to the banks of the State, and the Dairy and Food Commissioner, etc. So it may be laid down as the rule which obtains now in this country that if the head of an executive department of the government does not exceed his authority nor pass the line of his duty he may not be made to respond to damages for the result of his action, and this regardless of the actual motive which may have impelled him to do that of which the plaintiff complains. It has been ruled that the executive of a nation and the Governors of the several States are exempt from responsibility to individuals for their official utterances.

So are all judges of courts and judicial officers while acting in the limits of their jurisdiction.

Cooley on Torts (3rd ed.), p. 431.

A rule is equally as well fixed in the law books that immunity from civil damages lies to publications of the executive department of the government. As for instance, a petition addressed to the appointing power which contains a defamatory matter derogatory of the character upon an applicant for a position, although libelous in effect is notwithstanding a privileged communication or publication. Take the case of Larkin vs. Noonan, 19 Wis., p. 93, et seq., which illustrates both the rule last suggested and one which is entirely applicable to

the facts of your case. The action in the Noonan case was for libel. The petition has certain averments as to the character and reputation of the plaintiff, and that at the time of the alleged libel he was sheriff of Milwaukee County in the State of Wisconsin. He alleged in substance that in November, 1861 at the City of Milwaukee the defendant Noonan falsely, wickedly and maliciously did compose and publish concerning the plaintiff, as such sheriff, certain false, scandalous, malicious and defamatory matter which was then set out in full, with appropriate inuendoes. He alleged further that the publication was made to the Governor of the State in the form of a petition for the removal of the plaintiff from the office of sheriff, it being the law of that State that the Governor could remove the sheriff for cause. The defendant Noonan answered and made his defense relying among other things upon the fact that the communication under the circumstances to the Governor of the State was absolutely privileged.

Passing upon the question the Supreme Court of the State of Wisconsin held that the communication under the circumstances was absolutely privileged and that even though under averment to malice the petition stated no cause of action. The court among other things said:

"The libelous matter complained of was contained in a petition addressed to the Governor to procure the removal of the appellant, the plaintiff below, from the office of sheriff of Milwaukee County, on account of gross misconduct in office. It is claimed by the counsel for the respondent that an application to the Governor for such a purpose is, under the constitution and laws of this State, strictly in the nature of a judicial proceeding, and therefore, that the matters stated in the petition, if pertinent to the subject of investigation, are privileged, and furnish an absolute exemption to all liability to an action of libel. If this main proposition thus insisted upon be correct, that such an application is in the nature of a judicial proceeding, then we suppose all matter which is embraced in the petition, if pertinent and relevant, is privileged. This seems to be a well-established principle. Jennings vs. Paine, 4 Wis., 358; Lake vs. King, 1 Saunders, 120; Starkie on Slander (Wend. ed.), 240; O'Donaghue vs. McGovern, 23 Wend., 25; Hastings vs. Luck, 22 id., 410; Gilbert vs. the People, 1 Denio, 41; Garr vs. Selden, 4 N. Y., 91; Hartsock vs. Reddick, 6 Blackf., 255. And the rule is certainly sustained by the most weighty reasons and the highest considerations of public policy. Can then a petition, addressed to the Governor, asking the removal of a person from the office of sheriff on the ground of malversation in office, be said to be in the nature of a judicial proceeding? We are inclined to the opinion that this question must be answered in the affirmative.

"Our constitution provides that the Governor may remove a sheriff upon giving him a copy of the charges against him and an opportunity of being heard in his defense. Sec. 4, Art. 6. The statute provides that same thing. Sec. 4, Ch. 14, R. S. 1858. It is obvious that these provisions clothed the Governor with a power over the proceeding strictly analogous to that exercised by a court in the trial of a cause. He is required to furnish the accused with a copy of the charges made against him, and give him an opportunity of being heard in his defense. This involves as a consequence a trial—a legal investigation into the truth of the charges. Witnesses may be subpoenaed (Sec. 1, Ch. 137, R. S. 1858), sworn and examined. Testimony must be taken, weighed and considered. And although the proceeding is summary, and no trial by jury allowed, yet it conforms in important particulars to the proceedings in judicial tribunals. If the charges are sustained by satisfactory testimony, the Governor may remove the delinquent officer. If the charges are not proven, the officer must be acquitted. Hence, in the hearing of causes of this nature, the

Governor acts in a quasi-judicial capacity (Randall vs. the State, 16 Wis., 340), and the proceeding is analagous, in its most essential features, to a judicial hearing and investigation. And there would therefore seem to be the same grounds of public policy for saying that all matters contained in the petition which are material and pertinent to the subject of inquiry should be privileged, that there is for holding that what takes place in the ordinary course of justice is absolutely exempt from an action for libel. The same rule as to impunity should be applied in the one case as in the other. Upon this question we cannot better express our views than by adopting the just and forcible language of Senator Clinton, used by him in giving his opinion in Thorn vs. Blanchard, 5 Johns, 507-530: 'There is a certain class of cases wherein no prosecution for a libel will lie, when the matter contained in it is false and scandalous; as in a petition to a committee of parliament; in articles of peace, exhibited to justices of the peace; in a presentment of a grand jury; in a proceeding in a regular course of justice; in assigning, on the books of a Quakers' meeting, reasons for expelling a member; in an exposition of the abuses of a public institution, as in the case of the deputy governor of Greenwich hospital, addressed to the competent authority to administer redress. The policy of the law here steps in and controls the individual rights of redress. The freedom of inquiry, the right of exposing malversation in public men and public institutions, to the proper authority, the importance of punishing offense, and the danger of silencing inquiry and of affording impunity to guilt, have all combined to shut the door against prosecutions for libels, in cases of that, or of analogous nature.' (See the instructive opinion of Justice Cowen, in Howard vs. Thompson, 21 Wend., 319.) If we are right in holding that a petition addressed to the Governor, asking the removal of a person from the office of the sheriff, is exempt from an action for libel, there is an end of this case. It is true the plaintiff offered to amend the complaint by averring express malice and want of probable cause in making the charges of official misconduct against him, but this obviously would not help out the case as an action for libel." (Larkins vs. Noonan, 19 Wis., 98-100.)

It will be noted in this case that the court held that the action of the Governor with reference to the matter was of a quasi-judicial nature. Upon an examination of the duties which the Governor under those circumstances performed one will be impressed with their similarity to the duties required of the Dairy and Food Commissioner in cases of the character under consideration, and that if one is quasi-judicial in its nature the other is equally so, and that both on the ground of the quasi-judicial nature of his acts and of the fact that the acts complained of were within the performance of his duties as a member of the executive department of the government, the Dairy and Food Commissioner could not be made to respond in damages in this character of suit for his official actions.

Sanders State Bank vs. Hawkins, 142 S. W., 84 et seq. The case of Sanders State Bank vs. Hawkins is one directly in point on the question here at issue.

The Hon. William E. Hawkins, now of the Supreme Court of the State, was Commissioner of Insurance and Banking and in the course of the performance of his duties as such officer closed the Sanders State Bank. The plaintiff in bringing the suit for damages alleged that Judge Hawkins acting without legal cause or authority and with malice and that he was prompted by motives of pique, spite and ill-will entertained by him against the plaintiff, the bank and all of its officers; that his purpose in closing the bank was to injure and harass the plaintiff and all its stockholders. In other words, the bank

alleged that Judge Hawkins' purpose was not to perform his duty as bank commissioner, but to vent his spite, spleen, malice and ill-will against the bank and its officers. The action was brought to recover damages of him and his bank examiner who acted with him in closing up and taking charge of the affairs of the bank. When the case came on for trial the district court dismissed the case on demurrer on the ground that it stated no cause of action. When the case reached the court of Civil Appeals it was affirmed by that court on the ground that in as much as the petition did not state any facts showing that Judge Hawkins exceeded his authority of Bank Commissioner that the petition stated no cause of action, as the motives which actuated the Bank Commissioner, whether good or bad, constituted no part of a cause of action in the absence of a showing that he had exceeded his authority. The court said:

"Believing as we do, that, in failing to allege facts showing that the appellees exceeded the authority conferred by the law under which they purported to act in closing the appellant bank, the petition has stated no grounds for holding either of them personally liable for the injuries which are claimed, we conclude that the demurrer was properly sustained. Under the authorities previously referred to, if the superintendent and the examiner acted within the powers conferred upon them by law, they cannot be held liable for their arbitrary conduct, even though prompted by improper motives."

So much for the facts upon which the case was based and on the final conclusion of the court. The particular matter which we desire to direct attention is the principles of law announced in the opinion which shows that Judge Hawkins as Commissioner of Banking was acting in a quasi-judicial capacity. In the case referred to the court said:

"It appears to be conceded by counsel for appellant that the appellees were quasi-judicial officers and that their conduct in closing the bank must be regarded as having been performed while purporting to act in that capacity In order to render a judicial or quasi-judicial officer personally liable in a private action for damage resulting from his official conduct, it must appear that he transcended the limits of his power. As long as he remains within the scope of his legal authority, his motive is immaterial. Rains vs. Simpson, 50 Texas 495, 32 Am. Rep. 609; McVea vs. Walker, 11 Texas Civ. App., 46, 31 S. W., 839; Taylor vs. Goodrich, 25 Texas Civ. App. 109, 40 S. W. 515; Anderson vs. Roberts, 35 S. W. 416; Throop on Public Off., 713, and numerous cases cited in note. The case of Rains vs. Simpson, supra, was one in which a sheriff sued the members of the county court for maliciously refusing to approve his bond as tax collector. After discussing the facts alleged in the petition and holding that they were insufficient to constitute a cause of action, the court said: 'From the very necessity of the case this immunity from private liability extends, not only to negligent, but willful and malicious, judicial acts. As said by Chief Justice Shaw, in Pratt vs. Gardner, 2 Cush. (Mass.), 69 (48 Am. Dec., 652): "If an action might be brought against the judge by a party feeling himself aggrieved, the judge would be compelled to put in issue facts in which he has no interest, and the case must be tried before some other judge, who in his turn might be held amenable to the losing party, and so on indefinitely. If it be said that it may be conceded that the action will not lie, unless in a case where a judge has acted partially or corruptly, the answer is that the losing party may always aver that the judge has acted partially or corruptly, and may offer testimony of bystanders or others to prove it; and these proofs are addressed

to the courts and judge before whom the judge is called to defend himself, and the result is made to depend, not upon his own original conviction (the conclusion of his own mind in the decision of the original case), as by the theory of jurisprudence it ought to do, but upon the conclusion of other minds, under the influence of other and different circumstances.'' It often happens that the issue of authority or jurisdiction is attended with some difficulty, and its existence depends upon the happening of certain facts which must be ascertained, from extraneous evidence, and about which there might be an honest difference of opinion. In such cases the administration of justice and the performance of important public duties would be seriously interfered with if the officer who is called upon to determine such questions is to act at his peril. The public interest demands that he be permitted to exercise the utmost freedom consistent with an honest endeavor to reach and announce the proper conclusion. Of course, if he should be influenced by improper or malicious motives in exceeding his authority, or knowingly do so, he could not then claim immunity from liability for such civil damages as he might wrongfully inflict. Anderson vs. Roberts, 35 S. W., 416." (142 S. W., 86.)

Nor does the rule of protection extended to officers end at this point, but goes further. For it is said that when the conduct of an officer is attacked as being in excess of authority conferred by law, if there are any conditions under which he might exercise the power assumed, it will be presumed in support of the validity of his acts such conditions existed. Concerning this very matter in the same case the court laid down the rule as follows:

"When the conduct of an officer is attacked as being in excess of the authority conferred by law, if there are any conditions under which he may exercise the powers assumed, it will be presumed, in support of the validity and regularity of his acts, that such conditions existed and formed the basis of his official conduct. City of San Antonio vs. Berry, 92 Texas 319, 48 S. W. 496; Throop on Public Officers, 558. We see no good reason why the same presumptions should not be indulged in favor of the regularity of the officer's conduct when he is sought to be held liable in an action like the present."

It is unnecessary for us to enter upon a lengthy comparison of the authority conferred upon the Dairy and Food Commissioner in performing his duties and that conferred upon the Commissioner of Banking concerning banking matters. It is sufficient to state that they are substantially the same in so far as the subjects to be handled by them are similar, but that in so far as the regulatory authority conferred upon the two officers differ, that the authority conferred upon the Dairy and Food Commissioner is of a wider and more far reaching extent and contains more elements of a judicial nature than does the law conferring authority upon the Commissioner of Banking. These conclusions are evident by reading of the powers conferred upon the Bank Commissioner and upon the Dairy and Food Commissioner. The point to be insisted upon is that the Dairy and Food Commissioner is a quasi-judicial officer the same as the Commissioner of Banking, and that no action can lie against him for his official conduct so long as he acts upon matters within his jurisdiction, and this regardless of the motives which impel him to act in the particular matter under investigation.

Prima Facie Privileged Publication.

We have discussed the law of absolute privileged publications as applicable to the question propounded by you showing that the publication would be absolutely privileged, for two reasons:

First, because the publication is required by the Dairy and Food Commissioner of the State to be made by him while discharging the duties of his office.

Second, because the report you propose to make and the subject matter you propose to include in such report would be when transmitted to the governor or published in bulletins the exercise of such discretion as to make your acts quasi-judicial in their nature.

We now pass to the broader ground that the matter is prima facie privileged at all events, and that no recovery could be had except express malice be shown.

Colony vs. Farrow, 5 Hun. (N. W.), 607.
Finley vs. Steeler, 60 S. W., 108.
Hemmens vs. Nelson, 138.N. Y., 520.
Mayo vs. Sample, 18 Iowa, 306.
Greenwood vs. Cobbey, 26 Neb., 450.
Coogler vs. Rhodes, 56 Am. St. Rep., 170.

In order that you may have in mind the general rule, we will, before entering upon the discussion of cases somewhat parallel to the one presented, refer to the celebrated case of the Missouri Pacific Railway Company vs. Richmond, 73 Texas, page 568, et seq., because this case succintly states the rule which we will have occasion to say applied in the various cases, which we will hereafter consider. In the Richmond case referred to the plaintiff alleged that the railroad company published a pamphlet of discharged employes in which appears the name of the plaintiff Richmond, who had been an employe of that road. The words published with reference to Richmond were as follows: "A. F. Richmond, the conductor on the I. & G. N. was discharged in July 1883 for carelessness." The evidence showed that the railway company operated about six thousand miles of railroad with twenty-four thousand employes, and that it would be impossible without some system of reporting incompetent men to avoid the danger of re-employing them; that it was also the duty of the railway company to the public to avoid such re-employment and to take proper measures to guard against it. The Supreme Court of Texas held that the publication was a privileged one on the ground that a communication made in good faith in reference to a matter in which the person communicating has an interest, or in which the public has an interest is privileged if made to another for the purpose of protecting the interest; and that a communication made in the discharge of a duty and looking to the prevention of wrong towards another, or the public, is so privileged when made in good faith. The court held that in such cases malice would not be inferred from the publication and that its existence as a fact must be established by other evidence. It was held therefore, that the communication was privileged and in the absence of proof of express malice no judgment

could be awarded against the Company, and none was awarded. In discussing the law and facts of the case the Supreme Court of the State took occasion to lay down the general rules of law governing cases of prima facie privileged publications, or as they are sometimes called, conditionally privileged publications, saying:

"We understand the law to be that a communication made in good faith in reference to a matter in which the person communicating has an interest or in which the public has an interest is privileged if made to another for the purpose of protecting that interest, and that a communication made in the discharge of a duty and looking to the prevention of wrong towards another or the public is so privileged when made in good faith. In such cases, although the statements made may have been untrue, malice cannot be implied from the fact of publication and to sustain an action in which the existence of evil motive must be proved.

"In the case of Harrison vs. Burk (5 El. & El., 348), it was said: 'A communication made bona fide upon any subject matter in which the party communicating has an interest or in reference to which he has a duty is privileged if made to a person having a corresponding interest or duty, although it contained criminatory matter which without this privilege would be slanderous and actionable. * * * Duty, in the preferred canon, cannot be confined to legal duties which may be enforced by indictment, action or mandamus, but must include moral and social duties of imperfect obligation.'

"When words imputing misconduct to another are spoken by one having a duty to perform, and the words are spoken in good faith and in the belief that it comes within the discharge of that duty, or where they are spoken in good faith to those who have an interest in the communication and a right to know and act upon the facts stated, no presumption of malice arises from the speaking of the words, and therefore no action can be maintained in such cases without proof of express malice. If the occasion is used merely as a means of enabling the party to utter the slander to indulge his malice, and not in good faith to perform a duty or make a communication useful and beneficial to others, the occasion will furnish no excuse." Bradley vs. Heath, 12 Pick., 164; Noonan vs. Orton, 32 Wis., 112; Harper vs. Harper, 10 Bush., 455; Harwood vs. Keech, 4 Hun., 390; Townes on Libel and Slander, 241-245." (73 Texas, 575.)

After stating the law the court then applied the same to the facts of the case, saying in substance that in the discharge of the duties imposed upon the officer of the Company who made the publication, that it was his duty to the railroad company and to the public alike to see that none but competent and careful men were employed to conduct the company's business; that this duty he could not discharge in person throughout all the lines operated by the railway company, and it became necessary that persons on different parts of the line should be clothed with power to employ such service; that the officer making the publication having been informed by credible person or persons that the appellee Richmond was not a careful man, and that he had been careless in the discharge of his duty as a conductor to such an extent as to make his discharge necessary, it became his duty to place this information in the possession of all persons having power to employ, and failure to so have done would have been a breach of duty. Then said the Supreme Court of the State:

"A publication so made is not actionable in the absence of actual malice, and as there was no evidence of this, the court below should not have submitted a charge under which the jury could have found in favor of appellee any exemplary damages.

"We are further of the opinion that the court should have granted a new trial on the ground that there was no evidence sufficient to show *express malice*, for in the absence of this the language complained of, under the circumstances of the publication, was not actionable, and appellee therefore not entitled to damages, either actual or exemplary.

"If, as claimed by appellee, the publication had been placed in the hands of the agents of other railway companies, without malice but for the sole purpose of enabling such agents to avoid the employment of unsuitable persons; whether so communicated by request or not, looking to the public interests involved, we do not see that such a publication would be actionable.

"It seems to us that any person who upon reasonable grounds believes himself to be possessed of knowledge which, if true, does or may affect the rights and interests of another, has the right in good faith to communicate such belief to that other, and he may make the communication with or without request, and whether he has or has not personally any interest in the subject matter of the communication." (73 Texas, 576.)

Continuing further the court said:

"Looking to the public interests involved in the safe operating of railways, as well as the interests of their owners, it seems to us that one having a reasonable ground to believe that a person seeking important position in that service was incompetent, careless, or otherwise unfit would be under such obligation to communicate his knowledge or belief to all persons likely to employ such unsuitable person in that business as would make the publication privileged if made in good faith." (73 Texas, 576.)

It will be noted from the extract first quoted from the Richmond case that a communication made in good faith in reference to a matter in which the person communicating has an interest, or in which the public has an interest is privileged, if made to another for the purpose of protecting that interest. That is one of the rules of conditioned privilege or prima facie communication.

Cooley on Torts, 3rd ed., p. 435.
Billet vs. Times-Democrat Pub. Co., 58 L. R. A., 62.
Hemmens vs. Nelson, 138 N. Y., 517; 20 L. R. A., 440.
Stephenson vs. Ward, 48 App. Div. N. Y., 291.
Maurice vs. Worden, 52 Md., 253.
Eames vs. Whittaker, 123 Mass., 342.
Harwood vs. Keech, 4th Hun., 389.
Wieman vs. Madee, 40 Am. Rep., 477.
Decker vs. Gaylord, 35 Hun., 584.
Perkins vs. Mitchell, 31 Barb., 461.
Halstead vs. Nelson, 36 Hun., 149.
Howland vs. Flood, 160 Mass., 509.
Garn vs. Lockard, 180 Mich., 196.
Shinglemeyer vs. Wright, 50 L. R. A., 129.
Pierce vs. Oard, 23 Neb., 828.
Webber vs. Lane, 71 S. W., 1099, et seq.

It seems that the Board of Aldermen of the City of Kirkwood constitute a body under the laws of Missouri to which a liquor dealer should apply for his license. It appears that Webber was a liquor dealer and that Lane and others were a special committee of the Board of Aldermen appointed to investigate a report or protest filed by citizens of the town against the issuance of a license to Webber. The city council and the committee appointed by them to make the investigation were of course white men and officers of the town. The protest filed by the city council was substantially as follows:

"Hon. Sirs: Whereas, we the respectable colored citizens of Kirkwood, Mo., see the immorality and vice that's being carried on in Theodore Weber's saloon on Main Street. We would like to call your attention especially to the frequenting of this place by the young colored girls of this town, many under age. Our talking and pleading are in vain. Therefore, we feel it our indispensable duty to petition you to help us to suppress the one evil mentioned above, if no more. We feel that this board, composed of honorable, intelligent, respectable, honest, law-abiding citizens of this town, will do something to eradicate this awful evil, that is a disgrace to the self-respecting negro of Kirkwood. (Signed by G. S. Brooks, J. A. Mitchell and others)."

When this protest or petition was filed by the city council it was referred to the defendant Dennis Lane and others as a special committee selected from the membership of the city council for the purpose of investigating the charges. Dennis Lane and his committee investigated the charges and made a written report to the Aldermen of the city, in which they reported that the charges made were substantially true. This report in writing was signed by the Board of Aldermen in open session. Suit for libel was filed by Weber against Lane and others for damages in the sum of ten thousand dollars. The defendants, among other things, plead their entire action with reference to the matter was official, that they were not actuated by malice and therefore all said and done by them was privileged for which no recovery could be had. The Supreme Court of the Court of Civil Appeals at St. Louis sustained the proposition taken by the defendants and permitted no recovery against them. The decision of the court was based upon two purposes, the first was the action of the board of aldermen, was quasi-judicial and therefore absolutely privileged, and second, that the communication and its publication was at any rate conditionally privileged and no recovery could be had in the absence of proof of actual malice. In passing upon the questions at issue upon these two purposes, the court said:

"It appears from the record in the cause that the action of a board of aldermen of a city of the fourth class in respect to issuing or revoking dramshop license was treated by the plaintiff's counsel and the court as the exercise of a legislative function. We think this was an erroneous view of the function exercised by these bodies in respect to dramshop license. The mayor and board of aldermen of cities of this class are given power to regulate and license dramshops. Rev. St. 1899, 5978. Their proceedings in the exercise of this power must conform in every respect to the laws of the State in respect to granting State and county license to keep a dramshop. To obtain a dramshop license from a city of the fourth class, the same steps are required to be taken as are required to be taken to obtain a license from the county under the general laws of the State. The order of a county court granting a license to keep a dramshop is a judgment in favor of the license, and the proceedings resulting in the order are judicial. State vs. Evans, 82 Mo., 319; State ex rel. vs. Higging (St. L.), 84 Mo. 319, 84 Mo. App. 531. Freeman, in his work on judgments (4th ed.), in section 2, says a judgment is 'the decision or sentence of the law pronounced by a court or other competent tribunal upon the matter contained in the record.' The Supreme Court en banc, in State ex inf. vs. Fleming, 147 Mo. loc. cit. 10, 44 S. W. 758, through Sherwood, J., defined a judgment to be 'the decision by a court of com-

petent jurisdiction upon a matter presented before it which involves a question of fact, or a question of law, or a compound question of both law and fact,' and in that case held that the determination of a county court that a majority of the taxable inhabitants of a town signed the petition to be incorporated as a city as provided by section 977, Rev. St. 1889, makes the order thus incorporating the city a judgment, and not simply an administrative or legislative act. This ruling was followed on a second appeal of the same case. State ex inf. vs. Fleming, 158 Mo. 558, S. W. 118. In County Court of Callaway County vs. Inhabitants of Round Prairie Township, 10 Mo., 697; Dunkin County vs. the District County Court of Dunklin Co., 23 Mo., 449; State ex rel. School District vs. Byers, 67 Mo., 706; State ex rel. vs. Higgins, supra, and numerous other cases that might be cited, it was, in effect, held that where an inferior tribunal was by statute intrusted with jurisdiction to exercise certain functions that required the ascertainment of the existence of certain facts (for instance, whether or not a petition upon which the tribunal was authorized to act was signed by the requisite number of qualified persons), the finding of the fact that the petition was so signed was the exercise of a judicial function. The decisions of the appellate courts of the State, without exception, treat the proceeding of a county and excise commissioner in granting a dramshop license as judicial. State vs. Evans; State ex rel. vs. Higgins, supra; State ex rel. vs. Heege (St. L.), 37 Mo. App., 338; State ex rel. vs. Couthorn (K. C.), 66 Mo. App., 96; State ex rel. vs. Higgins (St. L.), 71 Mo. App., 180. The board of aldermen of a city of the fourth class, in passing upon an application for a license to keep a dramshop in such city, is required to act upon a like petition, and to find the same facts, in regard to the qualifications of the applicant, as does the county court in a like proceeding for a State and county license to keep a dramshop; hence, if the act of the latter is judicial, so, also, must be the act of the former, and in such a proceeding the board of aldermen is as much a judicial tribunal as is the county court." (71 S. W., 1102-1103.)

Continuing further the court said:

"The appointment of a committee to investigate the charges was not only authorized, but was a conservative and cautious step taken for the purpose of gaining information upon which they might confidently rely before proceeding to take any other step, and was clearly within their discretion. They are not responsible to any one for what is contained in the communication of the colored citizens of the city, nor for ordering that communication to be filed, nor for appointing a committee to investigate the charges contained in the communication, unless actuated by actual malice. Cooley on Torts, sec. 214; Callahan vs. Ingram, 122 Mo. loc. cit. 365, 26 S. W. 1020, 43 Am. St. Rep. 583. The appointment of the committee and the report of the committee were both in the discharge of official duty, and are, for that reason, privileged. Hamilton vs. Eno, 81 N. Y., 116; White vs. Nicholls, 3 How. 266, 11 L. Ed. 591; Cooley on Torts; Callahan vs. Ingram, supra. The complaint, the appointment of the committee, and the report of the committee, so far as the mayor and council are concerned, being privileged communications, malice cannot be implied, and no recovery can be had against them without proof of actual malice. Briggs vs. Garrett, 111 Pa. 404, 2 Atl. 513, 56 Am. Rep. 274; Lovell Co. vs. Houghton, 116 N. Y. 520, 22 N. E. 1066, 6 L. R. A. 363. There is no evidence in the record proving or tending to prove actual malice, and defendants' instruction in the nature of a demurrer to the evidence should have been given."

Coloney vs. Farrow, 5 Hun. (N. Y.) 607, et seq.

This is also a liquor case; that is, it is an action for slander growing out of an application on the part of Coloney made to the excise commissioner of the town, and against the granting of which the defend-

ant filed protest. It was not brought against the excise commissioner of the town, nor against the excise board, but was brought against a third party, Mr. Farrow, who filed the protest against granting of the application on the ground that the plaintiff, Coloney, was the keeper of a house of ill-fame, and therefore was not entitled to license as a liquor dealer. The New York court adhered to the principles we have here announced, and held that the communication of Farrow to the excise board, which board performed the same duties as are performed here by the Comptroller and by the county judge, was privileged and no recovery could be had, unless express malice was shown. In discussing the case, the court said:

"The defendant said to the excise commissioner of the town in which both the plaintiff and the defendant lived, in substance, that the plaintiff kept a house of ill fame, and that upon that account the defendant protested against the board of excise granting to the plaintiff a hotel license to sell liquor. The question of granting the license was before the board, or about to come before it. The words were not spoken in the hearing of any other person. The words were actionable *per se*, unless privileged. The presumption arising from the occasion, from the defendant's relation to the subject and his interest in it, from the official character of the person to whom the communication was made, is that the communication was privileged. Decker vs. Gaylord, 35 Hun., 584; Van Wyck vs. Aspinwall, 17 N. Y., 193; Lewis vs. Chapman, 16 Id., 369; Fowles vs. Bowen, 30 Id., 20; Klink vs. Colby, 46 Id., 427; Hamilton vs. Eno, 81 Id., 116; Moore vs. Mfrs. Nat. Bank, 123 Id., 420; Hemmens vs. Nelson, 138 Id., 517.

"Where a person is so situated that it becomes right in the interest of society that he should tell to a third person certain facts, then if he, bona fide and without malice, does tell them it is a privileged communication. Blackburn, J., in Davis vs. Snead. L. R. 5 Q. B. C. 611, quoted and approved in Moore vs. Mfrs. Nat. Bank, supra."

It is noted that the court held upon ample authority there cited that the presumption arose from the defendant's relation to the subject and from the official character of the person to whom the communication was made, that the communication was privileged; that where a person is so situated that it becomes right in the interest of society that he should tell a third person certain facts, then if he, bona fide and without malice, does tell them it is a privileged communication. Discussing the question somewhat further and concerning the character of proof necessary to establish malice, the court said:

"The words being upon the evidence presumptively privileged, the burden then rested upon the plaintiff to prove that the defendant did speak them maliciously. This could not be done by simply showing that the words were false, because the presumption of good faith, which privilege supplies, repels the idea of malice, the presumption being that the defendant is only honestly in error." 5 Hun. (N. Y.), 608.

The substance of the last quotation is the rule adhered to by all authorities that not only must the plaintiff show that the alleged defamatory words were false but he must show that the words were spoken maliciously, and that this is not done by simply showing the falsity of the public issue.

Finley vs. Steele, 60 S. W. 108, et seq.

This is a Missouri case, and arose out of the action of a county school commissioner. The statutes of Missouri provide that the county school commissioner may revoke a certificate to teach, for incompetency and cruelty, on satisfactory proof thereof, and that all charges shall be preferred in writing and signed by the parties. A county school commissioner, after complaint had been made to him of plaintiff's incompetency as a teacher, wrote to the defendants, who constituted the board of directors by whom she was employed as a teacher, requesting a report of plaintiff's trouble with her pupils. It was held that in the absence of proof of actual malice, defendants were not liable for libel in writing a defamatory letter to the school commissioner in response to such request, since it was a qualified privileged communication.

The suit was brought by Mrs. Finley against E. T. Steele and other members of the local school board of the school of which Mrs. Finley was the teacher. The alleged libelous publication was in the form of a letter written by Steele and other members of the board to R. L. Walker, the school commissioner of the county, an office corresresponding to our county superintendent. The letter was written in response to a communication from Mr. Walker as county school commissioner, and was, in effect, that Mrs. Finley was totally incompetent to teach school; that the school had had trouble more or less all the time, but that things instead of getting along better were getting worse; that she was tyrannical, abusive and indecent; the letter also set forth some acts of tyranny, abuse and indecency. On the whole it may be said that if the letter was not true it was libelous, and, of course, actionable, if not privileged. Upon the trial of the case, the defendants admitted writing and sending the letter to Walker, the county school commissioner, but they alleged that it was written in the discharge of their duties as members of the school board of their district and without malice. The courts, as suggested, held that the communication was either absolutely privileged or conditionally so, and that in either event the members of the school board were not liable, because if absolutely privileged no libel could attach, and if qualifidly so they were not liable, because malice had not been shown. The court said that the communication was made "on proper occasion, from a proper motive, and was based upon a reasonable cause. It was made in apparent good faith, and under these circumstances, the law does not imply malice, and as there was no proof of express malice the plaintiff was not entitled to recover." 60 S. W. 110.

It will be noted that the communication was made to the county school commissioner who had authority to revoke the certificate of school teachers for incompetency, cruelty, immorality, drunkenness, or neglect of duty when satisfactory proof thereof was furnished the commissioner.

In passing upon the question, the court adhered to the established principles of law, to which we have heretofore referred, and, among other things, said:

"The publication in question was with respect to plaintiff as school teacher, and is, upon its face, clearly defamatory, and, if false, actionable per se, unless absolutely or qualifiedly privileged. Absolutely privileged publications are legislative and judicial proceedings and naval and military affairs, while a qualified privilege 'extends to all communications made bona fide upon any subject-matter in which the party communicating has an interest, or in reference to which he owes a duty to a person having a corresponding interest or duty, and to cases where the duty is not a legal one, but where it is of a moral or social character of imperfect obligation.' 13 Am. & Eng. Enc. of Law, 411. In case of absolute privileged communications the law, out of its regard for the public welfare, considers that all persons shall be permitted to express their sentiments, regardless of their truth, and affords them absolute immunity from any prosecution therefor, either civil or criminal, although the publication may be knowingly and willfully false, and with express malice. Newell, Defam. (2nd ed.), 418. There are certain restrictions, however, as to this class of publications as to when published, in order that they may be privileged. In case the publication is only a qualified privilege, the 'party defamed may recover, notwithstanding the privilege, if he can prove that the words used were not used in good faith, but that the party availed himself of the occasion willfully and knowingly, for the purpose of defaming the plaintiff.' Id., 475. But from our standpoint, we think it unnecessary to decide whether the facts disclosed by the record bring the publication, because of its quasi-judicial character, within that class called 'privileged,' or not, provided the communication was a qualified privilege. In Byam vs. Collins, 111 N. Y. 143, 19 N. E. 75, 2 L. R. A. 139, it is said: 'A libelous communication is regarded as privileged, if made bona fide upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, if made to a person having a corresponding interest or duty, although it contains criminating matter which without this privilege would be slanderous and actionable; and this though the duty be not a legal one, but only a moral or social duty of imperfect obligation.' In speaking of the proper meaning of privileged communications, Klinck vs. Colby, 46 N. Y., 427, it is said: 'The proper meaning of a privileged communication is said to be this: that the occasion on which it was made rebuts the inference arising prima facie from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove that there was malice in fact, and that the defendant was actuated by motives of personal spite or ill will, independent of the circumstances in which the communication was made. * * * But when the paper published is a privileged communication an additional burden of proof is put upon the plaintiff, and he must show the existence of express malice.' It is announced in Marks vs. Baker, 28 Minn. 162, 9 N. W. 678, that 'the rule is that a communication made in good faith upon any subject matter, in which the party communicating has an interest, or in reference to which he has a duty, public or private, either legal, moral or social, if made to a person having a corresponding interest or duty, is privileged; that in such case the inference of malice * * * cast upon the person claiming to have been defamed.' 'Malice in such case is not shown by the mere fact of the falsity of the publication.' Henry vs. Moberly, 6 Ind. App. 490, 33 N. E. 981; Stewart vs. Hall, 83 Ky., 375. In Briggs vs. Garrett, 111 Pa. St. 404, 2 Atl. 513, it was held that a communication, to be privileged, must be made on a proper occasion, from a proper motive, and must be based upon reasonable or probable cause. When so made in good faith, the law does not imply malice from the communication itself, as in the ordinary case of libel. Actual malice must be proved before there can be a recovery, and in the absence of such proof a nonsuit should be granted."

It will be noted that the court held that the action of the board was of a quasi-judicial character, but did not deem it necessary to determine whether communications of this kind from a board without a *quasi*-judicial character were absolutely privileged in as much as,

under the facts of the case, it was clearly privileged on another ground.

Hemmens vs. Nelson, 138 N Y. 520 et seq.

The suit was brought by Mrs. Emily Hemmens against Edward B. Nelson, in the form of an action for slander. The facts may be substantially stated as follows:

Edward B. Nelson was principal of an institution for deaf-mutes, one of the charitable institutions of the State. and as such was the executive head and manager thereof. The general management of the institution was committed by statute to a board of trustees with power to enact by-laws, etc. It was, under the rules, the duty and right of the defendant Nelson to attend meetings of the board, make reports in writing and take part in discussions. He was required to employ and dismiss all employes, except officers of the institution or persons appointed by the board, and, with the approval of the executive committee, had power to suspend any officer or teacher appointed by the board. He was also required to keep a book in which was entered all things worthy of note relating to the instruction. This book was the property of the trustees and was submitted to them at quarterly meetings. The plaintiff, Mrs. Emily Hemmens, formerly Emily Halstead, was superintendent of the sewing department, her duty being to superintend the making of clothing and to instruct a class in sewing. Defendant's wife received, by mail, an envelope enclosing a printed letter or circular containing obscene and indecent matter; upon it were words written in pencil. The wife opened the envelope, and on discovering the nature of the enclosure handed it to her husband; he examined the writing on the paper and the directions on the envelope, compared them with writings of plaintiff and others in his office and formed the opinion that plaintiff sent it. Defendant thereupon took the letter and papers to the chairman of the board and of the executive committee, and expressed to him the opinion that plaintiff sent the letter. The chairman after an examination of the letter and a comparison with plaintiff's letters and signatures, agreed with defendant. At his suggestion the papers were sent to an expert in New York, who returned them with his opinion that the address on the envelope and the pencil writing were written by plaintiff. At a meeting of the executive committee having charge of the institution, which was called for the purpose and at which all the parties were presnt, the defendant Nelson charged in substance that the plaintiff, Mrs. Hemmens, wrote the letter, and she was on that day discharged by the committee.

The Court of Appeals of New York, in passing upon the state of facts, held that the charges made by Nelson to the effect that Mrs. Hemmens wrote the letter were defamatory and prima facie actionable, but that if the defendant Nelson believed that plaintiff sent the letter it was his duty to communicate it to the committee and president, as he did so: that his statements, in the absence of proof of actual malice, were confidential and privileged, and a direction for a verdict in favor of defendant was proper; that the question was not whether the charge was true or false, or whether defendant had suffi-

cient cause to believe that plaintiff sent the letter, or acting hastily or in mistake, but whether there was evidence that he knew or believed the charge to be false.

The court, in discussing the question, among other things, said:

"There can be no doubt that the occasions upon which the defendant made the charges were privileged, the only question being as to its nature and extent. The defendant occupied an important and responsible office under the authority of the State, involving the performance of duties of the most varied and delicate nature, upon the proper discharge of which the efficiency and welfare of the institution largely depended. It was his duty to watch and carefully observe the moral conduct, not only of the children committed to his charge, but even in a greater degree, the teachers, upon whose influence and example so much, for good or evil, depended. It was essential that he should be at liberty to communicate freely with the governing body as to any matters touching the conduct of either the teachers or the pupils. This he could not do if hampered by the fear of penalties that could follow errors of judgment or mistakes, as to who was or was not properly chargeable with improper conduct. In some cases the privilege which the law gives to persons in such circumstances, to speak freely, is absolute, however malicious the intent or false the charge may be. This immunity applies to words defamatory of the character of another spoken by a member of a legislative body in debate or in due course of proceedings, by counsel in arguments pertinent to the issue before the courts of justice, by military officers in reports or statements to their superiors and all acts of state. From considerations of public policy to secure the unembarrassed and efficient administration of justice and public affairs, the law denies to the defamed party any remedy through an action for libel or slander in such cases. Hastings vs. Lusk, 22 Wend., 410; Moore vs. M. N. Bank, etc., 123 N. Y., 420.

"The courts have refused to extend the class of cases where absolute privilege applies, and it shall assume it does not apply in this case, though it would perhaps be difficult to make a satisfactory distinction, founded upon principle, between the case of defamatory words in a petition to a legislative body or committee or the reports of military officers, and the character of the charge in this case and the circumstances under which it was made. If the defendant believed that the plaintiff was the person who sent the letter it was his duty to communicate the fact to the executive committee and the president, all of whom had a corresponding duty with respect to everything that concerned the welfare of the institution, and his statements, under such circumstances, were confidential and privileged until the plaintiff removed the privilege by proof, on her part, of actual, or, as it is sometimes called, express malice or malice in fact. Byam vs. Collins, 111 N. Y., 143; Vandersee vs. McGregor, 12 Wend., 545; Van Wyck vs. Aspinwall, 17 N. Y., 190; Washburn vs. Cooke, 3 Den., 120; Hemmens vs. Nelson, 36 Hun., 155; Moore vs. M. N. Bank, supra.

"This kind of malice which overcomes and destroys the privilege is of course quite distinct from that which the law, in the first instance, imputes with respect to every defamatory charge, irrespective of motive. It has been defined to be an 'indirect and wicked motive which induces the defendant to defame the plaintiff.' Odgers on L. & S., 267. Unless we can find in the record in this case some proof which would warrant the jury in finding the existence of such wicked motive, on the part of the defendant, when he made the charge in question, then the direction of the learned trial judge was correct and the judgment must stand. The question is not whether the charge is true or false, nor whether the defendant had sufficient cause to believe that the plaintiff sent the letter, or acted hastily, or in a mistake, but the question is, the occasion being privileged, whether there is evidence for the jury that he knew or believed it to be false. The plaintiff may have arrived at conclusions without sufficient evidence, but the privilege protects him from liability on that ground until the plaintiff has overcome the presumption of good faith by proof of a malicious purpose to defame her character, under cover of the privilege. The plaintiff must be able to point to some evidence in the

record that would warrant the jury in imputing this guilty motive to the defendant before her appeal can be sustained. As malice was an essential element in her cause, not to be implied from the charge itself, but quite the contrary, from the occasion on which it was made, the burden of establishing that fact was upon her."

It is noted that this authority is directly in line with the general rule which we have been invoking in this discussion, and which is the rule obtaining in practically every jurisdiction in the country.

In this particular case defendant Nelson was at the head of one of the state's institutions, which corresponds in a measure with a head of a department, except of course he lacked the authority in the administration of the affairs of the institution which the head of a department has. Yet notwithstanding this disadvantage the rule of qualified privilege applied to his utterances.

It will be noted from the opinion that the court was inclined to hold that it was a case of absolute privilege, saying that it was difficult to make a satisfactory distinction, founded upon principle, between the case of the defamatory words held in other instances to be absolutely privileged and those in the case then in consideration, showing very clearly that had the case been one where the officer acting was acting in a quasi-judicial capacity, the court would undoubtedly have held it to be a case of absolute privilege.

Mayo vs. Sample, 18 Iowa, 306.

This case arose out of substantially the following facts: Sample was the mayor of the city of Keokuk, Iowa, and as such was ex officio head of the police department of the city. While acting as mayor he received satisfactory information that the plaintiff Mayo had in his possession divers and sundry articles of personal property which had been stolen from other parties and sold by plaintiff. In his discharge of his duty as mayor the defendant, Sample, in connection with the city marshal called on Mayo and stated to him that he had been informed that he had stolen goods in his possession, etc., and represented to him the immorality of such conduct and requested plaintiff to permit them to examine the stolen property. Upon examination many articles of the stolen property were found and with the consent of the marshal were delivered to the owners. In his pleading the defendant and Sample averred that all he did and said as mayor was in the discharge of duties as a public officer. The facts appear to be that Mr. Sample as mayor of the city, when he went to the house of Mayo to have the same searched for the stolen goods, told Mayo that he, Mayo, knew the goods were stolen and he, Mayo, was no better than a thief. The trial court instructed the jury that if they believed that all the defendant Sample did and said on the occasion referred to was done by him as mayor and in the discharge of his duties as a public officer and without malice or intention to injure the plaintiff Mayo, they should find a verdict in favor of Sample. The action was one of slander and upon the charge aforesaid the jury returned a verdict in favor of Sample, the mayor. In passing upon the case the Supreme Court of Iowa, through Judge Dillon, among other things, said:

"Words ordinarily slanderous may not be so because spoken by the party in the performance of public or official duty, upon a just occasion, and without malice. (See authorities cited in concluding portions of opinion.) Words thus spoken come within the class of privileged communications; and are not actionable unless express malice be shown:

"The jury have found the defendant's second plea or answer to be true in point of fact. There is no satisfactory evidence of express malice, and its existence is rebutted by the finding of the jury. The defendant, by virtue of his office as the head of the police department, and charged with the duty of seeing that the criminal laws of the State and city were duly enforced, had the right, acting in good faith from honest motives, and with probable cause or ground of suspicion, to proceed to the plaintiff's place of business, and to state to him what others had told him in respect to stolen property being there, and that he wished to search for and obtain it. Let us not be understood as saying that he would be justified in making a wanton and malicious assault upon the plaintiff's character; and that he could make his own official character and visit a cloak to cover malice or words maliciously spoken.

"The public have rights, and so have individuals. Rules of law are founded upon good sense and due regard alike to the rights of both the public and the citizen. It not infrequently happens, however, that an individual becomes, without any real guilt, so surrounded by circumstances as that he must suffer some inconvenience, or even injury, in order that the higher interests of the public, or the community, may be protected by the detection and punishment of offenders. (See on this point, observations of Ewing, Ch. J., in Grimes vs. Coyle, 6 B. Monr., 301-305; Opinion, Marshall, Ch. J., in Faris vs. Starker, 9 Dana, 128, 130.)

Continuing further the court said:

"The court instructed the jury, 'that the answer of the defendant contained two good counts, either of which, if true, is a complete defense.' In this, there was no error. Bona fide efforts, made by public officers, in the line of their duty, acting upon information received from others, and without malice, with a view to discover offenders or obtain stolen property, are justifiable and proper. And a charge of crime, in connection with such efforts, where no bad motive exists, and where 'the party acted in good faith, and took no advantage of the occasion to injure the plaintiff's character or standing,' by a malicious attack, is not regarded as slanderous, without proof of malice in fact. (See, on this subject, fully supporting the above views, Washburn vs. Cooke, 3 Denio (N. Y.), 110; Grimes vs. Coyle, B. Monr., 301; Faris vs. Starke, 9 Dana, 128; I Hilld. on Torts, 343, 373, and authorities cited; Rector vs. Smith, 11 Iowa, 302; Bradley vs. Heath, 12 Pick., 162; Bunton vs. Worley, 4 Dibb (Ky.), 38; Coffin vs. Coffin, 4 Mass., 1; Streeby vs. Wood, 15 Bard., 105; Coombs vs. Rose, 8 Blackf, 155; White vs. Nicholls, 3 How. (U. S.), 266; I Am. Lead, Cas., 166 and authorities cited.)

"The verdict of the jury establishes that the defendant did not speak the words charged, if at all, out of ill will, resentment, or express malice: This court is of the opinion that the court below did not err, in refusing to grant a new trial because of errors of law occurring at the trial, or because the verdict was contrary to the evidence."

It will be observed from a consideration of this case that the alleged slanderous words were communicated directly to the plaintiff in the presence of other parties and that they were sufficient to have constituted a slander if false or if not privileged. But the court held that the words were privileged and that if spoken without malice no action would lie. The jury by its verdict found there was no malice, and the court very properly rendered judgment for the defendant.

The case is somewhat analogous to the case at bar. In this instance the allaged defamatory words of libel was communicated to the plaintiff by letter, but was not published nor seen by any third party. The language used by the defendant Lane in the letter was of much less positive force than that used by the mayor of Keokuk. But the defendant Lane, like the mayor in the case quoted from, used the words in the performance of his duty, and certainly if the one was privileged the other is.

Greenwood vs. Cobbey, 62 Neb. 450.

In this case Cobbey brought an action against Greenwood in the District Court of Gage County, Neb., to recover damages for slander and on the trial obtained a verdict for $1,500.00. There were three counts in the petition. Greenwood was mayor of the city of Wymore and Cobbey was city attorney. It was urged on the trial of the case that the third count in the petition stated no cause of action, and because the court overruled the demurrer to the third count error was assigned on the appeal of the case. The third count to which objection was made was as follows:

"Plaintiff for a third cause of action complains of the defendant for that on the 28th day of July, 1887, and at divers other times, in the county of Gage, and State of Nebraska, the defendant then and there being mayor of the city of Wymore, in said Gage County, Nebraska, and this plaintiff being then and there the duly elected, qualified and acting, city attorney of the city of Wymore, aforesaid, said defendant wickedly, maliciously and knowingly intending to injure, degrade and defame this plaintiff, as such officer and city attorney, in a certain discourse, which he, the defendant, then and there had of and concerning this plaintiff as such city attorney, at a public meeting of the city council of said city, of Wymore, and in the presence and hearing of a large number of people, falsely, wickedly, maliciously, and knowingly, did speak and publish the following false and defamatory words, that is to say: 'He (meaning this plaintiff) is unfit to hold the office of city attorney; his opinion is too easily warped for a money consideration.' Whereby and by means of which false and defamatory words, this plaintiff has been greatly injured in his good name as such officer, to his damage in the sum of five thousand dollars."

At the time of the trial of the case under the statutes of Nebraska authority was conferred upon the mayor and city council to appoint a city attorney who shall hold his office for one year unless sooner removed by the mayor with the advice and consent of the council. The law also provided that the mayor should preside at the meetings of council and should have the superintending control of all the officers and affairs of the city and shall take care that the ordinances of the city are complied with; the law also made it his duty to communicate from time to time with the city council and give them such information and recommend such measures as in his opinion might tend to the improvement of the finances of the city, the police, health, security, ornament, comfort, and general prosperity, of the city. One of the defenses of the mayor on the trial was that the communications referred to in the third count were made by him officially as mayor to the city council. The Supreme Court of Nebraska, upon the facts

in the case, held that the third count in the petition, which is quoted here, did not state any cause of action, saying:

"All of the cases seem to agree that communications of this kind are privileged, either absolutely, or when made in good faith. Absolute exemption is applied to the Legislature and the courts, in order that investigations may be thorough, and the truth declared without fear or favor. The same rule probably applies to quasi-judicial bodies in conducting their business. In the absence of authorities in cases like that under consideration, we deem the better rule to be that communications of the kind are privileged when made bona fide. In other words, when such communications are made against an officer in good faith, and the privilege is not abused, the officer making the charges is not liable. There is no claim that the plaintiff in error abused his privilege, nor that he did not act in good faith. The third count of the petition, therefore, wholly fails to state a cause of action. (Mayrant vs. Richardson, 1 Nott & McCord (S. C.), 347; State vs. Burnham, 9 N. H., 34; Com. vs. Clapp, 4 Mass., 163; O'Donaghue vs. McGovern, 23 Wend., 26." (26 Neb., 456)

Coogler vs. Rhodes, 56 Am. St. Rep. 170.

During the month of May, 1890, there was a vacancy in the office of the sheriff of Hernando County. The Governor of the State, the Hon. Francis P. Fleming, had appointed the defendant in error, Rhodes, to fill the vacancy, but the commission upon such appointment had not been issued and delivered. The plaintiff being a citizen and elector of the state residing in said county and opposed in sentiment to the issuing of such commission, sent a letter to the Governor upon the subject. In the letter referred to concerning the applicant Rhodes, the following language was used:

"It is a notorious fact that for years he has run the only house of prostitution here and his mistress has been indicted in our courts."

Without going into a discussion as to the ultimate result of the communication, it is sufficient to state that Rhodes brought a suit for libel against Coogler by reason of the foregoing statement and its publication in the letter written to the Governor of the State. One of the defenses of Coogler was that it being addressed to the appointing power by a citizen having an interest in the subject matter it was a privileged communication. The Supreme Court of Florida held that it was a privileged communication, from which no action would lie in the event it was published in good faith and without malice. Upon the subject and with reference to this matter the court said:

"The last and most important question in the case arises upon the assumption of the defendant that the letter containing the alleged libelous words was a privileged communication, and that no action would lie upon the same. It is deemed proper to observe here, in speaking of a publication the nature of which exempts the publisher from an action of libel for matters therein stated, the better term is a privileged publication, instead of a privileged communication. Though these terms are often used interchangeably and as synonymous the term 'privileged communication' in its ordinary signification has reference to that class of written messages which either entitled or obliges the party to whom they are communicated to without the disclosure of matters thereof; Townshend on Slander and Libel, 4th ed., Section 208. The term privileged publica-

tion is the one which has been used by this court; Montgomery vs. Knox, 23 Fla., 595, text 604. Privileged publications are divided into two classes: absolutely privileged, and conditionally or qualifiedly privileged; Townshend on Slander and Libel, 4th ed., Section 209. The term 'absolute privilege' has reference to words spoken or written in certain legislative and judicial proceedings. As we do not consider the publication in question as falling under this class of privilege, we will not attempt definitions of the same. Various definitions, with differing and refined shades of meaning, have been given of what constitutes a conditionally privileged publication. Some of them will be found in the following authorities: Townshend on Slander, 196 et seq.; Cook vs. Hill, 3 sand., 341. That general definition which more nearly fits the circumstances on the present case is as follows: 'Where circumstances exist, or are reasonably believed by the defendant to exist, which cast upon him the duty of making a communication, in the bon a fide performance of such duty'; Odgers on Libel and Slander, 198. Perhaps the following is more especially applicable: 'Where a person is so situated that it becomes a right, in the interest of society, that he should tell to a third person certain facts, then, if he bona fide, and without malice, does tell them, it is a privileged communication.' This definition is considered more exact in leaving out the word "duty," because it is privileged in the interests of society for a man to bona fide and without malice to say those things which no positive legal duty may make it obligatory upon him to say. Townshend on Slander and Libel, 4th ed., Section 209. That the matter stated in accordance with above definitions with good motives, and upon reasons apparently good, should turn out to be untrue will not render the publisher liable: State vs. Burnham, 9 N. H., 34; 31 Am. Dec., 217; Moore vs. Butler, 48 N. H., 161; Toogood vs. Spyring, 1 Cromp., Mees & R., 181; 4 Tyrw., 582. In cases of qualifiedly privileged publications, the presumption which attends cases not so privileged of malice from the publication of libelous language does not prevail; the burden of proof is changed, and, in order for the plaintiff to recover, he is called upon affirmatively and expressly to show malice in the publisher. This malice may be inferred from the language itself, or may be proven by extrinsic circumstances. While the malice may be inferred from the communication, it is not inferable from the mere fact that the statements are untrue. The existence or nonexistence of such malice, where the facts are controverted and there is evidence upon the subject, is a question of fact for a jury. Townshend on Slander and Libel, 4 ed., Section 288, and authorities cited in notes to the text. Tattison vs. Jones, 8 Barn & Co., 578; White vs. Nicholls, 3 How., 266, text 285 et seq. That which would otherwise be a qualifiedly privileged publication is not so if the publisher is actuated by malice. White vs. Nicholls, 3 How., 31, Montgomery vs. Knox, 23 Fla., 595, text 609. This latter case does not draw any distinction between the two classes of privileged publications. It stated, in effect (9 headnote and also in the text), that a publication in regard to business by one having an interest therein, and only to others having an interest, is privileged, and the privilege furnishes a good defense in a suit for libel, unless it can be shown that the publication was made from express malice; in which case the privilege does not avail. The decision is of undoubted correctness in its application to the facts of the case adjudicated. The general proposition of law however would have been more clearly expressed if the court would have used the words 'qualifiedly' or 'conditionally,' in connection with the word 'privileged,' because it seems that the question of malice does not enter into cases of absolute privilege. Cooley on Torts, 2 ed., top page 247, et seq. In cases of absolute privilege, an action can not be sustained even where there is express malice.

"Communications to the appointing power with reference to the character and qualifications of candidates for public office have been often given as illustrations of qualifiedly or conditionally privileged publications: White vs. Nicholls, 3 How., 266; Cook vs. Hill, 3 Sand., 341; Commonwealth vs. Wardell, 136 Mass., 164; Cooley on Torts, 2 ed., top page 251. In such cases, no action will lie for false statements in the publi-

cation, unless it be shown that they are both false and malicious and the burden of proof in this respect rests upon the plaintiff: Cooley on Torts, 251 and authorities in note 3. Wyeman vs. Madee, 45 Mich., 484; 40 Am. Rep., 477; O'Donaghue vs. McGovern, 23 Wend., 26."

This case is in line with the other cases cited by us and is only an application of the same principle to a different state of facts. In other words, under our American system of government it is conceived to be proper and right that the citizen shall be free to express his opinion concerning public matters unhampered and unterrified by prospective libel and slander suits so long as his opinions are expressed in good faith and without malice: it is also conceived that the public officer having to do with the enforcement of the law shall be permitted to do so fearlessly and unhampered by fear of prospective damage suits so long as he acts honestly, faithfully and without malice. It may briefly be said that the Constitution and laws of this State do not hang above the head of a conscientious and efficient officer the sword of Damocles.

You are therefore advised that if you do not act beyond your authority in making and publishing your report to the Governor and in making and publishing all bulletins and other official communications which are required or permitted by law, such official acts of yours are absolutely privileged under the laws of this State.

Yours truly,
W. A. KEELING,
Assistant Attorney General.

OP. NO. 1692—BK. 48, P. 407.

MARRIED WOMEN—OFFICERS—CARRYING PISTOL—COUNTY ATTORNEY.

Article 476, Penal Code.
Articles 5951 et seq., Revised Statutes.

1. A lady elected County Treasurer married during her term of office; after her marriage it became necessary that she give a new bond. Held, that after her marriage she takes the name of her husband and a new bond should be executed in that name.

2. Under the holding by the Court of Criminal Appeals, in the case of Lattimore vs. State, 145 S. W., 588, the phrase "or other civil officer" applies only to civil revenue officers. The county attorney not being a civil revenue officer would not have authority to carry a pistol, even when engaged in the discharge of his duties.

January 9, 1917.

Hon. Roy L. Hill, County Attorney, Paint Rock, Texas.

DEAR SIR: The Attorney General has your letter reading as follows:

"Under letter bearing date December 18, 1916, I wrote you regarding our county treasurer here. I thank you for the prompt and courteous reply to my inquiry, but a new phase of the case has developed since writing you for a construction, and I have been asked by our county judge, Hon. Jas. E. House, to again counsel with you in this regard. Mrs. Tomerlin has married since her qualification, but immediately upon

her marriage her bondsmen came before the court and asked to be relieved from her bond, in other words it is necessary now that she make a new bond. Will this in any manner affect her holding the office, and will she have the right to make bond as Mrs. Bettie Tomerlin, or will it be necessary that she make bond as Mrs. Bettie Woods? Also which of the two names will she be required to use?

I would like your opinion also, as to whether or not a county attorney has a right to carry a pistol. It has been my understanding of the law that he has, but the case you referred me to, 145 S. W., 588, is in point exactly as to what I wanted, but it put me to thinking. I have been advised that they have, and if, or not, I want to know authoritatively—as myself and the officers here have planned a campaign on some violations, and if I have any protection I want to know it. I trust I am not burdening the Department, but these matters are of importance. I appreciate your cooperation, and assure you of the fact that you have mine."

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

1. In our opinion your County Treasurer, formerly Mrs. Bettie Tomerlin, but now Mrs. Bettie Woods, having married Mr. Woods during her incumbency of the office, should execute a new bond in the name of Mrs. Bettie Woods.

There is nothing in the statutes of this State compelling a lady upon her marriage to take the name of her husband. However, this being the rule of the common law it is the custom in this State for her so to do.

Upon this question the Court of Criminal Appeals of this State in the case of Rice vs. State, 38 S. W., 801, said:

"There is nothing in our statute requiring or compelling the wife to take or assume the name of her husband. While this is generally the case, yet the wife might retain her own name. She might be married to the defendant, and still be known by her maiden name, or some other name than his. 'It is said, the husband being the head of a family, the wife and children adopt his family name—by custom, the wife is called by the husband's name; but whether marriage shall work any change of name at all is, after all, a mere question of choice, and either may take the other's name, or they may join their names together.' See 9 Am. & Eng. Enc. Law, tit. "Husband and wife," page 813; and also Converse vs. Converse, 9 Rich. Eq., 535, 574; Fendall vs. Goldsmid, 2 Prob. Div. 263, and Ex parte Snook, 2 Hilt., 566." 38 S. W., 802.

In the case of Murphy vs. Coffey, 33 Texas, 508, the Supreme Court used this language:

"Her name, her property and her personal rights were merged in those of her husband."

In the case of Freeman vs. Hawkins, 77 Texas, 498 there was involved the validity of service by publication upon the defendant Mary E. Robinson, who had prior to the filing of the suit become the wife of a man by the name of Freeman. The court in that case held that the service was defective and insufficient to make Mary E. Freeman a party to the suit, although the court held that if there had been actual service on Mrs. Freeman under the name of Mary E. Robinson it might have been her duty to appear, even though cited in the wrong name.

The only question that might arise would be in event a suit should be filed against the Treasurer in the name of Mrs. Bettie Tomerlin it would be necessary to have personal service upon her.

The statutes of this State, Articles 5951 and 5954, provide for the changing of names of persons. Any officer would have the right to go into court under the provisions of these articles and have his name changed. Under such a procedure it could not be contended that the officer had vacated his office and he would have the legal right to use the new name thus given him by the court in attesting any official act.

Again, it is provided by the laws of this State relating to marriage that the license, after the ceremony of marriage, shall be recorded in the records of the county clerk's office, and this is notice to the world, coupled with the common law rule and custom, of the change of the name of a lady upon her marriage from that used by her as a maiden to that of her husband.

We therefore advise that your County Treasurer should execute the new bond in the name of Mrs. Bettie Woods. We suggest that the commissioners court in an order approving the bond make mention of the fact that Mrs. Tomerlin, Treasurer, had intermarried with Mr. Woods and hence the change in her name.

2. Replying to your second inquiry we beg to say that we can but reiterate the statement in our former communication to you to the effect that under the holding of the Court of Criminal Appeals, in the case of Lattimore vs. State, 145 S. W. 188, the term "or other civil officer engaged in the discharge of official duty" used in Article 476 of the Penal Code, applies only to civil revenue officers.

We do not believe a county attorney is a revenue officer and so long as the rule laid down in the case mentioned is to be followed in this State we are of the opinion a county attorney would have no authority to carry a pistol, even while in the discharge of his duties.

This is contrary to a long line of decisions by the Court of Civil Appeals, dealing with the subject, but as the Lattimore case is the last expression we can find we are forced to follow it and advise accordingly.

With respect, I am,

Yours very trutly,

C. W. TAYLOR,
Assistant Attorney General.

OP. NO. 1695—BK. 48, P. 415.

PUBLIC OFFICERS—LEGISLATURE—MEMBER OF.

Constitution, Article 3, Section 24; Article 16, Section 1; Revised Statutes, Article 7056.

A member of the Legislature can not draw per diem except from the date of his qualification as a member of the Legislature. He can draw his mileage regardless of the date of his qualification, provided he does appear as a member of the Legislature and qualifies.

January 15, 1917.

Hon. F. O. Fuller, Speaker of the House of Representatives, Capitol.

DEAR SIR: In your verbal communication to us you request the advice of the Attorney General as to whether or not a member of the House of Representatives who was not present at the convening of the Legislature, and who did not arrive and take the oath of office until this morning, can draw his per diem for the days of his absence.

In reply to this inquiry, we beg to advise you that in our opinion a member of the Legislature cannot draw his per diem for the period intervening between the date of the assembling of the Legislature and the date he appears and takes the oath of office as a member.

Section 24 of Article 3 of the Constitution declares the per diem pay of representatives shall be "for their services."

Section 1, Article 16, of the Constitution, provides that members of the Legislature shall before they enter upon the duties of their office take the oath therein defined.

Section 24 of Article 3 of the Constitution has been carried into the Revised Statutes as Article 7056.

These general provisions of the Constitution and of the Statute clearly contemplate that the per diem of members of the Legislature shall be for services performed as public officers. From this the inference must follow that until such members become public officers, or at least are recognized as such by the Legislature itself, they are not entitled to per diem. This too is the general rule; that is, an officer is usually required to qualify before entering upon the duties of his office and is entitled to draw pay only from the time of qualifying. 23 Amer. & Eng. Enc. of Law, 399; Authorities cited in note 16.

It is quite true that the taking of the Constitutional oath, or even the giving of a bond, is not always a prerequisite to the right of an actual incumbent of an office to draw his compensation, but in cases of this character the person thus failing to qualify must however have entered upon the actual discharge of his duties as a public officer. United States vs. Flanders, 112 U. S. 88.

In the instance presented by you, however, for consideration the member did not present himself to the Legislature nor offer to perform any legislative function assigned him until this morning, at which time he took the oath of office. In such case we are of the opinion that the member cannot draw his per diem except for the time beginning with the day of his admission into the House and qualification as a member. He can of course draw his mileage as that is both constitutional and statutory.

Yours truly,

C. M. CURETON,

First Office Assistant Attorney General.

OP. NO. 1701—BK. 48, P. 455.

Under the Constitution and Rules of the Senate, an adverse vote by the Senate on the confirmation of an appointment made by the Governor, may be reconsidered if the Senate deems it wise so to do.

January 30, 1917.

Honorable W. P. Hobby, Senate Chamber, Capitol.

DEAR SIR: Under date of the 29th instant you submitted to this Department the following question:

"Please give me your opinion on the following point of order: Is a motion to reconsider the vote on the confirmation of an appointment by the Governor in order after the appointee has been voted on by the Senate and failed to receive the necessary two-thirds, and is the appointee rejected until the motion to reconsider is acted upon?"

Replying to your inquiry, beg to call your attention to Section 11, Article 3 of our Constitution, which reads as follows:

"Each house may determine the rules of its own proceedings, punish members for disorderly conduct, and, with the consent of two-thirds, expel a member, but not a second time for the same offense."

The Senate, therefore, is given authority to adopt rules for its own proceedings. The Senate, in rule 52, in regard to the reconsideration of questions, has the following, among other provisions:

"After a question shall have been decided, either in the affirmative or negative, any member voting with the prevailing side may, on the same day in which the vote was taken, or within the next succeeding day of actual session, move the reconsideration thereof. * * *"

Section 53, of the Senate rules, reads as follows:

"In all cases a motion to reconsider shall be decided by a majority of the vote."

The rules of the Senate seem to make the motion to reconsider applicable to all questions upon which the Senate is called to vote. There is no exception, and we do not believe that a motion to reconsider an unfavorable vote on the confirmation of an appointee for office, is any exception to the rule. In order to decide that a case of this kind is an exception, there must be written into the rules of the Senate, something that the Senate iself has not heretofore written.

A motion to reconsider is a new motion, and presents a new question, and is intended to permit a deliberative body to relieve itself, if it should desire to do so, from an embarrassment in order that a question heretofore judged may be rejudged. Of course, the motion to reconsider may be brought to a finality by defeating it or by the adoption of a motion that the same lie on the table. The Senate rule requires a majority to reconsider, and this is the rule that prevails generally in deliberative bodies, although the final disposition of the main question may require more or less than a majority. The effect of the adoption of a motion to reconsider is to abrogate the former vote on the main question which will then stand before the Senate in precisely the same state and condition as if no vote had theretofore been taken.

Section 12 of the Constitution which provides for the filling of vacancies in state and district offices by appointment of the Governor

to be confirmed by the Senate, among other things, uses this language:

"* * * If rejected, said office shall immediately become vacant, and the Governor shall, without delay, make further nominations until a confirmation takes place. * * *"

I assume that the insistence that the motion to reconsider is not applicable to an adverse vote on the confirmation of an appointee arises out of the language of the Constitution just quoted.

After due consideration, we are constrained to the view, that the language, "if rejected said office shall immediately become vacant" means, if finally rejected, and does not prohibit the Senate from reconsidering, if it deems it wise to do so, the previously recorded adverse vote, but that a vote on this question, like votes on all other questions, may be reconsidered under the rules adopted by the Senate, and the original question again presented to be rejudged.

Yours very truly,

B. F. LOONEY,
Attorney General.

OP. NO. 1702—BK. 48, P. 458.

COUNTY SUPERINTENDENTS OF PUBLIC INSTRUCTION—METHOD OF ELECTING—CONSTITUTIONAL LAW.

1. A law, complete in other respects, but leaving it to a popular vote of the people to determine as to whether or not superintendent of public instruction of a county should be elected by the county school board or by a popular vote of the people, as other county officers are elected, would be unconstitutional.
2. Method of electing must be prescribed in the law enacted by the Legislature.

January 30, 1917.

Hon. F. O. Fuller, Speaker, House of Representatives, Capitol.

DEAR SIR: That portion of your letter which states the question concerning which you desire the advice of the Attorney General, reads as follows:

"A bill is now pending before the Legislature that has for its purpose the election of county school superintendents by the county school trustees.

"I understand that when the bill comes up on engrossment an amendment will be offered embodying the local option feature and authorizing people by popular vote in such county to determine whether or not county superintendents of public instruction shall be elected by the county school board or by a popular vote of the people.

"I desire an opinion from your office as to whether or not the Legislature has the right to pass the bill with the proposed amendment, and whether or not such amendment is unconstitutional."

Briefly restated the question is, whether or not a law may be passed, complete in other respects but leaving it to a popular vote of the people as to whether Superintendents of Public Instruction of such

county should be elected by the County School Board or by popular vote of the people, as other county officers are elected. The law would be placed upon the statute books complete in other respects, except that the law would not provide the method for electing county superintendents, but would submit to the people two methods, either one of which they might choose by a popular vote.

In the opinion of this Department such a proposed amendment would be unconstitutional. The Constitution of this State vests in the Legislature all legislative authority, and this authority cannot, unless expressly authorized by some other provision of the Constitution, be delegated to the people as a body of voters. It seems to us that the Supreme Court of this State, in the case of ex parte Mitchell, 177 S. W., 953, is conclusive of the issue. In that case the Supreme Court of the State had before it the poolhall law enacted by the Thirty-third Legislature, which left it optional with the counties or political subdivisions thereof to determine by an election whether the operation of poolhalls should be prohibited therein. The constitutionality of the Act was assailed on two grounds, one of them being that the Act amounted to a delegation by the Legislature of its own legislative power imposed upon it by the Constitution, which it alone must exercise and which it cannot commit to any other agency.

The other ground of assault upon the Act was, that it authorized the suspension of a general law of the State by the voters of a county or subdivision thereof. The Supreme Court sustained both grounds of complaint and held the Act unconstitutional. The court said:

"The act is plainly unconstitutional, in our opinion, for both of these reasons. We largely rest our decision as to the first question upon the State vs. Swisher, 17 Texas, 441, where an act of the Legislature, in no way dissimilar in its effect from this one, was, upon this ground, held unconstitutional by the first Supreme Court of the State. That decision has never been overturned, and is the law upon the question. The second question is equally well settled, according to our view, by Brown Cracker & Candy Co. vs. City of Dallas, 104 Texas, 290, 137 S. W., 342, Ann Cas., 1914B, 504." 177 S. W., 954.

There is a principle of law somewhat akin to that which might be invoked in favor of the amendment referred to in your communication, that is, that the question as to the time when an Act may take effect may be referred to the people at large. 6 Am. and Eng. Enc. of Law, page 1023.

Illustrative of this last named principle is the case of Stanfield vs. State, 83 Texas, 317, wherein the Supreme Court of the State sustained an Act of the Legislature which conferred upon the Commissioners Courts of the counties of the State, authority to provide for the election of a county superintendent when they deemed it advisable; but the principle there invoked is one entirely different to that involved in your inquiry.

In the Stanfield case the commissioners court was merely called upon to find a fact, to wit: the fact as to the necessity for a county superintendent. This fact having been found the law at once became effective in such counties.

In the matter here under discussion a different question arises; the determination of the method by which a public officer shall be selected is not the determination of a fact, but is providing a rule of action for the government of the county, and is therefore legislation, the exercise of a legislative function confided by the Constitution of this State in the Legislature alone.

The power to declare what the law shall be (as for example what the law shall be as to the manner of selecting a County Superintendent of Public Instruction in any particular county) is legislative in character. In other words, the power to prescribe a rule of action for the county is legislative power.

See generally the following authorities on the subject as to what is legislative power:

Richardson vs. Young, 125 S. W., 664.
Atwood vs. Buckingham, 62 Atl., 618.
Booth vs. Jefferson, 113 S. W., 61.
Merchants Exchange, St. Louis vs. Knott, 111 S. W., 565.

Having referred to the opinion of the Supreme Court in the case of ex parte Mitchell, holding the local option poolhall law unconstitutional, we deem it proper that we should say before concluding this opinion that it is the uniform custom of this office to advise those who call upon us for an opinion that the opinion of the Supreme Court on the question controls and should be followed on all civil matters; and since your question is a matter relating to civil law we have cited the opinion referred to as authoritative and controlling. On similar questions of criminal law we have always cited the opinion of the Court of Criminal Appeals on the poolhall law, which holds the Act constitutional; we have made no effort to reconcile the opinions of our two Supreme Courts; what we have said, and the most we can say, is that the opinion of the Supreme Court should control on civil questions and that the opinion of the Court of Criminal Appeals is supreme on questions of criminal law, and controls where the question involves a criminal statute.

You are respectfully advised that in the opinion of this Department the manner of selecting a county superintendent cannot be left to a vote of the people, but must be prescribed in the law enacted by the Legislature.

Respectfully submitted,
C. M. CURETON,
First Assistant Attorney General.

OP. NO. 1706A—BK. 48, P. 488.

PUBLIC OFFICERS—HOLDING TWO OFFICES.

An act "for making further and more effectual provision for the national defense, and for other purposes," which, among other things, provides for the appointment, designation or detail, by the Governor, of an officer of the national guard of the State to act as disbursing officer for

the United States, is not violative of the State Constitution, Sections 12 and 33 of Article 16, prohibiting the holding of two offices, etc.

February 21, 1917.

Colonel J. T. Stockton, Capitol.

DEAR SIR: We have your inquiry of even date, calling attention to Section 67, of the Act of Congress, approved June 3rd, 1916, entitled "An Act for making further and more effectual provision for the national defense, and for other purposes," which, among other things, provides for the appointment, designation or detail, by the Governor, of "an officer of the National Guard of the State" to act as "disbursing officer for the United States," and presenting the question as to whether or not such appointment, detail or designation by the Governor can be legally made under pertinent provisions of the State Constitution.

The provision of the Act of Congress referred to is designed to provide for the proper custody and safe-keeping of, and accounting for, such Federal funds and property as may be delivered to the State, for the use, maintenance, etc., of the National Guard.

The constitutional questions arising, obviously relate to the proper construction of Sections 12 and 33, Article 16, of the State Constitution, which read, respectively, as follows:

"Sec. 12. Officers not Eligible.—No member of Congress, nor person holding or exercising any office of profit or trust, under the United States, or either of them, or under any foreign power, shall be eligible as a member of the Legislature, or hold or exercise any office of profit or trust under this State."

"Sec. 33. Payment of Warrant by Accounting Officers.—The accounting officers of this State shall neither draw nor pay a warrant upon the treasury in favor of any person, for salary or compensation as agent, officer, or appointee, who holds at the same time any other office or position of honor, trust, or profit, under this State or the United States, except as prescribed in this Constitution."

We are of the opinion that these constitutional provisions do not operate to avoid the designation required by the Federal Act for reasons which will presently appear.

These, and all other provisions, must be read in the light of the entire State Constitution; they must also be read in the light of relevant terms of the Federal Constitution in existence at the time of the adoption of the State Constitution; and, thereupon, such construction must be given the specific terms as will, if possible, give effect to all terms—State and Federal—touching the matter.

Amongst the powers expressly granted to Congress by the Federal Constitution is the following:

"To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the offices, and the authority of training the militia according to the discipline prescribed by Congress." (Section 8, Article 1, Constitution.)

The foregoing clause, was, of course, in the National Constitution at the time Texas became a State and a party thereto and at the time

the present State Constitution was adopted; this being true, it cannot be assumed that the State, in the adoption of its Constitution, intended to enact such laws as would render the securing of the State's rights offered by, and the performance of the State's duties imposed through, Clause 16, Section 8, Article 1, of the Federal Constitution (quoted above) impossible—such an assumption, to be justified, would have to be predicated upon an express declaration to that effect. No such expression can be found; nor do we believe it can be deduced by implication.

Congress, by the clause quoted, is, by all the States, expressly given the power to "organize, arm and discipline the militia." This, manifestly, carries with it the power to provide for the compensation of men and officers out of the funds of the United States. At the same time, the clause reserves to the states the appointment of the officers. These officers, so appointed, are State officers; but they are also—or may be—officers of the United States, at least, when the militia "may be employed in the service of the United States," as is provided for in Clause 16, Section 8, Article 1 of the Federal Constitution. Now, if the language of Section 12, Article 16, of the State Constitution (quoted above) were to be construed as if standing alone and were to be given its broadest possible meaning there could be no such co-ordination and co-operation between the State and the United States, in the matter of the militia, as is provided for in the foregoing provision of the Federal Constitution, for the simple and obvious reason that, in such case, an officer of the militia would "hold or exercise an office of profit or trust" "under the United States" and "under this State." That Section 12, Article 16, of the State Constitution was not intended to be given this broad and literal meaning is demonstrable from the fact that Section 12, as it now reads, is identical with Section 13, Article 7, of the Constitution of 1845, with the existence of which Texas became a State, and from the further fact that the Federal scheme of co-ordination, outlined in Clause 16, Section 8, Article 1, of the Federal Constitution, must therefore, have been in the minds of the people of Texas when they adopted the terms of what is now Section 12, Article 16.

That Section 12, Article 16, has no reference to the creation, officering, etc., of the Militia is indicated, furthermore, by the language of Section 46, Article 16, commanding the Legislature to provide for the organization, etc., of the militia of the State. This Section is a specific grant of power upon a specific subject; the power so granted shall be exercised "in such manner as they (the Legislature) shall deem expedient." There is no limitation made in the grant of this power referring back to Section 12, or to any other provision of the State Constitution; but, what is more important, there is coupled with the grant the express declaration that it shall not be used incompatably "with the Constitution and the Laws of the United States." The concluding language just quoted from Section 46 refers, we think, to Clause 16, Section 8, Article 1, of the Federal Constitution and indicates the purpose of the State—whether Congress should provide for it—to co-ordinate its militia organization

with that of the Nation in such manner as Congress should prescribe in the use of the power delegated to it.

From the existence of Section 46, Article 16 of the State Constitution, and the pre-existence of Clause 16, Section 8, Article 1, of the National Constitution, we conclude that the "office of profit or trust under this State" which may not be filled by a person who holds an "office of profit or trust under the United States," is a "civil office" and that the inhibition of Section 12. Article 16, has no reference to offices of the militia, where a civil office is not involved.

Under the construction given Section 12, of Article 16, the difficulty with respect to Section 33 of the same Article disappears, for the simple reason that the restrictions there placed upon the issuance and payment of warrants are limited to cases "except as prescribed in this Constitution." If Section 12 does not prohibit, and if Section 46—taken in connection with Clause 16, Section 8, Article 1, of the Federal Constitution, *warrants* the joint employment of officers, etc., of the militia by the State and the United States, then, clearly, we have a case failling within the excepting clause of Section 33.

As already stated we think Sections 12 and 46, Article 16, have the effect indicated in the hypothesis just put, and we hold, therefore, that Section 33, Article 16, would not apply to the issuance and payment of warrants drawn for the compensation of the disbursing officer appointed, designated or detailed by the Governor under the terms of the Act of Congress referred to.

Your inquiry is accompanied with a draft of what you call "Section 33" of a Bill to be proposed conforming the State Militia Law to the requirements of the Federal Act, reading as follows:

"Sec. 33. The Governor of this State shall detail an officer, not below the grade of major, from the Quartermaster Corps of the National Guard of Texas, subject to the approval of the Secretary of War of the United States, as property and disbursing officer for the United States.

"The property and disbursing officer shall perform such duties as are, or may hereafter be required of him by the laws of the United States or the regulations promulgated thereunder; and by the requirements of this act or the acts of the Legislature of Texas, and such regulations as may be prescribed thereunder.

"The officer so detailed as property and disbursing officer shall receive during the period of his detail the same pay received by officers of the rank of captain in the United States Army; the proportion of such pay as is not paid from Federal funds by authority of the Secretary of War shall be paid from any available State Military Funds."

We have examined this draft of "Section 33" and think the same is in proper form, and, for the reasons stated above, we think there is no constitutional objection to this section.

Yours truly,

LUTHER NICKELS,
Assistant Attorney General.

OP. NO. 1707—BK. 49, P. 1.

OFFICE—VACANCY—CONFIRMATION IN THE SENATE.

The statute (Article 5236, Revised Statutes, 1911), creating the office of Commissioner of Labor, provides that said officer shall be appointed by the Governor, whose term of office shall begin on the first day of February of every odd-numbered year, and shall continue for two years and until his successor is appointed and qualified. Held, that the expiration of said two-year period created a vacancy in the office within the meaning of Constitution, Article 4, Section 12, and that his appointment by the Governor for the new term was to fill the vacancy.

It was necessary therefore for the Governor to submit his name to the Senate for confirmation or rejection.

The Senate having rejected him, the Constitution provides: "Said office shall immediately become vacant, and the Governor shall, without delay, make further nominations, until a confirmation takes place."

Pending the filling of the vacancy as above provided, Mr. Woodman, by virtue 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," may continue to perform the duties of the office and the Comptroller would be authorized to issue his warrant for his salary covering said period.

February 19, 1917.

Hon. James E. Ferguson, Governor of the State of Texas, Capitol.

DEAR SIR: We quote from your communication of the 13th inst., to this department, as follows:

"On the 17th day of January, as Governor of the State, I appointed Honorable C. W. Woodman Labor Commissioner. Following what appears to have been the custom, on the same date I sent, together with other names, the name of Mr. Woodman to the Senate and asked their advise and consent to his appointment as Labor Commissioner.

"I am now officially advised that the Senate by a vote of 19 to 11 was in favor of the confirmation of Mr. Woodman, lacking only one vote of being a two-thirds majority of the members of the Senate present. The question has been raised as to whether it is legally necessary for the Senate to confirm his appointment as commissioner, in order that he may be entitled to fill the office.

"I, therefore, write and respectfully request you to furnish me with your opinion at your earliest convenience, answering the following:

"First. Is it necessary for two-thirds of the Senate present to give their consent and advice to Mr. Woodman's appointment as a condition precendent to his filling the office of Commissioner of Labor, and will the Comptroller be authorized to issue his warrants for his services?

"Second. Mr. Woodman, being now the duly appointed Labor Commissioner, is the Comptroller authorized in issuing his warrants for his services and the maintenance of his department until his successor is qualified?

"Third. Is any action of the Senate by confirmation or otherwise necessary to entitle Mr. Woodman to hold the office of Commissioner of Labor under a regular appointment from the Governor?"

Answer to your inquiries involves a construction of Section 12, Article 4, of our Constitution, which provides as follows:

"All vacancies in State or district offices, except members of the Legislature, shall be filled, unless otherwise provided by law, by appointment of the Governor, which appointment, if made during its session, shall be

with the advice and consent of two-thirds of the Senate present. If made during the recess of the Senate, the said appointee, or some other person to fill such vacancy, shall be nominated to the Senate during the first ten days of its session. If rejected, said office shall immediately become vacant, and the Governor shall, without delay, make further nominations, until a confirmation takes place. But should there be no confirmation during the session of the Senate, the Governor shall not thereafter appoint any person to fill such vacancy who has been rejected by the Senate; but may appoint some other person to fill the vacancy until the next session of the Senate, or until the regular election to said office, should it sooner occur. Appointments to vacancies in offices elective by the people shall only continue until the first general election thereafter."

The following proposition may be deduced from the foregoing section:

First: Unless the law has made other provisions therefor, all vacancies in State or District offices must be filled by the appointment of the Governor.

Second: The term "all vacancies" comprehends vacancies in office of every kind and character.

Third: All appointments to fill vacancies made by the Governor shall be with the advice and consent of two-thirds of the Senate present. If the appointment is made during the session of the Senate the name of the appointee must be submitted to it during its session. If made during the recess of the Senate the name of the person so appointed shall be nominated to the Senate during the first ten days of its session next following thereafter.

Fourth: If the Senate should reject the appointee the office shall immediately become vacant and it is the duty of the Governor to make further nominations until confirmation takes place.

Fifth: If there should be no confirmation during the session of the Senate the Governor is authorized after the adjournment of the Senate to appoint any person other than the ones theretofore rejected by the Senate to fill such vacancy until the next session of the Legislature.

The statute creating the office of Labor Commissioner, provides as follows:

"Art. 5235. The bureau of labor statistics shall be under the charge and control of a commissioner of labor statistics.

"Art. 5236. The Commissioner of Labor Statistics shall be appointed by the Governor, whose term of office shall begin on the first day of February of every odd-numbered year, and shall continue for two years and until his successor is appointed and qualified. The commissioner may be removed for cause by the Governor, record thereof being made in his office, and any vacancy shall be filled in the same manner as the original appointment. Said commissioner shall give bond in the sum of two thousand dollars, with sureties to be approved by the Governor, conditioned for the faithful discharge of the duties of his office, and he shall also take the oath of office prescribed by the Constitution. He shall have an office in the capitol building; and, except as hereinafter provided, he shall safely keep and shall deliver to his successors all records, papers, documents, correspondence and property pertaining to or coming into his hands by virtue of his office."

The office of Labor Commissioner being a State office it is only necessary to determine whether the appointment of Mr. Woodman was made by you for the purpose of filling a vacancy therein in order

to answer your inquiries. The term of Labor Commissioner is fixed by statute for a period of two years beginning on the first day of February of every odd-numbered year, and the provision is further made that he shall continue in office until his successor is appointed and qualified. Mr. Woodman's first term as Labor Commissioner ended on the 31st day of January, 1917. He was appointed by you to succeed himself for the new term beginning February 1, 1917, and ending January 31, 1919. The question therefore resolves itself into this—was there a vacancy in the office of Labor Commissioner at the expiration of Mr. Woodman's first term, notwithstanding the provision that he shall hold over or continue in office until his successor is appointed and qualified. If there was such a vacancy it was your duty to appoint someone to fill the same, and it was necessary for you to submit the name of your appointee to the Senate for its action thereon. If there was no vacancy the State had no jurisdiction over the matter and it was not necessary for you to send to it the name of your appointee. The question as to whether or not the expiration of a term of office creates a vacancy therein, notwithstanding the provision of our Constitution authorizing and requiring incumbents to hold over until their successors shall be dutly qualified has been definitely decided by our courts.

Tom vs. Klepper, 172 S. W., 721.
Bickford vs. Cocke, 54 Texas, 432.
State vs. Catlin, 34 Texas, 48.
Maddox vs. York, 54 S. W., 24.

The case of Tom vs. Klepper, supra, was decided by the El Paso Court of Civil Appeals in January, 1915. The question involved was the right and title to the office of county commissioner in and for precinct No. 2, of Martin County. Appellant Tom had been duly and legally elected county commissioner for said precinct at the general election held in 1912. There was no election held to fill said office in said precinct at the general election in 1914. The county judge soon after the general election in 1914 held that there was a vacancy in the office of county commissioner for said precinct, and acting under the authority of Article 2240 R. S. 1911, appointed appellee Klepper, to serve as such commissioner until the next general election. The article of the statute above referred to under which the county judge made the appointment provides as follows:

"In case of vacancy in the office of commissioner the county judge shall appoint some suitable person living in the precinct where such vacancy occurs to serve as commissioner."

After appellee Klepper had been appointed he proceeded to qualify under the law and demanded the surrender of the office from appellants Tom, who refused to surrender it on the ground that no vacancy existed in the office at the time the county judge made his appointment, and that by virtue of the Constitution he had the right to hold over until his successor had been chosen and qualified. The court in disposing of this question said:

"Was appellant entitled to hold over for another two years or was there a vacancy in the office of county commissioner for precinct No. 2?

"Our opinion is that there was a vacancy in the office of county commissioner for that precinct within the meaning of Article 2240, Revised Statutes above quoted at the expiration of appellant's full two years service by reason of the failure to elect a commissioner for that precinct at the general election in 1914. We think this view accords with the settled policy of our State Constitution restricting the duration of the terms of office as provided in the articles of the Constitution and statute quoted. A holding beyond the two years would be by sufferance rather than by any intrinsic title to the office. The question has frequently been the scbject of judicial investigation and has given occasion to disagreement of opinion in other jurisdictions. A review of the various holdings and the reasons given would be of little value. We are of the opinion that while the very question presented without some qualifying fact has not been before our courts for decision, the courts of this state in several cases have established principles that fix the rule of construction and interpretation of the principle involved. In addition to the articles of the Constitution and statutes of this State already referred to and quoted, we refer to the cases of Maddox vs. York, 54 S. W., 25; State ex rel. Bovee vs. Catlin, 19 S. W., 302; Bickford vs. Cocke, 54 Texas, 482; Robinson vs. State, ex rel. Aubank, 28 S. W., 566."

An application was made to the Supreme Court for writ of error in this case, which application was refused by said court on the 9th day of June, 1915, the Supreme Court thereby approving the holding of the Court of Civil Appeals in said case.

In the case of Bickford vs. Cocke, supra, our Cupreme Court in construing the hold-over provision of the Constitution, said:

"The primary object of this provision, that the incumbent is entitled to hold the office until the successor is elected or qualified is simply to prevent on the grounds of public necessity, a vacancy in fact in office until the newly elected or appointed officer can have a reasonable time within which to qualify. The right of the officer who thus holds over is by sufferance, rather than from any intrinsic title to the office. This view accords with the settled policy of our State Constitution restricting the duration of the terms of office."

Discussing the same question the Ft. Worth Court of Civil Appeals in the case of Maddox vs. York, supra, said:

"Distinctive force was ascribed in the opinion (referring to an opinion of an Indiana court construing a provision of the Indiana Constitution) to the word 'elected' in the sentence just quoted from the Indiana Constitution, which word as before seen does not appear in that connection in our Constitution; and stress was also made upon the fact that the holding-over feature was by the language so quoted expressly made a part of the official term, while in our Constitution it seems to have been segregated from the regular term of office and treated as a mere holding pro tempore, to subserve public convenience. The question to be determined in all of the cases is: what is meant by the term 'vacancy in office,' as used in the Constitution or statute being construed? It should be borne in mind that such vacancy may be constructive as well as actual. Mechem Pub. Off., Section 127."

This case was certified to the Supreme Court and by that court affirmed. 93 Texas, 275. From a review of the above cases it will be seen that our courts do not construe the hold-over period of an incumbent in office as any part of his term of office. The question is definitely settled that the expiration of an officer's term creates a

vacancy in the office, notwithstanding the Constitution provides that the incumbent may hold over until his successor has qualified. The hold-over period of the incumbent is not a part of his term, but in order to prevent a hiatus he is permitted to hold the office pro tempore until his successor has been lawfully chosen. It is doubtless unnecessary to cite authorities from other States bearing on this question because the courts of our own State are the very highest authority on questions involving an interpretation of our own Constitution and statutes. However, in our investigation of this subject we find the courts of other states construing constitutional and statutory provisions similar to ours have held that a vacancy in office is created by virtue of the expiration of the term, notwithstanding the incumbent is authorized to hold over until his successor has been chosen and qualified.

State ex rel. Attorney General vs. Thomas, 14 S. W., 108 (Mo. case).
State ex rel. Sikes vs. Williams, 121 S. W., 64 (Mo. case).
State vs. Stonestreet, 12 S. W., 895 (Mo. case).
State vs. Seay, 64 Mo., 89 (Mo. case).
State vs. Florida, ex rel. vs. Murphy, 32 Fla., 138.
Kline vs. McElvey, 57 W. Va., 29.
Johnston vs. Wilson, 2 N. H., 202.
State ex rel. Wilkinson, Dist. Atty. vs. Hingle (La. case), 50 So., 616.

The Sikes case above involved a contest over the office of factory inspector for the State of Missouri. Said office was a statutory one as is the office of Labor Commissioner in our State, the statute creating it providing "that within thirty days after the passage of this Act * * * the Governor of the State with the advice and consent of the Senate shall appoint a competent person to serve as factory inspector who shall hold office for four years from the date of his appointment, or until his successor is appointed and qualified."

In May, 1901, an appointment was made by the Governor for the term ending May 13, 1905. In May, 1905, the Governor appointed another person for the term ending May 13, 1909. On May 11, 1907, this appointee resigned, which resignation was accepted by the Governor. On May 6, 1907, the Governor sent the name of Sikes to the Senate as his appointee to fill out the unexpired term ending May 13, 1909. This appointment was confirmed by the Senate. On November 16, 1907, the Governor sent to the office of the Secretary of State a communication advising that he had appointed Mr. Sikes for a term of four years from August 11, 1907. A commission was issued to cover this appointment. On January 6, 1909, this last appointment was sent to the Senate for confirmation, but no action was taken thereon. On May 22, 1909, the Governor's successor commissioned one Williams as factory inspector for a term of four years from May 13, 1909, under which commission Williams qualified and claimed the office, but Sikes refused to surrender it on the ground that there was no vacancy to be filled at the time of Williams appointment. He abandoned the contention that he was entitled to hold the office by virtue of the last commission issued him and placed his contest on the ground that the Governor was authorized to appoint only in the event of a vacancy and that there was no vacancy in the office

at the time of Williams' appointment. In disposing of this contention the Supreme Court of that State said:

"This brings us to the consideration of the statute which would authorize the relator to hold and enjoy the office of factory inspector beyond the end of his term, May 13, 1909. The only provisions of law authorizing the relator to hold beyond the designated end of his term, May 13, 1909, are the terms employed in the statute providing that he shall hold 'until his successor is appointed and qualified.' While this language recognizes the fact that there might be some delay in the appointment and qualification of a successor, it equally and fully recognizes the right of the Governor to appoint at any time after the term. Upon this proposition it must not be overlooked that the cases treating of this subject recognize a distinction between appointive and elective officers, and, when the cases are fully considered and analyzed, it will be found that learned counsel for relator are in error when they say that our later cases are in conflict with State ex rel. vs. Stonestreet, supra, and State ex rel. vs. Thomas, 102 Mo., 85, 14 S. W., 108. For the purposes of appointment there was a vacancy in this office May 13, 1909.

In the case of State ex rel. Attorney General vs. Thomas, opinion of the Supreme Court of Missouri, the question directly involved was whether or not the expiration of a term of office creatd a vacancy in said office, notwithstanding the provision that the incumbent should hold over until his successor was elected and qualified. On this question the court said:

"Passing now to the second head of relator's contention, was there a vacancy in the office of marshal when the special election of March 4, 1890, was held? The information of the relator states that the term of office of the marshal is for the period of four years, and until his successor shall be duly elected and qualified; but, for the very reason that the occupant may retain it until, etc., it is strenuously insisted that there was no vacancy in the office of marshal, because there was an incumbent holding over after his term of office had expired, and this because no valid election had been held prior to the special one of March 4, 1890, under which respondent claims. If the mere fact of physical occupancy could prevent an office from becoming vacant, then it is easy to see that no election, whether occurring prior to the expiration of the official term, or subsequent thereto, could be effectual in securing a successor to the then occupant, because there would be no vacancy; that is, the office would be actually occupied. This argument, of course, proves too much. An office is vacant within legal intendment, and for all purposes of election or appointment, as well when the official term of the occupant has expired as in case of his death, resignation, or removal. Johnston vs. Wilson, 2 N. H., 202. The fact that the incumbent remains clothed with official authority, in furtherance of a wise provision of public policy and of public law, can not enlarge the boundaries of his official term, or arrest the operation of the power of appointment or of election."

In this opinion the court refers to and overrules the case of State vs. Lusk previously decided by the Supreme Court.

In the case of State of Florida vs. Murphy, supra, the Supreme Court of said State had under consideration the provision of its Constitution relating to vacancy in office. Construing said term the court said:

"Vacancy here means that the office is without such an occupant as precludes the filling of it in any mode which the Constitution may pro-

vide, or may recognize as lawful; that notwithstanding the incumbent of the former term may, and it is contemplated that he shall, continue in office, or perform the official duties of the said term after the expiration of his official term, and until his successor is duly qualified, still the office is vacant as to the new term, in the sense that any office is vacant which is not occupied by a person chosen to fill it for such term."

In the case of Kline vs. McKelvey, supra, the Supreme Court of West Virginia held that incumbency of an office by holding over under the statute does not preclude the existence of a vacancy as a basis for the exercise of the appointive power. On this question it said:

"The respondents incumbency of the office after the expiration of his term could be no bar to the right of appointment. For the purposes of appointment there is a vacancy notwithstanding his occupancy. Section 2 of Chapter 7 of the Code virtually says this, for it provides that the term of every officer shall continue until his successor is elected or appointed and qualified. To say the least, it implies that an appointment may be made while an officer is waiting the selection of his successor."

In other states the rule obtains that the expiration of a term of office does not create a vacancy.

People vs. Bissell, 49 Cal., 407.
Rosborough vs. Boardman, 67 Cal., 116.
People vs. Tilton, 37 Cal., 614.
Stratton vs. Gulton, 28 Cal., 51.
State ex rel., vs. Howe, 25 Ohio, 588.
Commonwealth vs. Hanley, 9 Pa., 513.

However, a careful reading of the opinions of the courts of these states will disclose that the rule is based upon some statutory or constitutional provision peculiar to these states, and for that reason said opinions cannot be considered as authority on a question involving a construction of our Constitution and statutes. For example, the California cases, supra, hold that a public office in that state does not become vacant upon the expiration of a term because the statute of that state specifically defines what shall be considered vacancies, and as the expiration of a term was not included in the statutory definition, the courts of said state have held that it did not constitute a vacancy.

In the case of State ex rel. vs. Howe, 25 Ohio, 588, it was held that a vacancy authorizing the Governor to appoint did not arise by virtue of the expiration of a term of office, because the statute of said state provided:

"That officers should hold their offices for three years from the date of their appointment and until their successors are appointed and qualified, unless vacancies occur from *death, resignation or removal for cause,* as herein provided."

The courts of said state hold that there can be no vacancy in office other than those named in the statute, and inasmuch as the expiration of a term of office is not embraced in the statutory definition of vacancy, the same does not constitute a vacancy under the laws of that state.

In the case of Commonwealth vs. Hanley, 9 Pa. 513, the court construed the following provision of the Constitution of that state:

"They (officers) shall hold their offices for three years if they shall so long behave themselves well, and until their successors shall be duly qualified."

The court held that the latter clause of the Constitution extended the term of the officer beyond three years and until such time as a successor should qualify, and that therefore the expiration of three years where there was no successor who had qualified for the office did not constitute a vacancy because the latter clause of the constitutional provision was as much a part of the term of office as the three years. Our courts have given the hold-over provision of our Constitution a meaning quite the reverse of the above, as has already been seen.

Basing our opinion upon the authorities above cited, particularly the Texas cases, we respectfully advise you:

First: That the expiration of Mr. Woodman's term of office created a vacanacy in the office.

Second: That his appointment for the new term was to fill the vacancy.

Third: That is was necessary therefore for you to submit his name to the Senate for confirmation or rejection.

Fourth: The Senate having rejected him, the Constitution provides: "Said office shall immediately become vacant, and the Governor shall, without delay, make further nominations until a confirmation takes place."

Fifth. Pending the filling of the vacancy as above provided, Mr. Woodman, by virtue of Section 17 of Article 16, which provides that "all officers within this State shall continue to perform the duties of their offices until their successors shall be duly qualified," may continue to perform the duties of the office and the Comptroller would be authorized to issue his warrant for his salary covering said period.

Yours truly,

B. F. LOONEY,
Attorney General.

OP. NO. 1713—BK. 49, P. 14.

SHERIFFS—BOND OF, AS TAX COLLECTOR.

The office of sheriff and tax collector in counties having a population of less than 10,000 is an inseparable office under the Constitution.

Where the sureties on a bond as tax collector are relieved by the commissioners court and the incumbent refuses or fails to make a new bond, the effect is to vacate the entire office, as well as of sheriff and of tax collector.

Constitution, Article 8, Section 16.

Revised Statutes, Articles .6079, 6081, 7607, 7608, 7120, 7121, 7606.

March 2, 1917.

Hon. S. T. Dowe, County Judge, Pearsall, Texas.

DEAR SIR: The Attorney General is in receipt of your letter of February 24th, reading as follows:

"Some of the bondsmen on the tax collector's bond of this (Frio) County have notified him that they will make application on the 12th of the coming month at the next regular meeting of the commissioners court to be relieved from further responsibility on his bond as tax collector. The sureties on his collector's bond are not on his sheriff's bond. Now I wish to ask this question: If he should fail to make a new bond as tax collector does such failure render void his bond as sheriff."

Under the Constitution of this State counties having less than 10,000 inhabitants elect an officer as sheriff and collector of taxes for such county. Section 16 of Article 8 of the Constitution is in the following language:

"The sheriff of each county, in addition to his other duties, shall be the collector of taxes therefor. But in counties having ten thousand inhabitants, to be determined by the last preceding census of the United States, a collector of taxes shall be elected to hold office for two years and until his successor shall be elected and qualified."

In pursuance of this provision of the Constitution the Legislature enacted what is now Article 7607 of the Revised Statutes of 1911, in the following language:

"In each county having less than ten thousand inhabitants, the sheriff of such county shall be the collector of taxes, and shall have and exercise all the rights, powers and privileges, be subject to all the requirements and restrictions, and perform all the duties imposed by law upon collectors; and he shall also give the same bonds required of a collector of taxes elected."

It will be noted from the wording of the above article that the sheriff as collector of taxes shall give the same bonds required of a collector of taxes who is elected as such.

Article 7608 of the Revised Statutes of 1911, as amended by Chapter 124, Acts of the Thirty-fourth Legislature, prescribes the bond to be executed by the tax collector.

Article 7121, Revised Statutes of 1911, prescribes the bond to be executed by the sheriff of a county.

It thus appears that a sheriff and tax collector in those counties having a population of less than 10,000 is required to execute two bonds, one as sheriff and the other as tax collector.

Article 6079, Revised Statutes of 1911, relating to the relief of sureties on official bond is in the following language:

"Any surety on any official bond of any county officer may apply to the commissioners court of the county to be relieved from his bond, and the clerk of the county court shall thereupon issue a notice to said officer, and a copy of the application, which shall be served upon said officer by the sheriff or any constable of the county."

While Article 6081 requiring the execution of a new bond reads as follows:

"Said officer so notified shall give a new bond within twenty days from the time of receiving such notice, or his office shall become vacant."

From the plain wording of the last quoted Article it appears that unless the officer execute a new bond within twenty days from the receipt of the notice from the commissioners court his office shall become vacant.

Assuming, as seems to be indicated in your letter, that your sheriff and tax collector fails or refuses to execute a new bond in event the sureties on his old bond are relieved, the question then arises—is the entire office of sheriff and tax collector vacated by reason of the fact that the office of tax collector is made vacant under the statutes.

In our opinion the effect of vacating the office of tax collector is to vacate the entire office of sheriff and tax collector, and the commissioners court would be authorized to fill the vacancy under Articles 7120 and 7606, Revised Statutes of 1911.

We are led to this conclusion by reason of the fact that Section 16 of Article 8 of the Constitution creates an inseparable and indivisible office of sheriff and collector of taxes, and while the incumbent of that office may act in a separate capacity in the discharge of his respective duties, yet he does not act as two officers. This provision of the Constitution does not confer upon the sheriff of the county the duty of collecting the taxes, but constitutes one office, the duties of which are those of sheriff and those of a collector of taxes. In other words, this provision of the Constitution, as well as the statutes enacted thereunder, do not constitute the sheriff in those counties an ex officio tax collector. He is a dual officer exercising the functions of two separate offices in counties having a population of 10,000 or less under the next preceding United States census.

If the sheriff was merely an ex officio tax collector then it might be permissible for him to in any manner vacate the office of tax collector and remain as sheriff. There are numerous authorities to the effect that making a person an ex officio officer by virtue of holding some other office does not merge the two offices. The court in the case of State vs. Laughton, 19 Nev., 202, said:

"Making a person an ex officio officer, by virtue of his holding another office, does not merge the two into one. People vs. Edwards, 9 Cal., 286; People vs. Love, 25 Cal., 520; Lathrop vs. Brittain, 30 Cal., 630; People vs. Ross, 38 Cal., 76; Territory vs. Ritter, 1 Wyo., 333; Denver vs. Hobart, 10 Nev., 31."

Again, if it should be held that this officer could in any manner vacate the position of collector of taxes and remain as sheriff and the commissioners court should fill the vacancy in the office of collector of taxes, we would then have a condition whereby a county of less than ten thousand inhabitants would have both a sheriff and a collector of taxes, the two offices occupied by different persons in the very face of the Constitution, and bring about the very condition the Constitution prohibits. This clearly could not be done.

We therefore advise you that in our opinion if your sheriff and collector of taxes should fail to execute a new bond as collector of

taxes upon his sureties being relieved, the effect thereof would be to create a vacancy in the office of shriff and tax collector, and the commissioners court should proceed to fill such vacancy by an election of a successor to the present incumbent.

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

OP. NO. 1715—BK. 49, P. 25.

PUBLIC OFFICES—BRANCH PILOTS.

Branch pilots are public officers under the Constitution and laws of this State, and the duration of office of persons appointed as an original appointment is two years.

The period of time which one appointed to fill a vacancy in the office may hold such office is for the unexpired term of two years only.

Such officer must be confirmed by the Senate.

March 6, 1917.

Hon. C. J. Bartlett, Secretary of State, Capitol.
Attention of Mr. Cox, Chief Clerk.

MY DEAR SIR: Your communication of March 3rd, is as follows:

"This department has been confronted with numerous questions pertaining to the appointment and term of office of persons appointed by the Governor to the office of branch pilot at the various ports of this State, and, inasmuch as there is some conflict of opinion respecting these matters, we respectfully ask that you answer each of the following submitted questions:

"First: What is the term of duration of office of persons appointed to the office of branch pilot as an original appointment?

"Second: What is the term or duration of office of persons appointed to the office of branch pilot to fill a vacancy in such office?

"Third: The Supreme Court of this State having held in the case of Peterson vs. Board of Pilot Commissioners, cited in 57 S. W., page 1002, that branch pilots are State officers within the meaning of the constitutional term, is the confirmation of such officers by the Senate necessary under the provisions of Section 12, Article 4, Constitution of Texas?"

An answer to your inquiry involves a consideration of Revised Statutes, Article 6305 and 6306, which read as follows:

"Article 6305. Appointment, term and vacancies.—The Governor is authorized and required to appoint at each of the ports such number of branch pilots as may from time to time be necessary, each of whom shall hold his office for the term of two years. In case of a vacancy in said office, the appointment shall be for the unexpired term.

"Article 6306. Bond and oath.—Before entering upon the duties of his office, each branch pilot shall enter into bond, with two or more good and sufficient sureties, in the sum of five thousand dollars, payable to the Governor and his successors in office, and conditioned for the faithful performance of the duties of his office. Such bond shall be approved by the board of commissioners of pilots for the port, or if there be no such board, by the county judge of the county in which the port is situated, and forwarded to the Governor, to be by him deposited in the office of the Secretary of State. Each pilot shall also take and subscribe the oath of office prescribed in the Constitution, which shall be indorsed on said

bond, and together with the bond shall be recorded in the office of the clerk of the county court of the county in which such port is situated before being forwarded to the Governor; and certified copies of said bonds, under the hand and seal of the county clerk, may be used as evidence in all the courts with like effect as the originals."

You will note from the foregoing that the position of branch pilot is referred to as an office and that a branch pilot is required to take the constitutional oath prescribed for public officers in this State and to give bond.

In addition the courts of this State have expressly held that a branch pilot is an officer, under the Constitution and laws of this State.

Peterson vs. Board of Commissioners, 57 S. W., 1002.
Peterson vs. Smith, 69 S. W., 540.
Olsen vs. Smith, 68 S. W., 320.

We have concluded that branch pilots, therefore, are public officers under the Constitution and laws of this State.

Revised Civil Statutes, Article 6305 fixes the term of office for branch pilots at two years, which is the constitutional limit in this State.

Harris' Constitution, Article 16, Section 30.

You will note that the same article of the statute declares that in case of a vacancy in the office of branch pilot the appointment to fill such vacancy shall "be for the unexpired term."

You are advised, therefore:

First. That the duration of office of persons appointed to the office of branch pilot as an original appointment is two years.

Second. That the period of time which one appointed to fill a vacancy in the office of branch pilot may hold such office is for the unexpired term of two years only.

Third. On February 19, 1917, the Attorney General, in an opinion written to the Hon. James E. Ferguson, Governor of the State, held that the name of Mr. Woodman, as his appointee for Labor Commissioner, to fill the term beginning February 1, 1917, must be certified to the Senate for confirmation and be confirmed by that body before he would be legally appointed to the office. We enclose you a copy of that opinion, with the advice that it applies with equal force to the appointment of one to fill an original term of office as branch pilot; and the same ruling applies to one who is appointed to fill a vacancy for the unexpired term of the office of branch pilot.

Yours very truly,

C. M. CURETON,
Acting Attorney General.

OP. NO. 1717—BK. 49, P. 49.

JUDICIAL DISTRICTS—DISTRICT ATTORNEYS.

The Legislature has the power in the creation of judicial districts to reorganize districts theretofore created and change the boundaries thereof by adding certain counties thereto and taking others from such districts.

The Legislature may change the numerical designation of judicial districts and may designate them either by number or by any words or name appropriately distinguishing the same.

A district attorney residing in a county taken from an existing district and placed in a new district bearing a different number may be by the Legislature declared to be the attorney for the newly created district.

Constitution, Section 7, Article 5.

Constitution, Section 21, Article 5.

Constitution, Section 14, Article 16.

House Bill 276 of Thirty-fifth Legislature, creating the Eighty-first and reorganizing the Thirty-sixth and Forty-ninth Judicial Districts.

March 21, 1917.

Hon. T. P. Morris, District Attorney, Beeville, Texas.

DEAR SIR: The Attorney General has your letter, as follows:

"As you are, no doubt, aware that the present Legislature has created a new judicial district, in which is embraced three counties of the old Thirty-sixth Judicial District; Wilson County, my home county, is one of the counties placed in the new district; five counties remaining in the old district; at the last election I was elected district attorney of the Thirty-sixth and was duly qualified as such. I have not seen the bill creating the new district, but am reliably informed that the bill provides that the district attorney of the Thirty-sixth Judicial District shall be the district attorney of the newly created one. As the Constitution and the law provide the manner of electing and appointing the district attorney, am I not, having been elected and qualified as the attorney of the Thirty-sixth District, entitled to remain as such, notwithstanding the law as now passed; in other words, is it with the Legislature or me to say?"

The copy of the bill we have before us referred to by you is the printed H. B. No. 276, by Brown, et al., creating the Eighty-first and reorganizing the Thirty-sixth and Forty-ninth Judicial Districts. We find in Section 3 of the bill the following:

"The present district attorney of the Thirty-sixth Judicial District of Texas, who resides in Wilson County, Texas, shall act and be the district attorney of the Eighty-first Judicial District of Texas, as herein created, and shall hold office until the next general election and until his successor is duly elected and qualified."

In section 2 it is provided that the present district attorney of the Forty-ninth Judicial District shall continue as the district attorney of the reorganized district of that numerical designation.

In Section 1 it is provided that the Governor is empowered to appoint a district attorney for the Thirty-sixth Judicial District to hold office until the next general election.

Prior to the taking effect of the Act under discussion the Thirty-sixth Judicial District of which you were elected district attorney is composed of the counties of Aransas, Atascosa, Bee, Live Oak, Mc-

Mullen, San Patricio and Wilson, the latter being the county of your residence. (See Chapt. 102 Acts Thirty-third Legislature.) Under this Act the Eighty-first Judicial District is to be composed of the counties of Frio, LaSalle, Atascosa, Wilson and Karnes.

It therefore appears that the new Eighty-first District, of which you were made the District Attorney is composed of a portion of the old Thirty-sixth to which is added three other counties, and that you reside in such portion of the old district.

In so far as the change affects you the result is, the Legislature has so changed the boundaries of your district as to exclude certain counties therefrom, add others thereto, and change the number of the districts. If the Legislature had the authority to make such changes, then it is but the legal consequence of such Act that you become the district attorney of the new district, but in addition to this conclusion the Legislature to make doubly sure expressly so provided in the above quoted portion of Section 3 of the bill.

Section 7 of Article 5 of the Constitution of this State reads in part as follows:

"The State shall be divided into as many judicial districts as may now or hereafter be provided by law, which may be increased or diminished by law."

The above quoted portion is from the amendment to said section in 1891, while this provision of the original Constitution of 1876 was in the following language:

"The State shall be divided into twenty-six judicial districts, which may be increased or diminished by the Legislature. For each district there shall be elected, by the qualified voters thereof, at a general election for members of the Legislature, a judge, who shall be at least twenty-five years of age, shall be a citizen of the United States, shall have been a practicing attorney or a judge of a court in this State for the period of four years, and shall have resided in the district in which he is elected for two years next before his election; shall reside in his district during his term of office; shall hold his office for the term of four years; shall receive an annual salary of twenty-five hundred dollars, which shall not be increased or diminished during his term of service; and shall hold the regular terms of court at one place in each county in the district twice in each year, in such manner as may be prescribed by law. The Legislature shall have power by general act to authorize the holding of special terms, when necessary, and to provide for holding more than two terms of the court in any county, for the dispatch of business; and shall provide for the holding of district courts, when the judge thereof is absent, or is from any cause disabled or disqualified from presiding."

The language used in the original, as well as in the amendment, clearly shows a purpose on the part of the people to give the Legislature a free hand in the creation of judicial districts, with the single limitation in the original that the number thereof should not be less than twenty-six. The authority to increase or diminish the number of such districts, of necessity implies the right to change the boundaries of districts theretofore, in existence, for in no other manner could a district be abolished or created.

The Supreme Court in Lytle vs. Halff, 75 Texas, 128, discussing the authority of the Legislature to create judicial districts, says:

"Article 5, Section 7, provides: 'The State shall be divided into twenty-six judicial districts, which may be increased or diminished by the Legislature.' And Section 14 of same article provides that 'the judicial districts in this State and the time of holding the courts therein are fixed by ordinance forming part of this Constitution, until otherwise provided by law.'

"Both of these sections evidence the fact that it was intended the Legislature—the only body empowered to make laws—should have power to increase or diminish the number of judicial districts, and to determine what territory should be embraced in a given district; and, in the absence of some limitation in these respects, nothing further appearing to illustrate the intention, the presumption would be that it was the intention to confer on the Legislature the power to create a judicial district out of a territory, however small, if the business within it so required."

This authority is too well established and been exercised too long to need further discussion.

It is the practice of the Legislature in the creation of judicial districts to designate the same by number. However, should that body so determine it could discard the use of numbers and make use of names of persons or any other words to designate the various districts now or hereafter created—for the reason the Constitution is silent upon the subject—merely requiring that the State be divided into districts.

A question similar to this was involved in the case of State vs. Draper, 50 Mo. 353. In that case Judge Pipkin was the Judge of the Fifteenth District. The Legislature changed the designation of the district from the Fifteenth to the Twenty-sixth and at the same time designated certain other counties as the Fifteenth District. The auditor refused to issue warrant for Judge Pipkin's salary as Judge of the Twenty-sixth District on the ground that he was commissioned judge of the Fifteenth District. The Court in refusing to sustain the auditor, said:

"Convenient circuits mean territorial districts, and not the names by which such districts may be called. The numbering of the districts or circuits is only a convenient mode of designating them. They might have been designated by giving them the names of distinguished persons or places, or in any other mode, so as to distinguish them apart from each other. The name or number of the circuit constitutes no essential part of it. The entity is the territory embraced within certain boundaries, and that remains the same whether the name or number be changed or not. But when the number used in designating the circuit is also used in the commission issued to the judge, without inserting the boundaries of his circuit, he is thereby constituted judge of the territory which elected him. The simple change of the number designating his territory will not invalidate his commission as judge of that territory. He remains judge of the same territory notwithstanding the name or number of that territory is changed. It is urged, however, that the simple change of number changes also his territory, and that he must remove to the number indicated by his commission, although it may cover territory two hundred miles distant. If this be true, then the next Legislature may change the number again and drive him to another part of the State, and every succeeding Legislature might do likewise. The Constitution admits of no such construction.

The St. Louis circuit is designated in the commission of the St. Louis judges as the Eighth Circuit, and the act of the Legislature designated the St. Louis circuit as the eighth in number. Now suppose the Legislature in a new act was to call it the tenth, and number the existing tenth as the eighth. Would the five judges in St. Louis have to emigrate to find their circuit, or could they still remain as the judges of that particu-

lar territory notwithstanding its number had been changed to the tenth? The absurdity of this carries its refutation on its very face, and yet there is no difference in numbering this circuit and numbering any of the others. The number in either case is only used as a convenient mode of distinguishing one from another."

While the office of district attorney in this State is created by the Legislature under express authority of the Constitution, yet it is not a constitutional office in the sense it cannot be abolished, even during the term of an incumbent; it is merely the creature of the Legislature as appears from Section 21, Article 5, Constitution as follows:

"The Legislature may provide for the election of district attorneys in such districts, as may be deemed necessary, and make provision for the compensation of district attorneys, and county attorneys."

On the right of the Legislature to abolish an office, we quote from 29 Cyc. 1368, as follows:

"The authority in the government which possesses the power to create an office has, in the absence of some provision of law passed by a higher authority (that is, in the case of a municipal authority, some statutory or constitutional provision; in the case of the Legislature, some constitutional provision) the implied power to abolish the office it has created, or to consolidate two or more offices it has created. But if an office has been provided for by the Constitution, such an office may not be abolished by an act of the Legislature. To abolish an office the intention of the competent authority to abolish such office must be clear."

Also from 23 A. & E., 406, as follows:

"In the United States the terms of certain State officers are not infrequently fixed by the State Constitution. Where this is the case the Legislature can not extend or abridge the term so fixed, either directly or indirectly.

"But the Legislature when authorized to create new political organizations as counties, cities, and incorporated villages, may abolish old organizations, as by the creation of two counties out of an existing county, or by the creation of a city from territory previously existing under some other form of government, although the effect is to abolish offices existing under the old political organizations whose terms were fixed by the Constitution, and this is so though such offices are abolished during the terms of the existing incumbents thereof."

No attempt has been made, however, to abolish the office you hold, on the contrary it is expressly retained, with jurisdiction over a portion of the original territory, part of such original territory having been taken therefrom and new territory added thereto in a lawful manner as heretofore shown.

In directing that you shall be the district attorney for the newly created Eighty-first district, the Legislature has relieved you of the necessity of abandoning your residence in Wilson County and establishing same in some county now incorporated in the Thirty-sixth District. Under Section 14, Article 16 of the Constitution all district officers are compelled to reside within their districts—and should

you have failed to so change your residence the effect would have been to vacate your office. Throop on Public Office, Section 426.

We therefore advise that the Legislature was acting within its authority in providing that you shall be the district attorney of the newly created Eighty-first Judicial District.

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

OP. NO. 1740—BK. 49, P. 89.

GRAND JURIES—BAILIFFS—SHERIFFS.

The sheriff of a county could not accept the office of bailiff for the grand jury and receive the per diem provided by law.
Articles 418, 419 and 1161, C. C. P.
Article 3864, Revised Statutes.

April 3, 1917.

Hon. Earl Carter, County Attorney, Hillsboro, Texas.

DEAR SIR: The Attorney General has your letter of March 27th, as follows:

"The sheriff of this county has had himself appointed riding bailiff to the present grand jury. It is my understanding that this work properly belongs to the constables of the county and that neither the sheriff nor his deputies have any right to draw any pay for services rendered in summoning witnesses for the grand jury. The auditor of the county has requested me to write you for an opinion relative to this matter that he may be guided correctly in the premises."

In our opinion the various statutes of this State covering the subjects of bailiffs for the grand jury, the duties of a sheriff and the compensation provided for such services would prohibit the sheriff from accepting the office of bailiff for the grand jury, and the consequent receipt by him of the fees provided by law for such services.

Of course the service of any character of process issued out of any court or tribunal authorized by law falls among the general duties of a sheriff or constable, but when the Legislature has seen fit to confer upon certain special officers a portion of the duties of a sheriff and has provided a compensation to such special officers, then, this being a special law upon the subject would govern to the exclusion of the general law regulating and prescribing the duties of sheriffs and fixing a fee therefor. The office of bailiff to the grand jury is created by Article 418 of the Code of Criminal Procedure of this State in the following language:

"Art. 418. Bailiffs may be appointed; their oath.—One or more bailiffs may be appointed by the court to attend upon the grand jury, and, at the time of appointment, the following oath shall be administered to each of them by the court, or under its direction: 'You solemnly swear (or affirm, as the case may be) that you will faithfully and impartially perform all the duties of bailiff of the grand jury, and that you will keep secret of the proceedings of the grand jury, so help you God.'"

It will be noted that this Article provides for the taking of an oath by the bailiff. In addition to the duties prescribed by Article 418 we find other authorities prescribed by Article 419, C. C. P., as follows:

"Art. 419. Bailiff's duties.—A bailiff is to obey the instructions of the foreman, to summon all witnesses, and, generally, to perform all such duties as are required of him by the foreman. Where two bailiffs are appointed, one of them shall be always with the grand jury."

It thus appears that a bailiff to the grand jury is a sworn officer, with certain well defined duties.

The compensation of bailiffs for the grand jury is fixed by Article 1161, C. C. P., as follows:

"Art. 1161. Pay of bailiffs.—Bailiffs, for the grand jury shall receive such pay for their services as may be determined by the district court of the county where the service is rendered; and the order of the court in relation thereto shall be entered upon the minutes, stating the name of the bailiff, the service rendered by him, and the amount of pay allowed therefor; provided, the pay shall not exceed two dollars and fifty cents per day for riding bailiffs during the time they ride, and not exceeding one dollar and fifty cents per day for other bailiffs; and provided, further that the deputy sheriff shall not receive pay as bailiff."

It will be noted that the compensation is to be determined by the district court of the county, provided that the same shall not exceed $2.50 per day for riding bailiffs, during the time they ride, and not to exceed $1.50 per day for other bailiffs. We also find in this article that the deputy sheriff shall not receive pay as a bailiff. This article does not mention the sheriff as one who shall not receive pay, but we are unable to distinguish between the shriff and his deputy, in a matter of this character. We think a reasonable interpretation to be placed upon this limitation as to the deputy is that it includes his principal also, for the reason that a deputy can act only in the name of his principal, the sheriff, and if a deputy is deprived of the compensation surely his principal could not charge for his services, the deputy being upon a salary paid by the sheriff and the sheriff being compensated by fees. Sheriff's fees are fixed by Article 3864 of the Revised Civil Statutes and Articles 1122 and 1130 C. C. P., when paid by the State; and by Articles 1173 and 1174, when paid by the defendant. But nowhere in the chapter relating to costs paid by counties do we find that the sheriff is entitled to any fees to be paid by the county. It is only certain expenses, such as allowance for the feeding of prisoners, guards for jails, etc., that the county is chargeable for the benefit of the sheriff. It is well established by numerous authorities that an officer is entitled to only those fees expressly provided by statute, and unless a statute clearly gives a fee none may be charged.

In addition to what has been said above we call attention to Article 7129 of the Revised Statutes, 1911, as follows:

"Each sheriff shall attend upon all district, county and commissioners court for his county and in counties where the Supreme Court and the Court of Appeals shall hold their sessions the sheriffs of such counties shall attend upon such court."

As compensation for the services required under the above article a sheriff, under Article 3864, is entitled to receive $2.00 per day, to be paid by the county, for each day he, by himself, or a deputy, shall attend the district or county court. The district court being in session at the time of the sessions of the grand jury it is contemplated that the sheriff or his deputy shall be in attendance upon the court and not in attendance upon the grand jury. It will be noted that the compensation for attendance upon the court is paid to the sheriff and not to the deputy, and if it were permissible for the sheriff to be employed as the riding bailiff for the grand jury it would place him in a position whereby he would be entitled to draw $2.00 per day for waiting upon the district court and a probable $2.50 per day for acting as riding bailiff to the grand jury, in addition to which he, of course, would receive the fees provided by statute for the performance of any other services required of him. In our opinion the duties devolving upon a riding bailiff for a grand jury are incompatible with those required of a sheriff in attendance upon the district court.

Under the plain wording of Article 418 we are of the opinion that the Legislature contemplated the appointment of a separate and distinct officer as a bailiff for the grand jury, and did not intend that the duties and compensation therein conferred be exercised and received by another officer, holding office under some other statutory provision.

We call attention also to Section 40, Article 16, of the Constitution, prohibiting the holding at the same time of more than one civil office of emolument, except that of justice of the peace, county commissioner, notary public and postmaster.

We believe the language of Article 418, C. C. P.., is sufficient to designate the bailiff for the grand jury as an officer under the law, which would bring the sheriff within the meaning of Section 40, Article 16 of the Constitution, and prohibit his acceptance of the office of bailiff while retaining that of sheriff. Of course the Legislature would have the power to confer upon the sheriff the additional duty of serving as an officer of the grand jury, or, if it saw fit, to designate him the bailiff for the grand jury and for such added services prescribe compensation, to be paid by the county. The Legislature has not done this, but has, on the other hand, provided that the court shall appoint one or more bailiffs who shall take an oath that they will faithfully and impartially perform all of the duties of bailiff of the grand jury and keep secret the proceedings of the grand jury. If a sheriff, in his capacity as such, could act as bailiff, as a bailiff is here designated, it would be useless to require of him an additional oath. The fact that an additional oath is required and it is not provided that the sheriff shall exercise such powers, to our minds discloses the intention of the Legislature that a sheriff should not be appointed to fill such office of bailiff.

We therefore advise you that the sheriff could not legally be appointed bailiff for the grand jury and receive the compensation accruing to such office, under the order of the district court.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

OP. NO. 1728—BK. 49, P. 129.

COUNTY AUDITOR—STATUTORY CONSTRUCTION—COUNTY OFFICES.

Statutes in pari materia will be construed together and unless there be such irreconcilable conflict and so pronounced antagonism as to make the same irreconcilable both will stand.

The various statutes of the State authorizing the commissioners' court to audit all accounts; the county treasurer to examine the books of the various officials, to ascertain if they have on hand any moneys belonging to the county; and the district courts to appoint finance committees, for the purpose of examining such books are to be construed in connection with the latter law, authorizing the appointment of county auditors and conferring similar duties upon that officer, and when so construed the two statutes not being irreconcilable and being in pari materia all will stand.

Articles 1453, 1510 and 2241, Chapter 2 of Title 29, Revised Statutes of 1911.

April 7, 1917.

Hon. Clay Cotton, County Attorney, Palestine, Texas.

DEAR SIR: In your communication, addressed to the Attorney General, under date of April 5, you enclose an inquiry addressed to you by Mr. H. M. Hinzie.

The substance of this communication, as we understand it, is that he desires to know whether or not the Act of the Thirty-fifth Legislature extending the County Auditors' Law to counties having a population of less than forty thousand supersedes Articles 1453, 1510 and Section 8 of Article 2241, Revised Statutes of 1911, which last named articles, in the order enumerated, respectively authorize the appointment by the district judge of a Finance Committee to examine the books of the county; authorize the county treasurer to examine the books of the various officers of the county and authorize the commissioners court to audit all accounts against the county.

The Act of the Thirty-fifth Legislature referred to is House Bill No. 526, which we understand takes effect ninety days after adjournment of the Regular Session, and by which bill the County Auditors' Law, as now existing, and being Chapter 2 of Title 29, of the Revised Statutes of 1911, is amended in certain particulars and for the purpose of this opinion is extended to counties having a population of less than forty thousand inhabitants, or having a tax valuation of less than fifteen million dollars.

The language of this bill, so extending the authority to appoint county auditors is found in Article 1460a, added by the amendment, as follows:

"Article 1460a. When the commissioners court of a county, not mentioned and enumerated in Article 1460, shall determine that an auditor is a public necessity in the dispatch of the county business and shall enter an order upon the minutes of said court, fully setting out the reasons and necessity of an auditor, and shall cause said order to be certified to the judge, or judges, of the district court, or courts, having jurisdiction in the county, said judge or judges, shall, if such reason of the commissioners court, be considered good and sufficient, appoint a county auditor, as provided in Article 1461, who shall qualify and perform all the duties required of county auditors by the laws of this State; provided said judge or judges shall have the power to discontinue the

office of county auditor at any time after the expiration of one year; when it is clearly shown that such auditor is not a public necessity and his services are not commensurate with his salary received."

As will be observed from a reading of the above added article county auditors appointed in those counties not heretofore authorized to appoint auditors have the same authority and are required to perform the same duties as those officers appointed under Chapter 2, Title 29, supra.

The duties of a county auditor are set out in Section 6 of the original Act, being now Articles 1467, 1468, 1469 and 1470, Revised Statutes. By which Articles it is made the duty of the auditor to have a general oversight over all the books and records of all the officers of the county, district or state who are authorized to receive or collect any money, funds, fees or other property for the use of or belonging to the county and to have continual access to and examine all the books, accounts, reports, vouchers and other records of such officers and to examine all reports of officers required under Article 1421.

It is also provided that he shall at least once in each quarter check the books and examine all the reports of the tax collector and treasurer and all other officers in detail. He shall fully examine the quarterly report of the treasurer and all disbursements, together with the canceled warrants that have been paid and shall verify the same with the Register of Warrants.

By Article 1472 it is made the duty of the auditor, without giving notice beforehand, to examine, inspect and collect the cash in the hands of the Treasurer, not less than once in each quarter. He shall see that all laws are strictly enforced and that all balances to the credit of the various funds are actually on hand in cash.

By Article 1487 it is made the duty of the county auditor to keep an account with each and every person named in the preceding articles and in doing so he shall relieve the county clerk of keeping the finance ledger required in Article 1402.

The above provision embodied in Article 1487, whereby the duty imposed upon the county auditor to keep accounts with the various officers relieves the county clerk from keeping the finance ledger, formerly required, is the only specific instance in the Auditor's Law where the duties imposed upon such officer relieve any other officer of the county from the duties imposed upon him in former laws.

Article 1453 provides in substance that at each term of the district court the judge, upon request of the grand jury, may appoint a committee consisting of three citizens of the county, men of good moral character and intelligence and experienced accountants, to examine into the condition of the finances of the county.

Article 1510 provides in substance that it shall be the duty of the county treasurer to examine the accounts, dockets and records of the various officers of the county for the purpose of ascertaining whether any moneys of right belonging to the county are in their hands, unaccounted for.

Section 8 of Article 2241, which article contains the general powers of the commissioners court, is as follows:

"To audit, adjust and settle all accounts against the county and direct their payment and to audit, adjust and settle all accounts and claims in favor of the county."

The above are the articles of the statute referred to by Mr. Hinzie in his communication to you. In our opinion the County Auditors' Law does not repeal, either expressly or by implication, nor in any manner affect the provisions of the above statutes, and the duties imposed by such statutes exist as though the County Auditors' Law had never been enacted.

That each and all of the laws here under discussion relate to the same subject matter is manifest from the plain reading thereof. It is a general and long accepted 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 intent 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. Rann, 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, 31 Texas, 438."

The County Auditors' Law containing no express repeal of the statutes here under discussion then if the same are repealed it must therefore be by implication.

It is also a well established rule of construction that repeals by implication are never favored and that in order to work a repeal the provisions of such statutes must be so antagonistic and so pronounced that both cannot stand. In discussing the question of an implied repeal the Supreme Court of this State, in the case of Cole vs. State ex rel. Cobolini 170 S. W., 1036, said:

"Repeals by implication are never favored. Laws are enacted with a view to their permanence, and it is to be supposed that a purpose on the part of the lawmaking body to abrogate them will be given unequivocal expression. Knowledge of an existing law relating to the same subject is likewise attributed to the Legislature in the enactment of a subse-

quent statute; and when the later act is silent as to the older law, the presumption is that its continued operation was intended, unless they present a contradiction so positive that the purpose to repeal is manifest. To avoid a state of conflict an implied repeal results where the two acts are in such opposition. But the antagonism must be absolute—so pronounced that both can not stand.

Though they may seem to be repugnant, if it is possible to fairly reconcile them, such is the duty of the court. A construction will be sought which harmonizes them and leaves both in concurrent operation, rather than destroys one of them. If the later statute reasonably admits of a construction which will allow effect to the older law and still leave an ample field for its own operation, a total repugnance can not be said to exist, and therefore an implied repeal does not result, since in such case both may stand and perform a distinct office. Especially will this construction be adopted where the older law is particular and expressed in negative terms, and the later statute is general in its nature. In such instances that to which the older law distinctly applied its negative provisions will be regarded as excepted from the operation of the more general statute." (170 S. W., 1037.)

See also Eubank vs. City of Fort Worth, 173 S. W., 1003.

In the case of Barnes vs. State, 170 S. W., 548, the Court of Criminal Appeals, upon a motion for rehearing went at length into the question of the construction of statutes in pari materia and cited numerous authorities to the effect that such statutes must be considered as one and the same Act.

There being no irreconcilable conflict in the statutes here under discussion we advise you that no repeal of the former statutes was affected by the enactment of the County Auditors' Law and that the duties imposed upon the district judge, county treasurer and commissioners court by the articles herein named have been in no way affected and should be performed when the necessity therefor arises.

As to the appointment of a Finance Committee conditions might arise whereby the grand jury would deem it necessary that such a committee should be appointed and it would be their duty to request the district judge so to do. The audit and settlement of accounts against the county is made the special duty of the commissioners court, by Section 8 of Article 2241, above referred to, and likewise we are of the opinion that the county treasurer at any time he sees fit to examine the books of the various officers of the county would have the authority to perform that service.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

OP. NO. 1766—BK. 49, P. 244.

ALIENS—UNIVERSITY OF TEXAS, BOARD OF REGENTS OF—REMOVAL OF PROFESSORS OF.

Constitution, Article 7, Sections 10 to 15.
Constitution, Article 16, Section 30a.
Revised Statutes, Articles 2636, 2639, 2640, 4042a.

1. A foreign born resident of the United States who has merely declared his intention to become a citizen, but whose naturalization has not been completed is an "alien."
2. There is nothing in the treaties between the United States and the countries named which conflicts with the right of the Board of Regents to remove any of the professors named because they are aliens.
3. The right of public employment is not one of the rights protected under the privilege, immunity, equal protection and due process clauses of the Constitution of the United States so far as aliens are concerned.
4. The professors named are aliens and may lawfully be removed by the Board for that reason if the Board concludes that the interest of the University shall require it.
5. Procedure of removal discussed.

May 9, 1917.

Hon. Robert E. Vinson, President of the University of Texas, Austin, Texas.

DEAR SIR: Your letter requesting an opinion of the Attorney General reads substantially as follows:

"At the last meeting of the Board of Regents of the University of Texas, on April 24, the following resolution was unanimously passed, viz.: that the services of all aliens in the employ of the University be terminated at once, their pay to continue thirty days. After some investigation, I have discovered in the University the following cases, which present legal problems which I am not able to solve, and upon which I desire your ruling at your earliest possible convenience.

"(1) Miss Lilia Mary Casis was born in Jamacia, and has been a British subject, but took out her first papers for naturalization as an American citizen in November, 1913. She has not yet carried this original intention into full effect.

"(2) Dr. James Edwin Thompson was born in England; has been a British subject; took out his first papers in 1895, according to the certified statement attached hereto; has paid his poll tax regularly since that date and voted at every election, up to and including the one for 1916, and has voted at all elections since the first of January, 1917. He has made application for full citizenship in the United States, and his petition will be acted upon by the district court in Galveston sometime during November, 1917. Dr. Thompson has held a commission as first lieutenant in the Medical Reserve Corps of the United States Navy since April, 1912, and within the last few weeks has been advanced to the rank of major in the same organization.

"(3) Mr. Charles Knizek was born in Bohemia; came to America in 1909; took out his first naturalization papers in 1911; has filed his application for second papers, which will be acted upon in June, next.

"(4) Mr. Jacob Anton de Haas was born in Holland; came to America in 1904; took out his first papers in 1904; made application for his second papers in 1914, but action thereon was postponed because his witnesses had all removed to Europe at the outbreak of the war. In December, 1916, after one year's residence in Texas, he filed renewed application for final papers, which will be passed upon June, next.

"(5) Mr. Karl Friedrich Muenzinger was born in Germany, with last foreign residence in Switzerland; took out his first papers, according to exhibit hereto attached, in 1906. He has not completed this naturalization, on account of the fact that as a student he has removed from one institution to another until his appointment as an instructor in the University of Texas, his year of residence here not having terminated at the outbreak of the European war. I understand that his original papers have lapsed.

"Will you be kind enough to certify to me, at your earliest convenience, your opinion as to the citizenship status of each of the individuals above referred to, in order that I may carry into effect the ruling of the Board of Regents? Further, will you be kind enough to indicate to me whether

the ruling of the board of Regents as above given can be legally put into effect in the light of certain possible treaties into which the United States Government may have entered with foreign powers?"

The question presented is not one with reference to citizens of the countries with which the United States is at war and therefore to be qualified and whose rights are to be ascertained under the classification of "resident alien enemies," but your letter shows that the parties named are subjects of various countries with most of which the United States is at peace. The question to be considered, therefore, is with reference to the parties named as "aliens" from the several countries named. It appears from your statement that final naturalization papers have not issued to any of those named by you, although all have declared their intention to become citizens of the United States in the manner provided by law. This, however, does not make them citizens of the United States. A declaration of intention does not make an alien a citizen—an alien remains such until naturalization is completed.

2nd Cyc., 117.
In Re Moses, 83 Fed., 995.
Minneapolis vs. Reum, 56 Fed., 576.

In the last named case it was held that a foreign born resident of the United States who has merely declared his intntion to become a citizen but has never complied with any other provision of the naturalization laws, is none the less an alien, although under the Constitution and laws of the State where a resident he may under such conditions have the elective franchise and have actually voted for members of Congress and State and county officers. These authorities are conclusive and necessitate the opinion that all those named by you in your communication are aliens and will remain so until they have a judgment of the proper court completely naturalizing them.

We have examined the treaties existing between the United States and the various sovereigns of which those named in your letter are subjects and find no provision in any of them with which the resolution of the board of regents is in conflict. The right of public employment is not one of the rights protected in any of the treaties referred to, nor is its denial within the inhibitory provisions of the Constitution of the United States relating to privileges and immunities, nor is such a right protected by the equal protection or due process clause of the fourteenth amendment to the Constitution of the United States.

The University of Texas was created and exists by virtue of the Constitution and laws of this State.

Harris' Constitution, Art. 7, Secs. 10 to 15, inc.

Its government is by public officers whose offices are provided for in the Constitution and laws of the State.

Harris' Constitution, Art. 16, Sec. 30a.
Vernon's Sayles' R. S., Arts. 40-42a.

It is true that a professor in the University of Texas is not an officer.

Butler vs. Regents of the University, 32 Wis., 131.

But, nevertheless, we believe that he is a public employe engaged in a public employment. In a very essential sense of the word he helps administer one of the departments of the government and an agency of the State.

Moscow Hdw. Co. vs. Colson, 158 Fed., 199.

The salaries of university professors are paid by appropriation out of the Treasury of the State from funds raised by taxation. On the whole, we have therefore concluded, that a professor in the University is engaged in a public employmnt by the State. It has been authoritatively settled by a recent opinion of the Supreme Court of the United States that the right of public employment by a State may be denied an alien.

Heim vs. McCall, 239 U. S., 175.

This case was begun by a bill in equity to restrain the public service commission for the first district of the State of New York from declaring certain contracts for the construction of portions of the New York subway system void, and forfeited for violation of certain provisions inserted in the contracts in pursuance of Section 14 of the New York labor law. This section of the law in part reads as follows:

"Section 14. Preference in employment of persons upon public works. —In the construction of public works by the State or a municipality, or of the United States shall be employed; and in all cases where laborers by persons contracting with the State or such municipality, only citizens are employed on any such public works, preference shall be given citizens of the State of New York. In each contract for the construction of public works a provision shall be inserted, to the effect that, if the provisions of this section are not complied with, the contract shall be void. * * *"

The Court stated the case and issue in part as follows:

In the course of construction each of the contractors has constantly employed and now employ a large number of laborers and mechanics who are residents of the city of New York but who were born in Italy and are subjects of its King, and also employed laborers who, though citizens of the United States, were not citizens of New York, and did not give preference to citizens of the State of New York over such laborers so employed who were not citizens of the State but citizens of the United States.

At the time of the proposals it was known to be and is necessary to employ a large number of such subjects of the King of Italy and citizens of other States and of other countries to perform said contracts within the time and at the prices stated in order to keep the construction and equipment of the dual system within the total amount provided and specified in the contracts and plans.

The treaty between the United States and Italy of 1871 provides that the subjects of the King of Italy residing in the United States shall have and enjoy the same rights and privileges with respect to persons and property as are secured to the citizens of the United States residing in the United States.

Complaint was made to the public service commission of the violation of the statute as shown in the foregoing statement and the action was brought for the purpose of restraining a cancellation of the contracts. The Supreme Court of the United States held that the law was valid, although it denied to aliens the right to be employed upon a public work.

The Court in part said:

"To sustain the charge of unconstitutionality, the Fourteenth Amendment is adduced, and the specification is that the law abridges the privileges and immunities of the contractors and those of their alien employes in depriving them of their right of contracting for labor, and that the State of New York, by enacting and enforcing the law, deprives employers and employes of liberty and property without due process of law and denies to both the equal protection of the law.

"The treaty that it is urged to be violated is that with Italy, which, it is contended, 'put aliens within the State of New York upon an equality with citizens of the State with respect to the right to labor upon public works'; and that Congress has fortified the treaty by Section 1977 of the Revised Statutes (a part of the civil rights legislation).

"The application of the law to the subway contracts, and whatever its effect and to what extent it affects the corporate rights of the city or of the subway contractors are local questions (Stewart vs. Kansas City, ante, p. 14) and have in effect been decided adversely to plaintiffs in error by the Courts of Appeals. The principle of its decision was, as we have seen, that the law expressed a condition to be observed in the construction of public works; and this necessarily involved the application of Section 14 to subway construction and the subordinate relation in which the city stood to the State. Therefore, the contention of plaintiffs in error that the rapid transit lines have given the city rights superior to the control of the State, so far as the law in question is concerned, has met with adverse decision. Whatever of local law or considerations are involved in the decision we are bound by; whatever of dependence the decision has in the general power of a State over its municipalities has support in many cases. We have recently decided the power exists, and we may be excused from further discussion of it. Stewart vs. Kansas City, supra.

"With the rejection of the asserted rights of the city must go the asserted rights of residents and taxpayers therein and the rights of subway contractors, so far as they depend upon the asserted freedom of the city from the control of the State.

"The claim of a right in the city of such freedom is peculiar. The State created a scheme of rapid transit, constituted officers and invested them with powers to execute the scheme; yet the contention is that scheme, officers and powers have become in some way in their exercise and effect superior to the State law, or, according to the explicit contention (we say explicit contention, but it is rather a conclusion from an elaborate argument and much citation of cases), that the city's action in regard to the subway is proprietary in character, and, being such, the city can assert rights against the State, and that individual rights have accrued to residents of the city of which the city is the trustee and which 'are so interwoven and bound up with the rapid transit system as to be "beyond the control of the State."' Counsel have not given us a sure test of when action by a city is governmental and when proprietary. We need not attempt a characterization. If it be granted that the city acted in the present case in a proprietary character and has secured proprietary rights, to what confusion are we brought! A taxpayer of the city, invoking the rights of the city, asserts against the control by the State of the pro-

prietary action of the city the protection of the Fourteenth Amendment, and then against the proprietary action of the city that amendment is urged in favor of the contractors with the city, and their exemption from the performance of their contracts declared. There seems to be a jumble of rights. If the city is not an agent of the State (it is contended the city is not), but a private proprietor (it is contended the city is), it would seem as if it has the rights and powers of such a proprietor, and, as such, may make what contracts please it, including or excluding alien laborers.

"But upon these suppositions we need not dwell. It is clear it is with the State law and the city's execution of it as agent of the State that we must deal and only on the assumption that the State law has been held to apply by the Court of Appeals, and, by a consideration of the power to enact it, determine the contentions of all of the plaintiffs in error.

"The contentions of plaintiffs in error under the Constitution of the United States and the arguments advanced to support them were at one time formidable in discussion and decision. We can now answer them by authority. They were considered in Atkin vs. Kansas, 191 U. S., 207, 222, 223. It was there declared, and it was the principle of decision, that 'it belongs to the State, as guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities.' And it was said, 'No court has authority to review its action in that respect. Regulations on this subject suggest only considerations of public policy. And with such considerations the courts have no concern.'

"This was the principle declared and by the Court of Appeals in the decision of the present case. Does the instance of the case justify the application of the principle? In Atkin vs. Kansas the law attacked and sustained prescribed the hours (8) which should constitute a day's work for those employed by or on behalf of the State, or by or on behalf of any of its subdivisions. The Fourteenth Amendment was asserted against the law; indeed, there is not a contention made in this case that was not made in that. Immunity of municipal corporations from legislative interference in their property and private contracts was contended for there (as here); also that employes of contractors were not employes of cities. It was contended there (as here) that the capacity in which the city acted, whether public or private, was a question of general law not dependent upon local considerations or statutes, and that this court was not bound by the decision of the State court. And there (as here) was asserted a right to contest the law, though the contracts were made subsequent to and apparently subject to it, upon the ground that they were entered into under the belief that the law was void. Finally the ultimate contention there was (as it is here) that the liberty of contract assured by the Fourteenth Amendment was infringed by the law. In all particulars except one that case was the prototype of this. There the hours of labor were prescribed; here the kind of laborers to be employed. The one is as much of the essence of the right regulated as the other, that is, the same elements are in both cases—the right of the individual employer and employe to contract as they shall see fit, the relation of the State to the matter regulated, that is, the public character of the work.

"The power of regulation was decided to exist whether a State undertook a public work itself or whether it 'invested one of its governmental agencies with power to care' for the work, which, it was said, 'whether done by the State directly or by one of its instrumentalities,' was 'of a public, not private, character.' And, being of public character, it (the law—the Kansas statute) did not 'infringe the liberty of any one.' The declaration was emphasized. 'It can not be deemed,' it was said, 'a part of the liberty of any contractor that he be allowed to do public work in any mode he may choose to adopt, without regard to the wishes of the State.' And obversely it was said (as we have already quoted): 'On the contrary, it belongs to the State, as the guardian of its people, and having control of its affairs, to prescribe the conditions (italics ours) upon which it will permit public work to be done on its behalf, or on behalf of its

municipalities.' See also Ellis vs. United States, 206 U. S., 246. The contentions of plaintiffs in error, therefore, which are based on the Fourteenth Amendment can not be sustained.

"Are plaintiffs in error any better off under the treaty provision which they invoke in their bill? The treaty with Italy is the one especially applicable, for the aliens employed are subjects of the King of Italy. By that Treaty (1871) it is provided, Articles II and III, 17 Stat., 845, 846:

" 'The citizens of each of the high contracting parties shall have liberty to travel in the States and territories of the other, to carry on trade, wholesale and retail, to hire and occupy houses and warehouses, to employ agents of their choice, and generally to do anything incident to, or necessary for trade, upon the same terms as the natives of the country, submitting themselves to the laws there established.'

" 'The citizens of each of the high contracting parties shall receive, in the States and territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or shall be granted to the natives, on their submitting themselves to the conditions imposed upon the natives.'

"There were slight modifications of these provisions in the treaty of 1913 as follows: 'That the citizens of each of the high contracting parties shall receive, in the State and Territories of the other, the most constant security and protection for their persons and property and for their rights. * * *'

"Construing the provision of 1871 the Court of Appeals decided that it 'does not limit the power of the State, as a proprietor, to control the construction of its own works and the distribution of its own moneys.' The conclusion is inevitable, we think, from the principles we have announced. We need not follow counsel in dissertation upon the treaty-making power or the obligations of treaties when made. The present case is concerned with construction, not power; and we have precedents to guide construction. The treaty with Italy was considered in Patsone vs. Pennsylvania, 232 U. S., 138, 145, and a convention with Switzerland (as in the present case) which was supposed to become a part of it. It was held that a law of Pennsylvania making it unlawful for unnaturalized foreign born residents to kill game, and to that end making the possession of shotguns and rifles unlawful, did not violate the treaty. Adopting the declaration of the court below, it was said 'That the equality of rights that the treaty assures is equality only in respect of protection and security for persons and property.' And the ruling was given point by a citation of the power of the State over its wild game which might be preserved for its own citizens. In other words, the ruling was given point by the special power of the State over the subject matter, a power which exists in the case at bar, as we have seen.

"From these premises we conclude that the Labor Law of New York and its threatened enforcement do not violate the Fourteenth Amendment or the rights of plaintiffs in error thereunder nor under the provisions of the treaty with Italy." (239 U. S., 189.)

It is true there is no statute in this State denying public employment to aliens, nor is there one creating such a right. However, to the Board of Regents of the University is confided the authority to determine who shall be employed as professors in the University.

Vernon's Sayles' Statutes, Article 4042a.
Revised Statutes, Articles 2636, 2639, 2640.

Article 2636 vests the government of the University in the Board of Regents.

Article 2639 gives the Board the authority to appoint the professors and other officers, fix their respective salaries, and to enact such

by-laws, rules and regulations as may be necessary for the successful management and government of the University.

The Board of Regents, therefore, are at liberty to decline to employ an alien as a professor if they so desire. It is a matter within their descretion as public officers of the State. Where the power of prescribing qualifications is left with the school board, there seems to be no limitation on their discretion in the absence of a statute.

35 Cyc., 1065.

The Board, therefore, has lawful authority to decline to employ aliens from the governments named by you as professors of the University of Texas. The Board is also given the power of removal by Revised Statutes, 2640 in the following language:

"The Regents shall have power to remove any professor, tutor, or other officer connected with the institution when in their judgment the interesr of the university shall require it."

When the Board concludes that the interest of the University requires the removal of a professor because he is an alien, it has authority to remove him.

The statute does not undertake to regulate the procedure necessary for removal, but it is elementary that such a Board cannot arbitrarily exercise this statutory power, but must act with discretion and judgment and take all necessary steps to inform itself before proceeding to consummate the removal.

35 Cyc., 1091.

In the event a professor is employed for a definite term, our opinion is that although he may be removed under this statute, still he should be given a notice and a hearing before the final order removing him is carried into effect. When the order of removal is entered by the Board, it should be upon and embrace a finding that in the judgment of the Board the interest of the University requires the removal of the particular professor whose case is before it for consideration.

You are advised, therefore, that the professors named by you in your letter are aliens, and may be lawfully removed by the Board for the sole reason that they are aliens if the Board concludes in the exercise of their judgment that the interest of the University shall require it.

Permit me to say in conclusion that this opinion is confined purely to the legal questions presented and that the writer has expressed no opinion as to the public policy or propriety of the Board's action —these being for the board alone and concerning which the Attorney General has no authority and expresses no opinion.

Your very truly,
C. M. CURETON,
Assistant Attorney General.

OP. NO. 1777—BK. 49, P. 360.

NOTARY PUBLIC—TIME FOR QUALIFICATION.

Under the statute a notary public may qualify at any time within ten days after notice issued by the county clerk to appear and qualify. The notice so issued by the county clerk is given after the receipt of the commission by such clerk from the Secretary of State.

Articles 6002, 6015, and 6016, Revised Statutes, 1911.

June 27, 1917.

Hon. John W. Hornsby, County Attorney, Austin, Texas.

DEAR SIR: You enclose for an opinion of this Department thereon a communication addressed to you by Mr. L. D. Hawkins, under date of June 14th, as follows:

"Prior to June 1, 1917, I received from the county clerk of Travis County notice to the effect that I had been duly appointed notary public for Travis County for the term of two years from the first day of June, 1917, and advising me to appear at his office 'and qualify under said appointment not before June 1, 1917, and not later than June 10, 1917.' Without having qualified as such notary, I left Travis County on June 7, 1917, and was absent therefrom until June 13, 1917. Will you kindly advise me whether, under this state of facts, I am entitled to qualify as such notary public, and, if so, how late I may do so.

"As it may have a bearing on the question, I will state that I am advised by the county clerk that he has not yet received from the Secretary of State any notaries' commissions whatever, but have received from him only a list of the names of those who have been appointed to such office for this county."

By the terms of Article 6002, Revised Statutes, a notary public holds his office for a term of two years from the 1st day of June, after his appointment at a Regular Session of the Legislature, The Articles of the statute relating to the qualification of Notaries Public are Articles 6015 and 6016, as follows:

"Art. 6015. To qualify, when.—When a notary is appointed, the Secretary of State shall forward the commission to the clerk of the county court of the county where the party resides; and the said clerk shall immediately notify said party to appear before him within ten days, pay for his commission, and qualify according to law; provided, that, if said party be absent from the county, or sick at the time of reception of said commission by the clerk, then he shall have ten days from his return to said county in which to appear and qualify.

"Art. 6016. Clerk shall notify Secretary of State.—The clerk receiving the commission shall indorse thereon the day on which notice was given, and, if the party pay the State fee for commission and qualify according to law, the said clerk shall notify the Secretary of State of his qualification, giving date of same, and remit the fee to said officer; but if the party fails to qualify and pay the fee within the limited time the appointment shall be void, and the clerk shall certify on the back of the commission that the party has failed to qualify, and return it to the Secretary of State."

It will be noted from a reading of the two above quoted articles that it is the duty of the Secretary of State to forward the commission to the clerk of the county court of the county where the party resides,

and immediately the clerk shall notify the party to appear before him within ten days, pay for the commission and qualify according to law. It is made the duty of the clerk to endorse upon the commission the day which the notice was given and if the party fails to qualify and pay the fee within the limited time the appointment shall be void, and the clerk shall certify on the back of the commission that the party has failed to qualify and return it to the Secretary of State.

We call particular attention to that portion of Article 6016, which declares that if the party fails to qualify and pay the fee within the limited time the appointment shall be void. This is an express declaration on the part of the Legislature that a failure to comply with the statutory provision ipso facto vacates the office to which the Notary Public was appointed, and brings the case within the rule laid down in Throop on Public Officers, Section 173, as follows:

"Where a statute fixes the time, within which the official oath must be taken, or the official bond given, the weight of the American authorities is decidedly in support of the doctrine, that the provision respecting the time is directory, although the statute declares that the office is forfeited by the default; and that, unless the statute expressly declares that the failure to take the oath or to give the bond, by the time prescribed, ipso facto vacates the office, the oath may be taken and the bond given at any time afterwards, before judgment of ouster upon an information in the nature of a quo warranto, or other legal declaration that the office is thereby vacated. But the authorities are not uniform in support of this doctrine; for it has been held, in other cases, that the failure to take the oath or to give the bond, within the prescribed time, vacates the office, without any proceedings to declare it vacant; so that it can not be restored by a subsequent compliance with the statute." (Throop on Public Officers, Section 173.)

We are therefore of the opinion, and so advise you, that the appointee must qualify by taking the oath and giving the bond within ten days after the notification by the county clerk.

We call your attention, however, to the language of Article 6015, which provides in substance that it is the duty of the Secretary of State to forward the commission to the clerk of the county court and the the clerk shall immediately notify said party to appear before him within ten days, pay for his commission and qualify according to law.

It is further provided by Article 6016 that the clerk shall endorse on the commission the day on which notice was given. This language clearly indicates that the clerk has no power to issue a notice until he has actually received the commission from the Secretary of State, and the notice issued by him prior to the receipt of the commission is not the notice contemplated by the statute and is not binding upon the prospective notary, in that it fixes a limitation of time, within which he has the right to qualify. In the instant case we are of the opinion that if Mr. Hawkins so desires he may insist upon receiving the ten days notice after the actual receipt of the commission by the county clerk, and that he has ten days from the date of such notice within which to qualify.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

OP. NO. 1809—BK. 50, P. 46.

LABOR COMMISSIONER—FAILURE TO QUALIFY—VACANCY.

The Senate refused to confirm the appointment of C. W. Woodman as Labor Commissioner; the Governor then submitted the name of Frank Swor and he was confirmed; Swor failed for about three months to qualify.

Held, that Woodman would under these circumstances hold over and draw his pay until a successor qualified; but that the Governor should make another appointment, as it will be presumed that Swor did not accept the appointment. As to the remedy in case of a failure on the part of the Governor to make another appointment, attention is directed to impeachment proceedings which were filed including this as one of the grounds for impeachment. (See also page 392, this volume.)

August 18, 1917.

Hon. Will D. Suiter, Chairman, Committee on Public Debts, Claims and Accounts, Capitol.

DEAR SIR: I am in receipt of your communication of the 17th inst., on behalf of Senate Committee on public debts, claims and accounts of which you are chairman, in which you state that during the regular session of the Thirty-fifth Legislature the Senate refused to confirm C. W. Woodman as Labor Commissioner; that during the first called session the Governor submitted to the Senate the name of Frank Swor for the confirmation as Labor Commissioner, and he was confirmed by the Senate. You furthermore state that Mr. Swor has failed to take the oath of office as Labor Commissioner, and, in fact, has failed altogether to accept and qualify to said office, and that C. W. Woodman is continuing to discharge the duties of the office, and is drawing the salary as Labor Commissioner.

You call attention to the provisions of Section 12, Article 4 of the Constitution, which reads as follows:

"Sec. 12. All vacancies in State or district offices, except members of the Legislature, shall be filled, unless otherwise provided by law, by appointment of the Governor, which appointment, if made during its session, shall be with the advice and consent of two-thirds of the Senate present. If made during the recess of the Senate, the said appointee, or some other person to fill such vacancy, shall be nominated to the Senate during the first ten days of its session. If rejected, said office shall immediately become vacant, and the Governor shall, without delay, make further nominations, until a confirmation takes place. But should there be no confirmation during the session of the Senate, the Governor shall not thereafter appoint any person to fill such vacancy who has been rejected by the Senate; but may appoint some other person to fill the vacancy until the next session of the Senate, or until the regular election to said office, should it sooner occur. Appointments to vacancies in offices elective by the people shall only continue until the first general election thereafter."

After making this statement you propound the following question:

"Does this article of the Constitution, under the statement of facts set out herein, authorize the said Woodman to continue to fill the office of Labor Commissioner and to draw his salary therefor?"

If the article of the Constitution just quoted was the only provision in the Constitution relating to the subject, your question should be

answered in the negative. In this connection, however, I beg to call attention to Section 17 of Article 16 of the Constitution, as follows:

"All officers within this State shall continue to perform the duties of their offices until their successors shall be duly qualified."

Construing these different provisions of the Constitution together, and they must be so construed as to give meaning to each, I am of the opinion that Mr. Woodman, under the facts stated, will continue to discharge the duties of the office until his successor shall be appointed and qualified.

The term "vacancy" is used with varying meanings. There may be a constructive vacancy and yet the office may be physically occupied. You will note the language of Section 17 just quoted. It does not say that the incumbent after his term expires shall hold the office, but "shall continue to perform the duties of their office until their successors shall be duly qualified."

After the Senate rejected the nomination of Mr. Woodman, the Governor, on February 17th, requested the opinion of this department as to whether the Comptroller would be authorized to issue warrants for the salary of Mr. Woodman and for the maintenance for his department.

We gave the subject at that time an exhaustive examination and on February 19th answered the inquiries of the Governor, copy of our reply I am enclosing herewith. In our communication to the Governor we concluded as follows:

1. That the expiration of Mr. Woodman's term of office created a vacancy in the office.
2. That his appointment for the new term was to fill the vacancy.
3. That it was necessary, therefore, for you (the Governor) to submit his name to the Senate for confirmation.
4. The Senate having rejected him, the Constitution provides: "Said office shall immediately become vacant, and the Governor shall without delay make further nominations until a confirmation takes place."
5. Pending the filling of the vacancy as above provided, Mr. Woodman, by virtue of Section 17, Article 16, which provides that all officers within this State shall continue to perform the duties of their office until their successors shall be duly qualified, may continue to perform the duties of the office, and the Comptroller would be authorized to issue his salary covering said period.

I beg, therefore, to answer your first question just quoted in the affirmative; that is to say, until the successor of Mr. Woodman qualifies he is by virtue of the Constitution authorized to discharge the duties of the office and to collect the salary therefor.

If the Governor, instead of nominating Woodman to succed himself, had nominated Brown, and if on the rejection of Brown by the Senate, the Governor had nominated Jones, and if Jones after being confirmed had refused to accept the office and qualify, as Swor has done, no one would entertain a doubt but what Mr. Woodman could, under the circumstances, continue to discharge the duties of the office, pending the appointment and qualification of his successor.

I can see no difference between the case supposed and the actual situation.

Your next question is:

"Does the Governor, by submitting the name of another appointee, as in this case, whose nomination is confirmed but who fails to take the oath of office, thereby comply with the requirements of the Constitution to that extent that it is not necessary for him to submit the name of any other nominee to the Senate for confirmation. In other words, can the requirements of the Constitution of the State of Texas be reduced to a nullity by such methods?"

Answering this inquiry, beg to say that I do not believe the requirements of the Constitution can be nullified by the failure to fill the vacancy created by the refusal of Swor to accept the office, without violating the Constitution.

The Constitution clearly contemplates that every vacancy in this office shall be filled by appointment by the Governor and confirmation by the Senate, when in session. That a vacancy exists in that Mr. Swor has failed to accept the appointment, there can scarcely be a doubt. The fact that, without reason therefor, he has failed to qualify since his confirmation, which took place on May 11, 1917, should be accepted as conclusive evidence that he has not accepted the appointment. This being the case, the vacancy continues, and, under the provisions of the Constitution first quoted, it is the province and duty of the Governor, now that the Senate is in session, to send the name of someone to the Senate to fill said vacancy.

To constitute the acceptance of an office there must be the concurrence of two wills. It is not a unilateral affair. There is the appointing or electing power on one side and the person elected or appointed on the other, and in no case can the office be considered filled until there is an acceptance by the person chosen. The fact that a person consents to be appointed and confirmed does not constitute an acceptance of the office, in fact this would be meaingless unless the appointee accepts, and qualifies. Mr. Swor has not done this, but for more than three months has neglected to qualify, although he could have done so any day during this time. The conclusion, therefore, is irresistible that he has not accepted the appointment and that a vacancy exists that should be filled by the Governor appointing some person whose name should be sent to the Senate for its consideration.

Your third question is as follows:

"If the Governor fails and refuses to submit another appointment to the Senate for confirmation, then what is the proper method for the Senate to pursue in order to comply with the full requirements of the Constitution and laws of the State in seeing that a proper person is legally and constitutionally appointed to the office of Labor Commissioner."

I beg to call attention to paragraph 6 of the charges of impeachment introduced by Speaker Fuller in the House of Representatives on August 1, 1917, as follows:

"That during the session of the Thirty-fifth Legislature James E. Ferguson as Governor of Texas submitted to the Senate of Texas the

nomination of C. W. Woodman for confirmation as Labor Commissioner. The Senate of Texas refused to confirm the nomination. After their adjournment, Governor Ferguson appointed the chief deputy of C. W. Woodman to fill the place made vacant by the Senate's refusal to confirm C. W. Woodman; but that he has failed and refused to qualify and more than a reasonable time has elapsed since his appointment, but that he has continued to act as deputy, and the said C. W. Woodman has continued to act as Commissioner. And, knowing these facts, Governor Ferguson has failed and refused to make an appointment, and C. W. Woodman now, although confirmation was refused him by the Senate of Texas many months ago, continues to hold the office and draw the pay; that it was the duty of the Governor, when the Senate refused to confirm C. W. Woodman, to make another nomination, and in case the nominee refused to qualify, that it was his duty to make another appointment, but that he has failed and refused to do so in defiance of the Constitution of Texas and his oath of office."

In view of the fact that this matter is undergoing investigation by the House of Representatives, I do not believe this department could with propriety express the opinion which would have to be done in order to answer your last inquiry.

I trust, therefore, that you will pardon me for declining to answer your last question, in view of the fact that the matter is undergoing judicial investigation in the House.

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

P. S. Since writing the above opinion, I learn from the press that Mr. Swor has qualified as Labor Commissioner.

OP. NO. 1810—BK. 50, P. 51.

CONSTITUTIONAL LAW.

1. House of Representatives at Special Session has power to consider the question of impeachment of the Governor, although subject has not been submitted by the Governor.
2. House of Representatives has power to compel an officer under investigation precedent to probable impeachment, appearing as a witness in his own behalf, to disclose on cross-examination the sources of funds borrowed by him, where witness testified to borrowing such funds on direct examination in his own behalf.
3. House of Representatives in such proceedings has the power to compel an officer of a brewing association to disclose whether or not the association loaned money to the officer under investigation.

August 21, 1917.

Judge E. R. Bryan, House of Representatives, Capitol.

DEAR SIR: We have your favor of even date wherein you propound the following question:

"1. Has the House of Representatives sitting as a Committee of the Whole, to investigate charges against Governor Ferguson, authority to compel Governor Ferguson to tell from whom he borrowed certain money for his own private use in taking up his personal indebtedness to certain banks?

"2. Has the House of Representatives the power to compel an officer of a brewing association to testify whether said officer or said association loaned Governor Ferguson certain money for his private use in taking up certain notes of his in banks?"

Except for matters of procedure, the two questions presented by you involve like considerations and will, in the main, be treated together.

The power to impeach is in express terms vested in the House of Representatives (Constitution, Article 15, Section 1). This power is vested in all embracing language; the manner of its exercise is not detailed or described in the granting instrument; under elementary rules, therefore, the House may properly do all things needful or essential to the complete exercise of the power granted. The principle is thus stated by eminent authority: "Where a general power is conferred or duty enjoined, every particluar power necessary for the exercise of the one or the performance of the other is conferred." Cooley's Constitutional Limitations, page 63; People, ex rel., McDonald vs. Keeler, 52 Am., 49. The power to impeach, as will be more fully pointed out hereinafter, is judicial, or at least is quasi-judicial, and from this it necessarily follows that the incidental authority of the House to compel the attendance and testimony of witnesses with respect to relevant matters is as expressly conferred as if it were in specific terms granted. But if it were not expressly conferred, this power to compel testimony would follow as an incident obviously necessary to the use of the general power to impeach.

From this proposition there is no dissent in the adjudicated cases. The grant of power in Section 1 of Article 15 of the State Constitution is, in substance, identical with the grant of the power of impeachment to the House of Representatives by Clause 5, Section 2, Article 1, of the Federal Constitution, and of this latter grant the Supreme Court of the United States, in Kilbourn vs. Thompson, 103 U. S., 168, 190, said: "The House of Representatives has the sole power to impeach officers of the Government, and the Senate to try them. Where the question of such impeachment is before either body acting in its appropriate sphere on that subject, we see no reason to doubt the right to compel the attendance of witnesses, and their answer to proper questions, in the same manner and by the use of the same means that courts of justice can in like cases."

The power to compel the giving of testimony is, of course, based upon the precedent proposition that the House has jurisdiction of the subject matter, and because of this basic question the decisions in cases arising out of attempts to punish witnesses for contempt in proceedings other than impeachments are of great value. Either House of Congress, or of the Legislature, has the power to expel members, a power, manifestly, analogous to that of impeachment of other officers. In in re Chapman, 166 U. S., 661, the recalcitrant witness claimed his personal privilege against "unreasonable searches and seizures," and contended that the questions, which he refused to answer, were "intrusions into the affairs of the citizens" and might involve self-incrimination; these contentions were all

overruled by the Supreme Court, and upon the subject that Court said:

"Under the Constitution the Senate of the United States has the power to try impeachments; to judge of the elections, return and qualifications of its own members; to determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member; and it necessarily possesses the inherent power of self-protection.

"According to the preamble and resolutions, the integrity and purity of members of the Senate had been questioned in a manner calculated to destroy public confidence in the body, and in such respects as might subject members to censure or expulsion. The Senate, by the action taken, signifying its judgment that it was called upon to vindicate itself from aspersion and to deal with such of its members as might have been guilty of misbehavior and brought reproach upon it, obviously had jurisdiction of the subject matter of the inquiry is directed, and power to compel the attendance of witnesses, and to require them to answer any question pertinent thereto. And the pursuit of such inquiry by the questions propounded in this instance was not, in our judgment, in violation of the security against unreasonable searches and seizures protected by the Fourth Amendment.

"In Kilbourn vs. Thompson, 103 U. S., 168, among other important rulings, it was held that there existed no general power in Congress, or in either House, to make inquiry into the private affairs of a citizen: that neither House could, on the allegation that an insolvent debtor of the United States was interested in a private business partnership, investigate the affairs of that partnership, as a mere matter of private concern; and that consequently there was no authority in either House to compel a witness to testify on the subject. The case at bar is wholly different. Specific charges publicly made against Senators, had been brought to the attention of the Senate, and the Senate had determined that investigation was necessary. The subject-matter as affecting the Senate was within the jurisdiction of the Senate. The questions were not intrusions into the affairs of the citizen; they did not seek to ascertain any facts as to the conduct, methods, extent or details of the business of the firm in question, but only whether that firm, confessedly engaged in buying and selling stocks, and the particular stock named, was employed by any Senator to buy or sell for him any of that stock, whose market price might be affected by the Senate's action. We can not regard these questions as amounting to an unreasonable search into the private affairs of the witness simply because he may have been in some degree connected with the alleged transactions, and as investigations of this sort are within the power of either of the two Houses they can not be defeated on purely sentimental grounds.

"The questions were undoubtedly pertinent to the subject-matter of the inquiry. The resolutions directed the committee to inquire 'whether any Senator has been, or is, speculating in what are known as sugar stocks during the consideration of the tariff bill now before the Senate.' What the Senate might or might not do upon the facts when ascertained, we can not say, nor are we called upon to inquire whether such ventures might be defensible, as contended in argument, but it is plain that negative answers would have cleared that body of what the Senate regarded as offensive imputations, while affirmative answers might have led to further action on the part of the Senate within its constitutional powers.

"Nor will it do to hold that the Senate had no jurisdiction to pursue the particular inquiry because the preamble and resolutions did not specify that the proceedings were taken for the purpose of censure or expulsion, if certain facts were disclosed by the investigation. The matter was within the range of the constitutional powers of the Senate. The resolutions adequately indicated that the transactions referred to were deemed by the Senate reprehensible and deserving of condemnation and punishment.

The right to expel extends to all cases where the offence is such as in the judgment of the Senate is inconsistent with the trust and duty of a member. 1 Story on Const., Section 838. Reference is there made to the case of William Blount, who was expelled from the Senate in July, 1797, for 'a high misdemeanor entirely inconsistent with his public trust and duty as a Senator.' The offence charged against him, said Mr. Justice Story, was an attempt to seduce an American agent among the Indians from his duty, and to alienate the affections and confidence of the Indians from the public authorities of the United States, and a negotiation for services in behalf of the British government among the Indians. It was not a statutable offence nor was it committed in his official character, nor was it committed during the session of Congress, nor at the seat of government.

"Commenting on this case, Mr. Sergeant says in his work on Constitutional Law, 2d ed., page 302: 'In the resolution, the Senate declared him guilty of a high misdemeanor, though no presentment or indictment had been found against him, and no prosecution at law was ever commenced upon the case. And, it seems no law existed, to authorize such prosecution.'

"The two Houses of Congress have several times acted upon this rule of law, and the cases may be found, together with debates on the general subject, in both Houses, of great value, in Smith's Digest of Decisions and Precedents, Senate Doc. No. 278, 53d Con., 2d Session. The reasons for maintaining the right inviolate are eloquently presented in the report of the committee in the case of John Smith, accused in 1807 of participating in the imputed treason of Aaron Burr. 1 Hall's Am. L. Journal; 459; Smith's Digest, page 23.

"We can not assume on this record that the action of the Senate was without a legitimate object, and so encroach upon the province of that body. Indeed, we think it affirmatively appears that the Senate was acting within its right, and it was certainly not necessary that the resolutions should declare in advance what the Senate meditated doing when the investigation was concluded."

That either House, when investigating a subject within its jurisdiction, has the constitutional power to compel testimony relevant to the subject, against the claim of constitutional privileges of the witness, is clearly recognized by the Court of Criminal Appeals of this State in the case of Ex Parte Wolters, 144 S. W. 531-535. It is true that in the Wolters case the witness was released, but this was done upon the sole ground that the House of Representatives, at the time it adjudged Wolters guilty of contempt, did not have within its jurisdiction any subject to which the information sought from the witness was relevant. Said the Court, speaking through Presiding Judge Davidson: "It might be concluded as a correct proposition, so far as this case is concerned, that whenever the Legislature has authority to enact laws, it would have corresponding authority to make necessary investigations for the ascertainment of such facts as would be necessary as a predicate for the enactment of laws wherein the matter was then pending and formed a part of the proceedings of that body. These rules apply as well to a special as to a general session" (537).

The only questions, therefore, are, *first*, whether or not the subject-matter of the resolution under which the House is now acting is within its jurisdiction, and *second*, whether or not the testimony sought is relevant to the exercise of that jurisdiction.

That the subject-matter of impeachment is, generally, within the jurisdiction of the House is the plain and emphatic declaration of Section 1 of Article 15 of the Constitution. The fact that this general jurisdiction is proposed to be exercised at a special session and the fact that the subject thereof has not been submitted by the Governor, we think, do not at all detract from the power of the House. This proceeds, inevitably, we think, from the grant of power in all-embracing terms plus the necessarily incidental authority to do what may be essential to the complete exercise of the power expressly granted. That the limitations placed upon the activity of either or both of the two Houses, at a special session, by the Constitution refer to the exercise of the power of legislation and have no application to the use of the impeaching authority, we think, is clear from a consideration of the nature of the power and of the machinery provided for its exercise.

The nature of the impeachment power is judicial. This conclusion inevitably flows from a consideration of the pertinent constitutional provisions. The Articles of Impeachment having been preferred, the Senate "sits as a Court of Impeachment," and the Senators are sworn on a *new oath* "impartially to try the party impeached" (Sec. 3, Art. 15). No person can be *"convicted"* without the concurrence of two-thirds of the Senators present (Sec. 3, Art. 15). When two-thirds of the Senators, sitting as a "Court of Impeachment" have voted for "conviction," a *"judgment"* is framed and rendered (Sec. 4, Art. 15). A designated body of men, to wit: those called "Senators" are sworn in as a "Court," independent of their oaths as Senators,—to "try" a man; if the man is there "convicted," certain of his political rights, to wit: "disqualification from holding any office of honor or profit under this State," certain of his personal privileges, to wit: his right to be considered as qualified to hold "any office of honor or profit under this State;" and certain of his property rights, to wit: the pecuniary emoluments of the office held,—are forever taken away by the *"judgment."*

This is "due course of law" because it is so provided by the law itself. A result of this nature can only follow from the use of essential judicial power; from this proposition there is no dissent by any authority in America or England. See Ex Parte Wolters, 144 S. W. 531; Kilbourn vs. Thompson, 103 U. S. 168, and the other cases herein cited.

The law providing this result having been enacted in the exercise of the supreme legislative power by the adoption of the Constitution, and the result so provided being essentially judicial, reason would indicate that every step in procedure necessary to reach the result is of judicial nature. It has been said that the Articles of Impeachment are analogous to a bill of indictment by a grand jury which sets in motion the jurisdiction of the District or County Court; if so, they are also analogous to an Information filed by a county attorney which may invoke the jurisdiction in a misdemeanor case. County and district attorneys are provided for in the Judiciary Article of the Constitution, because the functions of their offices are necessary in the exercise of the jurisdiction of the courts. The grand

jury is also provided for in the Constitution as a part of the judiciary. The grand jury when it returns a bill, and the county and district attorneys when they file informations, pass judgment upon the facts of evidence and adjudge that these facts are sufficient to show that an offense has probably been committed. The indictment having been returned or an information having been filed, there must be an officer of the court to prosecute, and in the prosecuting function the county or district attorney acts as a part of the judiciary. In impeachments, the House of Representatives,—not as a part of the Legislature, but as a separate entity,—performs the functions of both the grand jury and the district or county attorney. Preliminarily, it hears the evidence; it considers and passes upon the facts in evidence, and thereupon adjudges the probably guilt or innocence of the officer; if from a consideration of the evidence it believes the officer guilty, it so adjudges and presents this judgment in the form of Articles of Impeachment. But its functions do not end here; the Articles having been found, the House appears before the "Court of Impeachment" as the prosecutor. The jurisdiction of the "Court if Impeachment" lies dormant until invoked by the preliminary judgment of the "House"; this jurisdiction, once invoked, is kept in motion by the activity of the prosecutor,—the "House." It must be apparent, therefore, that the "House,"—as a separate entity,—is a necessary part of the judicial machinery provided for the reaching of a judicial result.

That the "House," in impeachments, acts judicially, and not legislatively, is clearly indicated, also, by the arrangement of the constitutional provisions The powers of the House and the Senate pertaining to "legislation" are set forth in detail in Article 3 of the Constitution. Section 1 of that Article declares that the "legislative power" shall be vested in a Senate and House of Representatives, which, together, shall be styled "The Legislature of the State of Texas.'" Neither the House nor the Senate enacts laws; as separate entities they are unknown in the passage of laws, for Section 29 of Article 3 provides that "the enacting clause of all laws shall be: 'Be it enacted by the Legislature of the State of Texas.'" It must be clear that all legislative power which the House and Senate separately or jointly exercise is derived from Article 3. But the impeachment power is not to be found in this article at all. It is to be found in Article 15. A reasonable conclusion would seem to be that the people would have embodied the impeachment power in the legislative section of the Constitution if they had understood it to be of a legislative nature; that they did not so understand or intend it is manifest from their conduct in placing this power in another and distinct article far removed from the legislative article.

But aside from these considerations of reason, the overwhelming weight of authority in America and England is that the "House," when it presents articles of impeachment, acts judicially, and not legislatively. (Kilbourn vs. Thompson, 103 U. S. and other authorities cited therein.) Texas authorities are unanimous to this effect. In ex parte Wolters 144 S. W., 531, 535, Judge Davidson, speaking for the Court of Criminal Appeals, said:

"The Legislature by the terms of Article 2, Section 1, of the Constitution, is made the law-making power of the State. This provision of the Constitution limits that body to legislation, *unless there be found some other provision in that instrument authorizing it to exercise other powers and functions, such as, among other things, to present articles of impeachment against named officials, etc.*"

This excerpt clearly indicates that impeachment is not a legislative function, and no authority can be cited against the proposition.

If, then, the impeaching power is judicial, and is not legislative, it must be clear that the limitation and requirements of the Constitution as to how and when the legislative power shall be exercised have no application to the use of the impeaching power. The procedure for the use of the legislative power is prescribed in Article 3; the power to impeach is vested and controlled by another and wholly different division of the Constitution, to wit; Article 15, and Article 15, which deals with the matter as entirely separate from the legislative power must be primarily considered as to the use of the authority there conferred. And this article provides separate functions for each of the Houses. As remarked above, the House and the Senate are both necessary to the judicial result of impeachment, but while both are ultimately necessary, they act separately and within separate spheres. Of this subject, the Supreme Court of the United States, in Kilborn vs. Thompson, 103 U. S. 168, 183, said:

"Of course, neither branch of Congress, when acting separately, can lawfully exercise more power than is conferred by the Constitution on the whole body, *except in the few instances where authority is conferred on either House separately, as in the case of impeachments.*"

This case also recognizes the powers of each in impeachment proceedings as being judicial, and not legislative. If, therefore, the power is judicial, and the Houses act as independent units as the Legislature, or parts of the Legislature, it would be difficult to imagine any reason why this independent judicial power should be in any wise controlled by an agency of the legislative power, or an agency of the executive power, and yet this would be the inevitable result if it were true that the House may act for impeachment purposes only upon submission by the Governor. This judicial power having once been expressly conferred, it would require an express constitutional declaration to warrant the conclusion that its exercise is in any way dependent upon the exercise of a legislative or executive power. No such declaration exists; nor is there any language in the Constitution from which a like intent may be deduced The fact that the impeachment power is judicial makes manifest its independence of the provisions relied upon to show that a submission of the subject by the Governor is necessary. The provisions relied upon for this purpose are Section 8, of Article 4, which empowers the Governor to "convene *the Legislature* on extraordinary occasions"; Section 5, of Article 3, which 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;" and Section 40, of Article 3. But these provisions are wholly inapplicable to a convention of the House

for impeachment purposes because they, by their express terms, apply to *"the Legislature"* and not to the *"House,"* separately, and because Section 40 of Article 3 makes it plain that when "the Legislature" is convened by the Governor it is convened for legislative purposes.

As a matter of course, this does not mean that the "House" can not prefer articles of impeachment at a session convened by the Governor; it can do this, but when it does so, it acts as a judicial body and not as a part of the Legislature, and acts pursuant to its individual independent power and not by virtue of the mere fact that it happens to be in session as a part of the Legislature at the time when the occasion for impeachment arises.

That the House of Representatives at a session of the Legislature called by the Governor may present articles of impeachment without the necessity of the subject having been presented by the Governor is recognized not only by the Kilbourn case, *supra,* but by the Court of Criminal Appeals of this State in the case of ex parte Wolters, 144 S. W.

The Wolters case arose out of efforts of the House of Representatives to punish a witness for contempt in proceedings other than impeachments; under the facts presented, it was held that the House did not have the power to punish, because no subject of legislation had been submitted by the Governor upon which legislation could be had at the special session touching the matters about which the witness refused to testify; but in the course of the opinion, the Court cites a case of impeachment as being one subject upon which the House might act without the necessity of submission by the Governor (See the excerpt quoted from the opinion hereinabove).

The subject of impeachment is by Article 15 confided to the two Houses separately without limitation, except such limitations as to the power of the Senate as are there imposed. This power is vested to be used absolutely independent of the control of the Governor. The Governor, as shown above, has authority to convene the Legislature; but no such authority is conferred as to the "House" in impeachments.

This freedom from executive control flows, *ex necessitate,* from the Constitution itself. Article 15 expressly provides that the Governor may be impeached by the House and be tried thereon by the Senate. There can be found no justification for the bedief that the people, who made the Constitution, would provide that the Governor may be impeached and at the same time arm him with the power to thwart impeachment however heinous his sins might be. There would be as much reason in providing for a grand jury and at the same time providing that the grand jury may not convene until the consent of all persons who might be indicted is obtained. The idea that the impeaching power should be free from the control or influence of any officer subject thereto in all probability prevented the Supreme Court of the United States from being vested with the power to try impeachments. The proposition so to vest the power was advanced in the constitutional convention and was rejected because the members of that court were to be made subject to impeachment. Upon the sub-

ject of the impropriety of vesting the court with this power, since its members were subject thereto, Mr. Story, in his work on the Constitution, has this to say:

"But * * * a far more weighty consideration is, that some of the members of the judicial department may be impeached for malconduct in office; and thus the spirit which, for want of a better term, has been called the corporation spirit of organized tribunals and societies, will naturally be brought into play. Suppose a judge of the Supreme Court should himself be impeached; the number of his triers would not only be diminished, but all the attachments and partialities, or it may be the rivaliries and jealousies, of peers on the same bench, may be, or (what is practically almost as mischievous) may be suspected to be, put in operation to screen or exaggerate the offense. Would any person soberly decide that the judges of the Supreme Court would be the safest and best tribunals for the trial of a brother judge? (See Section 768, Story on the Constitution, 4th Edition.)"

If, in reason, the Supreme Court may not properly pass upon the guilt or innocence of one of its members, would it not be absurd to say that impeachment of an officer could be made to depend upon that officer's pleasure?

If the argument against the power of action without submission by the Governor is sound at all, it is sound as applicable to all possible cases. The course of the argument ignores the fundamentals. Suppose a man who should be Governor should commit a crime of a nature as universally to shock the common conscience, and there were no doubt as to his guilt, or suppose he should commit such a crime and openly confess and boast of its commission, or suppose that he should commit such a crime and openly confess its commission and accompany this confession with the threat to commit other heinous offenses, by the simple expedient of non-action with respect to submitting the subject of his own impeachment to the Legislature, he could effectually thwart the express will of the people, as declared in their Constitution, that he be impeached and removed from office, and continue to hold and exercise the office of honor and profit which he had dishonored.

Reply might be made that in such a case the Governor could be indicted and punished under the criminal law; but this is idle talk; he might be indicted and convicted, and unless the death penalty were assessed, he would continue to hold and exercise the office because impeachment is the sole method of removal from office in his case. It might even be that, if indicted and convected, he could, in the prison cell, sign the pardon which would remit his sins. A doctrine fraught with such possibilities is monstrous and can find no justification in a government controlled by law. Moreover, it would convict the men of undoubted wisdom who drafted the Constitution, and the people en masse who adopted it, of vain, frivolous and foolish things; it is inconceivable that all these men, bent upon the serious task of constructing a government for themselves and posterity, should solemnly ordain that an officer may be impeached and removed from office, and then make the exercise of the power to do so depend upon the pleasure of the officer himself. The great men who drew the Constitution, and the intelligent people who adopted it as their supreme

law, must have known that an officer would be slow to recommend his own impeachment, and knowing this they must have intended that the repository of the power should be free of his control.

Consequently, being cognizant of the fact that provisions for the convention of the Legislature and limited participation in its proceedings by the Governor had been made with respect to the use of the Legislative power, and, in order to avoid the possibility of confusion, the people provided for the untrammeled use of the impeaching power in another and wholly separate division of the Constitution, to wit: Article 15, wherein they said:

"The power of impeachment shall be vested in the House of Representatives."

The Constitution will be searched in vain for any limitation upon the power thus conferred. Nothing in the instrument from the preamble to the closing sentence, to indicate that this power should at any time lie dormant or that it may not be used on any of the 365 days of the year. It is vested without limitation as to time of use; the fact that conditions might easily arise at any time demanding its use, made such an unlimited provision necessary if the people were to be subject to the universal principle that there is no right without a remedy. To hold that the provisions with reference to the convention of the Legislature and with reference to submission of subjects by the Governor apply here, requires a precedent holding that the term "House of Representatives" means the same thing as the term "The Legislature," because it is only "the Legislature" that the Governor is authorized to convene; the precedent construction is impossible for the simple reason that the Constitution itself provides that "The Legislature" consists of both Houses acting jointly in legislative matters; whereas the impeaching power is placed in one House acting separately and judicially.

The House having been vested unequivocally with this power,—having been expressly commanded to do this thing,—and no detailed procedure having accompanied the command, under fundamental principles it is clothed with full authority to do all things essential to the achievement of the purpose. The Constitution is silent as to when it shall execute the command laid upon it; therefore, it may act at any time. No rules for its procedure having been prescribed by the Constitution, it may itself prescribe such rules therefor as it may deem necessary. No machinery having been provided by the Constitution for procuring relevant information, it may compel the giving of testimony and the production of papers. Having once organized at a session provided for by the Constitution, it may thereafter meet and continue its old organization, or it may re-organize, as to it may seem fit. As a separate entity, it has been given the power to compel the attendance of recalcitrant members, or to expel them, and this it may do at its pleasure.

We believe that no authority against the views herein expressed can be found; and that such authorities, bearing upon the subject, as may exist sustains them.

In June, 1913, Governor Sulzer of New York convened the Legislature of that State in extra-ordinary session; his proclamation of convention did not include the subject of impeachment, nor was such subject submitted to the Legislature by subsequent message. During the time that the Legislature was in this session, the Assembly, (or House of Representatives) preferred articles of impeachment against Governor Sulzer, which articles were tried by the Senate and judgment was rendered removing the Governor from office. Subsequently, Mr. Sulzer, pretending to be Governor, issued a pardon in due form to one Robin, a prisoner in the State Penitentiary, and, upon the strength of this pardon Robin procured a writ of habeas corpus upon the theory that the impeachment was void and the pardon valid because the House had preferred the articles, and the Senate had tried the same, at a special session when the subject had not been submitted by the Governor. The Constitution of New York contained the following provisions: "The Governor * * * shall have power to convene the Legislature, or the Senate only, on extraordinary occasions. *At extra-ordinary sessions no subject shall be acted upon except such as the Governor may recommend for consideration.*" It will be noted, at this place, that the limitation placed upon the power of the two Houses by the New York Constitution is much broader than the limitation placed upon our own Houses when in special session; in New York they were prohibited from acting on *any subject* not submitted, while, under our Constitution, they are only prohibited from enacting "*legislation upon subjects other than those designated.*" The validity of Sulzer's impeachment was presented in Robin's habeas corpus proceeding and was passed upon by the highest court of New York in the case of People vs. Hayes, 143 N. Y. Sup. 325. That Court held that the Article of the New York Constitution mentioned had no application to impeachments because the Houses were acting judicially, and not legislatively; and, for like reasons, Judge Davidson, in the excerpt above quoted from Ex Parte Wolters, 144 S. W. 531, clearly indicated that Section 40, Article 3, of our Constitution is inapplicable to impeachments. All the primary questions now presented were involved in People vs. Hayes, supra, and because of this and because of the unanswerable logic supporting that decision, we deem it appropriate to quote therefrom at length as follows:

"It is urged that this provision contains a prohibition against the consideration by the Assembly of the subject of impeachment; that one of the purposes was to hinder the Assembly when in such extraordinary session from impeaching the Governor; that the only time when the Assembly could consider the subject of impeachment was when it was in regular session; and that it has no power to convene and sit except at regular and extraordinary sessions. In other words, having adjourned sine die in any year, it is without power, no matter what hideous acts of crime or monstrous acts of tyranny or usurpation a Governor may be guilty of, to set the machinery of his punishment in motion until the stated day of the meeting of both branches of the Legislature.

"(1) The subject of impeachment, like the power of a legislative body to punish for contempt, has a different character from subjects requiring the action of both branches of the Legislature and of the Governor in order that laws may be enacted. The power conferred upon the Assembly

to impeach the Governor is a judicial power. Speaking of the division of powers under our Constitution, Judge Rapallo of the Court of Appeals, says:

" 'Notwithstanding this general division of powers, certain powers in their nature judicial are, by the express terms of the Constitution, vested in the Legislature. The power of impeachment is vested in the Assembly.' People ex rel. McDonald vs. Keeler, 99 N. Y., 482, 2 N. E., 615, 52 Am. Rep., 49.

"The power of impeachment, therefore, being a judicial power of the Assembly, can not be participated in by the Governor or the Senate, and therefore does not constitute a legislative subject. Having no power in the premises, an acting Governor could not call the Assembly into session for the purpose of impeaching an absent Governor. Neither is the Assembly shorn of its impeaching power by the summons of the Legislature in extraordinary session. The whole design of Constitutional Government would fail of protection of popular rights and relief from oppression and wrong against those in exalted place, if there were no independence nor power in the Assembly to make impeachments.

"(2) Judge Cooley, in his great work on Constitutional Limitations, says:

" 'In considering State Constitutions we must not commit the mistake of supposing that, because individual rights are guarded and protected by them, they must also be considered as owing their origin to them. These instruments measure the powers of the rulers, but they do not measure the rights of the governed.' Cooley's Cons. Lim. (3rd Ed.), 36.

"The measure of the power of our rulers in the Assembly as respects the Governor is that it may impeach him. Once impeached, that function ends. What time during its yearly office, the Constitution does not specify. The Assembly is the Assembly, whether in regular or extraordinary session or whether self-convened. It is the sole impeaching functionary, and in its exercise of power it is beyond the let or hindrance of the executive or the courts. It is the exclusive and final judge of the occasion or time it shall select to impeach, and of the acts of the Governor it may specify as grounds for impeachment. This great power is political. History is replete with illustrations of its use and abuse. It is reserved to the State for its preservation and the destruction of its enemies and is beyond the control of every court except the court empowered to try the impeached and find his guilt or innocence. Martin vs. Mott, 12 Wheat. 29, 6 L. Ed., 537; Matter of Guden, 171 N. Y., 529, 64 N. E., 451; People ex rel. Broderick vs. Morton, 156 N. Y., 136, 50 N. E., 791, 41 L. R. A., 231, 66 Am. St. Rep., 547.

"(3) The argument that the Assembly clothed with the power to impeach has no power to convene itself for such purpoes has little to commend it, for it is at war with that interpretation of our Federal and State Constitutions which have made them equal to all the vicissitudes involved in a century and a third of National life. Judge Cooley has stated the rule with precision:

" 'Where a general power is conferred or duty enjoined, every particular power necessary for the exercise of the one or the performance of the other is conferred.' Cooley's Cons. Lim., page 63; People ex rel. McDonald vs. Keeler, 99 N. Y., 463, 2 N. E., 615, 52 Am. Rep., 49."

In our opinion, therefore, the jurisdiction of the House over the subject-matter of the investigation is undoubted. The remaining question is as to the relevancy of the information sought.

Of the question of relevancy the House itself is the primary, if not the sole, judge; this follows from the nature of the proceeding. The judgment of the House as to whether or not articles of impeachment shall be preferred, in any case, is final and non-reviewable by any other body or tribunal. It would seem to follow that it is finally and conclusively authorized to act upon any evidence which may satisfy

itself, or satisfy a majority of its members present; the weight of the evidence is for it alone to judge; sequentially, therefore, it would appear to be that all questions of materiality and relevancy are finally committed to its own discretion. No authority can be found that indictates any other rule, but the reasoning of all pertinent authorities lead to this result. From the judgment of the House preferring the articles, and from the judgment of the Senate rendered thereon, there is no appeal. How, then, could it be said that each House is not the exclusive judge of what evidence it will hear?

We do not believe that the constitutional provisions with respect to self-incrimination apply in a proceeding of this kind in favor of the officer whose impeachment may be sought, unless the questions asked indicate that the answers would disclose a violation of the criminal laws of the State. We know of no criminal law providing a penalty against the witness for borrowing money from any individual, firm or corporation. The rule, as we understand it, is that the witness in a criminal prosecution is only protected against his own testimony in cases where there is reasonable ground to apprehend that he would be exposed to a criminal prosecution should he answer; Ex parte Park, 40 S. W. 300; Ex parte Wilson, 47 S. W. 996; Ex parte Sauls, 78 S. W. 1073; Ex parte Merrell, 95 S. W. 1047; Ex parte Hughes, 121 S. W. 1118; and the term "criminal prosecution" as used here, as we understand it, refers to prosecutions upon indictments by grand juries. Again, it is the rule, without exceptions so far as we know, that where a witness takes the stand in his own behalf and makes statements about particular transactions, he becomes a witness for all purposes and is subject to cross-examination as to all matters involved. The rule is thus stated by Judge Hurt in the case of Brown vs. State, 44 S. W. 176: "When the defendant takes the stand, he becomes a witness for all purposes. The State is not confined in its cross-examination to matters elicited in chief. This is well settled." See, also, Ex parte Park, 40 S. W. 300; Pylan vs. State, 26 S. W. 621; Oliver vs. State, 28 S. W. 202; Thomas vs. State, 28 S. W. 534; Dickey vs. State, 56 S. W. 628; Ware vs. State, 38 S. W. 198; Bearden vs. State, 73 S. W. 19.

As to the officers of Brewing Associations as mentioned in your second question we think they can be compelled to give testimony along the lines suggested by you, for the reason that the information described in your question could not reasonably expose them to criminal presecutions. Besides we regard the case of In re Chapman, 166 U. S. 661 as directly in point and as holding that these witnesses could be compelled to testify.

Yours truly,

LUTHER NICKELS,
Assistant Attorney General.

OP. NO. 1811—BK. 50, P. 77.

CONSTITUTIONAL CONSTRUCTION.

1. A member of the State Senate who, as such, assists in establishing a Supreme Judicial District and a Court of Civil Appeals therein, is ineligible during the term for which he was elected to appointment to a position on the bench of said court.

2. The Constitution does not create said courts, but the same are created by the Legislature under the restrictions and limitations provided in Section 6 of Article 5.

August 28, 1917.

Honorable Senate Committee on Nominations, Senate Chamber.

GENTLEMEN: I have your communication, through Senator Lattimore, reading as follows:

"The Committee on Nominations will meet at 9 a. m. August 28 to consider and report on nominations. Senator S. M. King is affected by the resolution herewith sent you. If you could give us an opinion on the matter embraced in said resolution by that time it would be greatly appreciated by the committee."

Senate Simple Resolution No. 31, referred to in your communication, as amended and adopted by the Senate, is as follows:

"Simple Resolution No. 31.

"Whereas, Section 18, Article 3, of the Constitution of Texas provides that 'No Senator or Representative shall, during the term for which he may be elected, be eligible to any civil office of profit under this State which shall have been created, or the emoluments of which may have been increased during such term'; and,

"Whereas, The Constitution further provides that the term of office of State Senator will be four years;

"Therefore, be it resolved, That the Committee on Nominations be requested to make a thorough investigation of the constitutional questions involved as to all offices or positions of emolument and report the result of their investigation to the Senate, and that said committee be requested to obtain the opinion of the Attorney General."

If I understand the facts gathered from your communication and the resolution of the Senate, they are, that Hon. S. M. King was a State Senator, representing the Fourteenth District during the Thirty-fourth Legislature; that he participated in the proceedings of that session of the Legislature when the Act creating the Ninth Supreme Judicial District was enacted, and subsequently, and while still a Senator, he was appointed by the Governor to fill a vacancy on the bench of said Court.

You request the opinion of this Department as to whether or not Senator King was eligible to such appointment.

The Constitutional provision mentioned in the Senate resolution is not, in our opinion, in any sense ambiguous, but its evident meaning is so plain as to really require no construction.

The Constitution provides that no Senator or Representative shall, *during the term for which he was elected,* be eligible to any office of profit or trust under this State "which office shall have been created * * * *during such term.*"

The reason for this rule, as stated by Judge Story in his work on the Constitution, Section 867, is: "The reason for excluding persons from offices who have been concerned in creating them or increasing their emoluments, are to take away as far as possible any improper bias in the vote of the representative, and to secure to the constitutents some solemn pledge of his disinterestedness."

A judgeship on the Court of Civil Appeals is an office both of profit and trust. Senator King was a member of the Senate when the Ninth Supreme Judicial District was formed and the Court of Civil Appeals established therein. Senator King was appointed by the Governor to fill a vacancy on said bench *"during the term for which he was elected."*

He was, in our opinion, ineligible to such appointment.

The only possible suggestion that can be made that would cast any doubt as to the correctness of this conclusion, is to say that the office was not created by the Legislature but by the Constitution.

That portion of Section 6 of Article 5 of the Constitution, brought under review, reads as follows:

"The Legislature shall, as soon as practicable after the adoption of this amendment, divide the State into not less than two nor more than three Supreme Judicial Districts, and thereafter into such additional districts as the increase of population and business may require, and shall establish a Court of Civil Appeals in each of said districts, which shall consist of a chief justice and two associate justices, who shall have the qualifications as herein prescribed for justices of the Supreme Court."

The Thirty-fourth Legislature divided the State into Supreme Judicial Districts, creating a new district, the Ninth, and established therein a Court of Civil Appeals. Without this Act of the Legislature neither the district nor the Court would have existed. The caption of the Act of the Legislature in question is as follows:

"An Act to amend an Act of the Thirty-second Legislature entitled 'An Act to amend Article 21, Title 4, of the Revised Civil Statutes, and to amend an Act passed by the Thirtieth Legislature creating the Sixth Supreme Judicial District of Texas, and to create the Seventh and Eighth Supreme Judicial Districts of Texas,' and to create the Ninth Supreme Judicial District of Texas, and to provide for the organization of a Court of Civil Appeals within the Ninth Supreme Judicial District of Texas, and to repeal all laws in conflict herewith, and declaring an emergency."

We see that the terms repeatedly used by the Legislature in this as well as in the captions of former bills establishing Courts of Civil Appeals were, "creating," "created." This is itself a construction of the Constitution, and shows that the Legislature, in passing the Act in question and others preceding, of which it was an amendment, thought it was creating courts. Aside from this, the Constitution did not attempt to divide the State into Supreme Judicial Districts, nor did it attempt to establish Cours of Civil Appeals; but devolved this duty upon the Legislature under the limitations and restrictions contained in Section 6 of Article 5.

Prior to the Act of the Thirty-fourth Legislature, there was no Ninth Supreme Judicial District and there existed no Court of Civil Appeals therein. It follows, therefore, that the Court was created, that is, called into existence, by this Act of the Legislature.

The word "create" means to call to exist, or to bring into existence, something which did not exist. The Constitution, as before stated, does not create, or purport to create, the Supreme Judicial Districts of the State, nor does it establish, or purport to establish, therein Courts of Civil Appeals, but leaves the creation of these districts and the establishment of these Courts to the Representatives of the people, without whose legislative Acts the districts would not exist nor could the Courts be established.

A case directly in point is that of the State Ex Rel. Attorney General vs. Porter, 1 Ala. 688, 124 Pac. 794. The Court had under consideration an Act of the Legislature which established a Tenth Judicial Circuit, and the Constitution of that State provided that the State should be divided into judicial circuits. The judges of the Circuit Courts of that State were elected by the members of the Legislature. The respondent was a member of the Legislature and was by it elected to the office of Circuit Judge of said Tenth Circuit, and his contention in said quo warranto proceedings was that the office of Judge of the Circuit Court was created by the Constitution, and the Court held that the particular office involved in that case was the judge of the tenth circuit, and that that office came into existence when the Legislature created the circuit, and that, as the respondent was a member of the Legislature that created said circuit, he was ineligible to said office. In the course of the decision the Court said:

"Thus it will be seen that the Constitution, instead of dividing the State into circuits, and creating the office of circuit judges, devolved that duty upon the Legislature, to be exercised as the increase of counties and population might render it expedient. Until the Act of the 31st of January, 1840, there was no circuit designated as the Tenth, but the statute creates the circuit, and requires that a judge thereof shall be elected. Had the two houses of the General Assembly elected such an officer previous to that enactment, the election would have conferred no authority upon the appointee nor have entitled him to the emoluments of office."

To the same effect is the decision of the Supreme Court of Mississippi in the case of Brady vs. West, 50 Miss. 68. The Court had under consideration an Act of the Legislature of that State which created the County of Tate out of portions of several other counties, and empowered the Governor to appoint the Clerk of the Chancery Court in the new county. The Governor appointed one Brady, who was a member of the Legislature which created the new county. An election, however, had been held, and one West was elected to said office; it being claimed that said office was an elective office under the Constitution. West brought a proceeding in quo warranto. The Constitution of Mississippi provided for the office of Clerk of the Chancery Court of the several counties, and it was insisted upon the part of Brady that the Act creating said new county did not create the office of Chancery Clerk, but that it was created by the Constitution of the State. In discussing that question the Court said:

"Upon reference to the Constitution, we find the nineteenth section of article 6 provides that the clerk of the Supreme Court shall be appointed by said court for the term of four years, and the clerk of the Circuit Court

and the clerk of the Chancery Court shall be elected by the qualified voters of their several counties, and shall hold their office for the term of four years. This does not create the office, but presupposes the office to exist, and prescribes the manner in which it is to be filled in counties fully organized. The office of clerk of the Chancery Court is a county office, and, in the nature of things, it cannot exist until the county exists. It springs into existence upon the creation of the county and the extension of the chancery system to it. It cannot be said, with any propriety of language, that the office of clerk of the Chancery Court of Tate County existed before the county was created, and before it had a Chancery Court, and the Act which created the county gave it a Chancery Court."

And held that Brady, having been a member of the Legislature that created said office, was disqualified from holding it during the continuance of his said term as a member of the Legislature. In that case the Court held that the office of Clerk of Chancery Court sprang into existence upon the creation of the county.

A similar construction was given in the case of State vs. Gooding, decided by the Supreme Court of Idaho, reported in 124 Pac. 791, in which the cases from Alabama and Mississippi, cited above, were referred to with approval.

The question under consideration has never been adjudicated by any Court of this State so far as we have been able to find. It may be true that under other provisions of the Constitution Governors have appointed to judicial positions members of the Legislature, who, as such, assisted in establishing judicial districts. The differences in the language of the Constitution authorizing a division of the State into judicial districts and the language with reference to the establishment of Courts of Civil Appeals, we believe, would possibly justify a difference in construction. However, that may be Judge Brown, in Rochelle vs. Lane, 105 Texas, 355, said: "That a disregard of the Constitution by the usurpation of power on the part of officials is not sanctioned by its long continuance, and that each officer should confine his acts to the limits of his powers. * * * We repeat that a violation of the Constitution cannot be sanctified by frequent repetitions, and such acts do not furnish a guide for a court that has regard for the Constitution of the State."

If, therefore, it should appear that this provision of the Constitution has heretofore been disregarded by Governors in appointing to office members of the Legislature who may have assisted in creating an office, we do not believe the same justifies a continued disregard.

The construction here given to the Constitution is in harmony with that given by my predecessor, Hon. R. V. Davidson, in a letter to Hon. J. J. Strickland, a member of the House of Representatives, on May 3, 1909. The question there presented was whether or not a member of the Legislature would be eligible to appointment on the State Fire Rating Board that was created at the session of the Legislature participated in by the proposed appointee. Attorney General Davidson held that the member of the Legislature was ineligible to appointment, quoting Section 18 of Article 3 of the State Constitution.

I am not to be understood as expressing an opinion on any other provision of the Constitution, as I understand your question does not bring under review any provision of the Constitution except that as to

the eligibility of a member of the Legislature to appointment, during the term for which he was elected, to an office created during the term of his service in the Legislature.

We are, therefore, of the opinion, and so advise you, that Senator King was ineligible to appointment as Judge of said bench during the term for which he was elected.

Yours very truly,

B. F. LOONEY,
Attorney General of Texas.

OP. NO. 1817—BK. 50, P. 109.

1. The Governor of the State is without authority to remove a member of the Board of Regents from office.
2. A member of the Board of Regents can only be removed from office for causes provided by the Legislature under quo warranto proceedings.

September 15, 1917.

Hon. W. P. Hobby, Acting Governor, Capitol.

DEAR SIR: I have your favor of the 12th instant, transmitting copy of Senate Simple Resolution No. 8, which states, in effect, that Hon. Wilbur Allen practiced deception on the members of the Senate in regard to his attitude towards the then pending issues with reference to the University and by these means secured his confirmation, as a member of the Board of University Regents.

The resolution of the Senate concludes as follows:

"Now, therefore, the Senate of Texas requests the Honorable W. P. Hobby, acting Governor of Texas, to set a day upon which the said Allen shall appear before said Governor, and a committee from the Senate shall appear before the said Governor and present to him reasons believed by the Senate to be good and sufficient cause for the removal of said Allen, to the end that said Allen may be removed by the Governor in conformity with the law."

Your communication is as follows:

"I enclose herewith copy of Senate Simple Resolution No. 8. I will be pleased to have you advise me your opinion as to the power of the Governor of Texas to remove a member of the Board of Regents of the University of Texas for cause as provided in the statutes."

Replying, I beg to call your attention to Section 7 of Article 15 of the Constitution, which reads as follows:

"The Legislature shall provide by law for the trial and removal from office of all officers of this State, the modes for which have not been provided in this Constitution."

The Constitution and statutes provide for the removal of certain officers by impeachment, but regents are not included, (Section 2, Article 15, Constitution; Article 6017, Vernon's Sayles'). Also provision is made for the removal of district judges by the Supreme

Court, (Section 6, Article 15, the Constitution; Article 6022, Vernon's Sayles.') Provision is also made for the removal of certain officers by the Governor on the address of two-thirds of each House of the Legislature, but regents are not included. (Section 8, Article 15, Constitution; Section 6018, Vernon's Sayles.')

The above are the only modes prescribed in the Constitution for the removal of officers.

The Legislature, however, in obedience to the provision of Section 7, Article 15, first quoted, has provided for the removal of certain district, county and city officials, (See Chapters 2 and 4, Title 98, Vernon Sayles.')

In each instance above mentioned, both in the Constitution and in the statute, the modes provided for the removal of officers, contemplate a trial. The procedure provides that a charge or petition is to be made setting up the grounds for removal; notice is required to be given the defendant of the complaint and of the time and place for the hearing, and full opportunity is afforded for a fair and impartial hearing; in other words, due process of law is provided.

Regents of the University are not mentioned by name in any of the provisions above referred to.

As the Legislature has been so particular to safeguard the property rights of the petty officers of the counties and towns of the State, to protect them from an arbitrary or summary dismissal from office, it is not to be conceived that it intended to leave the most dignified and important offices of the State unprotected, against the possible exercise of an arbitrary power of removal.

Such is not the case. The Legislature has, in obedience to the Constitution, made provision also for the trial and removal of regents when cause for such removal, as provided by the Legislature, exists.

Articles 6398-6404, Vernon's Sayles,' provide for the trial and removal of any public officer by quo warranto proceedings in the following instances:

> "In case any person shall usurp, intrude into, or unlawfully hold or execute, or is now intruded into, or now unlawfully holds or executes any office, or franchise, * * *. or any public officer shall have done or suffered any act which by the provisions of law works a forfeiture of his office," etc.

It is apparent, therefore, that if any person should intrude into, or unlawfully hold or execute an office; that is, without a legal election or appointment thereto, he could be tried and ousted by quo warranto proceedings. For instance, if an ineligible person should be appionted or elected to an office, or if a person should by any fraudulent or illegal means get possession of an office, this statute would be applicable.

Also where any public officer does or suffers any act, which, by the provision of law, works a forfeiture of his office, he can be tried and ousted under the provisions of this statute. For instance, when an officer forfeits his office by removal from the State, or by acceptance and qualification to another office, or should in any way abandon the office.

Section 5 of Article 16 of the Constitution reads:

"Every person shall be disqualified from holding office of profit or trust in this State, who shall have been convicted of having given or offered a bribe to procure his election or appointment."

It is perfectly apparent that if a regent of the University should be convicted of bribery, as contemplated by this provision of the Constitution, he could be removed by quo warranto proceedings.

Another instance: Article 200 of the Penal Code reads as follows:

"Any State or district officer in this State who shall be guilty of drunkenness shall be subject to removal from office in the manner provided by law; and, upon conviction thereof in any court of competent jurisdiction, shall be fined in any sum not less than ten dollars nor more than two hundred dollars."

Regents of the University are included within the term "State and district officers," hence on conviction for drunkenness a regent could be tried and removed from his office under the terms of the quo warranto statute, for an act done "which by the provisions of law works a forfeiture of his office."

Article 119-A, of the Penal Code, prohibits regents from making contracts for the erection or repair of any building or other improvements, or for the purchase of equipment, or supplies of any kind for the institution under their charge, where such contract or purchase is not authorized by a specific legislative enactment, or on written direction of the Governor acting under and consistent with the authority of existing laws, and they are prohibited from contracting or creating any deficiency in the name of the State not specifically authorized.

Section 119-B reads:

"That any regent * * * of any educational * * * institution who shall violate this Act shall be at once thereafter removed from his position with such institution, and shall not thereafter be eligible to hold said position. * * *"

This statute affords another instance where a regent could be ousted from office by the quo warranto statute for an act done which, by the provisions of law, works a forfeiture of his office.

The violation of the nepotism law is also a ground for the removal of a regent from office.

Article 6074 of Vernon's Sayles' reads as follows:

"In addition to any other penalty imposed by law, any person who shall violate any of the provisions of the law contained in the Penal Code relating to the offense known as nepotism and the inhibited acts connected therewith, shall be removed from his office, clerkship, employment or duty as therein mentioned."

With reference to this offense, quo warranto is specifically provided for in Article 6076, Vernon's Sayles,' as follows:

"All quo warranto proceedings mentioned shall be instituted by the Attorney General in one of the district courts of Travis County or in the district court of the county in which the defendant may reside; and concurrent jurisdiction in such suits is hereby conferred upon such courts."

Other instances could probably be found where regents may be subjected to trial and removal from office because of acts done or suffered, which, by the provisions of law, works a forfeiture of the office, but it is believed that these instances are sufficient to show that the Legislature has, in compliance with the Constitution, made provision for the trial and removal from office of regents of the University in all instances where, in the judgment of the Legislature, removal should take place.

I beg, therefore, to answer your question in the negative. In my opinion, the Governor has no power to remove a regent from his office, but such removal, if it takes place at all, must come as the result of a trial provided for in our quo warranto statutes.

The only pretense of authority in the Governor to remove a regent is found in Article 6027, Vernon's Sayles,' and is as follows:

"All State officers, appointed by the Governor or elected by the Legislature, where the mode of their removal is not otherwise provided by law, may be removed by him for good and sufficient cause to be spread on the records of his office and to be reported by him to the next session of the Legislature thereafter."

This statute, even if a valid law, has no application whatever to officers where the mode of their removal is otherwise provided by law, and, as I have just shown that the trial and removal of regents is provided for in the quo warranto proceedings, the statute in question gives no authority to the Governor to exercise the power of removal.

The validity of this statute, however, is exceedingly doubtful. The Constitution, Section 7, Article 15, requires the Legislature to provide by law "for the trial and removal from office of all officers of this State, the modes for which have not been provided in this Constitution." Assume, therefore, that the Legislature has made no provision for the removal of regents other than is found in the statute just quoted, does that comply with the Constitution? Is provision made therein for *a trial* before removal?

What does the term "trial" mean? "A trial is the judicial examination of the issues between the parties, whether they be issues of law or fact." 38 Cyc. 1267; Words & Phrases, 2nd Series, Vol. 4, p. 1103; Bouviere's Law Dictionary, Vol. 3, p. 3320.

In order to constitute a trial, charges must be made, notice thereof given, time and place for hearing named, and an opportunity for the person charged to be fairly and impartially heard on the issues made; otherwise, there is no trial and due process of law is not administered.

I beg to call your attention to the case of Honey vs. Graham, decided by our Supreme Court, reported in 39 Texas, page 1.

This case arose out of the fact that Governor Davis removed George W. Honey from the office of Treasurer of the State. It seems that Mr. Honey, with his family, left the State, saying to several persons that he would be gone six weeks. His chief clerk was left in possession of the office. Soon after Honey's departure, the Governor notified the chief clerk that he must execute a bond for the faithful administration of office. The bond was not executed to the satisfaction

of the Governor, and thereupon the office was seized by military force; the Governor issued a proclamation declaring the office vacant and appointed B. Graham to fill the vacancy. The suit of Honey vs. Graham resulted, and the case turned upon the power of the Governor to create a vacancy by removing the State Treasurer from office.

In the course of the decision, the court said:

"The Governor declares in his proclamation, that George W. Honey, late Treasurer of State, had absented himself (11) from the limits of the State—not on public business, and without leave of absence—leaving no bonded or responsible clerk, but leaving a man acting as such who, when called on to give the bond required by law, was unable to do so. These are the facts stated in the proclamation, from which a vacancy was inferred, and the appellee appointed to fill the vacancy. * * *

"The sixteenth section of the first article of the Constitution reads thus: 'No citizen of this State shall be deprived of life, liberty, property, or privileges, outlawed, exiled, or in a manner disfranchised, except by due course of the law of the land.'

"The right to hold and exercise the functions of an office to which the individual may have been duly elected may be regarded both as property and privileges, and therefore the incumbent can only be deprived of his office in the manner pointed out in the above quoted section of the Constitution. It may be safely admitted that more than one case might occur where the Governor would be authorized in assuming that an office was vacant; but no case can occur under our Constitution wherein the Governor would be authorized to *adjudge* an office *forfeited.*

"Judgment belongs to the judiciary. A charge of forfeiture can only be made out on proof—proof sufficient to satisfy twelve unprejudiced minds.

"To forfeit his right to an office, the incumbent must have done something sufficient in law to deprive him of the office; and the Constitution and laws secure to the person so accused the right of traverse—right of trial—and (12) no power on earth can lawfully deprive him of these rights. * * *

"The power of the Governor to fill a vacancy, when one exists, is not disputed. The power to create a vacancy is denied by every authority, except where the office is filled by the Governor's choice of an incumbent without concurrence of the Senate or election by the people, and the term of office is undefined by law. In such case the incumbent holds at the pleasure of the executive, and may be at any time removed from the office. Keenan vs. Perry, 24 Texas, 253; Hill vs. State, 1 Ala., 599; Bowman vs. Slifer, 25 Pa. St., 29; 13 Pet., 259; Lowe vs. Commonwealth, 3 Met., 213; Page vs. Hardin, 8 B. Mon., 648; Brown vs. Grover, 6 Bush., 1; Cummings vs. Clark (13), 15 Vt., 653; Johnson vs. Wilson, 2 N. H., 202; People vs. Fields, 2 Scam., 79."

This case announces the generally accepted doctrine that an office is both property and privileges, of which a person cannot be deprived, "except by the due course of the law of the land" (See Section 19, Bill of Rights), which means a trial—an opportunity to be heard.

The statute in question makes no provision for a trial, is arbitrary and despotic in its possibilities and, in our opinion, furnishes no authority to the Governor to remove a University regent from office.

Yours truly,

B. F. LOONEY,
Attorney General.

OP. NO. 1849—BK. 50, P. 275.

OFFICERS—CLERK OF THE DISTRICT COURT.

A clerk of the district court is a county officer as distinguished from State officers.
Constitution, Section 9, Article 5.
Constitution, Section 14, Article 16.
Constitution, Section 24, Article 5.
Constitution, Section 17, Article 15.
Revised Statutes, Articles 1685 and 6030.

December 13, 1917.

Hon. James A. Harley, Adjutant General, Capitol.

DEAR SIR: You transmit to this department a communication addressed to you by the local board for the county of Frio, from which it appears such board is in doubt as to whether or not clerks of the district court are included in the term "officers—legislative, executive or judicial of the United States or of State, territory, or District of Columbia," the same being subdivision A of Class 5 under the heading "claim for exemption or deferred classification contained in the questionnaire prescribed by the Federal authorities under the draft act."

We note that in Class 3 under this heading in the questionnaire subdivision D includes "county or municipal officer." In the opinion of this department a district clerk is a county officer as distinguished from a State official.

Section 9 of Article 5 of the Constitution, such article relating to the judicial department of the State government, provides in substance that there shall be a clerk for the district court of each county who shall be elected by the qualified voters for the State and county officers.

Section 14 of Article 16 of the Constitution provides in substance that all civil officers shall reside in the State and all district or county officers within their district or counties.

In the case of Kruegel vs. Murphy, 126 S. W., 343, in which a writ of error was denied by the Supreme Court, it was held that although the district clerk in and for Dallas County did not reside in one of the two districts into which the county was divided, yet being a resident of Dallas County he was not disqualified to act as the clerk of the court for the district in which he did not actually reside. The effect of the holding of the court in this case is to fix the status of the district clerk as that of a county official, he being held eligible to the office if he resided in the county. See also Kruegel vs. Daniels, 109 S. W., 1108.

Section 24, Article 5, of the Constitution, is in the following language:

"County judges, county attorneys, clerks of the district and county courts, justices of the peace, constables, and other county officers, may be removed by the judges of the district courts for incompetency, official misconduct, habitual drunkenness, or other causes defined by law, upon the cause therefor being set forth in writing and the finding of its truth by a jury."

The language used in the above section of the Constitution clearly classifies clerks of the district courts, among other officers therein enumerated, as county officers.

Article 6030, Revised Civil Statutes 1911, providing for the removal of county and certain district officers, is in the following language:

"All district attorneys, county judges, commissioners, and county attorneys, clerks of the district and county courts, and single clerks in counties where one clerk discharges the duties of district and county clerks, county treasurer, sheriff, county surveyor, assessor, collector, constable, cattle and hide inspector, justice of the peace, and all other county officers now or hereafter existing by authority either of the Constitution or laws, may be removed from office by the judges of the district court for incompetency, official misconduct, habitual drunkenness, or drunkenness not amounting to habitual drunkenness, as hereafter defined in this chapter."

The Legislature in substantially embodying into the statutes Section 24, Article 5, of the Constitution, has likewise classified clerks of the district courts as county officials.

Article 1685 R. S., 1911, provides that a clerk of the district court shall be elected by the qualified voters of the county. While the acts of the clerk of the district court of any county are valid throughout the State, yet his jurisdiction is co-extensive only with the limits of his county. He is elected by the voters of the county, must reside within the county and can perform no official act beyond the boundaries thereof.

In the case of In re Whiting, 2 Bard., (N. Y.) 513, quoted in Throop on Public Officers, Sec. 26, it was held that county officers within the meaning of the Constitution would comprehend all those who were appointed or elected for a county, and must reside and perform the duties of their offices within their counties, such as sheriffs, coroners, county clerks, etc.

The courts of the various states of the union have been called upon to determine whether certain officers should be classified as State or county officials. From Words and Phrases, Vol. 2, page 1663, we quote as follows:

"State officers, in a general sense, are officers whose duties and powers are coextensive with the territorial limits of the State. County officers, in the same sense, are those whose general authority and jurisdiction are confined within the limits of the county in which they are appointed, who are appointed in and for a particular county, and whose duties concern more especially the people of that county. Whether an officer unprovided for by the Constitution, but created solely by legislative enactment, is to be regarded as a State or county officer, must depend in a large measure upon the territorial scope of his jurisdiction, and upon the nature and character of his powers and duties. If the jurisdiction for the exercise of his powers and duties is coextensive with the limits of the State, then he is a State officer; if confined, like a sheriff or county judge, within the limits of a county, but coextensive with the limits of such county, then he is a county officer. State vs. Burns, 21 South., 290, 295; 38 Fla., 367.

"A county officer is one whose entire duties apply only to the county in which he is located, and for which he is elected or appointed. State vs. Glenn, 54 Tenn. (7 Haisk.,) 472, 473."

Also from Words and Phrases, Second series, Vol. 1, page 1100, we quote as follows:

"The words 'county officers' in the most general sense apply to officers whose territorial jurisdiction is coextensive with the county for which they are elected or appointed, and in a more precise and restricted sense mean officers by whom the county performs its usual governmental functions. State ex. rel. Buchanan County vs. Imel, 146 S. W., 783, 784; 242 Mo. 293."

"In general, a 'State officer' is one whose duties and powers are coextensive with the State, while a 'county officer' is one whose duties and powers are coextensive only with the county, and the fact that the official acts of an officer are so far extraterritorial that they are binding throughout the State does not make the officer who performs such acts necessarily a State officer. People vs. Evans, 93 N. E., 388, 391; 247 Ill., 547."

For comprehensive definitions of State officers we quote as follows from Words and Phrases, Second series, Vol. 4, page 675:

"The term 'State officers' is sometimes construed as only the heads of the executive departments of the State elected by the people at large, such as Governor, Lieutenant Governor, State Treasurer, Attorney General, and the like, and it should be so construed when used without circumstances indicating any other intent. In its more comprehensive sense it includes every person whose duty appertains to the State at large. The exact sense in which the term is used in any particular law must often be determined by ordinary rules for judicial construction. State ex rel. Milwaukee Medical College vs. Chittenden, 107 N. W., 500, 608; 127 Wis., 468."

We therefore advise you that in the opinion of this department, under the Constitution and Statutes of this State a clerk of the district court is a county official as distinguished from State official.

Yours ruly,

C. W. TAYLOR,
Assistant Attorney General.

OP. NO. 1852—BK. 50, P. 280.

SUSPENDED SENTENCE ACT—OFFICE—SUFFRAGE—SUSPENDED SENTENCE.

1. A suspended sentence in a felony case is not a final judgment, and a person is not "convicted of a felony" so long as the suspended sentence is in effect..
Acts Thirty-fifth Legislature, page 8.
2. A person is not prohibited from testifying as a witness by reason of his being under a judgment of a suspended sentence, in a felony case.
Espinoza vs. State, 165 S. W., 208.
Simonds vs. State, 175 S. W., 1064.,
3. A person is not prohibited from holding office or voting by reason of his being under a judgment of a suspended sentence, in a felony case.

Decemer 13, 1917.

Hon. J. R. Hall, County Attorney, Marshall, Texas.

DEAR SIR: The Attorney General is in receipt of your letter of December 10, wherein you advise that a constable of your county was recently convicted in the district court of your county of the offense of manslaughter, and that the jury recommended the suspension of

his sentence, and judgment was entered accordingly. You desire to have the ruling of the department upon the following qustions:

"1. Can he continue to legally hold his office so long as the suspended sentence is in effect?
"2. Can he legally vote?"

Replying thereto, we beg leave to advise that we are of the opinion that the facts stated by you do not ipso facto vacate the office of constable held by the party, nor does it disfranchise him from voting.

Article 6028, R. S., 1914, provides, in substance, that all convictions by a petit jury of any county officer for any felony or for any misdemeanor involving official misconduct, shall work an immediate removal from office of the officer so convicted; and such judgment of conviction shall, in every instance, embody within it an order removing such officer.

Subdivision 4 of Article 2938, R. S., 1914, provides that "all persons convicted of a felony; except those restored to full citizenship and right of suffrage or pardoned," shall not be allowed to vote in this State.

Disqualification from holding office or disfranchisement from voting, provided for in those articles of the statute are, in the main, based upon the fact of such party's "conviction of a felony."

In passing upon the meaning of the words "conviction of a felony," rendering a person incompetent to testify as a witness, as the words are used in our law, the Court of Criminal Appeals, in the case of Arcia vs. The State, 26 Texas, Crim. App. 204, used the following language:

"There are, however, some peculiar provisions in our code, which, we think, require more than a verdict and judgment to be shown, in order to establish a forfeiture of civil rights. Under our code, in all felony cases, a sentence must follow the judgment. This sentence is distinct from, and independent of, the judgment, and is, in fact, the *final* judgment in the cause. It must be pronounced and entered in all felony cases, except in a capital case, when the death penalty is assessed, before an appeal can be prosecuted. (Code Crom. Proc., Articles 791, 792, 793.). It is the sentence, therefore, and not the judgment, which, under our Code, concludes the prosecution in the trial court, and until it has been pronounced it cannot be said that the conviction in the trial court is complete, so as to work a forfeiture of civil rights. If, after sentence has been pronounced, no appeal is taken, the conviction is complete, and its consequences attach and operate at once. But if an appeal be prosecuted, the effect of the appeal is to suspend and hold in abeyance the enforcement and legal consequences of the conviction until the judgment of the court of last resort has affirmed the conviction had in the trial court. (Code Crim. Proc., Art. 849.) This view is confirmed by Article 27 of the Penal Code, which reads: 'An accused person is termed a "convict" after final condemnation by the highest court of resort, which, by law, has jurisdiction of his case, and to which he may have thought proper to appeal.'"

A person convicted of a felony is not disqualified as a witness until sentence has been passed upon him and he has accepted same, no matter for what reason he may not have been sentenced. If he has been sentenced, and his case has been appealed to the higher court, he is not disqualified as a witness until judgment against him has been affirmed by such court.

Flournoy vs. State, 59 S. W., 903.
Jones vs. State, 22 S. W., 404.
Robinson vs. State, 35 S. W., 651.
Woods vs. State, 26 Crim. App., 490.
Wright vs. State, 45 S. W., 723.

Under the provisions of our Penal Code, one whose sentence has been suspended, was not incompetent as a witness as being a convicted criminal.

Espinosa vs. State, 165 S. W., 208.
Simonds vs. State, 175 S. W., 1064.

Under the last suspended sentence Act, Acts of the Thirty-fifth Legislature, page 8, the wording of the Act is such as not to render the judgment thereunder a final judgment. In Section 2 it is provided that "in cases where the jury recommends a suspension of a sentence, neither the verdict of conviction nor the judgment entered thereon shall become final except under the condition and in the manner and at the time provided by Section 4." In Section 4 it is provided that, "if thereafter sentence shall be pronounced under the conditions named in the law the judgment shall then become final, evidencing clearly the intent and purpose not to make the judgment final until the sentence is pronounced."

Therefore, in keeping with these decisions of our courts, a person is not "convicted of a felony" until a final judgment is had in the case and sentence pronounced thereon. In other words, the sentence is the final judgment of a conviction by the court; and when the sentence is suspended there is not a conviction of a felony or final judgment in the case, which would ipso facto vacate the county office held by a party or disfranchise him from voting.

Yours truly,
W. J. TOWNSEND,
Assistant Attorney General.

OP. NO. 1871—BK. 50, P. 350.

OFFICIAL SHORTHAND REPORTERS—OFFICERS.

An official shorthand reporter, whether he be an officer or an employe merely, could not accept an appointment as assistant county attorney for the reason that the duties of the two are incompatible.
Constitution, Section 40, Article 16; Section 21, Article 5.
Revised Civil Statutes, Article 347, 1923.
Penal Code, Article 387.

January 17, 1918.

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

DEAR SIR: The Attorney General has your letter of January 15th, asking an opinion from this department as to whether or not it would be legal for an official shothand reporter for the District Court to hold the position of assistant county attorney. You state that if such procedure is permissible under the law you would like to appoint Mr.

J. A. Feagin, the official shorthand reporter, who is also a lawyer, as your assistant.

In the opinion of this department the official shorthand reporter could not while occupying that position, hold the office of assistant county attorney for the reason that the duties of the two positions are incompatible.

We would be disposed to hold that the official shorthand reporter was an officer were it not for the holding of the Court of Civil Appeals of this State in the case of Robertson vs. Ellis County, 84 S. W., 1097, although in this case the Court holds that the official shorthand reporter is not an officer for the reason that he exercises no function of government, yet the latter portion of the Court's discussion of this question limits the holding in that case to a construction of Section 30, Article 16, of the Constitution, limiting the term of office in this State to two years, and it may be that if the precise question you present was carried before the courts of last resort in this State they would hold the official shorthand reporter to be an officer within the meaning of Section 40, Article 16, prohibiting the holding of more than one office of emolument, except the four offices therein named. However, as we view the question you present it is unnecessary in determining that the two positions cannot be held at the same time by the same person, to hold that the official shorthand reporter is an officer, as under the Statutes of this State we believe the duties of the two positions are so wholly incompatible as to admit of no other decision. Your county has no district attorney, therefore you as county attorney, under the provisions of Section 21, Article 5, of the Constitution, represent the State in all cases in the district and inferior courts of your county.

By Article 347 R. S., you are authorized to appoint in writing one or more assistants to continue in office during your pleasure, and who shall have the power and authority to perform all the acts and duties you are authorized to perform under the law. Therefore, the assistant appointed by you would have the authority and the power, and it would be his duty, to appear and represent the State in the prosecution of all cases in the district court.

By Article 1923 the duties of the official shorthand reporter are prescribed, among which is that he shall attend all sessions of the court, take full shorthand notes of all the oral testimony offered in every case tried in the court, etc. If the same person occupied the two positions it would be necessary for him to perform two separate and distinct services required of him by the law at one and the same time. In other words, he must be acting in a dual capacity every moment during the trial of a criminal case or any civil case in which the State may be a party. To our minds this presents an incompatibility of duty sufficient to authorize the holding that the official shorthand reporter could not at the same time hold the office of assistant county attorney.

In addition to what has been said above we are impressed with the view that the Legislature has declared the incompatibility of the two positions in enacting what is now Article 387 of the Penal Code of this State, which is as follows:

"Nothing in this law shall be held or deemed to permit any district judge within this State to appoint as official stenographer of his district any person related within the third degree to the judge or district attorney of such district, but any such appointment is hereby declared unlawful under the provisions of this law and subject to the penalties herein provided."

From a reading of the above article of the Penal Code it is apparent that the Legislature has seen fit to thoroughly divorce the position, employment or office of the official shorthand reporter from that of the office of district attorney. You occupying the position of district attorney in your county, that is, representing the State in the district court, the same rule would apply to you.

If the district judge would not have authority to appoint a person related within the third degree to the district attorney, surely he would not have the authority to appoint the district attorney himself and as your assistant is authorized to exercise the same powers as are conferred upon you, then it would be, in our opinion, in the face of this statute for the official shorthand reporter to at the same time occupy the office of assistant county attorney. To our minds the above article of the Penal Code is a legislative construction that the duties of the two positions are wholly incompatible and that therefore the official shorthand reporter cannot hold the office of assistant county attorney.

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

OP. NO. 1874—BK. 50, P. 411.

OFFICERS—CONTRACTS WITH THE STATE.

A contract for the sale of supplies to a State Normal School made by a corporation, the president and general manager of which is president of the State Normal School Board of Regents is contrary to public policy and void.

Statutes prohibiting officials from contracting on behalf of the State with themselves are but declaratory of the common law.

That a member of an official board did not cast his vote in favor of letting the contract to a corporation in which he was a stockholder would not relieve the transaction from the operation of the rule.

January 30, 1918.

Hon. George Leavy, State Purchasing Agent, Capitol.

DEAR SIR: The Attorney General has your letter of January 25, wherein you desire advice from this department as to whether or not you should accept bids from the Walter Tips Hardware Company for supplies furnished the State normal schools, it appearing that Mr. A. C. Goeth, who is President of the State Normal School Board of Regents, is likewise president and general manager of the Walter Tips Hardware Company, a corporation.

In response to your inquiry we first beg to call your attention to Section 21, Article 16, of the Constitution of this State, which provides that all stationery and printing, except proclamations and such printing as may be done at the Deaf and Dumb Asylum, paper and fuel used in the legislative and all other departments of the Government except the judicial department, shall be furnished under contract, to be given to the lowest responsible bidder. This section further provides that "no member of officer of any department of the Government shall be in any way interested in such contract. This provision of the Constitution is carried into Revised Statutes, appearing as Article 7346 of the 1911 revision. It will be noted that the above constitutional and statutory provision relates only to stationery, printing, paper and fuel. We are not advised that the Walter Tips Hardware Company deals in any of these commodities, but we call your attention to these provisions for the reason that, as disclosed by our search, they are the only inhibitions either in the organic or statutory laws of this State against a State official contracting with the State in the manner under consideration in this opinion.

Therefore, if you are to refuse to accept bids from this concern it must be upon the ground that for a public official to contract with the State for supplies to be furnished such institution is contrary to public policy and for that reason void.

Members of the Board of Regents hold their offices and derive their power from Chapter 5, Acts of the First Called Session of the Thirty-second Legislature and Chapter 103, Acts Regular Session of the Thirty-third Legislature. It is provided by Section 5 of the former act that such Regents shall be charged with the responsibility of the general control and management of all State normal schools for white teachers. It is further provided that they shall have authority to erect, equip and repair buildings, to purchase libraries, furniture, apparatus, fuel and other necessary supplies. This places the burden upon the board to determine what is necessary to be purchased for these institutions. Of course under the laws relating to the State Purchasing Agent supplies for these institutions are to be purchased by the Board through that official upon a competitive bid. This is nevertheless a purchase by the board as they alone have authority to make such purchases. The State Purchasing Agent acts merely as the agent of the institutions or department for which he purchases supplies and he can make no contract unless the same be based upon a requisition by the head of the department or a board in charge of the institution which in turn must be based upon an appropriation made to that department or institution by legislative enactment.

This brings us to a consideration of the specific question propounded by you; that is, will you be authorized to receive bids from the Walter Tips Hardware Company of which Mr. Goeth is the president and general manager, for supplies estimated by the superintendent and approved by the Board of Regents. There being no constitutional or statutory inhibition except as to those commodities referred to in Section 21, Article 16, of the Constitution, then as to such other supplies it would be your duty to entertain the bid of this hardware company unless it is violative of public policy for such

company to contract with the State under existing conditions as herein set out.

We desire to say in the outset of this discussion that what is said here, as well as in the authorities cited and quoted from, is intended in an abstract way as a discussion of the legal principle involved and is not intended to in any way reflect upon the integrity of Mr. Goeth.

In discussing agreements tending to official corruption or injury to the public Elliott's Commentaries on the Law of Contract, Vol. 2, Sec. 706, states the rule in this language as follows:

"Agreements which tend to official corruption or injury of the public service may be entered into either directly with the official or with a third person who is to bring improper influences to bear upon such official. The courts will unhesitatingly pronounce illegal and void, as being contrary to public policy, those contracts entered into by an officer or agent of the public which naturally tend to induce such officer or agent to become remiss in his duty to the public. Nor is it necessary for the officer or agent to bind himself to violate his duty to the public in order to bring such an agreement within the operation of the rule. Any agreement by which he places himself or is placed in a position which is inconsistent with his duty to the public and has a tendency to induce him to violate such duties, is clearly illegal and void."

The following section dealing with the interest of a public official is in part as follows:

"Under this principle, contracts for services or material in which public officers have an individual interest, are prohibited. 'Independently of any statute or precedent, upon the general principles of law and morality, a member of an official board can not contract with the body of which he is a member.'"

Davidson vs. Guilford Co., 152 N. C., 436.
State vs. Windle, 156 Ind., 648.

Section 708 of this work is as follows:

"As a general rule, contracts for materials and supplies from an officer or member of a board whose duty it is to purchase such supplies are held invalid, although in some cases where the contract has been executed a recovery of the quantum meruit is allowed. The rule that an agent can not bind his principal in a contract which the agent makes with himself extends to public officials."

Baars vs. Laketon Tp., 163 Mich., 665, 129 N. W., 7, Ann. Cas., 1912a, 866 and note.

In the case of Noble vs. Davison, 96 N. E., 325, it was sought to prevent the enforcement of a contract for certain plumbing work for a school building. The Noble Plumbing & Heating Company was a corporation engaged in the business of plumbing and installing heating plants. The defendant, Earnest E. Noble, owned a large number of shares of the capital stock of this corporation and was likewise a member of the school board, letting the contract to the plumbing and heating company for the installation of a steam heating plant in the school building in the city of Princeton, Indiana. Davison, the appellee, in the higher court contended that the contract was void as in violation of a statute prohibiting a school trustee being interested

directly or indirectly in any contract with the district, and also that it was void on the grounds of public policy. The facts in this case, therefore, appear to be upon all four of the questions you present. Mr. Goeth occupies in this question a position analogous to that occupied by Mr. Noble in the Indiana case. Upon the question as to whether or not the contract was void as being contrary to public policy the court went at length into a discussion of the authorities. Numerous cases are discussed to the effect that contracts of this character are contrary to public policy. We quote this discussion as follows:

"Even in the absence of the statute, the contract would, as appellee maintains, be void, because contrary to public policy. Counsel for appellants say in their brief: 'Public policy is a juridical ignis fatuus upon which a judicial decision is sometimes sought to be founded when no support can be found for it in the law; and it is resorted to frequently when the purpose is to take from one of the parties to the controversy that which is his by vested right, sometimes by constitutional guaranty. * * * It was an unhappy day for the law when the term was invented and given meaning as having the force of law.' We can not concur in any such suggestion. One has heedlessly considered the decisions of this court who would at this day assert such doctrine. This court has ever steadfastly adhered to the rule which invalidates all agreements injurious to the public, or against the public good, or which have a tendency to injure the public. Contracts belonging to this class are held void, even though no injury results. *The test* of the validity of such agreements is the *tendency to public injury*, regardless of the actual intent of the parties, and *regardless of actual results.*

"Integrity in the discharge of official duty is zealously guarded by the law. It lends no aid to that which tends to corrupt or contaminate official action, whether such action be judicial, legislative, or administrative. 9 Cyc., 485. And the tendency of contracts between municipal corporations and officers thereof, for municipal improvements or supplies, is to mislead the judgments of the officers of the municipality, if not to sully their purity.

"In Cheney vs. Unroe, 166 Ind., 550, 77 N. E., 1041, 117 Am. St. Rep., 391, this court quoted with approval from Dillon, Municipal Corporations, the following: 'It is a well established and salutary doctrine,' says a distinguished author, 'that he who is intrusted with the business of others can not be allowed to make such business an object of pecuniary profit to himself.' This rule does not depend on reasoning technical in its character, and is not local in its application. It is based on principles of reason, of morality, and of public policy. It has its foundation in the very constitution of our nature, for it has authoritatively been declared that a man can not serve two masters, and is recognized and enforced wherever a well regulated system of jurisprudence prevails.

"In Waymire vs. Powell, 105 Ind., 328, 4 N. E. 886, this court, in holding void a contract between a board of county commissioners and one of its members, said: 'The law will not permit public servants to place themselves in a situation where they may be tempted to do wrong, and this it accomplishes by holding all such employments, whether made directly or indirectly, utterly void.'

"In City of Fort Wayne vs. Rosenthal, 75 Ind., 156, 39 Am. Rep., 127, it was held that an employment by a board of health of one of its members to vaccinate pupils in a public school was void. The court said: 'As agent, he can not contract with himself personally. He can not buy what he is employed to sell. If employed to procure a service to be done, he can not hire himself to do it. This doctrine is generally applicable to private agents and trustees; but to public officers it applies with greater force, and sound policy requires that there be no relaxation of its stringency in any case which comes within its reason.'

"In Wingate vs. Harrison School Township, supra, it was held that a contract by a school trustee for the improvement of school property, by the terms of which he was to share in the profits of the contract, was void, as against public policy.

"In Case vs. Johnson, supra, it was held that a contract between a board of town trustees, and one of its members, for a street improvement, was void, both by statute and because against public policy.

"Among the very numerous cases where this court has declared contracts void on grounds of public policy are the following: Maguire vs. Smock (1873), 42 Ind., 1, 13 Am. Rep., 353, holding illegal a contract with a property owner to pay his street improvement assessments for his signature to a petition for the improvement; Board vs. Mullikin (1848), 7 Blackf., 301, holding void a promissory note, executed to a board of commissioners, for the benefit of the county treasury, in consideration of the appointment by the commissioners of a certain person as collector of county revenue; Ellis vs. State (1852), 4 Ind., 1, holding that the State printer could not sell nor assign his office; Elkhart County Lodge vs. Crary (1884), 98 Ind., 238, 49 Am. Rep., 746, holding void a contract for services in securing the selection of a certain place for the location of a government building; State vs. Windle (1901), 156 Ind., 648, 59 N. E., 276, which held invalid an agreement by which a county treasurer was to be allowed interest on money furnished by him for the payment of county obligations.

"We see no reason for relaxing the rule adhered to so strictly by the courts of this State. In fact, not only in Indiana, but elsewhere generally the principle is applied by the courts in a large and constantly increasing number of cases. 9 Cyc., 482. As was said in State vs. Windle, supra: 'The protection of the public interests requires that no exception to this rule shall be allowed, nor any evasions tolerated.'"

In the case of Baars vs. Laketon, Ann. Cases, 1912-A, page 866, the Supreme Court of Michigan, in discussing this principle, upon the authorities cited, said:

"It is a well settled rule that an agent can not bind his principal in a contract which the agent makes with himself, and we have decided that the doctrine extends to public officers. This was decided in the case of People vs. Township Board, 11 Mich., 222. The following cases are in point on the general proposition: Beaubien vs. Poupard, Harr. (Mich.), 206; Walten vs. Torrey, Harr. (Mich.), 259; Clute vs. Barron, 2 Mich., 192; Dwight vs. Blackmar, 2 Mich., 330, 57 Am. Dec., 130; Moore vs. Maudelbaum, 8 Mich., 433; Flint, etc. R. Co. vs. Dewey, 14 Mich., 477; Hannah vs. Fife, 27 Mich., 172; Powell vs. Conant, 33 Mich., 396; Prince vs. Clark, 81 Mich., 167, 45 N. W., 663; Wilbur vs. Steepel, 32 Mich., 344, 46 N. W., 724, 21 Am. St. Rep., 568; McNutt vs. Dix, 83 Mich., 328, 47 N. W., 212, 10 L. R. A., 660, Miner vs. Belle Isle Ice Co., 93 Mich., 97, 53 N. W., 218, 17 L. R. A., 412; Humphrey vs. Eddy Transp. Co., 107 Mich., 153, 65 N. W., 13."

The reports abound in cases based upon statutes prohibiting officials becoming interested in contracts with the State. Statutes of this character, however, are nothing more than the adoption of the common law rule to the effect that one cannot in his official capacity deal with himself as an individual. In the case of Smith vs. Albany, 61 N. Y., 444, the New York Court of Appeals, in discussing this rule said:

"The Act of 1843 (Session Laws of that year, page 36) making it unlawful for a member of any common council of any city in this State to become a contractor under any contract authorized by the common

council, and authorizing such contracts to be declared void at the instance of the city, has not wrought a change in the rule referred to; it is, so far as it goes, simply declaratory of the law as it existed previous to its passage."

The Supreme Court of Texas discussed the rule in Willis vs. Abbey, 27 Texas, saying:

"Public policy required that the officers chosen to locate and survey the public lands should not be permitted to speculate in them, or to acquire interests in them, which would present to such officers the temptation to take advantage of the information which their official positions enabled them to acquire, to the detriment of the holders of certificates generally. (Flanikin vs. Fokes, 15 Texas, 180; DeLeon vs. White, 9 Texas, 598."

We quote from 9 Cyc., 485, as follows:

"A people can have no higher public interest, except the preservation of their liberties, than integrity in the administration of their government in all its departments. It is therefore a principle of the common law that it will not lend its aid to enforce a contract to do an act which tends to corrupt or contaminate, by improper and sinister influences, the integrity of our social or political institutions. Public officers should act from high consideration of public duty, and hence every agreement whose tendency or object is to sully the purity or mislead the judgments of those to whom the high trust is confided is condemned by the courts. The officer may be an executive, administrative, legislative, or judicial officer. The principle is the same in either case."

There are numerous other cases to like effect and holding, but we deem the above as sufficient citation of authorities to support the rule.

This transaction is not relieved of the vice referred to in the foregoing discussion by reason of the fact that the public official may not be dealing with himself in an individual capacity, but with a corporation in which he is a stockholder. The authorities are equally positive and clear that a contract entered into by a public official with a corporation in which he is a stockholder is void. Upon this point we quote from In Re opinion of the Justices, 82 Atl., 90, as follows:

"In Consolidated Coal Co. vs. Board of Trustees of Institute for the Blind, 164 Mich., 235, 129 N. W., 193 (1910), a member of the defendant board of trustees was a stockholder in the plaintiff corporation, which sold coal to the State Institution for the Blind. Such member had no control of the corporation, and received no benefit, other than the dividend on his stock, and had nothing to do with securing the contract; but it was held by the Supreme Court of Michigan that the sale was within the prohibition of the statute, which provided that no trustee of any board having control of any public institution in the State should be interested in any contract for the sale of supplies to such institution; and that the contract was therefore void. In the opinion of the court, it is said:

"'We do not regard the statute as merely putting in form of positive law a rule developed by the courts, but as a legislative rule founded in public policy, the plain effect of which the courts are not at liberty to deny or amend. There can be but one answer to the question.'

"In City of Northport vs. Northport Townsite Company, 27 Wash., 543, 68 Pac., 204, it was held that, where a member of the city council

was a stockholder and business manager of a lumber company, and the lumber company sold to the contractor materials for improvements on the streets of the plaintiff city, such member was within the statute prohibiting any such officer to be directly interested in any contract with the city.

"In Commonwealth vs. DeCamp, 177 Pa., 112, 35 Atl., 601, it was held that the secretary, who was also a stockholder of a corporation having a contract for the lighting of the city, is within the statute prohibiting any councilman from being interested in any contract with the city, though he was elected councilman after the execution of the contract."

The doctrine has also been announced that even though the stockholder of a corporation who was also a member of an official board, did not cast his vote in favor of the letting of the contract at the board meeting, this would not relieve the transaction from the operation of the rule. Upon this point we quote again from In Re Opinion of the Justices, supra, as follows:

"In Drake vs. City of Elizabeth, 69 N. J. Law, 190, 54 Atl., 248 (1903) the city council of the defendant city awarded a contract for State printing to the Times Publishing Company, and, it appearing that several members of the council were stockholders in the publishing company, it was held that this 'infection' was sufficient ground for avoiding the action of the entire board; and in the analogous case of Traction Company vs. Board of Public Works, 56 N. J. Law, 431, 29 Atl., 163, it appeared that the vote of the disqualified member was not necessary to the result, but the court said: 'The fact that there was a sufficient number of votes, apart from his vote, to pass the ordinance is no answer to the objection taken upon the vote. The "infection" of the concurrence of the interested person spreads, so that the action of the whole board is voidable.'"

We therefore advise you that in the opinion of this department it would be contrary to public policy for the Walter Tips Hardware Company to be permitted to bid upon and receive contracts for supplies for the State normal schools so long as a member of the Board of Regents of those schools is the president, manager and stockholder in such corporation.

Yours very truly,

C. W. TAYLOR,

Assistant Attorney General.

OP. NO. 1875—BK. 50, P. 422.

OFFICERS—DISTRICT ATTORNEY—COMPENSATION.

A district attorney may accept employment in any cause wherein he is not required by law to appear for the State.

Where a criminal case has been transferred out of a district, the district attorney may accept a fee as a private prosecutor in the court to which the case was transferred, there being no requirement in the statute that he follow the case and prosecute the same where tried.

Article 30, C. C. P.; Article 365, Revised Statutes, 1911.

February 1, 1918.

Hon. Dan J. Harrison, District Attorney, Liberty, Texas.

DEAR SIR: The Attorney General is just in receipt of your letter, without date, as follows:

"I wish you would please advise me if I would be permitted as district attorney to accept a fee from private parties to follow a case and prosecute the same which had been transferred out of my district."

In criminal cases the duty of the District Attorney is prescribed by Article 30 C. C. P., as follows:

"It is the duty of each district attorney to represent the State in all criminal cases in the district courts of his district, except in cases where he has been, before his election, employed adversely; and he shall not appear as counsel against the State in any court; and he shall not, after the expiration of his term of office, appear as counsel against the State in any case in which he may have appeared for the State."

It will be noted from a reading of the above article that it was made the duty of the district attorney to represent the State in all criminal cases in the district courts of *his district,* with certain exceptions. By this article he is prohibited from appearing as counsel against the State *in any court.* In our opinion the fact that the Legislature has required the district attorney to represent the State in all criminal cases in the district courts of his district and is prohibited from appearing against the State in any court, is significant and susceptible of the construction that it was not the intention on the part of the Legislature to prohibit a district attorney from appearing as counsel for the State in any district other than his own. By following a criminal case that had been transferred on change of venue and appearing as counsel for the State he would not only not be violating the provisions of this article, but would be performing a service entirely in accord with his duties as a representative of the State in criminal matters. If he may appear and represent the State, associated with the district attorney of the district where the case is being tried, then we see no good reason why he should not be permitted to receive compensation for such services paid by private prosecutor.

Article 365 of the Revised Statutes 1911, prohibits a district or county attorney from accepting a fee to prosecute any case which he is required by law to prosecute. We quote this article in full, as follows:

"A district or county attorney shall not take any fee, article of value, compensation, reward or gift, or any promise thereof, from any person whomsoever, to prosecute any case which he is required by law to prosecute; nor shall he take any fee, article of value, compensation, reward or gift, or any promise thereof, from any person whomsoever, in consideration of, or as a testimonial for, his services in any case which he is required by law to prosecute, either before or after such case has been tried and finally determined."

We have seen that the duty of the district attorney is to prosecute all criminal cases in the district courts of his district. Nowhere in the statute relating to the change of venue do we find that it is made the

duty of any district attorney to follow and prosecute a case upon a change of venue. If he is not required by law to prosecute a case in a county to which it is removed, then Article 365 just above quoted has no application.

It has been decided by the courts of this State that a county attorney may be employed and paid a fee by the commissioners court to represent the county in any cause where the duty is not enjoined upon him by law to represent the county. In Lattimore vs. Tarrant County, 124 S. W., 205, the court in discussing this question said:

"Neither was it proper to instruct a verdict as to the item of $600 alleged to have been paid to appellant Lattimore for 'ex officio' services as county attorney. It is quite true that there is no provision of law allowing the commissioners' court of a county to pay to the county attorney an ex officio salary as such, but it is equally true that the commissioners' court may lawfully employ the county attorney to represent the interest of their county in any cause where such duty is not enjoined upon him by law. Browning vs. Tarrant County, 111 S. W., 748. In other words, Article 299 Sayles' Ann. Civ. St., 1897, which makes it unlawful for a county attorney to accept any fee, article of value, compensation, reward or gift, for the prosecution of any case, or for services in any case, applies only to cases where he 'is required by law to prosecute.'"

It is also a well established doctrine in 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; S. W. Tel. & Tel. Co. vs. Priest, 72 S. W., 242.

It has also been decided that he who accepts an office for a fixed salary or fees cannot legally charge additional compensation for the performance of his official duty. City of Decatur vs. Vermillion, 77 Ill., 315.

There being no prohibition in the Statutes against a district attorney accepting employment as a private prosecutor and receiving pay therefor from private parties in a criminal case transferred out of the district on a change of venue, we advise that in the opinion of this department the same may be legally done.

Very truly yours,
C. W. TAYLOR,
Assistant Attorney General.

OP. NO. 1881—BK. 51, P. 11.

COUNTY OFFICERS—JUSTICES OF THE PEACE—CONTRACTS.

A justice of the peace is an officer of the county within the meaning of Article 376 of the Penal Code prohibiting county officials being interested in any contract with the county.

Employment of a justice of the peace by a county commissioner to do day labor upon the public roads of the county is a contract for the repair of roads within the meaning of Article 376 of the Penal Code.

February 9, 1918.

Hon. Carey Legett, County Attorney, Port Lavaca, Texas.

DEAR SIR: In your letter of February 6th, addressed to the Attorney General, you call our attention to Article 376 of the Penal Code dealing with county or city officers becoming interested in contracts, and then you propound the following questions for an opinion thereon:

"1. Would the justice of the peace be a county officer construed in the light of the above mentioned article?

"2. If he is considered as a county official in the above mentioned article, would it be legal for a county commissioner to hire a man who holds the office of justice of the peace, to work for wages on some road work, the remuneration for the said work coming from the county by approval of the commissioners court?"

The article referred to is as follows:

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

Replying to your first inquiry, we beg to say that in our opinion a justice of the peace is an officer of the county within the meaning of the above quoted article. A justice precinct is a political subdivision of a county created by law for the administration of that portion of the county's business within the precinct.

Section 24, Article 5 of the Constitution is as follows:

"County judges, county attorneys, clerks of the district and county courts, justices of the peace, constables, and other county officers, may be removed for incompetency, official misconduct, habitual drunkenness, or other causes defined by law, upon the cause therefor being set forth in writing and the finding of its truth by a jury."

It will be noted from a reading of the above section that the framers of the Constitution clearly classed justices of the peace as county officers.

We call attention also to Article 6030 of the Revised Civil Statutes of 1911, providing for the removal of certain county officers. This article is as follows:

"All district attorneys, county judges, commissioners, and county attorneys, clerks of the district and county courts, and single clerks in counties where one clerk discharges the duties of district and county clerks, county treasurer, sheriffs, county surveyor, assessor, collector, constable, cattle and hide inspector, justice of the peace, and all other county officers now or hereafter existing by authority either of the Constitution or laws, may be removed from office by the judges of the district

court for incompetency, official misconduct, habitual drunkenness, or drunkenness not amounting to habitual drunkenness, as hereafter defined in this chapter."

The Legislature has substantially embodied in the foregoing article, Section 24, Article 5, of the Constitution, and in so doing has likewise classified justices of the peace as county officials.

In holding that the trustees of a common school district are county officers the Court of Civil Appeals of this State in the case of Hendericks vs. State, 49 S. W., 705, after citing the section and article of the Constitution above cited, said:

"School districts are subdivisions of the county, as are commissioners' and justices' precints. Commissioners, justices of the peace, and constables are named along with other officers whose offices extend to the entire county; and the mention of 'other county officers' is a reference to them as county officers. Each of them is an officer in and for the precinct of the county of which his precinct is a part, and consequently of the county itself; and we think there should be no difficulty in construing the Constitution and the statute as including the officers of the precincts and districts of a county in the general designation of county officers."

In the case of Kimbrough vs. Barnett, 55 S. W., 120, the Court of Civil Appeals held that trustees of an independent school district were also county officers. The court said:

"We think there can be no doubt that a school trustee of an independent school district in this State is a county officer, as was held in the case of Hendericks vs. State, 49 S. W., 705."

A justice of the peace as a magistrate may sit in any portion of the county. His jurisdiction to this extent is co-extensive with the boundaries of the county.

Hart vs. State, 15 Court of Appeals, 202.
Ex parte Brown, 43 Texas Criminal, 45.
Brown vs. State, 55 Texas Criminal, 572.

We therefore answer your first question by saying that within the meaning of Article 376 of the Penal Code a justice of the peace is an officer of the county.

Second: Answering your second question, we are of the opinion that it would be a violation of the above quoted article of the Penal Code for a justice of the peace to accept employment for wages to work upon a road. He may not have entered into a written contract for repair of the road; nevertheless the agreement between the justice of the peace and the county commissioner that the commissioner would pay from the county funds certain daily wages, is in our opinion a contract for the repair of the road.

In the case of Rigby vs. State, 10 S. W., 760, cited by you, the Court in discussing the purpose of this legislation, said:

"Manifestly, the Legislature, in enacting the statute, intended thereby to protect counties, cities, and towns from official peculation. Such pec-

ulation was the evil sought to be suppressed; and the statute strikes at the very root of the evil, by making it an offense for any officer of a county, city, or town to become interested pecuniarily in matters wherein such corporations are pecuniarily interested. The purpose of such statute is to prevent official 'rings' from being formed and operated to prey upon the treasuries of counties, cities and towns; to prevent the officers of such corporations from using their official knowledge and influence to their individual pecuniary advantage in the financial transactions of such. The objects of the statute would be but partially attained if such officers are to be permitted to deal with their corporations in the sale and purchase of property. We can perceive no reason why a county officer should be permitted to sell a mule to his county, and yet be denied the privilege of making a wagon or other article of property for the county for a consideration. In the construction of a statute, the legislative intent, if that intent can be ascertained, must govern, even over the literal import of words, and without regard to grammatical rules. Willson Crim. St., Sections 17-26. Our construction of the statute is that it inhibits every officer of a county, city, or town from selling to or purchasing from such corporation any property whatever. This construction does not, we think, do violence to the language of the statute, and is the only construction which will accord with what we believe to be the intent and purpose of the statute."

We therefore advise you that it would be a violation of Article 376 of the Penal Code quoted above for a justice of the peace to accept employment, the wages therefor to be paid by the county, to work upon public roads.

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

OP. NO. 1888—BK. 51, P. 18.

OFFICES AND OFFICERS—COUNTY JUDGE—COUNTY TAX ASSESSOR—DEPUTIES AND ASSISTANTS.

County tax assessor can legally appoint a party as deputy who is the brother of the county judge.

February 26, 1918.

Hon. J. P. Coon, County Judge, Kaufman, Texas.

DEAR SIR: In your communication of the 23rd instant you submit the following:

"Under the Nepotism Law can the county tax assessor legally deputize my brother while I am county judge?"

Replying, I beg to say:

Article 3903, Vernon's Sayles Civil Statutes, 1914, provides for the appointment of deputies and contains the following provision:

"Whenever any officer named in Articles 3881 to 3886 shall require the service 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 appoint-

ment 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 officer applying for appointment of a deputy or assistant, or deputies or assistants, shall make affidavit that they are necessary for the efficiency of the public service, and the county judge may require, in addition, a statement showing the need of such deputies or assistants; and in no case shall the county judge attempt to influence the appointment of any person as deputy or assistant in any office."

It will be observed that the above article prohibits the county judge from attempting to influence the appointment of any person as deputy or assistant to any office and it was doubtless the intention of the Legislature in inserting this clause in this statute to leave the appointment of the *person* to act as deputy exclusively in the hands of the official desiring to make such appointment, and the only fact necessary for the county judge to determine is the need for such deputy or assistant by the officer making application therefor.

Article 381, Penal Code, 1911, as amended by the Act of 1915, (Chap. 95, page 149), provides in part as follows:

"* * * It shall hereafter be unlawful for any officer * * * to appoint or 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.* * * *"

Construing this Article the Attorney General in a recent opinion held that it would not be unlawful for the trustees of a public school to employ a teacher who is a sister to the county superintendent, notwithstanding the fact that the county superintendent is required to approve contracts between trustees and teachers of his county. This opinion contains the following language:

"The county superintendent might be said to *confirm the appointment* of a teacher. However, in order to secure a conviction an allegation would have to be made that the teacher was related within the prohibited degree 'to the person so appointing or so voting or to any other member of such board, the Legislature, or court, of which such person so appointing or voting may be a member' and to allege that the teacher was related within such degree to the person who 'confirmed the appointment' would be insufficient."

On July 13, 1915, I wrote the following opinion to the county attorney of Trinity County:

"In reply to your letter of the 29th ultimo, I beg to advise that it would not be a violation of the anti-nepotism law for the sheriff to employ as a guard the son of one of the county commissioners.

"When it becomes necessary for employing a guard the sheriff may, with the approval of the commissioners court, or in cases of emergency with the approval of the county judge, employ such number of guards as may be necessary. The sheriff's account therefor shall be itemized and sworn to and allowed by the commissioners court to be paid out of the county treasury. (Article 7127, Revised Statutes, 1911.) The employment of guards for the safe-keeping of prisoners must depend upon the necessity for such employment. The only thing to be decided by the commissioners court is whether such necessity exists when the sheriff makes his application. If the sheriff is authorized by the court to employ

guards, he may employ whomsoever he pleases to act as guard, and the fact that he employs a relative of a county commissioner would not make such employment a violation of the law prohibiting nepotism in this State. The county commissioner does not vote for the *employment* of his son; he only votes for the employment of *guards. The selection of the guard is left to the sheriff.*

"While it is true that the commissioners court votes to allow the sheriff's account for employing guards, yet it would not be a violation of the law for the commissioner to vote to allow the sheriff's account for the services rendered by his son, in view of the fact that the commissioner had nothing whatever, directly or indirectly, to do with the employment of his son as one of the guards."

The questions decided in the two opinions above referred to are analagous to the question submitted in your communication, and for the reasons above stated, we hold that it would not be a violation of the Anti-Nepotism Law for you as county judge to approve the application of the county tax assessor for the appointment of a deputy, although you may know at the time that he intends to appoint your brother as such deputy, if the application meets with your official approval.

Very respectfully,
W. P. DUMAS,
Assistant Attorney General.

OP. NO. 1886—BK. 51, P. 86.

PUBLIC OFFICERS—ALIENS.

Aliens who declared their intention to become citizens of the United States prior to September 27, 1906, but who failed within seven years thereafter to file their petition for citizenship, lost the right thereunder to become naturalized, and lost the right to vote and any other rights based upon said proceedings.

February 22, 1918.

Hon. H. E. Veltmann, Brackettville, Texas.

DEAR SIR: I have yours of the 17th instant, in which you ask the Department's opinion as to whether aliens who declared their intention to become citizens of the United States prior to September 27, 1906, are entitled to vote under our election laws. You copy in your letter a notice sent out from the Bureau of Naturalization in the Department of Labor, addressed to the clerks of courts exercising jurisdiction in naturalization matters, in which attention is called to the recent decision of the Supreme Court in the case of United States vs. Morena, 38 Supreme Court, 151.

It occurs to me that this decision of the Supreme Court, which I have just read in full, settles the question you propounded beyond controversy, and that your question should be answered in the negative.

The right of suffrage is extended to an alien who has filed his first papers, declaring his intention to become a citizen, on the ground that the same is made in good faith and that it is his bona fide inten-

tion to become a citizen of the United States. Where he fails to develop this intention by failing within seven years, from the amendment of 1906, to take out final papers, he has forfeited his right on his first application to become a citizen and, therefore, has forfeited all rights and privileges based thereon. We recently had occasion to answer the question of whether or not an *alien enemy* who had filed his first papers but who had never become naturalized, was entitled to vote. We held, in the light of recent Federal Decisions, that in view of the fact that the alien enemy was prohibited, during the state of war, to complete his naturalization, that all rights of citizenship, including the right to vote, based upon the filing of his first papers, were abrogated or, at least, held in suspense during the period of the war. I am enclosing herewith a copy of this opinion, which applies only to alien enemies, but the principle is somewhat similar to the principle involved in your inquiry.

I have no hesitancy, therefore, in advising you that, in the light of this decision of the Supreme Court, that *aliens who declared their intention to become citizens of the United States prior to September 27, 1906, but who failed within seven years thereafter to file their petition for citizenship, lost the right thereunder to become naturalized, and lost the right to vote and any other rights based upon said proceedings.*

Yours very truly,

B. F. LOONEY,
Attorney General.

OP. NO. 1900—BK. 51, P. 100.

PUBLIC OFFICE—ABANDONMENT OF OFFICE.

A member of the Legislature was appointed to an office and later the act under which he was appointed to the office was held unconstitutional.

Held, that it was a question of fact as to whether he had abandoned the office of member of the Legislature to be decided by the House of Representatives.

Authority to execute a warrant in favor of said member for mileage and per diem depends upon the decision of the House as to whether or not he is a qualified member of the House.

March 26, 1918.

Hon. F. O. Fuller, Speaker House of Representatives, Capitol.

DEAR SIR: I am in receipt of yours of the 26th instant, reading as follows:

"Sometime after the Regular Session of the Thirty-fifth Legislature, Hon. I. T. Valentine, a member of the House was appointed as judge of the court at Fort Worth, in Tarrant County, Texas. I am informed that Mr. Valentine qualified by taking the oath, etc., and entered upon the duties of his office as judge of said court, accepting fees, etc.

"I am informed that he tendered his resignation as a member of the House of Representatives to Governor Jas. E. Ferguson, but the resignation is not a matter of record in the Secretary of State's office, and it may be that he did not so tender his resignation as a member of the House.

"Sometime during last fall, the higher court held that the office to which Mr. Valentine had been appointed was unconstitutional, etc.

"Mr. Valentine was not in attendance at the Second and Third Called Sessions of the Thirty-fifth Legislature and has not been in attendance upon the Fourth Called Session until yesterday. He arrived on yesterday and now demands the per diem for the full thirty days of the fourth called session, as well as his mileage.

"Please advise me as follows:"

"First: If a member of the Legislature is appointed to any other office and said office is afterward declared unconstitutional and of no force and effect, does such member of the Legislature vacate his office as a member of the Legislature in accepting and qualifying under such appointment?

"Second: Under the facts as stated above with reference to Mr. Valentine, shall I execute warrant in his favor for the mileage and per diem of the Fourth Called Session of the Thirty-fifth Legislature?"

The question you present is whether or not, under the facts stated, Mr. Valentine has abandoned the office of representative. This is a question of fact, and not of law. There are certain rules of law, however, that may be stated as guides to the correct determination of the matter.

It is a well recognized principle of law that where a person holding one office accepts and qualifies to another, he thereby vacates the former. Our Supreme Court stated this rule, in the case of State vs. Brinkerhoff, 66 Texas, p. 47, as follows:

"The public has a right to know which is held and which is surrendered. It should not be left to chance, or to the uncertain whim of the office-holder to determine. The general rule, therefore, that the acceptance of, and qualification for, an office incompatible with one then held is a resignation of the former, is one certain and reliable, as well as one indispensable for the protection of the public."

If the law under which Mr. Valentine accepted the position of county judge had not been unconstitutional, we would have no trouble in determining the question presented, because, as a matter of law, his acceptance of the judgeship would *ipso facto* have vacated the office of representative.

We may assume that Mr. Valentine accepted the position of judge under the belief that he could legally do so, although he is charged with the knowledge that the act was unconstitutional.

We come back therefore to the question whether, under the facts stated, that is to say, the assumption of the judgeship to which he was appointed, the discharge of its duties, the enjoyment of its emoluments, his formal resignation to the Governor (if in fact one was tendered), his failure to attend and discharge public duties as representative during the second and third called sessions of the Legislature, and his failure to attend and discharge public duties at this the fourth special session until Monday, March 25th, when he appeared and demanded mileage and per diem for the full thirty days of the session, whether these facts constitute an abandonment of the office.

It is not necessary, in order to constitute a vacancy, for a formal resignation to have been tendered. This is one method of vacating

an office, but a vacancy may occur or an abandonment may be shown by other evidence.

A public office is held upon condition that the officer will diligently and faithfully execute his duties as such; this is due the public. A temporary or an accidental failure to perform the duties of an office might not justify a finding that the same had been abandoned, yet such failure from whatever cause or motive for such a length of time as to reasonably justify the belief that the officer either does desire or does not intend to discharge his official duties would justify a finding that the office had been abandoned.

The doctrine announced by Meachum, Section 435, is as follows:

"Public offices are held upon the implied condition that the officer will diligently and faithfully execute the duties belonging to them, and while a temporary or accidental failure to perform them in a single instance or during a short period will not operate as an abandonment, yet if the officer refuses or neglects to exercise the functions of the office for so long a period as to reasonably warrant the presumption that he does not desire or intend to perform the duties of the office at all, he will be held to have abandoned it, not only when his refusal to perform was wilful, but also where, while he intended to vacate the office, it was because he in good faith but mistakenly supposed he had no right to hold it."

To the same effect, I quote from Mr. Throop, Section 420, as follows:

"In order that an officer's conduct, which takes the shape of nonuser, should amount to an actual vacation, although without express renunciation of his office, the nonuser must be total and complete and of such continuance as to indicate clearly a total relinquishment. And where an officer of the United States, after being informed that the president intends to vacate the office, is suspended under U. S. Revised Statutes, Section 1768, and does not, upon the adjournment of the Senate, seek to recover the office, nor tender his service, nor demand the salary, his conduct evinces an intention to abandon the office, and is equivalent to a resignation. So the voluntary enlistment of a civil officer, in the military service of the United States, for three years or during the war, has been regarded as an abandonment or implied resignation of his office, so as to create a vacancy in the same."

The rule of law applicable to the case stated in your inquiry, I believe, is succinctly stated in the quotations just given from the text writers, but your question at least is one of fact for the determination of the House, guided in its judgment by the rule just quoted.

Whether or not Mr. Valentine is a qualified member of the House is a question within the exclusive jurisdiction of the House.

The Constitution, Section 8, Article 3, reads as follows:

"Each House shall be the judge of the qualifications and election of its own members; but contested elections shall be determined in such manner as shall be provided by law."

In my opinion, your authority to execute a warrant in favor of Mr. Valentine for mileage and per diem depends upon the decision

by the House as to whether or not he is yet, in view of the facts stated, a qualified member of the House.

Yours very truly,

B. F. LOONEY,
Attorney General.

OP. NO. 1901—BK. 51, P. 120.

DISTRICT ATTORNEYS—ASSISTANT FOR BEXAR COUNTY—STATUTORY CONSTRUCTION—CONSTITUTIONAL LAW.

The Legislature has the power to change the mode of appointment to offices created by the Legislature.

Changing the method of appointment does not vacate the office, and the party serving under an appointment by the original power will continue to serve under an act transferring the appointing power. The terms of an officer holding office during the pleasure of the appointing power will not exceed two years.

Constitution, Section 30, Article 16.

March 29, 1918.

Hon. H. B. Terrell, Comptroller, Capitol.
For Attention, Hon. L. W. Tittle, Acting Comptroller.

DEAR SIR: The Attorney General has your letter of the 26th, reading as follows:

"I beg to enclose a letter from Hon. D. A. McAskill, district attorney of Bexar County, which is self-explanatory, which is submitted to you for an opinion as to whether or not the old statute of 1909 is repealed by the statute of 1917, Acts of the Thirty-fifth Legislature; and if, in your opinion, this department is authorized to issue warrants to cover the assistant district attorney's salary now serving by appointment of the Governor. I will thank you for your opinion, with the return of Mr. McAskill's letter."

The letter enclosed addressed to the Comptroller by Hon. D. A. McAskill, District Attorney, is in the following language:

"Under Chapter 48, Acts of the Thirty-first Legislature, J. F. Onion, Jr., was appointed assistant district Attorney of Bexar County, Texas, by Governor Ferguson. Under Chapter 167, page 378, Acts of the Thirty-fifth Legislature, the Act of the Thirty-first Legislature is repealed and a different Act passed.

"Mr. Onion is likely holding a job that ceased to exist upon the repeal of the 1909 law. He has never been appointed by me. I suggest that you consult the Attorney General with reference to recognizing Mr. Onion as a legal or de facto officer and refer him to the foregoing Acts."

An inspection of the records in the office of the Secretary of State discloses that Mr. Onion was appointed by the Governor on January 17, 1917, confirmed by the Senate on February 10, 1917, qualified March 1, 1917, and his commission was issued on March 8, 1917.

By the act of Mrach 15, 1909, the Thirty-first Legislature amended Article 278 of the Revised Statutes by adding thereto Article 278a, which provided that the Governor shall appoint one Assistant District Attorney in a district in which there is situated a city of fifty thousand population of over, and in which there is no criminal dis-

trict court established by law. Such appointment is made upon the representation of the District Attorney or District Judge that there is need of such assistant. It is provided that the person so appointed shall give bond and take the oath of office required of the District Attorney and shall have power and authority to perform all the acts and duties of District Attorneys, and that such appointment shall be for such time as the Governor shall deem best in the enforcement of the law, not to be less than one month. Section 2 of the act fixes the compensation to be paid such assistant at the sum of two thousand dollars per annum, payable in monthly installments by the Comptroller of the State. It is provided by Section 3 that the Governor may remove said person from office by merely writing the District Attorney and District Judge of said district to that effect.

The above mentioned act of the Thirty-first Legislature was amended by Chapter 167, Acts Regular Session, Thirty-fifth Legislature, the pertinent provisions of which amendment are as follows:

It is made the duty of the District Attorney to appoint one assistant in districts in which there is situated a city of twenty-eight thousand population, provided the District Attorney shall furnish data to the District Judge that he is in need of an assistant, etc.

It is provided that the person so appointed shall give bond and take the oath of office required of District Attorneys and shall have power and authority to perform all the acts and duties of District Attorneys, and that said appointment shall be for such time as the District Attorney shall deem best in the enforcement of the law, not to be less than one month. The compensation fixed for such assistant is the sum of twenty-five hundred dollars per annum, to be paid monthly by the Comptroller. It is provided in Section 3 that the district attorney may remove said persons from office by merely writing to the district judge of the district to that effect.

A comparison of the original act and the amendment discloses that the effect of the amendment is to place the power of the appointment of the assistant in the district attorney instead of the Governor; that the salary is increased from two thousand dollars to twenty-five hundred dollars per annum, and that the power of removal is vested in the district attorney instead of the Governor. That the assistant district attorney appointed under either of the acts is an officer, we think is beyond question. He takes the oaths and executes the bond and has all the powers of a district attorney, his term of office not being fixed. The Constitution of this State, however, provides that the duration of all officers not fixed by this Constitution shall never exceed two years. Section 30, Article 16. Appointees holding office at the pleasure of the appointing power hold office for the term of two years only, as such language is construed to mean that such appointees shall hold their office at the pleasure of the appointing power not to exceed the constitutional limit of two years. Callaghan vs. McGown, 90 S. W., 319. Harris Constitution, Sec. 30, Art. 16, and cases cited.

Assuming that there was a necessity for confirmation by the Senate of the appointment of Mr. Onion on January 17, 1917, the term of office for two years will date from such confirmation on February 10,

1917. 29 Cyc. 1372. Therefore, unless Mr. Onion is removed by the appointing power prior to such date he will continue to serve until the expiration of the two years.

The office of assistant district attorney in counties of this class is clearly a legislative office, that is, one created by the Legislature and not by constitutional provision. The Legislature having created the office, it can modify, control or abolish it, and within these general powers is embraced the right to change the mode of the appointment to the office. Davis vs. State 61 Amer. Dec., 331. It was clearly not within the contemplation of the Legislature to abolish the office by the amendment to the act of 1909. The emergency clause states that the district attorneys have a large amount of important work which they are unable to attend to on account of the lack of time. Not only was the office not abolished, but it was extended to counties of a smaller population, the only effect in addition to this extension being, as heretofore stated, to change the power of appointment and removal and the compensation attached to the office.

The opinion of this department therefore is that the office was not abolished and that Mr. Onion will serve his term of two years subject of course to removal at any time by the district attorney in the manner set out in the act.

We therefore advise you that you should issue to Mr. Onion warrants for his salary in accordance with the appropriation bill.

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

OP. NO. 1913—BK. 51, P. 176.

OFFICERS—PUBLIC WEIGHERS.

Section 24, Article 5, Constitution.
Article 7828, Revised Statutes, 1911.

April 11, 1918.

Hon James A. Harley, Adjutant General, Capitol.

DEAR SIR: You transmitted to this Department a communication addressed to Major John C. Townes, Jr., of your Department by the Secretary of the Local Board for Milam County. From this communication it appears that a registrant claims deferred classification under Section 77, Rule X, Subdivision "D" by reason of the fact that he is the legally elected cotton weigher in precinct 6, of that county. Subdivision "D" of Rule X, Section 77 being the third classification under the Federal Draft Act, reads as follows:

"(d) A county or municipal official who has been elected to such office by popular vote where the office may not be filled by appointment for an unexpired term * * *."

It is under the above rule that the public weigher is claiming deferred classification as a county official and, therefore, it become nec-

essary to determine whether or not a public weigher elected for a precinct is to be classified as a county official.

Public weighers for precincts are elected under the provisions of Article 7820, R. S. 1911. There is no provision of the statute authorizing the filling of vacancies in this office by appointment. Section 24, Article 5 of the Constitution of this State is in the following language:

"Sec. 24. Removal of officers by district court.—County judges, county attorneys, clerks of the district and county courts, justices of the peace, constables, and other county officers, may be removed by the judges of the district courts for incompetency, official misconduct, habitual drunkenness, or other causes defined by law, upon the cause therefor being set forth in writing and the finding of its truth by a jury."

The above provisions of the Constitution relating to the removal of officers enumerate justices of the peace, and constables following, which appears the language "and other county officers." This provision of the Constitution clearly classifies such last named officers as county officers. Following this provision of the Constitution, the Legislature enacted what is now Article 6030, R. S. 1911, relating to the removal of certain officers which is as follows:

"Officer's removal by the district judge.—All district attorneys, county judges, commissioners, and county attorneys, clerks of the district and county courts, and single clerks in counties where one clerk discharges the duties of district and county clerks, county treasurer, sheriff, county surveyor, assessor, collector, constable, cattle and hide inspector, justice of the peace, and all other county officers now or hereafter existing by authority either of the Constitution or laws, may be removed from office by the judges of the district court for incompetency, official misconduct, habitual drunkenness, or drunkenness not amounting to habitual drunkenness, as hereafter defined in this chapter."

In the enactment of this Article, the Legislature has likewise classified justices of the peace and constables as county officers. It is true that the jurisdiction of a justice of the peace as well as that of a constable, extends in certain cases to the limits of the county while the jurisdiction of a public weigher is confined to the precinct to which he was elected. A public weigher takes the constitutional oath and executes the bond prescribed by law, which bond after its approval is filed and recorded in the same manner as the bond of county officers. See Article 7831. While the activities of a public weigher are confined to the precinct in which he was elected, yet he is performing one of the functions of government of the county.

A school trustee of a common school district has no jurisdiction beyond the bounds of such district, yet under the removal statute above quoted it has been held that he is a county officer and subject to removal as such. In the case of Hendrix vs. State, 49 S. W. 705, the Court of Civil Appeals of this State said.

"School trustees are not mentioned eo nomine either in the Constitution or in the statute providing for the removal of officers. 'County judges, county attorneys, clerks of the district and county courts, justices of the peace, constables, and other county officers, may be removed by the

judges of the district courts for incompetency, official misconduct, habitual drunkenness, or other causes defined by law, upon the cause therefor being set forth in writing, and the finding of its truth by a jury.' Constitution, Article 5, Section 24. The statute names the officers who may be removed, as follows: 'All district attorneys, county judges, commissioners and county attorneys, clerks of the district and county courts, and single clerks in counties where one clerk discharges the duties of the district and county clerks, surveyor, assessor, collector, constable, cattle and hide inspector, justices of the peace, and all other county officers now or hereafter existing by authority either of the Constitution or laws.' Revised Statutes, 1895, Article 3531. School districts are subdivisions of the county, as are commissioners' and justices' precincts. Commissioners, justices of the peace, and constables are named along with other officers whose offices extend to the entire county; and the mention of 'other county officers' is a reference to them as county officers. Each of them is an officer in and for the precinct of the county of which his precinct is a part, and consequently of the county itself; and we think there should be no difficulty in construing the Constitution and the statute as including the officers of the precincts and districts of a county in the general designation of county officers. The purpose of the Legislature to have the trustees of school districts removed in the same manner as other elective officers mentioned in the Constitution and statute is shown by the failure to provide otherwise any manner for their removal. In the case of the trustees appointed by the county judge for school communities, they may be removed by that officer upon the written application of a majority of the patrons of the school. Revised Statutes, 1895, Article 3955. The judgment of the court below will be affirmed."

From the above quoted portion of the Court's opinion, it appears that school trustees are held to be county officers within the meaning of the removal statute.

This Department would not care to place a construction upon a Federal Statute as we have no jurisdiction in such matter. However, it appears to us that Rule 10 comprehends all officials other than State officials, that is to say, it is intended to cover all officers of a county whether the jurisdiction of such officers is coextensive with the limits of the county and in addition thereto all municipal officers. In other words, the two classifications are city officers and all officers within a county not coming within the definition of city officials. A public weigher not being a municipal officer must, therefore, be classed as a county officer and we therefore advise you that a public weigher is a county officer.

Yours very truly,

C. W. TAYLOR,

Assistant Attorney General.

OPINIONS AS TO FEES AND COMPENSATION OF PUBLIC OFFICERS.

OP. NO. 1667½—BK. 48, P. 240.

Merchants who are not engaged in the manufacture of food or drugs but who are engaged only in the retail sale of such drugs in this State although a part of such food and drugs offered for sale are ordered from without the State, are not required to register with the Food and Drug Department and pay $1.00 registration fee for each year.

October 11, 1916.

Hon. S. A. L. Morgan, County Attorney, Vernon, Texas.

DEAR SIR: This Department is in receipt of your inquiry dated October 7, 1916, the effect of which inquiry is to be advised if Mr. J. H. Pendleton of Vernon, Texas, is liable to a charge of $3.00 under the Texas Food and Drug Law. You state that Mr. Pendleton is engaged in the retail drug business, but that he does not manufacture any drugs but does buy drugs from across the State line which are shipped to him at his place of business. You enclose with the inquiry a notice mailed out by the Food and Drug Department, which notice is as follows:

"Food and Drug Department
State of Texas
Last Notice Austin Past Due
J. H. Pendleton, Vernon. August 31, 1916.
due the
State of Texas
Registration fee 1014-16 $3.00.

The Texas Food and Drug Law:

"Sec. 23. All manufacturers of foods 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 shall annually register their firm names and addresses with the Dairy and Food Commissioner, and shall pay to said Commissioner a fee of $1.00 for such registration on or before the first day of September of each year. Such fees shall be turned over by the Commissioner to the State Treasurer.

"Sec. 8. Whoever shall do any of the acts or things prohibited or willfully neglect or refuse to do any of the acts or things enjoined by this act, or in any way violate any of its provisions, shall be deemed guilty of a misdemeanor, and shall be punished by fine of not less than $25 nor more than $200.

"Upon receipt of above amount, a receipt will be mailed you, and a registration number given you.

Respectfully,
R. H. Hoffman, Jr.,
"Dairy and Food Commissioner.

"P. S. The above law became effective June 11, 1911, and if you come under the provisions of the above law, you will be due $1.00 registration fee for each year you have been in business since 1911."

The conclusion of this department is that under the state of facts presented Mr. Pendleton would not be liable to the payment of the registration fee. We do not blieve that it was the intention of the

Legislature to impose a registration fee and to require a registration of every merchant who during the process of the year orders some article of food or drugs from without the State.

Back of the Pure Food Law itself, is the reason for its existence; that reason is expressed in the act itself, which is to prevent food adulteration, fraud and misbranding in the manufacturing and selling of articles of food and products. If all manufacturers in this State and those out of the State, are required to register their names, addresses and places of business, with the Pure Food Department, then the Department will know against whom to proceed in case impure misbranded articles of food are detected, as being offered for sale by any dealer in this State. We must presume that the Legislature did not intend to do a foolish thing, and there appears to be no valid reason existing to compel the retail merchant to register his name with the Department. There is no way in which his name could be of any benefit to the Department in enforcing the pure food laws. As a matter of fact, the dealer is entirely unknown to the Pure Food Department, until he is detected in the act of offering for sale, some article of food which is impure. At that stage, the Pure Food Department institutes an investigation as to who is the manufacturer of that product, and where he lives, so that he can proceed against such manufacturer so manufacturing impure articles of food. We will suppose for example, and by way of argument, that some small local dealer at some remote place, who orders during the year, several cases of canned tomatoes; this small merchant registers his name with the Pure Food Department and pays a dollar registration fee—in what way could this registration, in any manner, aid the Pure Food Department in its labors, should it develop that the canned tomatoes were impure? His name, address and registration does not aid the Department. If the tomatoes are found to be impure, the Pure Food Department can proceed against the local dealer, whether he is registered or not and can stop him from selling the impure brand of tomatoes, and the registration does not aid in the performance of this duty. On the other hand, we will construe that the Legislature meant to require manufacturers of all articles of food, who bring into the State and offer for sale in the State, such articles of food, and register their names and addresses with the Pure Food Department, then, when the Department detects an impure brand of tomatoes, the name and address of the factory is before him, and its place of business, if it has one, is a matter of record in his Department, he can then proceed against the manufacturer who adulterates the food. It might be contended here that many concerns who manufacture food outside of the State, do not bring such food into the State and offer it for sale, but such food is brought into the State as inter-state commerce, and there is therefore, no way to compel such manufacturer to register with the State Pure Food Department and pay the fee. Granting that these conditions do exist, it is one that cannot be remedied by State Legislation. It has been repeatedly held that we cannot regulate inter-state commerce, but when the impure product reaches this State, we can

stop its sale to our citizens; that is as far as we have authority to proceed.

It will have to be conceded that the act providing for the registration and payment of the fee, derives its authority from the police power of the State. It does not appear from the act that the measure was a revenue measure, but is a procedure under the police power of the State, and under this authority the State has the right to require reasonable registration fees. If it be contended that the object was to raise money with which the government or a portion of it should be supported, the act only probably would meet with serious constitutional objection; but we believe that the act is a reasonable one and is a proper exercise of the police power of the State, when it requires all manufacturers of food and products to register and pay the fees. It is doubtful whether there is a merchant in the State, who does not at some time during the course of a year, order some manufactured article without the State and brings same into the State and offers it for sale. If the Pure Food Law be so construed, as to subject every such person to the payment of one dollar registration fee, this construction would place in the State Treasury probably millions of dollars annually. We can never believe from the language used in this act, that it was the intention of the Legislature to place upon the retail merchant of this State, this burden of the government, which is out of all proportion to the benefits received. It does not answer the argument and say that they will pay this money without a contest, for it was not the intention of the Legislature to place this burden upon them, which we do not believe it was, which would be unjust to compel them to pay more than their just burden of sustaining the government. If it be contended that all of the merchants would not be liable to this tax, that some of them would buy all of their goods in the State, and therefore the number paid would not be so great. In this condition, we would have for example, two merchants doing business side by side; one orders a case of sardines from Kansas City; the other orders all his stuff within the State. The merchant who ordered the case of sardines from Kansas City would have to pay a one dollar tax, while the merchant who ordered from a point in this State, would be exempt from taxation. We assume that it was the policy of the Legislature to permit the merchants to buy from any source they pleased, and to treat all merchants in the same manner.

On the sixth day of October, 1914, this Department in an opinion to Hon. C. O. Yates, then Food and Drug Commissioner, construing the term "doing business in this State," used the following language:

> "It follows from this that the Texas dealer who buys these goods from manufacturers or jobbers outside the State and has them shipped to him to be resold by him, comes under the operation of the law and would be required to pay the fee provided in the act."

This expression was dicta and being in no way requisite to the determination of the question, it therefore did not challange the close attention of the Department, and in so far as this expression is

in conflict with the opinion herein rendered the same is overruled by this opinion.

The opinion above referred to followed an opinion previously rendered by Attorney General Lightfoot on March 22, 1911, but the inquiry answered by Mr. Lightfoot did not call for a construction of the part if Section 23 reading as follows: "and all such persons as shall bring into the State, etc."

Very truly yours,
W. A. KEELING,
Assistant Attorney General.

OP. NO. 1672—BK. 48, P. 263.

OFFICERS—COUNTY JUDGE—EX OFFICIO COMPENSATION.

It is legal for the commissioners court to pass an order fixing the ex officio compensation of a county judge at an amount which added to the official fees earned and collected by the judge will not exceed $125 per month.

Article 3893, Revised Statutes as amended by Chapter 121, Acts Thirty-third Legislature.

October 27, 1916.

Hon. J .C. Shipman, County Attorney, Hamilton, Texas.

DEAR SIR: The Attorney General is in receipt of your letter enclosing a copy of an order of your commissioners court entered at the January term, 1913, which you submit to this Department for an opinion as to its validity. Such order is as follows:

"It is ordered by the court that the ex officio compensation of the county judge of Hamilton County, Texas, be and the same is hereby placed so as to make, when added to the official fees earned and received by said judge, the sum of one hundred and twenty-five dollars per month, cash; provided said judge files with the county clerk of said county an itemized sworn statement of all fees so earned and received by him in cash at the end of each month, or before any warrant is issued for such ex officio compensation. Upon such affidavit being filed said clerk shall deduct the cash fees received by said judge from one hundred and twenty-five dollars, and shall also until December 31 of each year deduct 10 per cent of the ex officio coming to said judge and issue to said judge a warrant for the difference between $125 and the balance found as ascertained by the above rule, provided the cash fees received by said judge does not amount to $125 per month, in which case if said cash fees amount to $125 per month no warrant shall be drawn for that month, and if said cash fees amount to more than $125 per month, then the excess shall be deducted from the next month, in addition to the other deductions herein provided for at the end of the year, to wit: On December 31st each year the clerk shall issue a warrant in favor of said judge for the 10 per cent held back, in addition to any other amounts said judge shall be entitled to under this order.

"Done in open court this the 14th day of January, 1913, and take effect now."

By Chapter 121 of the Acts of the Thirty-third Legislature, Article 3893 of the Revised Statutes providing for ex officio compensation to certain county officials was amended 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 of the official beyond the maximum amount of compensation and excess fees allowed to be retained by him under this chapter."

The above quoted order of your commissioners court allowing ex-officio compensation establishes the maximum amount to be received by your county judge including fees and ex officio at $1,500.00 per annum, and therefore does not violate the above quoted article of the statute providing an increase of the compensation of such official above the maximums allowed by Articles 3881, inclusive.

The practical effect of this order is to place the county judge upon the guaranteed salary of not exceeding $125.00 per month. It is true, of course, under our Constitution, that the commissioners court could not place the county judge upon a salry basis, but there is no limitation in the statute authorizing the granting of ex-officio compensation which would debar the commissioners court from arriving at the amount of such compensation in the manner set out in this order. Indeed this statute prescribes no rule whatever for the commissioners court to follow in arriving at the amount to be allowed, the only limitation being that they are not permitted to allow such an amount that would increase the compensation of the county judge beyond the maximum allowed to be retained by him under the provision of that chapter.

We therefore advise you that the order of the commissioners court is valid.

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

OP. NO. 1688—BK. 48, P. 386.

Where there is no regular assistant county attorney and the county attorney in the interest of a proper and efficient administration of his office is required to employ assistance, the commissioners court has the discretion to allow the account of the county attorney for such services as necessary expenses of his office, and the county attorney may deduct the amount thereof from the amount, if any, due by him to the county.

December 22, 1916.

Hon. Henry E. Pharr, County Attorney, Sulphur Springs, Texas.

DEAR SIR: We have your letter of date November 29, in which you request the opinion of this Department on the following statement of facts:

"When I became county attorney two years ago I was allowed under the recent amendment to the fee bill to appoint a regular assistant at a salary of not to exceed $100 per month. However, owing to the financial stringency then existing, the county judge and commissioners court asked me not to appoint a regular assistant but instead when I had to have help to get some young attorney and use him when I needed him and pay him out of the fees of office for services actually performed.

"This was done and resulted in a net saving to the county the first year of more than $800 and this year of somewhere between $500 and $600. The specific reason and only reason this was done by the county judge, commissioners court and myself was in the interest of economy and saving to the county.

"The arrangement referred to was made with T. J. Ramey and it was understood by the entire court and was entirely satisfactory. Mr. Ramey presented a statement to the commissioners court of the services rendered and the court approved same for each year with the understanding that I should pay same out of the fees of the office and for me to charge it all to the expense of the office and deduct it from the amount of excess fees to be turned into the county.

"Was the money paid to Mr. Ramey legally paid under the facts referred to?"

Replying to your inquiry, you are advised that the Thirty-third Legislature amended certain features of the Fee Bill, which amendments became effective December 1, 1914, and among other things provided:

"At the close of each month of his tenure of such office each officer whose fees are affected by the provisions of this act shall make as a part of the report now required by law, 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. If such expense be incurred in connection with any particular case, such statement shall name such case. Such expense account shall be subject to the audit of the county auditor, and if it appear that any item of such expense was not incurred by such officer, or that such item was not necessary thereto, such item may be by such auditor or court rejected. In which case the correctness of such item may be adjudicated in any court of competent jurisdiction. The amount of such expense, referred to in this paragraph, shall not be taken to include the salaries of assistants or deputies which are elsewhere herein provided for. 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."

Under the provisions of the above quoted statute, it is our opinion that the commissioners court of your county is given the discretion to allow any necessary expense incident to the conduct of your office.

It is true the amount of the expense, referred to in said statute, shall not be taken to include the salaries of assistants and deputies, but under the facts submitted by you Mr. Ramey was not your assistant. He was never appointed to such position. He did not qualify as the law directs as such officer. Therefore, your expense account covering his services did not embrace or include the salary of an assistant. It was simply an item showing an amount of money paid to a lawyer for services rendered you in the discharge of the duties of your office. In determining whether or not your account for this expense should be allowed, the commissioners court had but two questions to decide: First, was the expense actually incurred by you, and,

second, was such expense necessary to the proper and efficient administration of your office?

As the court allowed these accounts it is to be presumed that they found that the expense was actually incurred by you and that the same was necessary in the discharge of the duties of your office. It is our opinion, therefore, that you are authorized to deduct the amount of such expense from the amount, if any, due by you to the county.

It appears from your letter that these accounts were presented to the court in the name of Mr. Ramey The statute contemplates that the officer incurring the expense should file the accounts. If you have not already done so, we would advise that you, as county attorney, present the accounts to the commissioners court as necessary items of expense of your office.

We note that you state that when you assumed the duties of county attorney of Hopkins County at the suggestion of the commissioners court of your county, you declined to have an assistant appointed and that you have employed Mr. Ramey from time to time to assist you only when his services were actually necessary and that such procedure has resulted in a net saving to the county for the two years ending December 1, 1916, of about $1,400. Under these facts we believe the commissioners court justly and legally allowed these accounts and that you would be authorized to deduct the amount thereof from the amount due by you to the county under the provisions of the Fee Bill.

However, we do not believe such a procedure would be lawful if it should appear that it was a subterfuge resorted to for the purpose of increasing the expenses for assistance beyond the amount of salary fixed by statute for a regular assistant. But this question is not involved in your inquiry, as the facts submitted by you clearly show that you declined to have an assistant appointed at the suggestion of the commissioners court and in the interest of economy and that as a result of following the suggestion of your commissioners court in this matter, you have saved the county during your first term of office about $1,400.00.

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

OP. NO. 1708—BK. 48, P. 493.

FEES OF OFFICE—SHERIFF—ATTENDING COUNTY COURT.

A sheriff is entitled to $2.00 per day for attending the county court for those days upon which he or his deputy actually attends the county court when that court is in actual as contradistinguished from constructive session.

The sheriff would be entitled to $2.00 per day for each day he attends upon the county court although the court does not remain in session throughout the entire day as the law does not recognize parts of a day.

The sheriff is entitled to $2.00 per day for days actually in attendance upon the county court when sitting as a juvenile court.

Article 3864, Revised Civil Statutes, and Title 17, C. C. P.

February 21, 1917.

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

DEAR SIR: From your letter of February 20, it appears your county judge desires an opinion from this Department construing the statute authorizing the commissioners court to allow the sheriff $2.00 per day for attending the county court. It appears your sheriff contends he is entitled to $2.00 for every day the court is in session, and the county judge desires to know whether he is entitled to $2.00 for every day the court is in session, or whether he is entitled to $2.00 for each day that he is in attendance on the court while it is actually at work trying cases. You also desire to be advised whether or not the sheriff would be entitled to his per diem when the county court is sitting as a juvenile court.

Replying thereto, we beg to say that the portion of Article 3864 Revised Statutes, 1911, pertinent to your inquiry 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 a day, to be paid by the county, for each day that the sheriff by himself or a deputy shall attend said court."

Our construction of the above language is that the sheriff is entitled to $2.00 for each day he or his deputy is in attendance upon the court when such court is actually as contradistinguished from constructively in session; that is to say, when the county judge assumes the bench and proceeds with the business of the court. However, for a sheriff to be entitled to his $2.00 per day it would not be necessary for the court to continue throughout the day. For instance, if the judge should merely assume the bench and finding no business requiring his attention and adjourn the court to the following day the sheriff would be entitled to his per diem because the law does not take into account the portion of the day, but considers it a whole day. On the other hand, should the judge of the court adjourn the same from Monday until Friday and not resume the bench during Tuesday, Wednesday and Thursday, the sheriff would not be entitled to his per diem for those three days.

We therefore advise you in answer to this question that the sheriff is entitled to his $2.00 per day only for those days he or his deputy actually attends the court when the court is in actual session and not constructively in session by reason of the fact that the term has not expired.

Answering your second question, you are advised that in the opinion of this Department a sheriff would be entitled to the per diem prescribed by Article 3864 for attending upon the county court when sitting as a juvenile court.

Title 17 of the Code of Criminal Procedure as amended by Chapter 112, Acts Thirty-third Legislature, regular session, relating to the control and treatment of delinquent children, confers upon the county and district courts jurisdiction for the trial of causes herein defined and prescribes that when disposing of such cases such courts or either of them may for convenience be called the juvenile court.

It clearly appears therefore that the trial of such cases is had in the county court, the effect being to confer additional jurisdiction upon such court, and that while for convenience in such matters the county court is denominated the juvenile court, yet under the law it remains and is the county court, for attendance upon which the sheriff receives $2.00 per day. Robinson vs. Smith County, 76 S. W. 584. See also Opinions of the Attorney General, 1912-1914, page 890.

Assuring you of our desire to aid you in the discharge of your duties, I am,

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

OP. NO. 1725—BK. 49, P. 74.

FEES—DISTRICT CLERK—TAX SUITS.

A district clerk would not be entitled to tax as a part of the costs in a suit for delinquent taxes a fee for the affidavit of the county attorney to the petition filed therein.
Articles 7688, 7691 and 7698, Revised Civil Statutes.

April 2, 1917.

Hon. Mike T. Lively, County Attorney, Dallas Texas.
For attention Hon. R. Trasp, Assistant.

DEAR SIR: The Attorney General is in receipt of your letter of March 27, as follows:

"Kindly inform me by ruling of your office as to whether or not in tax suits filed by the State of Texas, as required by the delinquent tax laws it is lawful for the district clerk to charge as part of the court cost a fee for taking the affidavit of the county attorney bringing said suits to the petitions in suits so brought. Also whether or not the district clerk is entitled to a fee for taking the affidavit as required in suits against unknown owners or nonresident owners of property sued upon, as required by Article 7698, Revised Statutes, 1911.

"Article 7698, Revised Statutes, 1911, requires that petitions in tax suits be sworn to, and Article 7698, Revised Statutes, 1911, requires that the county attorney make affidavit that owners are unknown. Article 7691, Revised Statutes, 1911, fixed the district clerk's fee at $1.00. Please inform me whether or not, in your opinion, this precludes the district clerk charging fees for the affidavits mentioned above."

Article 7691 of the Revised Statutes fixes the fee a district clerk may receive, in a suit for the collection of delinquent taxes at the sum of $1.50 in each case, to be taxed as costs of suit. This is a limitation upon the amount a district clerk may receive in any one case, brought for the collection of delinquent taxes.

It is true that Article 7688, providing for the bringing of suits to foreclose tax liens on delinquent lands prescribes that the petition in such suits shall be verified by the affidavit of the attorney bringing the same. Likewise it is provided by Article 7698 that in suits against unknown or non-resident delinquents citition may be had by

publication, upon the filing of an affidavit that the owner or owners are non-residents, or that the owner or owners are unknown to the attorney for the state. The affidavit required by Article 7688, as well as that required by Article 7698, of course must be made before an officer authorized to administer oaths, and if made before the district clerk, an officer vested with such powers, such officer would necessarily be entitled to a fee of fifty cents therefor, as is provided by Article 3855, a portion of the Fee Bill. However, Article 7691, above referred to, has limited the amount of costs that may be taxed for the district clerk in a suit on delinquent taxes to the sum of $1.50 in each case.

It is well settled that costs are peculiarly a statutory creature, and none may be taxed unless authorized by statute.

In re Davis, 166 S. W., 341.

It is also held that an officer must be able to point out the statute authorizing taxation.

Laclede Land & Improvement Co. vs. Morten, 167 S. W., 558.

The right to costs did not exist at common law, but rests on statute.

Boynton Land & Lumber Co. vs. Hawkins, 183, S. W., 959.

Costs are recoverable only when authorized by statute which are strictly construed.

State ex rel. vs. Kimmel, 183 S. W., 651.

The right to recover costs in civil cases depends wholly on statute.

Jordan vs. State, 143 S. W., 131.

More directly in point are the cases of Hill & Jahn vs. Lofton, 165 S. W., 67, and Bonougli vs. Brown, 185 S. W., 47, involving excessive charges as costs, in suits for the collection of delinquent taxes. In the first case the sheriff had retained excessive fees. The court said.

"The sheriff's deed recites that he sold the land for the amount of the judgment and the sum of $5.14 interest thereon at the rate of 6 per cent. per annum from the date of the judgment, and the further sum of $20.21 costs. According to Article 7691, Revised Statutes, 1911, the county attorney was entitled to recover a fee of only $3.00 and the district clerk a fee of $1.50, and the county clerk a fee of $1.00. It seems to be well settled in this State that a sale of land under tax foreclosure for a greater amount than the law allows and for costs exceeding the legal fees is void. Eustis vs. City of Henrietta, 91 Texas, 325, 43 S. W., 259. In this case the excess in costs amounted to $2.21. Lufkin vs. City of Galveston, 73 Texas, 340, 11 S. W., 340. In this case the excess was only 70 cents. In May vs. Jackson, 73 S. W., 988, the excess item was $2.50, and in each of these cases the judgment was declared to be void."
(165 S. W., 71.)

Likewise in the case of Benougli vs. Brown, the question of the validity of a tax sale for excessive costs was involved. In discussing the fees chargeable as costs in tax suits the court said:

"Evidently a different schedule of fees is intended to be provided in tax suits, for, in addition to fixing the fees of the officers mentioned, the law in question fixes the fees of the county attorney, the collector, and the county clerk. The law was intended to be and is perfect in itself, and no other fee bills can be lawfully made in tax cases as provided therein. If commissions were to be allowed the sheriff as in other cases, or the district clerk were to be allowed the same fees as in other cases, we must presume the statute would have so provided; but such was not done, and the officers are entitled to no fees except as therein provided. We must therefore conclude that the officers charged more than the law authorized or permitted." (185 S. W., 48.)

The court also cited and discussed other decisions of the courts as follows:

"An excessive levy for taxes is void, whether it is made excessive by including unlawful expenses with lawful taxes or otherwise. The statutory power to seize and sell the property of the citizen for taxes, the amount of which is beyond his control, is a power to sell for lawful taxes and lawful expenses, and, if an unlawful item is included under either head, the sale is absolutely void. It does not matter how small the unlawful amount may be, it renders the sale void; for the maxim de minimis non curat lex has no application to such cases in the absence of a statute so providing. Cooley on Taxation, pp. 955-958, and foot notes. It has been held in this State that, if excessive interest or costs are collected from the sale of property for taxes, it invalidates the sale. Lufkin vs. Galveston, 75 Texas, 340, 11 S. W., 340; Eustis vs. Henrietta, 91 Texas, 325, 43 S. W., 259. This seems to be the rule in every American State not having a statute to the contrary.

"In discussing this subject in the cited case of Lufkin vs. Galveston, the court, after citing a California case, held:

"'It is said in the case cited that "the rule as established by the authorities is that if the excess be as much as the smallest coin authorized by law the sale is void." * * * There is reason for the rule. It is to the interest of the public that illegal taxes should be so declared, and a trivial sum exacted of each taxpayer becomes a matter of importance as applied to the body of the taxpayers at large, and may become important in amount to each individual owner of property by reason of the continued exactions of successive years.'

"This was said in a case of excessive interest in the sum of 70 cents.

"In the cited case of Eustis vs. Henrietta, the language quoted was fully approved, and it was held that excessive costs would render a tax sale null and void.

"The Supreme Court justified its action in holding a sale void which included any amount, no matter how small, not permitted by statute, on the grounds if collected from many taxpayers it would amount to a large sum, or if collected from the individual for a number of years it might amount to a considerable sum. However, the better reason for holding such sales void is that the State has no power or authority to sell the property of the citizen for any amount without express statutory authority, and any attempt to do so is despotic, invalid, and illegal. That such small illegal sum should render the entire sale a nullity must result from the fact that some part of the property was taken to satisfy the illegal sum, and that such part would not have been sold at all if only what was lawful had been called for." (185 S. W., 48 and 49.)

It therefore appears to be the well established rule in this State that a sale upon a judgment for delinquent taxes wherein unlawful

costs have been charged is invalid. The statutes of this State having prescribed a fee of $1.50 for the district clerk in deliquent tax suits, therefore any amount charged as costs in excess of such amount would be an unlawful and unwarranted charge and invalidate the sale made under a judgment. It is true that the officer before whom the county attorney or the attorney bringing the suit makes the affidavit would be entitled to his fee therefor, but it cannot be charged as costs against the delinquent and collected, upon a sale of the land after judgment. The fee paid by the county attorney to the officer taking the affidavit could be charged by him in his monthly expense account, provided for under Article 3897, Revised Statutes, 1911, as an expense in the particular suit in which the charge was incurred.

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

OP. NO. 1724—BK. 49, P. 79.

COUNTY TREASURER—COMMISSIONS.

A county treasurer would not be entitled to a commission upon the amount of commissions retained by him on funds received and disbursed for the county.

April 2, 1917.

Hon. J. P. Word, County Attorney, Meridian, Texas.

MY DEAR SIR: In your letter of March 24. addressed to the Attorney General, you enclose a communication directed to you by your auditor, Mr. Charles D. Turner, as follows:

"Would you be kind enough to furnish me with an opinion on the following:

"If it is lawful for a county treasurer to be paid a commission upon the commissions paid to himself at the same rate as commissions paid for other disbursements."

Under Article 3873 of the Revised Statutes of this State a county treasurer shall receive commissions on the moneys received and paid out by him, the amount of such commissions to be fixed by an order of the commissioners court. It is provided that for receiving all moneys, other than the school funds, he shall receive a commission not exceeding two and one-half per cent and also a commission of not exceeding two and one-half per cent for paying out the same. This article of the statute leaves to the discretion of the commissioners court the amount of commissions a county treasurer may receive, that is to say, they may allow him a commission of not exceeding two and one-half per cent on all sums received and paid out, on behalf of the county, exclusive of the school fund, and also exclusive of all sums of money received from his predecessor, and exclusive of moneys paid over to his successor in office. There is a limitation, however, upon the amount of money a county treasurer may receive, in that Article 3875 of the Revised Statutes of this

State prescribes that commissions allowed to any county treasurer shall not exceed $2,000.00 annually.

It therefore appears that the compensation of county treasurer is determined by the commission allowed by the commissioners court, to be retained by him upon money received and paid out by him for and on behalf of the county, with the limitation that the amount so retained shall not exceed $2,000.00.

In our opinion the retention by the county treasurer of the amount of commissions allowed him by the commissioners court is not "paying out" the same on behalf of the county, within the meaning of Article 3873, above referred to. The funds of the county are in his hands and the compensation he receives is for receiving the same and disbursing them in the ordinary business of the county, and not for retaining the amount allowed him as compensation for his services. The commissions allowed to a county treasurer under our law are analogous to those allowed to a guardian or an administrator. It has been held that a guardian or administrator is not entitled to a commission upon the moneys retained by himself as commissions, nor upon the funds paid to himself in liquidation of a debt due by the estate to him.

Betts vs. Betts, 4th Abb., N. C. (N. Y.), 317.
Griffin vs. Collins, 53 S. E., 1004; 125 Ga., 159.
Brown vs. Walker's Heirs, 38 Texas, 109.

In the case of Betts vs. Betts, above cited, the right of one of the executors of a will to commissions upon amounts paid to the estate of a co-executor was in question. The report of the referee, which was confirmed by the Court, held that commissions were not allowable to the surviving executor upon amounts paid by him to the estate of the deceased co-executor. The report of the referee says:

"Upon the commissions so to be allowed, the executors now acting claim commissions. I see no good reason for such claim. It is not upon every act of parting with money that executors become entitled to commissions, or they would be allowed upon reinvestments. In this case they only hold what belonged to a co-executor who was prevented by death from receiving it in person without the intervention of the present executors, had she so chosen. I can not allow this claim." (4th Abb., N. C. (N. Y.), 438.)

In Griffin vs. Collins, supra, the Supreme Court of Georgia dismisses the claim of a guardian for commissions upon commissions to himself, in the following language:

"Of course, commissions should not be allowed on commissions and if there is in the account of the auditor such an item it should be stricken."

In the case of Brown, Administrator, vs. the Heirs of Walker, above cited, the Supreme Court of the State of Texas has held that an administrator was not entitled to a commission upon the debts due himself. The Court disposed of the case in the following language:

"The administrator was the creditor of the estate himself, to the amount of about $5,000; he collected the money necessary to pay this debt and the court has allowed him five per cent for collection, but he has not paid it out to any third person as the law contemplates. The money is yet in his hands and he being the creditor of the estate, if the estate is solvent, will be allowed to retain it in discharge of his own debt, but he pays it out to nobody; when it comes into his hands, on certain conditions it is his money, and he is not entitled to a commission for paying money to himself."

So it is in the case of the county treasurer. He is entitled to his commission upon the moneys received by him, although embodied in the moneys so received will be the commissions retained by him, under order of the commissioners court. But he would not be entitled to a commission upon such commissions so retained. When a county treasurer has disbursed the funds of a county in the ordinary transaction of the business thereof the time then arrives when he must compute the amount due him for his services. The services required of him by the law in receiving and disbursing the moneys of the county have been performed. The time has arrived when a calculation must be made to determine the amount of compensation due him and it is upon the actual receipts and disbursements theretofore made by him that the calculation is made, being that percentage of receipts and disbursements which have been fixed by the order of the commissioners court, bearing in mind always the limitation that the amount retained shall not exceed $2,000.00 for any one year.

We therefore advise you that your county treasurer would not be entitled to commission upon the amount of commissions paid him.

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

OP. NO. 1751—BK. 49, P. 203.

COUNTY TREASURER—COMMISSIONS OF.

A county treasurer is neither entitled to commissions on scrip received by the tax collector in payment of county taxes and turned over to him, nor to commissions for reporting and turning over such scrip to the commissioners court.

April 30, 1917.

Hon. Lex Smith, County Attorney, Fairfield, Texas.

DEAR SIR: We have a letter from you in which you state:

"The county treasurer of Freestone County on July 15, 1915, presented an account of $1026 on scrip taken in taxes and turned over to the commissioners court for cancellation, which was paid by said court. The court now, however, is dissatisfied about the matter and desires a ruling from your department."

Replying thereto, we beg to state that by the terms of Article 3873 R. S., the county treasurer's commissions are fixed 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."

By the terms of Article 3874 it is provided that he shall be "allowed for receiving and disbursing the school funds one half of one per cent for receiving, and one half of one per cent for disbursing, said commissions to be paid out of the available school funds of the county."

Article 3875 R. S., is as follows:

"The commissions allowed to any county treasurer shall not exceed two thousand dollars annually."

You do not state whether the $1,026.00 allowed by the commissioners court of your county as "commissions to the Treasurer on scrip taken in on taxes and turned over to the commissioners court for cancellation" represents merely commissions for receiving the scrip from the tax collector, or commissions for reporting and delivering the same to the commissioners court for cancellation, or whether it represents commissions for both receiving and delivering the same.

The case of Wharton County vs. Ahldag, 84 Texas 12; 19 S. W. 291, involved the following state of facts:

Ahldag, the county treasurer of Wharton County, retained as commissions two and one half per cent for receiving scrip paid to the tax collector for taxes and two and one half per cent for turning such scrip over to the commissioners court. The commissioners court allowed him two and one half per cent for receiving the scrip, but rejected his claim for the commissions of two and one half per cent for turning the same over to the commissioners court. The trial court held that the treasurer was entitled to commissioners on the scrip turned over to the commissioners court "as on money disbursed," and Wharton County appealed from the judgment of the trial court.

The Commission of Appeals in an opinion, which was adopted by the Supreme Court, held that the county treasurer was entitled to commissions on scrip taken in by the tax collector for taxes and turned over to him, but not to commissions on scrip turned over by him to the commissioners court for cancellation.

The facts involved in the case of McKinney vs. Robinson, 84 Texas 489, 19 S. W., 699, were in substance as follows:

The tax collector of Wilbarger County received in payment of county taxes scrip, which he turned over to the county treasurer, who entered the same on his books as so much money received and paid out by him for which he charged the county five per cent commission. The county, through Robinson, county judge, sued for these commissions. Upon appeal the Commission of Appeals held that the treasurer was entitled neither to commissions on scrip received by him from the tax collector in payment of county taxes, nor to commissions for turning over the same to his successor. This opinion was adopted by the Supreme Court. On motion for rehearing Chief Justice Stayton said:

"But we desire to say that in the case of Wharton County vs. Ahldag, decided at the last Galveston term (ante, p. 12), the question whether a county treasurer was entitled to commissions on county scrip taken in payment of taxes by a tax collector was not involved; for the question in that case was whether the treasurer was entitled to commissions for turning over such scrip as for money disbursed; and what was said in the opinion in that case on the right of the treasurer to have commissions on scrip taken in for taxes must be considered obiter."

See also,

Farmer vs. Aransas County, 53 S. W., 607.
Baylor County vs. Taylor, 22 S. W., 983.
Waller County vs. Rankin, 35 S. W., 876.

You are therefore advised that the county treasurer of your county was not entitled either to commissions on scrip which was received by the tax collector in payment of county taxes and turned over to him, or to commissions for reporting and turning over the same to the commissioners court for cancellation.

Very truly yours,
JOHN C. WALL,
Assistant Attorney General.

OP. NO. 1760—BK. 49, P. 263.

FEES—COUNTY JUDGE—COMMISSIONERS—EXECUTORS AND ADMINISTRATORS.

Where an administrator, under proper orders of the court, conducts a mercantile business of the estate, the county judge is not entitled to a commission upon daily sales, except insofar as the proceeds represent the corpus of the estate, or profits arising from the transaction of the business. He is not entitled to a commission upon sales arising from investment, sales and reinvestment in the usual course of business.

May 14, 1917.

Hon. R. A. Hall, County Attorney, Marshall, Texas.

MY DEAR SIR: The Attorney General has your letter of May 9th, as follows:

"Will you please advise me whether or not, in your opinion, under Article 3850, Vernon's Sayles' Civil Statutes, the county judge is entitled to a commission of one-half of one per cent upon the actual cash receipts of the administrator from daily sales made by him in the conduct of a retail business."

From your letter we take it that the administrator in this case is, under proper orders of the Court, conducting a mercantile establishment belonging to the estate. This is made the duty of an executor or administrator in proper cases by the provisions of Article 3351, R. S. 1911, and has been approved by the courts of this State.

See Altgelt vs. Sullivan & Co., 79 S. W., 339.
Stafford & Co. vs. Dunovant's Estate, 81 S. W., 66.

The fees allowed to the county judge in probate matters are those set out in Articles 3849 and 3850 of the Revised Statutes. The fee or commission in question in this case is that provided by Article 3850, which is as follows:

"Article 3850. Commission allowed county judge.—There shall also 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."

It is a fundamental rule, well established by the decisions of every court of the Union, that in order for an official to be entitled to charge and receive costs in any matter pending before the courts, he must be able to point out a statute granting such right in specific terms and it is likewise a well established rule that such statutes must be strictly construed.

In re Davis, 166 S. W., 341.
Laclede Land and Improvement Co. vs. Morten, 167 S. W., 558.
Boynton Land and Timber Co. vs. Hawkins, 183 S. W., 959.
State ex rel. vs. Kimmel, 183 S. W., 651.
Jordan vs. State, 143 S. W., 131.
Hill & Jahn vs. Lofton, 163 S. W., 67.
Bonougli vs. Brown, 185 S. W., 47.

It is true the statute quoted above grants to the county judge a commission of one-half of one per cent upon the actual cash receipts of each executor, administrator or guardian. This, however, is intended to grant to the county judge a commission upon the cash receipts arising from the sale of property belonging to the estate and constituting the corpus thereof. In our opinion, the scope of this Article could not be broadened so as to comprehend the business of transacting a mercantile establishment and give to the county judge commission upon all daily sales of such establishment, where such business was conducted in the usual and ordinary course by the purchase of goods, wares and merchandise, the sale thereof and the replenishing of the stock and further sales and thus continuing a business.

An administrator receives commissions of five per cent on cash received and a like per cent upon cash paid out in the course of the administration. This is expressly provided for in Article 3621, R. S. 1911, as follows:

"Article 3621. Commission allowed executors and administrators.—Executors and administrators shall be entitled to receive and may retain in their hands five per cent on all sums they may actually receive in cash, and the same per cent on all sums they may pay away in cash in the course of their administration."

The courts of this state have recognized the right of the county judge to allow to executors and administrators extra compensation for special services performed on behalf of and in aid of the estate.

See Stonebreaker vs. Friar, 70 Texas, 202.
James vs. Craighead, 69 S. W., 241.

We are unable to find a case, however, where a county judge ever undertook to allow to himself extra compensation for any service performed by him. In fact, such an attempt would be in violation of the rule laid down by the authorities cited above, to the effect that an officer must receive costs under the express provision of the statute.

The question of whether or not an administrator or executor is entitled to commissions on money expended by him in the purchase of goods for carrying on the business of the estate and also upon money received from the sale of goods was before the Supreme Court of this State in the case of Dwyer vs. Kalteyer, 68 Texas, 564. The court held that the statutes authorizing executors and administrators to retain five per cent on receipts and disbursements is not applicable to a case of this character. The court said:

"But it is also contended on behalf of appellants that the executor was entitled to commissions on money expended by him in the purchase of goods for carrying on the business of the estate, and also upon money received from the sale of the goods so bought. We think, however, that the statute allowing commissions is not applicable to such a case. Such a compensation for buying and selling goods would not only be unreasonable in itself, but would impose such an expense upon the transactions as to be ruinous to any business. When the Legislature provided that a commercial business might be continued by an executor or administrator, it did not contemplate that he should secure his compensation through a commission upon the purchase and sale of new goods, but by a reasonable allowance for the time and labor bestowed upon him upon this business, as is provided by statute for other such extraordinary services. The ruling of the court below was in accordance with this view; and in so ruling the court was correct. The executor was entitled to five per cent upon the amount realized from the goods on hand when he took charge of the estate, and this was allowed him. He was also entitled to a reasonable compensation for his services in conducting the business in addition to his ordinary commission as executor.

"The other errors assigned are not likely to arise upon another trial and need not be discussed; but for the error in the charge of the court which has been pointed out, the judgment will be reversed and the cause remanded." 68 Texas, 564-565.

In the case of Beard vs. Beard, 140 N. Y. 260, the trustees of an estate claimed commissions of some $28,000.00 upon $600,000.00 gross receipts arising from the carrying on of a business of the estate. Under the statutes of that State they were entitled to receive for their services the stautory commissions for "receiving and paying out" the moneys of the estate. The Court, in holding that the statute was not applicable to a case where a mercantile establishment was conducted by the trustee, said:

"What do these words 'receiving and paying out' mean as used in the statute? They are comprehensive enough if literally construed to embrace all moneys which come into the hands of the trustees as such, from whatsoever source or cause, and all moneys paid out by him as such on any account. If a trustee invests money he pays it out, and when it is repaid to him he receives it again. But it has been held that in such cases the money is not received and paid out within the meaning

of the statute. (Matter of Kellogg, 7 Paige, 265; Betts vs. Betts, 4 Aub. (N. C.), 317, 436; Drake vs. Price, 5 N. Y., 430, 433.) The same rule was laid down in Matter of Hayden (54 Hun., 197, affirmed in this court, 125 N. Y., 776). In that case the testator authorized his executors, in their discretion, to continue for a year the business of the manufacture and sale of furniture, in which he was engaged at the time of his death. It was held that the executors were not entitled to commissions on the moneys paid out and expended in carrying on the business. Judge Barker, writing the opinion in the Supreme Court, which was adopted by this court, said: 'While it is apparent that the money was received and paid out in the execution of the provisions of the will and pursuant to the authority given by it, it nevertheless does not appear that from the business any profit or any advantage resulted to the estate. The buying and selling incident to the conduct of a manufacturing or other business is at best a species of reinvestment of the trust funds. If commissions were to be allowed each time a stock in trade were purchased or sold, the executors' commissions would largely consume the body of the estate, especially where the stock in trade is rapidly turned over and no great profits realized from the transactions.' Here many items of money, amounting in the aggregate to about $250,000, were disbursed in carrying on the business, all of which came back again to the trustees in the prices charged by them for the use of the basin and for services rendered by them to the patrons thereof, and in this way some of the money was turned over many times. It is plain that if a trustee, under such circumstances, is entitled to commissions on all the money received and disbursed, the commissions might eat up the corpus of the estate, as indicated by the chancellor in the Kellogg case and by Judge Barker in the Hayden case." (140 N. Y. Rep., 264-265.)

A holding to like effect is also contained in the decision of Jones vs. Jones, 39 S. C., 247, from which we quote, as follows:

"First, then, as to the commissions on the money paid out in the conduct of the business of the tan yard. I will have to sustain the probate judge. The law allowing commissions to administrators contemplates commissions on funds originally received and finally paid out, because administration does not contemplate the turning over of funds, or their investment in a business or the conduct of a business, paying out and receiving money in that way. As I have already said, the law allowing commissions, only contemplates the original receiving of the money and the finally paying it out, because that is the business of the administration; to collect assets, convert them into funds, disburse them for debts and to the distributees. I do not know of any rule of law that would allow an administrator commissions on lending money that he has received, and commissions on receiving that same money, and collecting it in a note made payable to him for money borrowed, or repeating that operation in succession. Because, if he could do it in one instance, he might do it in repeated instances, and by that means, perhaps, the increment of interest might be consumed by the administrator. It is, therefore, ordered, adjudged and decreed, that the eighth exception to the probate decree be, and the same is hereby disallowed and overruled." (39 S. C. Rep., 248.)

This Department, through the writer, in an opinion rendered June 24, 1913, held that a county judge would not be entitled to a commission of one-half of one per cent upon investments, collections thereof, and re-investments, by a guardian of funds belonging to the estate of his ward. In this opinion the Department quotes from In the Matter of Kellogg, 7th Paige's Chancery Reports, 265, a New York case, as follows:

"The result of such a principle of computing the allowance for commissions, if the investments of the trust fund were made from year to year and the accounts were rendered or passed annually, would be to

give the trustee his full commissions upon the principal of the trust fund every year, as well as upon the income thereof received and expended from time to time. And where the trust fund was less than $1000, if it did not produce more than 5 per cent interest, the whole income would not only be exhausted in payment of the commissions of the trustee, but in the course of time the commissions payable upon the receipt and disbursement of the interest annually would sink the principal also.

"The investment or reinvestment of the fund, from time to time, upon new securities for the purpose of producing an income therefrom, is not such a paying out of the trust moneys as entitles the guardian or trustee to commissions for paying out the same, within the intent and meaning of the statute on this subject; unless such securities are finally turned over to the cestui que trust as money, or otherwise applied in payment on account of the estate. Neither is the guardian or trustee entitled to charge a new commission for the collecting or receiving back of the principal of the fund which he has so invested. But he will be entitled to commissions upon the interest or income of the fund produced by such investments, and received and paid over by him." (Reports and Opinions of Attorney General, 1912-14.)

It will be noted that in the above cited cases the courts based their ruling upon the fact that to allow administrators, executors or guardians the commission upon all receipts and disbursements in the transaction of a business where the same funds are being turned over would, in the long run, dissipate the estate and there would remain nothing for creditors or distributees. Of course, under our statute, the commission allowed to a county judge is but a fractional portion of that allowed to executors or guardians, but the principle is the same, and if protracted far enough would work an exhaustion of the estate, as much as would the application of the rule to guardians and administrators.

In our opinion the analogy is perfect between the right of the administrator and that of the county judge to commissions on sales of merchandise by an administrator operating a business, and we base this opinion upon the authorities holding that the former is not entitled thereto. We see no good reason to hold the county judge entitled to such commissions when the administrator is not, in fact it is clear that neither is entitled thereto.

We therefore advise you that in the opinion of this Department a county judge is entitled to a commission of one-half of one per cent upon the cash receipts of an executor or administrator, where such receipts arise from the sale of property belonging to the estate and on hand at the time the administrator or executor takes charge. In addition to this, where, under proper orders of the court, the administrator conducts a mercantile establishment by the purchase and sale of goods the county judge would also be entitled to a commission upon the profits arising therefrom, for the reason that the profits become a part of the corpus of the estate and are to be distributed as other funds belonging to the estate.

The county judge would not be entitled, therefore, to receive a commission upon the daily sales, which is in specific answer to the communication you addressed to this Department.

Yours very truly,

C. W. TAYLOR,

Assistant Attorney General.

OP. NO. 1773—BK. 49, P. 322.

SHERIFFS—COUNTY CONVICTS—ALLOWANCE FOR SUPPORT AND KEEPING.

The sheriff is not entitled to a per diem allowance where county convicts are placed to work upon the public roads or other public works of the county, and are not cared for and supported by the sheriff.
Chapter 3, Title 104, Vernon's Sayles' Civil Statutes.
Articles 1142 and 1143, C. C. P.
Article 7127, Revised Statutes, 1911.

June 11, 1917.

Hon. T. M. Jordan, County Attorney, Kountze, Texas.

DEAR SIR: The Attorney General has your letter of June 8th, as follows:

"Under Article 1143, C. C. P. 1911, the county is liable for the safekeeping, support and maintenance of prisoners confined in jail or under guard, said allowance not to exceed 50 cents per capita per day. Please advise me whether this article applies to convicts who are doing labor on the county road, and when said convicts are kept in a camp and not at the county seat."

The allowance made by Article 1142, C. C. P., to the sheriff for the safekeeping, support and maintenance of prisoners is intended to compensate the sheriff for such purpose during the time the prisoners of the county are in his custody, either in the county jail or under guard.

Chapter 3 of Title 104 of the Revised Civil Statutes of this State relating to workhouses and county convicts deals with the prisoners of the county after conviction upon misdemeanor charges, in our opinion is dealing with the prisoners of the county whose status is not the same as those prisoners provided for by Article 1142, C. C. P., although this latter article would cover the prisoners confined in the county jail or under guard after conviction upon misdeameanor charges. Chapter 3, supra, directs the commissioners court to employ the county convicts upon county farms or in county workhouses, and by Article 6238 it is provided that such convicts shall be put to labor upon the public roads, bridges or other public works of the county, whien their labor cannot be utilized in the county workhouse or farm. Article 6233 provides that county workhouses and farms shall be under the control and management of the commissioners courts, and such courts are authorized to adopt such rules and regulations as they deem necessary for the successful management and operation of these institutions, for effectively utilizing the labor of county convicts.

It is provided by Article 6239 that where county convicts are not at work they may be confined in the county jail or workhouse, as may be most convenient, or as the regulations of the commissioners court may prescribe. We think these various articles of the statute clearly indicate a purpose to take the county convicts from under the control and direction of the sheriff whenever they are put to

labor in the county workhouse, upon the county farm or upon the public roads or other public works of the county.

By Article 6246, Revised Statutes, it is provided that convicts shall be so guarded while at work as to prevent escapes.

By Article 7127 it is provided that the sheriff may upon certain conditions employ such a number of guards as may be necessary for the safekeeping of prisoners and the security of jails. The compensation of the guards so employed is fixed by Article 1143, C. C. P., as amended by Chapter 68, General Laws of the Thirty-fifth Legislature. The guards thus employed by the sheriff it is clear are not the guards contemplated by Article 6246 to insure the detention of county convicts while at work upon the public roads or other public works of the county. The guards thus provided for are those guards necessary in the safekeeping of prisoners confined in the county jail. In our opinion the commissioners court may employ such guards as they deem necessary to guard the prisoners at work on the public works and that the sheriff has no authority to perform with reference to the employment of such guards, and that they do not come under the provision and their compensation is not prescribed by Article 1143, C. C. P., above mentioned.

When county convicts are put to work upon the public roads of the county it is done under the rules and regulations prescribed by the commissioners court, and the expense of their maintenance and support and guards for their safekeeping is to be borne by the commissioners court, under the rules and regulations prescribed by them.

In other words, when the convicts are taken from the county jail or are taken from the custody of the sheriff and placed in charge of those selected by the commissioners court to supervise and guard them in their work upon the public roads.

We therefore advise that in the opinion of this Department the sheriff is not entitled to his per diem as fixed under Article 1142, when county convicts are engaged in labor upon the public roads.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

OP. NO. 1815—BK. 50, P. 96.

FEES—COMMISSIONS—DISTRICT ATTORNEY.

A district attorney upon a per diem basis is not entitled to a commission upon sums collected upon forfeited bail bonds. The statute allowing to district attorneys in districts composed of two or more counties fifteen dollars per day for one hundred and twenty-three days in addition to the five hundred dollars allowed by law is intended to be complete compensation to such officer for his services.

Article 363, Revised Statutes, 1911, Articles 1118 and 1120, C. C. P.

September 6, 1917.

Hon. Louis Seay, District Attorney, Groesbeck, Texas.

DEAR SIR: The Attorney General is in receipt of an unsigned communication dated at Groesbeck, Texas, which relates to the compensation of district attorneys, and we assume therefore that such communication is from you. This communication is as follows:

"You will recall the conversation had with you, in your office, at Austin, about ten days ago relative to the statute fixing the salary of district attorneys, of two or more counties, and whether or not such officers are allowed a commission for collection of bail bond forfeitures, etc. In support of the affirmative I have copied the statutes as follows:

"Art. 363, of the Revised Civil Statutes reads: Whenever a district or county attorney has collected money for the State, or for any county, he shall, within thirty days after receiving the same, pay it into the treasury of the State, or of the county to which it belongs, after deducting therefrom and retaining the commissions allowed him by law. Such district or county attorney shall be entitled to ten per cent commissions on the first thousand dollars collected by him in any one case for the State or county from any individual or company, and five per cent on all sums over one thousand dollars, to be retained out of the money when collected, and he shall also be entitled to retain the same commissions on all collections made for the State or for the county; provided, that ten per cent shall be allowed on all such sums heretofore collected since the adoption of the Revised Statutes.

"It is held that under this article a district attorney is entitled to receive money collected on forfeiture of recognizance and may prosecute a motion against the sheriff who fails or refuses to pay over the money so collected by him. Russell vs. State, 40 S. W., 69.

"Art. 1120, Code of Criminal Procedure, fixing the salary of district attorneys of two or more counties, reads: In addition to the five hundred dollars now allowed them by law, district attorneys, in all judicial districts in this State composed of two or more counties, shall receive from the State as compensation for their services the sum of fifteen dollars for each day they attend the session of the district court in their respective districts in the necessary discharge of their official duties, and fifteen dollars per day for each day they represent the State at examining trials, inquest proceeding and habeas corpus proceedings, etc. Provided that all fees heretofore allowed district attorneys, under provisions of Article 1118 of the Code of Criminal Procedure, and in Chapter 5, of the General Laws passed at the Special Session of the Twenty-fifth Legislature, in districts composed of two or more counties, shall, when collected, be paid to the clerk of the district court, who shall pay the same over to State Treasurer. The same article was re-enacted by the Thirty-fourth Legislature, by adding a provision for an assistant district attorney, for counties with a city of 55,000 population or over.

"Art. 1118, referred to in the above, statute and the fees specified, was taken away from district attorneys of two or more counties and reads:

"For all convictions in cases of felonious homicides the sum of $40, etc. Nowhere in this article is there mentioned what such officers shall receive for the collection of bail bonds, etc.

"The other statutes referred to in Article 1120, above quoted, that is, Chapter 5 of the General Laws of the Twenty-fifth Legislature is the same as Article 1120, except Article 1120 adds the commission for prosecuting anti-trust suits. Nowhere in this later statute is there mentioned commissions.

"My proposition: The statute or Article 1120 fixing the salaries of district attorneys of two or more counties, can be no greater than its terms. It fixes the salary by adding the 133 days at $15 per day, as being the part the State pays such services. It says that fees and commissions heretofore allowed, by the statute, naming them, are taken away by that act. It leaves the other statute open with no reference to it,

whereby district attorneys are allowed ten per cent for collection of such judgments as bail bonds."

The department regrets that it is unable to concur in your view of this matter. You base your opinion upon the language used in Article 1120 in the Code of Criminal Procedure, which provides that all fees heretofore allowed district attorneys under the provisions of Article 1118 of the Code of Criminal Procedure and Chapter 5 of the general laws passed at the special session of the Twenty-fifth Legislature in districts composed of two or more counties, shall, when collected, be paid to the clerk of the district court, who shall pay same over to the State Treasurer. The construction you place upon this language is that the fifteen dollars per diem allowed such officers is in lieu of the fees theretofore collected. As we view it this is an erroneous construction of this language. Our interpretation of it is that the language used is merely for the purpose of disposing of those fees enumerated that heretofore accrued to the district attorney, and it was not intended by this language that the fees enumerated should be the only compensation taken from the district attorney who is upon a per diem basis. Should this language have been omitted from the bill then no disposition would have been made of those fees authorized to be collected by law, and when paid into the district clerk's office there would have been no disposition of same. In other words, we do not concur in your view that it was the intention of the Legislature to allow district attorneys fifteen dollars a day in lieu of certain statutory fees, but that it was the purpose of he Legislature to remit the amount to be received by such district attorneys in the sum of $2,495.00 per annum.

The language of Article 363 of the Revised Statutes of 1911, is that a district or county attorney may retain out of the funds collected by him a certain per cent thereof. It is not a fee paid into the registry of the court and no necessity existed for its disposition when the Legislature saw fit to place the district attorney upon a salary basis. Article 1120 of the Code of Criminal Procedure in placing the district attorney upon a per diem basis supersedes in so far as that class of officers is concerned, all other compensation theretofore accruing to such officer. This article provides that for each day the district attorney shall attend the session of the district court he shall be entitled to fifteen dollars per day, and in addition thereto fifteen dollars per day for each day he represents the State in examining trials, inquest proceedings and habeas corpus proceedings, not to exceed of course one hundred and thirty-three days in any one year.

We therefore advise that in the opinion of this Department, the district attorney in districts composed of two or more counties would not be entitled to a commission upon amounts collected upon forfeited bail bonds or any other moneys collected for the State and county, as is provided by Article 163 of the Revised Statutes, but that the compensation allowed to such officers under Article 1120 C. C. P., is exclusive.

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

OP. NO. 1823—BK. 50, P. 124.

CITY ATTORNEY—FEES—CORPORATION COURT.

The city attorney, as prosecuting attorney in the corporation court, can not legally collect a fee in a misdemeanor case where a conviction is had in such court, from which judgment, an appeal is taken to the county court, where on such appeal, the judgment is affirmed.

September 20, 1917.

Hon. Jim L. McCall, City Attorney, Weatherford, Texas.

DEAR SIR: The Attorney General is in receipt of your letter of a recent date, submitting to the department the inquiry as to whether or not the city attorney would be entitled to his fee in a misdemeanor case tried in the corporation court where a conviction was secured, from which judgment an appeal is taken to the county court where the judgment is affirmed.

Article 925, of the Code of Criminal Procedure, provides that "In all appeals from justices' and other inferior courts to the county court, the trial shall be de novo in the county court, the same as if the prosecution had been originally commenced in that court."

Subdivision 2 of Article 1168 of said Code, in fixing the fees of the county attorney where convictions are had, provides that "for every other conviction in cases of misdemeanor where no appeal is taken or where on appeal the judgment is affirmed, $10.00," thus allowing only a $10.00 fee in such misdemeanor case, where a conviction is had on an appeal to the county court from the justice court.

In construing this Article, the Court of Criminal Appeals in the case of Huizar vs. State, 63 S. W., 329, upheld this statute and, acting on a motion to re-tax the costs in the case wherein the county attorney had charged two fees of ten dollars each for convictions in the justice court and the county court, held that the county attorney was entitled to only the one fee, even though the defendant had been convicted in both courts. Approved in Ex Parte Way, 48 Tex. Cr., 584; 89 S. W., 1075.

Article 914, Vernon's Sayles' Civil Statutes, 1914, relating to fees to be collected by the officers of a corporation court, provides that "there shall be taxed against and collected of each defendant, in case of conviction before such court (referring to the corporation court), such costs as may be provided for by ordinance of said city, town or village; but in no case shall the council or board of alderman of any such city, town or village prescribe the collection of greater costs than are prescribed by law to be collected of defendants convicted before justices of the peace."

Article 921, Vernon's Civil Statutes, 1914, relating to appeals from the corporation courts to the county courts, provides that "said appeal shall be governed by the rules of practice and procedure for appeals from justices courts to the county court, as far as the same may be applicable."

In all appeals from justices and other inferior courts to the county court, the trial shall be de novo, the same as if the prosecution had been originally commenced in that court. Article 925, Code Criminal Procedure.

The city council or board of aldermen of a city, town or village, have the power to adopt such rules and regulations concerning the practice and procedure in a corporation court as said council or board of alderman may deem proper, not inconsistent with the laws of this State. Article 912, Vernon's Sayles' Texas Civil Statutes, 1914.

The Articles above referred to are all of the material laws governing the subject matter in controversy, and construing together the several Articles here referred to, so as to carry out the legislative intent, if possible, this Department is of the opinion that you, as city attorney cannot legally collect a fee as prosecuting attorney in the corporation court in a misdemeanor case where it is appealed to and affirmed by the county court, for to collect such fee would be the collection of "greater costs than are prescribed by law to be collected of defendants convicted before justices of the peace," and the collection of such a fee, under such circumstances, would "not be governed by rules of practice and procedure for appeals from justice courts to the county court, so far as the same may be applicable." A city ordinance authorizing the collection of an attorney's fee in the corporation court and the county court—two fees where on an appeal to the county court, a conviction is had is not enforcible as to the city attorney's fee, as such ordinance would be in contravention of Article 912, Vernon's Sayles' Civil Statutes, as being inconsistent with the laws of this State.

If two persons should be prosecuted for an affray, offenses committed in this State, one in the corporation court, the other in the justice court, and both parties are convicted and each appeal his case to the county court where upon a trial de novo the judgments are affirmed, the one whose case originated in the corporation court, if both attorney's fees are collectible, would be required to pay an additional attorney's fee as a penalty for his case originating in a corporation court—a matter over which he had no control. It would not be equitable, as between citizens of this State, for such a situation to arise, and it is not believed by this department, from any legislative enactment to which our attention has been directed, that this situation was intended by the Legislature.

It is true that this ruling, affecting city attorney's fees, works a hardship upon the various city attorneys of this State who are devoting their time and energies to the enforcement of the criminal laws of this State, for the betterment of society, but if the Legislature—the law-making power—had its attention called to the matter, doubtless it would adopt some remedial legislation for the benefit of such officers.

Your truly,
W. J. TOWNSEND,
Assistant Attorney General.

OP. NO. 1825—BK. 50, P. 131.

FEES—INQUESTS—JUSTICES OF THE PEACE.

October 3, 1917.

Hon. Charles Huppertz, County Auditor, Austin, Texas.

DEAR SIR: Your favor of September 28th, addressed to this department, submitting the following inquiry, for its opinion as to the law governing the matter, has been received:

"Any justice of the peace shall be authorized and it shall be his duty to hold inquests within his county in certain cases. In this connection would respectfully ask your opinion on the following points: supposing that a number of persons perish in a flood and the bodies are afterwards recovered and the circumstances of the death are commonly known, is it necessary to hold an inquest in such cases? If your opinion is in the affirmative will the justice holding such inquest be entitled to a fee in each case, when a number of such cases are together and the cause of death is the same?

"Second, if a family is killed by the husband, wife or an unknown person but evident that each and all were killed in the same manner at the same time and place, is the justice holding the inquest entitled to fee in each case, that is upon each person?"

Article 1058, Code of Criminal Procedure, relating to inquests, by whom held and in what cases, reads as follows:

"Any justice of the peace shall be authorized, and it shall be his duty, to hold inquests within his county, in the following cases; provided, that all inquests shall be held by the justice of the peace without a jury:

"1. When a person dies in prison.

"2. When any person is killed, or from any cause dies an unnatural death, except under sentence of the law, or in the absence of one or more good witnesses.

"3. When the body of any human being is found, and the circumstances of his death are unknown.

"4. When the circumstances of the death of any person are such as to lead to suspicion that he came to his death by unlawful means."

Article 1156, Code of Criminal Procedure, regulating the fees allowed a justice of the peace, in ordinary inquests, provides that "a justice of the peace shall be entitled, for business connected with an inquest on a dead body, including, certifying and returning the proceeding to the proper court, the sum of five dollars, to be paid by the county." The object of an inquest is to find out the cause of death when the cause is unknown.

Answering your first question, "Suppose a number of persons perish in a flood and the bodies are afterwards recovered and the circumstances of the deaths are commonly known, is it necessary to hold an inquest under such circumstances?" we are of the opinion that an inquest under such circumstances is not necessary and is not required by law.

It is required by law that "an inquest be held when the body of a human being is found, and the circumstances of his death are unknown."

The word "unknown," in its common acceptation, as used in the subdivision of this article, means "not known," "not become an object of knowledge"; "not recognized, discoverd or found out." Century Dictionary.

In cases of a public calamity of common knowledge to every one, such as the Galveston flood of recent years, wherein hundreds of people were drowned and lost their lives, it would not be seriously contended by any one that "the circumstances of the death of such parties were unkown," and that there was "the absence of one or more good witnesses" to such deaths. On the contrary, it was the common knowledge of every one that a flood and storm had occurred, that many lives were lost, and there was evidence on every hand to show irresistably how and under what circumstances such deaths occurred. Would a justice of the peace of Galveston, surviving, be permitted under the law to pass along the beach where dead bodies were strewn and hold an inquest on each dead body, and thereby claim a fee of $5.00 on each body for such service? Was it intended by the Legislature that fees should be collected under such circumstances? We think not. In cases of a like character we do not think an inquest is demanded or provided for by law.

In answer to your second inquiry, "If a family is killed by the husband, wife or an unknown person, but evident that each and all were killed in the same manner at the same time and place, is the justice of the peace holding the inquest entitled to fee in each case, that is, upon each person?", we are of the opinion that the justice of the peace is entitled to a fee on each dead body for which he holds an inquest and makes a certificate of his findings to the court as required by law.

In this case, "the circumstances of the death of the parties are unknown," besides, the persons "are killed or die an unnatural death, in the absence of one or more witnesses," and under these circumstances an inquest is permissible under the law, to ascertain the cause or causes of the death of said parties; the circumstances of their death "leading to the suspicion that such parties came to their death by unlawful means." It is necessary to produce testimony by circumstantial, if not by direct evidence, as to when and how the parties were killed; whether killed by one or more persons and to ascertain if the circumstances lead to suspicion that such parties came to their death by unlawful means.

Article 1078 of the Code of Criminal Procedure provides that when an inquest has been held, the justice before whom the same was held shall certify to the proceedings, and shall inclose in an envelope the testimony taken, the findings of the justice, and all other papers connected with the inquest and deliver same to the district clerk of the county of his residence in the manner directed by the article, before the fee for holding the inquest in a proper case is payable.

Yours truly,

W. J. TOWNSEND,
Assistant Attorney General.

OP. NO. 1848—BK. 50, P. 255.

FEES OF TAX COLLECTORS FOR INDEPENDENT SCHOOL DISTRICTS.

(1) In independent school districts not constituted of a city or town the compensation of the district assessor and collector of taxes is that fixed by the board of trustees of the district.

(2) In independent school districts constituted of a city or town, the assessor and collector for the district shall be the city assessor and collector, if the city has one, and he "shall receive such fees and commissions for his services as may be allowed by the ordinances of the city."

(3) The fee of one dollar provided in Article 7691, Revised Statutes, to tax collectors is the fee to county tax collectors and not to the collectors of taxes for an independent school district.

December 6, 1917.

Hon. W. F. Doughty, Superintendent Public Instruction.

DEAR SIR: We have your letter of December 3, enclosing a letter from Honorable W. R. Blain of Beaumont, Texas, addressed to you, and asking the advice of this Department on matters inquired about in Mr. Blain's letter. Prior to this we had received a letter on the same subject from Mr. J. W. Kinnear, tax assessor and collector of the South Park Independent School District, Beaumont, Texas. From the two letters we gather the following facts:

Block Number 2 of the South Park Addition to the City of Beaumont consists of ten unimproved lots. The entire block is owned and has been rendered for taxation by W. H. Davenport. Said block is situated in the South Park Independent School District. State, county, school district and navigation district taxes levied for the past nine years were delinquent. The State and county taxes for said years have been paid, the county tax collector accepting as fees and costs due him only one dollar for the entire block for each of the nine years. Mr. Kinnear, the assessor and collector for the independent school district, in his letter, states that he has been instructed by the trustees of the South Park Independent School District to collect one dollar for each year on each of the ten lots as fees or costs, when the delinquent school taxes are paid. Mr. Blain in his letter states that, on behalf of the owner, he has tendered payment of the delinquent school taxes (and this we assume to mean taxes, penalty and interest) and nine dollars as costs due the tax collector of the district. The tax collector, however, advised that he is instructed by the trustees to collect ninety dollars costs. Mr. Blain seems to be the attorney for the owner.

The one dollar fee referred to in these letters is the fee provided to county tax collectors for their services in connection with the collection of delinquent taxes, in Article 7691, R. S., in the following language:

"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. * * * 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 the sale of same after the taxes, penalty and interest due thereon to the State are paid; provided, that where two or more unimproved city or town lots belonging to the same person and situated in the same city or town shall all be included in the same suit and costs, except those of advertising, which shall be twenty-five cents for every ten lots, or any number less than ten, taxed against them collectively just as if they were one tract or lot; and 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 delinquent may pay the amount of the tax, interest, penalties and all accrued costs to the county collector during the pendency of such suit."

This clearly is a fee provided to county tax collectors as compensation for the particular services mentioned. To show that it was not intended as a fee to tax collectors of independent school districts, it is necessary only to call attention to the fact that the collectors of such districts do not have to separate property previously sold to the State from that reported to be sold as delinquent for the preceding year, and do not have to certify the same to the commissioners court. This is also made clear by the provisions of those articles of the statute relating to the duties of the collector of taxes for independent school districts and the compensation they shall receive.

Article 2861, R. S., is in part as follows:

"The assessor and collector of taxes of the district shall have the same power and shall perform the same duties with reference to the assessment and collection of taxes for free school purposes that are conferred by law upon the city marshal of an unincorporated town or village, and *he shall receive such compensation for his services as the board of trustees may allow, except in cities and towns otherwise provided for*, not to exceed four per cent of the whole amount of taxes received by him."

In independent school districts constituted of a city or town the duties and compensation of the collector for the independent school district are thus stated:

"Article 2881. In an independent school district constituted of a city or town having a city assessor and collector of taxes, such assessor and collector of taxes shall assess and collect the taxes for school purposes, provided, that in a city or town having an assessor and collector of taxes the levy of taxes for school purposes shall be based upon the same assessment of property upon which the levy for other city purposes is based. It is further provided, that, in such a city or town the assessor and collector of taxes shall receive *no other compensation for collecting school taxes than the compensation paid him for assessing and collecting city taxes;* and taxes for school purposes in such a city or town shall be assessed and collected as other city taxes are assessed and collected."

It will thus be seen that no particular fees are provided by law to the collectors of taxes for an independent school district. In independent school districts not constituted of a city or town the assessor and collector of taxes of the district "shall receive such compensation for his services as the board of trustees may allow."

In independent school districts constituted of a city or town, it is provided that the assessor and collector of the district shall be the city assessor and collector, if the city has any, and he "shall receive no other compensation for collecting school taxes than the compensation paid him for assessing and collecting city taxes." That is, his compensation for all of his services as city assessor and collector, including his services in the collection of school taxes, is the compensation fixed by the city charter, if in a city having a special charter, or, as directed by the general law, if in a city chartered under the general law.

The manner and method of fixing the salary or compensation of the officers of a city chartered under the general law is as follows:

"Article 816. The city council shall on or before the first day of January next preceding each and every election, fix the salary and fees of office of the mayor to be elected at the next regular election, and shall, at the same time establish the compensation or salary to be paid to the officers elected or appointed by the city council; and the compensation or salary so established shall not be changed during the term for which said officers shall be elected or appointed."

"Article 941. The (city) assessor and collector shall receive such fees and commissions for his services as may be allowed by the ordinances of the city."

You are advised, therefore, that the assessor and collector of taxes for an independent school district is not entitled to the fees provided in Article 7691, R. S., to county assessors and collectors. The fees therein provided were intended alone for county officers as compensation for their services enumerated therein. In the instant case, neither the South Park Independent School District nor the collector of taxes for said district is entitled to the ninety dollars claimed, or any portion thereof.

The primary object and purpose of Article 7691, R. S., was to provide to county officers reasonable compensation for services rendered by them in connection with the collection of delinquent taxes and to provide that this compensation should be collected from the delinquent owner. It was not intended thereby to create a source of revenue for the State, the coutny, independent school districts or any other character of district. The delinquent owner in this case has already paid the proper amount of fees to which the county tax collector was entitled, when he paid the delinquent state and county taxes. It would be manifestly unjust to require him to again pay these fees when he pays the delinquent school district tax. With equal force the commissioners of the navigation district might insist that he should again pay these fees when he pays the delinquent navigation district tax. And if his property is situated within a road district, it might be with equal force insisted that he should again pay the fees when he pays the delinquent road district tax. And if his property is situated within an irrigation district, it might be insisted with equal force that he should again pay these fees when he pays the delinquent irrigation district taxes.

It has not become necessary for us, in answering the inquiries, to construe Article 7691, R. S., except as to the character of officers

for whom the fees therein were provided. We think, however, that the county tax collector accepted the proper amount as his fees, to wit, one dollar for the entire block consisting of ten unimproved lots, for each of the nine years. See Raht vs. The State, 106 S. W., 900; Typer & Knudson vs. Tom et al., 132 S. W., 850.

You are, therefore, advised that, in the opinion of this Department, the delinquent owner, W. H. Davenport, is not liable for fees in any amount to the assessor and collector of taxes for the South Park Independent School District.

Yours very truly,

JOHN C. WALL,
Assistant Attorney General.

OP. NO. 1847—BK. 50, P. 266.

FEES OF OFFICE—DISTRICT CLERK—INHERITANCE TAX.

1. No public officer can collect fees without a law authorizing him to do so and clearly fixing the amount.
2. "The commissions" allowed by law to a district clerk by the provisions of Article 1193 of the Code of Criminal Procedure "upon judgments recovered" in a court of which he is clerk, applies to judgments in scire facias cases, on forfeited bail bonds and recognizances, which partake of a criminal character though quasi civil in nature; but such commissions are not collectible as to judgments recovered in ordinary civil cases, such as judgments recovered on tax collector's bond for collection of inheritance tax, etc.

State vs. Norrel, 53 Texas, 427.
State vs. Moore, 57 Texas, 307.
State vs. Hart, 70 S. W., 948.

December 8, 1917.

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

DEAR SIR: The Attorney General is in receipt of your favor of December 5, wherein you submit the following inquiry for his opinion as to the law governing the same:

"Will you kindly advise whether or not the district clerk is entitled to commissions on a judgment procured and collected in the district court of an inheritance tax?"

Replying thereto, we beg to advise that "no public officer can withdraw from the State treasury or impede in its course to the treasury, any money without a law authorizing him to do so, and clearly fixing the amount." State vs. Moore, 57 Texas, 321.

In other words, no public officer can collect fees, without a law authorizing him to do so, and clearly fixing the amount.

Article 1193 of the Code of Criminal Procedure provides that "the district or county attorney shall be entitled to 10 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 judgments are rendered, shall be entitled to 5 per cent of the amount of said judgments to be paid out of the amount when collected."

Article 363 of the Revised Civil Statutes, 1914, in effect, provides that whenever a district or county attorney has collected money for the State or for a county he shall be entitled to 10 per cent on the first one thousand dollars collected by him in any one case, and 5 per cent on all sums over one thousand dollars to be retained out of the money when collected, and he is entitled to retain the same commissions on all collections made for the State or for any county.

No authority is given under this Article (363) or by any other provision of law, for the clerk of the court to retain any portion of a judgment when collected in a civil case, wherein the State or county is a party thereto, as moneys due him. If he is entitled to any moneys on a judgment obtained for the collection of an inheritance tax, it is by the provision of Article 1193 of the Code of Criminal Procedure, above quoted. However, this identical question has been decided by our courts holding that a clerk is not entitled to any commissions on judgments obtained in his court in ordinary civil cases.

In the case of the State vs. Norrel, supra, the State brought suit on the bond of defendant for balance due as collector of taxes, and recovered judgment for the sum of $1,268.77. Execution was issued on the judgment by E. Hallman, clerk of the district court, and the amount of the judgment collected and paid over to him. Demand was made by the representative of the State on said clerk for the money collected on the judgment. He paid over all the amount except $60.61, which he retained and refused to pay over, claiming the same as commissions allowed him by law under the provisions of Article 1193 of the Code of Criminal Procedure, above quoted.

The court, in passing upon the question and in disposing of the case, used the following language:

"The clerk of the district court of Travis County contends that he has the right to retain as his fees, under the provisions of Article 1112 of the Revised Code of Criminal Procedure, the money for which this motion was made against him.

"This article reads as follows: 'The district or county attorney shall be entitled to ten per cent on all fines, forfeitures or money 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 money when collected.'

"This is not a part of the original Code of Procedure, as adopted by the Legislature, February 21, 1879, but is an amendment subsequently made April 22, 1879, and that part in relation to the fees of the clerk is an entirely and district clause.

"The caption under which this amendment was made is as follows:

" 'An act to amend chapter two of title fifteen, and chapter one of title sixteen, of the Code of Criminal Procedure, of an act entitled "An Act to adopt and establish a Penal Code and a Code of Criminal Procedure for the State of Texas." ' Laws Regular Session, Sixteenth Legislature, 133.

"The judgment upon which commissions are claimed by the clerk was rendered in a civil suit, upon a defaulting collector's bond. Should it be admitted that the Legislature could constitutionally pass an amendment to the Code of Criminal Procedure, in which they should therein provide for the fees of clerks in civil cases, we are of opinion, from the caption itself of this act, and from its context, that the Legislature by this article

intended to provide for the fees of clerks, not in civil cases, but in those arising under the Penal Code and Criminal Procedure.

"This construction is consistent with the langauge used, though that language might be sufficiently comprehensive, abstractly considered, to embrace fees in civil cases also.

"The phrase, 'upon judgments recovered,' would appropriately apply to judgments in scire facias cases on forfeited bail bonds and recognizances, which, though quasi civil in their nature, have been construed, both by this court and the Court of Appeals, in cases arising under the revised codes, to so far partake of a criminal character as that the Supreme Court did not have jurisdiction of them on appeal.

"We are further strengthened in this construction from the fact that by the provisions of the Revised Civil Statutes the fees of clerks in civil cases are otherwise fully provided for; and it will not be presumed, unless the language and context would bear no other reasonable construction, where the existing law has made adequate provision for the particular case, that the new law passed upon a different feature of the case was intended to be cumulative and give double fees for the same service. The case having been submitted upon an agreed statement of facts, and to obtain the proper construction of this article of the statute, the judgment of the court below will be reversed, and judgment here rendered for the State in accordance with this opinion, and it is accordingly so ordered."

The doctrine announced in the above case to the effect that the clerk of a court is not entitled to any commissions on judgments obtained and collected by him in the court of which he is clerk in ordinary civil cases, was approved in the case of State vs. Moore, 57 Texas, 307. Also, in case of State vs. Hart, 70 S. W., 948.

The courts, in construing this article of the Code of Criminal Procedure, relating to the commissions allowed by law to a district clerk by the provisions of Article 1193 of the Code of Criminal Procedure upon "judgments recovered," applies only to judgments in scire facias cases on forfeited bail bonds, or recognizances, which partake of a criminal character though quasi civil in nature, and are not collectible by such clerk in ordinary civil cases such as judgments on tax collector's bond for collection of inheritance tax, etc.

Therefore, we respectfully advise that in the opinion of this Department the district clerk of your county is not entitled to any commission whatsoever upon the judgment obtained and collected in the matter of the collection of an inheritance tax, about which you write.

Yours truly,

W. J. TOWNSEND,
Assistant Attorney General.

OP. NO. 1856—BK. 50, P. 302.

S. B. 370—ASSESSORS AND COLLECTORS OF TAXES—FEES FOR COLLECTING COUNTY ROAD TAXES TO PROVIDE INTEREST AND SINKING FUND FOR COUNTY ROAD BONDS ISSUED UNDER S. B. 370, CHAPTER 203, ACTS REGULAR SESSION, THIRTY-FIFTH LEGISLATURE.

1. Where county road bonds have been issued under said act and the debts of existing road districts in the county have been assumed by the county, the road district tax can no longer be levied and collected. Thereafterwards only a county tax to provide interest and sinking fund for the county bonds can be assessed.

2. For the assessing and collecting of such county road tax no particular fee or commission is provided. It is a mere county tax, and must be included with other county taxes, and said officers are entitled only to the commissions provided in Articles 3871 and 3872 on the entire amount of the county taxes assessed and collected, including said road tax.

January 4, 1918.

Hon. A. L. Liles, County Auditor, Belton, Texas.

DEAR SIR: We have your letter of December 22, in substance stating that on December 10, 1917, Bell County voted county road bonds, under the provisions of a law passed by the Thirty-fifth Legislature, known as Senate Bill 370, providing for the assumption by the county of the bonded indebtedness of the road districts. Then your letter proceeds as follows:

"This consolidates all of the twelve road districts in Bell County; also includes all portions of the county not now having any bonds outstanding, and makes one rate cover all assessed property in the county.

"Now, the question arises: What compensation, if any, shall be allowed the tax assessor and tax collector for assessing and collecting this Bell County special road bond tax?"

Replying thereto, we beg to call attention to the following portions of Article 637-b, contained in Section 2 of said act:

"In the event the proposition to issue such county bonds shall receive the necessary favorable vote, as is now provided by law, and said bonds shall have been approved and issued, the taxes theretofore levied and collected in any road district or districts shall from that date be dispensed with, as hereinafter provided. * * * After such county bonds shall have been deposited for the credit of the interest and sinking fund account of said district or districts, the sinking fund theretofore collected and on hand for the credit of such district or districts, shall be passed to the sinking fund account of the county. The commissioners court shall no longer levy and collect the taxes provided for under the original election for said bonds in such district or districts, but in lieu thereof they shall annually, from the taxes levied for the county bonds hereinbefore provided for, pay the interest on said county bonds deposited for the credit of such district or districts. * * * From said county taxes levied for that purpose, the commissioners court shall also set aside annually the necessary sinking fund for the retirement of said county bonds, and upon the maturity of said county bonds, the commissioners court shall pay said bonds in full, etc."

The law clearly provides that after such county road bonds are issued and the outstanding indebtedness of existing road districts has been assumed by the county, the commissioners court shall cease to levy taxes in road districts, and shall thereafter levy only a county tax to provide interest and sinking fund for the county bonds.

The law governing the assessment and collection of taxes to provide interest and sinking fund for county road bonds issued under the provisions of Chapter 2, Title 18 of the Revised Statutes, and also for the collection of such taxes for a political subdivision or other defined district of a county, is thus stated in Article 634, R. S:

"Provided, that said tax herein authorized shall be assessed and collected in the same manner as now provided by law for the assessment and collection of other road taxes, if for a whole county, and if for a political or other defined district of a county, then it shall be assessed and collected as is now provided by law for the assessment and collection of common school district special local taxes."

In Article 2836, R. S. it is provided that "common school district special local taxes," shall be assessed and collected in the following manner:

"The tax assessor shall assess, and the tax collector shall collect, said district taxes as other district 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."

No particular fee or commissions are provided by statute for the assessment and collection of road taxes levied "for a whole county." County road taxes of every description have always been considered as a mere part of all county taxes levied, and the compensation provided to assessors and collectors is merely the commission provided to such officers by Articles 3871 and 3872, R. S. which are commissions on the entire amount of county taxes assessed and collected. That is to say, assessors are entitled to receive the commissions provided in Article 3871, R. S., on all county taxes collected by them, and in addition thereto, if there are road districts created under Chapter 2 of Title 18 in said county, one-half of one per cent of all road district taxes collected. As hereinbefore shown, where a county votes county road bonds under the provisions of Senate Bill No. 370, and the county has assumed the debts of any existing road districts therein, there ceases to be any road district tax, and there remains only a county road tax.

Therefore, in such counties assessors and collectors are not entitled to receive in addition to the commissions provided in Articles 3871 and 3872, any further commissions for the assessing and collecting of the tax to provide interest and sinking fund for the county road bonds. The compensation they are to receive must be determined by Articles 3871 and 3872 alone. Such road tax must be considered just as any other county tax, must be added to other county taxes, and

the compensation of assessors and collectors is merely such per cent. of the entire county tax, including the county road tax, as is provided in Articles 3871 and 3872.

Very truly yours,
JNO. C. WALL,
Assistant Attorney General.

OP. NO. 1876—BK. 50, P. 441.

FEES OF OFFICE—COMMISSIONS—COUNTY ATTORNEY, COUNTY CLERK, SHERIFF—TRIAL FEES.

The county attorney and county clerk are not entitled to commissions on trial fees. The sheriff is entitled to a commission of five per cent on trial fees collected.

February 4, 1918.

Hon. R. C. Johnson, County Attorney, Amarillo, Texas.

DEAR SIR: The Attorney General has your letter of January 31st, as follows:

"I understand the statutes to require that in every criminal case in the county court where a conviction is obtained, that a trial fee of five dollars be added as costs and collected.

"Is the county attorney, county clerk and sheriff entitled to their regular commissions upon this trial fee that is collected in criminal cases in the county court?"

In our opinion neither the county attorney nor the county clerk would be entitled to a commission upon trial fees collected. Article 1184 C. C. P., 1911, is as follows:

"In each case of conviction in a criminal action tried in the county court, whether tried by a jury or by the judge, there shall be taxed in the bill of costs against the defendant, or against all defendants where several are tried jointly, a trial fee of five dollars, the same to be collected and paid into the county treasury in the same manner as is provided in the case of a jury fee."

The articles of Code of Criminal Procedure under which district and county attorneys, clerks of the courts, sheriffs and other officers who collect money are entitled to commissions, are 1193 and 1194, which are as follows:

"Art. 1193. Commissions allowed district and county attorneys.—The district or county attorney shall be entitled to ten per cent on all fines forfeitures or money collected for the State or county, upon judgments received 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.

"Art. 1194. Commissions allowed sheriff or other officer.—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 our opinion neither the county attorney nor the county clerk would be entitled to commission upon a trial fee. This fee is taxed

and collected as costs. It is not such a judgment as is contemplated by Article 1193, but is a matter of costs incident merely to the judgment. As to a county attorney, this was expressly decided in the case of Fears vs. Ellis County, 20 Texas Civil Appeals, 159. We see no distinction to be made in this article between the right of the county attorney to a fee and that of the clerk. In the Fears case 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 advise you that in the opinion of this office neither the county attorney nor the county clerk would be entitled to a commission on a trial fee.

There is a distinction, however, to be made between Article 1193 authorizing commissions to district and county attorneys and clerks, and 1194 authorizing a commission to be paid to sheriffs and other officers who collect money for the State or county. The former article provides for a commission upon judgments recovered and as seen in the case of Fears vs. Ellis County, supra, this does not relate to a matter of costs. However, in the latter article it is provided that the sheriff or other officer who collects money for the State or county under any of the provisions of the Code except jury fees, shall be entitled to retain five per cent thereof.

We have seen from Article 1194 quoted above that a trial fee of $5.00 is authorized to be collected by the provision of the Code. Article 1194, therefore, in our opinion is ample authority for the sheriff to retain five per cent of all moneys collected by him for the State or county in any criminal matter except jury fees, and therefore would include a commission of five per cent on trial fees collected.

Yours truly,

C. W. TAYLOR,
Assistant Attorney General.

OP. NO. 1932—BK. 51, P. 276.

FEES—DISTRICT CLERK—CONSTITUTIONAL LAW—SPECIAL LEGISLATION.

The act of the Legislature granting to a district clerk $1200 additional compensation for services as clerk of a newly created district court is a special law dealing with county affairs, and therefore such provision is void under Section 56, Article 3 of the Constitution.

June 4, 1918.

Mr. H. L. Washburn, County Auditor, Houston, Texas.

DEAR SIR: In your letter addressed to the Attorney General you call our attention to Section 5, Chapter 19, Acts First Called Session Thirty-fourth Legislature, which section fixes additional compensation of your district clerk for his services as clerk of the Eightieth District Court of Harris County, and you desire to know the opinion of this department as to whether or not the clerk would be entitled to retain the extra $1200.00 allowed for this service in addition to the maximum salary and excess fees aggregating $4250.00 under Articles 3881, 3883, 3891 R. S., 1911, and acts amendatory thereof.

Section 5 of Chapter 19, Acts First Called Session Thirty-fourth Legislature, cited by you is in the following language:

"That the clerk of the district court of Harris County, as that office is now constituted, and his successor in office, shall be the clerk of the District Court of the Eightieth Judicial District of Texas in Harris County, and shall perform all the duties imposed upon him as the clerk of other district courts of Harris County, and for such additional service, shall receive twelve hundred dollars per year, as additional compensation to be collected out of the fees allowed by law."

The purpose of this Act as shown by its caption, is to re-organize the Twenty-third Judicial District of Texas and create the Eightieth, which district is formed by the counties of Harris and Waller.

By Chapter 130, Acts Regular Session Thirty-fifth Legislature, Article 3883 R. S., 1911, was so amended that the maximum amount of fees the district clerk in your county might retain was fixed at $2750.00 per annum.

By Article 3889 it is provided that in counties having a population in excess of 38,000, the officers enumerated in the chapter are entitled to retain one fourth of the excess fees until one fourth amounts to the sum of $1250.00. Therefore under the provisions of the general statutes dealing with the question of fees your district clerk would be limited to $4250.00 per annum.

Article 3891 referred to by you is as follows:

"In all counties in this State having more than one judicial district, the district clerks thereof shall in no case be allowed fees in excess of the maximum fees allowed clerks in counties having only one district court."

The above article of the statute is merely explanatory of the preceding articles in so far as the clerk of the district court is concerned and was inserted for the purpose of discolsing the fact that the Leg-

islature did not intend for clerks of the district court in those counties having more than one court to receive maximum fees for their services performed in each of such courts.

The Constitution of this State provides for only one district clerk in each county, and therefore the Legislature would be powerless to create an additional office of district clerk, no matter how many district courts might be created within a county. Therefore the provision in the act creating the Eightieth Judicial District to the effect that the clerks of the district court of Harris County as now constituted shall be clerk of the district court of the Eightieth, district, is mere surplusage, for that official would have been clerk of the new court had the act been silent upon the subject. The constitution and the statutes of this State make him the clerk of all district courts created for such county.

Coming now to the direct question presented by you, we are of the opinion that the language used in Section 5 is an open attempt on the part of the Legislature to pass a special law governing the affairs of Harris County and is in direct conflict with Section 56, Article 3, of the Constitution, prohibiting the passage of such laws where the general laws may be made applicable. Hall vs. Bell County, 138 S. W., 178; Altgelt vs. Gutzeit et al., 201 S. W., 400.

Under the fee bill the district clerk would be entitled to any fees earned by him for his services performed in the Eightieth District Court. Therefore, the language used in Section 5 to the effect that he shall receive $1200.00 per year additional compensation can have no other meaning than that the Legislature intended by the use of such language to give to the district clerk of that county $1200.00 more per year than to any other district clerk in the State. This is precisely what was sought to be done by the special road law under consideration in the case of Altgelt vs. Gutzeit et al., supra, and which the Supreme Court of this State said was a violation of Section 56, Article 3, of the Constitution, prohibiting the passage of any local or special law regulating the affairs of counties, cities, towns, etc., where a general law can be made applicable. In the case of Hall vs. Bell County, supra, wherein the court had under consideration the auditor's law and the amendment thereto by the Thirty-first Legislature exempting Bell County from its operation; the court held this was a violation of the above provision of the Constitution in that it was special legislation dealing with the affairs of Bell County. So in the case presented by you. We see no escape from the conclusion that in giving to the district clerk of Harris County $1200.00 per annum more than any other district clerk in this State the Legislature exceeded its authority, and therefore this provision of the act is void.

Of course the district clerk would be entitled to receive the usual fees for all services performed in the Eightieth District Court. He should report the same and account therefor in arriving at its maximum, but under the articles of the statute above quoted he would not be entitled to retain more than $4250.00, which is the maximum under the general laws of this State by which he must be governed.

Yours truly,

C. W. TAYLOR,
Assistant Attorney General.

OPINIONS ON PUBLIC SECURITIES.

OP. NO. 1843—BK. 50 P. 242.

PUBLIC SECURITIES—ROAD IMPROVEMENT DISTRICT BONDS—COUNTY AND MUNICIPAL BONDS—COMMISSIONS—COMMISSIONERS COURT.

1. Commissioners court can not sell road district bonds for less than their par value.
2. Commissioners court would be without authority to pay commission to an agent who represented road district in the sale of bonds.

November 23, 1917.

Hon. W. G. Gilles, County Judge, Cameron, Texas.

DEAR SIR: You have propounded to this Department the following inquiry:

Has the county commissioners court the authority to pay an attorney a commission on the sale of road improvement district bonds?

It appears that the bonds were sold for par and accrued interest and the amount the court desires to pay as commission would come from the funds derived from such sale.

The Road District Act of 1909 (Chapter 2, Title 18, R. S., 1911) was amended in part by Chapter 203, Acts of 1917, and Article 632 in the amending Act provides:

"The expenses incurred in surveying the boundaries of a political subdivision or defined district of the county and other expenses incident to the *issuance* of bonds of such political subdivision or defined districts shall be paid from the proceeds of the sale of the bonds of the district."

The words "expenses incident to the issuance of bonds" apply to any expenditure of money in the submission of the question, namely: Publication of election notices, printing ballots, remuneration of election officers, necessary expenses incurred in obtaining the approval of the Attorney General and printing the bonds, but it cannot, with reason, be contended that the express power to pay the expenses incident to the "issuance of bond" from the proceeds of their sale involves the implied power to pay expenses incident to the sale of bonds out of the money realized from such sale. If the Legislature in passing the amending Act had that intention, it would have no doubt framed the Act accordingly.

Road bond funds belonging to a political subdivision or defined district "shall be paid out by the county treasurer upon warrants issued by the county clerk upon certified accounts of the road superintendent of such road district and approved by the commissioners court of the county." (R. S., 1911, Art. 632, amended by Chapter 203, Acts 1917.) This provision in the Act contemplates that the money arising from the sale of the bonds shall be disbursed in a specified way to be used for specified purposes, namely: Expenses incident to the *issuance* of the bonds, and constructing roads.

The case of Davis vs. City of San Antonio, 160 S. W., 1161, involved a contract for the payment of commissions for the sale of bonds

of the city and it was held that under the provision of the city charter providing that bonds of the city shall not be sold for less than their par value, the city was not precluded from contracting to pay necessary expenses incident to the issuance of bonds, out of the general fund, including commissions for the sale thereof and fees of expert attorneys for an opinion as to their validity. I quote the following from the syllabi in that case:

"Under special acts, 1907, Chapter 70, amending the charter of San Antonio, and providing that all bonds shall net the city not less than their par value, with accrued interest to date of payment of the proceeds into the city treasury, no commissions, attorney's fees, or other expenses connected with the issuance and sale of bonds can be taken from the proceeds, unless the bonds are sold at a premium sufficient to pay such expenses; the term 'par value' meaning a value equal to the face of the bonds, or at the rate of $1.00 in money for $1.00 in bonds."

We observe that by Article 632, R. S. 1911, it is made the duty of the commissioners court to sell such bonds "to the highest and best bidder, for cash, either in whole or in parcels, at not less than their par value."

It will thus be seen that the commissioners court cannot sell the bonds for less than their par value and we think the court would be without authority to pay a commission to an agent who represented the district in the sale of the bonds. In other words, the funds derived from the sale of the bonds must be expended for the purposes specified in the statute.

Yours very truly,
W. P. DUMAS,
Assistant Attorney General.

OP. NO. 1844—BK. 50, P. 238.

PUBLIC SECURITIES—ROAD DISTRICT BONDS—COUNTIES—UNORGANIZED COUNTIES.

A road bond election can not be legally held within an unorganized county.

November 23, 1917.

Hon. Wm. W. Boddie, County Attorney, Odessa, Texas.

DEAR SIR: You have submitted to this Department the following question:

"Crane County is not organized and is attached to Ector County for judicial purposes. The proposed Fort Worth-El Paso Highway is to pass through about two miles of the northwestern part of Crane County and it is desired that Crane County shall bear its portion of the cost of the construction of such road. How can an unorganized county charge itself with bonds for road construction purposes?"

Replying thereto, I beg to state that after diligent search I have concluded that an unorganized county cannot vote bonds for road improvement purposes.

It is provided by Article 636, R. S., 1911, that road improvement bonds issued under Chapter 2, Title 18, shall take "the name of the county issuing the same."

Article 632, R. S., 1911, as amended by Chapter 203, Acts of 1917, contains the following provision:

"* * * Such bonds when so issued shall continue in the custody of and under the control of the commissioners court of the county in which they were issued and shall be by said court sold to the highest and best bidder. * * * Such funds shall be paid out by the county treasurer upon warrants drawn on such funds issued by the county clerk of the county, countersigned by the county judge, upon certified accounts approved by the commissioners court of the county, when such funds belong to the entire county. * * *"

Article 628, R. S., 1911, as amended by Chapter 203, Acts of 1917, provides in part as follows:

"Upon the petition of fifty or a majority of resident property taxpaying voters of *any county* or political subdivision or defined district of *any county* in this State, to the county commissioners court *of such county*, such court shall * * * order an election to be held in such county, political subdivision or defined district thereof, to determine whether or not the bonds of such county or political subdivision or defined district thereof shall be issued. * * *"

It is provided by Article 634, R. S., 1911, that before such bonds are put on the market it is the duty of the commissioners court "of the county in which such election was held" to levy a tax sufficient to pay the interest on and to provide a sinking fund sufficient to pay the bonds at maturity."

In the case of Aransas County vs. Coleman-Fulton Pasture Company, 191 S. W., 553, the Supreme Court used the following language:

"The former bounds of taxation for their construction and maintenance were set aside, and the political subdivisions named, in addition to all other debts, were, under legislative provision, given authority upon a requisite vote to issue bonds in the liberal amount of one-fourth of the assessed valuation of the real property of such districts. Not only was such authority given to counties and subdivisions of a county, but any number of adjoining counties were empowered to form themselves into a taxing district as a means of securing the improvement in the territory comprised by them. Different units for the necessary taxation, and therefore different units as the beneficiaries of the taxation, from those theretofore existing, were thus authorized. It was plainly designed that the extent of the improvement should not be limited alone to the necessities of a county, nor was it to be longer dependent alone upon the powers of a county. The purpose of the amendment was a broad one, its scope was large, its spirit liberal."

The above language construed only the constitutional amendment authorizing the issuance of road improvement bonds and it will be observed that the Court said that "the political subdivisions named * * * were *under legislative provision*, given authority upon a requisite vote to issue bonds."

Continuing, the Court said "the amendment to Section 52, Article 3, however, shows it was contemplated that *under legislative pro-*

vision read districts other than counties might be formed, which, as defined political subdivisions of the State, should in their own right exercise this power for the construction and maintenance of roads in their territory. This is revealed in the authorization for the formation of any number of adjoining counties into a district *under legislative provision.* Such a district, it was clearly intended, should constitute a corporate entity invested with an individual authority for this purpose, to be exercised with regard to the needs of the district as distinct from the needs of a county."

It will thus be seen that authority was given by the constitutional amendment to "any number of adjoining counties" to form themselves into a taxing district for the purpose of issuing bonds, but the same must be done *"under legislative provision."*

The articles of the statute above referred to, in my opinion, clearly contemplate that a political subdivision or defined district cannot take in territory embraced within two or more counties and that no authority exists in the statute for two or more counties to form themselves into a taxing district for the purpose of voting road improvement bonds; and, furthermore, the language used in Article 628, above to the effect that the petition for election must be submitted "to the county commissioners court of such county," clearly indicates that the county must be legally established and organized.

In the case of First National Bank vs. McElroy, 112 S. W. 803, it was held that until a county becomes legally organized for purposes of its own county government, it is not to be considered a subdivision of the State capable of performing legal and political functions. In this case the Court held, in substance, that to annex an unorganized county to an organized county for "all other purposes," besides judicial and surveying purposes, had the effect to confer and grant exclusive jurisdiction to the organized county generally and without particular enumeration. In other words, the Court took the view that where the unorganized county is attached for "all other purposes," its territory is thereby made practically a part of the organized county. This, however, would not authorize a county commissioners court to order a road bond election to cover territory outside the boundaries of the legally organized county.

Chapter 1, Title 18, R. S. 1911, deals with the issuance of **county** bonds for court house and jail purposes, constructing bridges, improving and maintaining roads, and establishing poor houses and poor farms; and Article 613 thereof provides that such bonds when issued "shall be based upon the taxable values of the county according to the last approved assessment"; and Article 615 thereof provides that such bonds shall be signed by the county judge, countersigned by the county clerk and registered by the county treasurer.

You are therefore advised that inasmuch as the Legislature has made no provision whereby an unorganized county can charge itself with bonds for road construction purposes, a road bond election cannot be legally held within such county.

Yours very truly,

W. P. DUMAS,
Assistant Attorney General.

OP. NO. 1845—BK. 50, P. 25.

PUBLIC SECURITIES—ROAD IMPROVEMENT DISTRICTS—MUNICIPAL BONDS—SPECIAL ROAD LAW.

1. Chapter 203, Acts of 1917, amending Articles 628 and 632, Revised Statutes, 1911, confers no authority on a county having a special road bond law to issue road district bonds under the general statute.
2. Revised Statutes, 1911, Article 641, authorizing "any county operaating under a special road tax law" to take advantage of the provisions of the Road District Act, does not apply to a county having a special road bond law.
3. The Road District Act of 1909, authorizing road districts to levy taxes and to issue bonds, was a legislative interpretation of former laws upon this subject and precludes the idea that such power theretofore existed in such districts.

December 5, 1917.

Hon. W. R. Castle, County Judge, Tyler, Texas.

DEAR SIR: In your communication of the 1st instant, in re bonds for road improvement district No. 6 of Smith County, you submit the following:

"Since submitting you this record on the 19th ult., I have kept in mind your objection to the approval of the bond record, based upon the fact that the record provides for serial bonds, maturing in series of five each year after date as provided by the Thirty-fifth Legislature, amending the general law, and that inasmuch as the special road law of Smith County does not provide for the issuance of serial bonds that the amendment would not apply to Smith County.

"Inasmuch as the special law of Smith County gives the commissioners court the power to make the bonds issued for road district purposes to mature optionally as provided in the order, I can see practically no difference to having them mature serially. In other words, if the court has the power to fix the date of maturity by option, it seems that it would have the power to fix the date of maturity without the option.

"Our special road law provides the same method for the issuance and sale of road district bonds as is provided by the general law under Article 627 to 641, inclusive, of Sayles' Civil Statutes. Article 641 seems to give counties operating under a special road law the advantage of those provisions of the general law."

Replying, beg to say:

(1) The special road law for Smith County was passed by the Thirty-third Legislature. (Chap. 70. Special Acts of 1913.) It provides for the issuance of road bonds for the county or any political subdivision or defined district thereof in an amount "not to exceed one-fourth of the assessed valuation of the real property," for the purpose of "constructing, maintaining and operating of macadamized, graveled or paved roads and turnpikes or in aid thereof;" and it also provides that such bonds "shall run *not less than twenty* nor more than forty years, with such option of redemption as may be fixed by the commissioners court." In other words, it provides for the issuance and sale of special road bonds in the same manner as was provided by Articles 628 and 632, R. S., 1911, prior to the 1917 amendment. The Special Act also provides that after such bond election has carried, the commissioners court shall appoint five road com-

missioners for the political subdivision or district voting the bonds, and prescribes their powers and duties, etc.

It was therefore the intention of the Legislature in passing the Special Road Law for Smith County that where road district bonds are to be issued by such county or any subdivision or district thereof, they must be issued in line with the provisions of said Special Act and not under the general law.

(2) The commissioners court attempted to issue the bonds for road district No. 6 under the general law, as amended by Chapter 203, General Acts of 1917, and attempted to make the same due and payable as follows: Bonds Nos. 1 to 5, inclusive, on April 10, 1919; 6 to 10, inclusive on April 10, 1920; 11 to 15, inclusive, on April 10, 1921, etc., but Section 16 of the Special Road Law for Smith County plainly provides that "such bonds shall run not less than twenty years from the date of the bonds." The Legislature, in placing this language in the Act, limited the *term* within which such bonds were to become due and payable and this limitation is in the nature of a restriction on the power to issue such bonds. As your Special Law makes it optional with the commissioners court in fixing the redemption of such bonds, they could therefore make any bonds issued thereunder *serial option* bonds; that is, with option of *redeeming* one, two or three bonds each year for the *first twenty years;* and the remainder in what is termed *maturity option* bonds, that is, one, two or three each year for the remaining ten or twenty years, provided, however, the voters authorize the issuance of such *maturity option* bonds.

(3) We do not think that Article 641, R. S., 1911, authorizing "any county operating under a special road tax law" to take advantage of any of the provisions of the general road district Act, applies to a county having a special road bond law. This Article was Section 9 of the Road District Act of 1909 and at that time probably no county special road law provided for the issuance of road bonds for the purpose of "constructing, maintaining or operating macadamized, graveled or paved roads and turnpikes or in aid thereof," and for that reason this Section was doubtless placed in the Act. In a former opinion this Department held:

"* * * the general road law enacted in 1909 authorizing subdivisions of counties to levy taxes and issue bonds was a legislative interpretation of former laws upon this subject and precludes the idea that such power before existed in such subdivisions. In fact, the emergency clause of said Act of 1909 contains the following provisions: 'The fact that there is no adequate law now on the statutes governing the issuance of bonds for road construction in political subdivisions * * * of the various counties of the State, constitutes an emergency,' etc." (1912-14 Attorney General's Report, 143.)

It is a well settled rule of statutory construction that a general law will not be held to repeal a particular and special law on the same subject.

26 Amer. & Eng. Ency. of Law, 743.
City of Laredo vs. Martin, 52 Texas, 548.
Ellis vs. Bates, 26 Texas, 703.

See also:
Brown vs. Chancellor, 61 Texas, 443.
Williams vs. State, 52 Texas Cr., 379, 107 S. W., 1126.
Ex Parte Neal, 47 Texas Cr., 442; 83 S. W., 831.
Ex Parte Kimbrell, 47 Texas Cr., 336; 83 S. W., 384.
Ex Parte Keith, 47 Texas Cr., 287; 83 S. W., 685.

We think the 1917 amendment to the Road District Act of 1909 confers no authority whatever on a county having a special road bond law to issue road district bonds under the general statute and we are therefore compelled to disapprove the bonds recently issued by road improvement district No. 6 of Smith County.

Very respectfully,
W. P. DUMAS,
Assistant Attorney General.

OP. NO. 1879—BK. 50, PP. 425, 435.

PUBLIC SECURITIES—MUNICIPAL BONDS—COUNTIES—ROAD DISTRICTS—CONSTITUTIONAL LAW.

1. Where a statute has but one general subject, dealing only with the matters related directly or indirectly to the main subject, which have a mutual connection and are necessary to the accomplishment of the purpose of the statute, it does not deal with two subjects in contravention of Section 35, Article 3, of the Constitution.
2. The Legislature, by Chapter 203, Acts of 1917, especially authorized counties to issue road improvement bonds for the purpose of purchasing roads already constructed by road districts and further constructing roads throughout the county; *held* the purchase of improvement district roads is incidental to and in aid of the general purpose.
3. Words and Phrases.—"Construction," "Maintenance," "Subject" and "Object" defined.
4. The specific authority given to counties by Chapter 203, Acts of 1917, to issue bonds for the purchase of and for the taking over of improved roads already constructed by road districts, added nothing to the powers that the counties already possessed.
5. To hold an Act of the Legislature to be unconstitutional is never a welcome duty and one that the Supreme Court has never performed, except with reluctance, and when upon mature consideration such is the conviction of the Court.

February 4, 1918.

To the Commissioners Court of Bell County, Belton, Texas.

In re Bell County Special Road Bonds:

GENTLEMEN: We are advised that Mr. Chas. B. Wood, of Chicago, the attorney for the bond company, has declined to approve the $694,000 road bonds for Bell County, because he regards the Act under which the bonds were issued, being Chapter 203, Acts 1917, as unconstitutional and void. We have been favored with a copy of Mr. Wood's opinion, which reads as follows:

"January 29, 1918.

"Messrs. Elston & Company, Chicago, Ill.,

"Gentlemen: I decline to approve $694,000 road bonds of Bell County, Texas, dated December 17, 1917, because I regard the act under which the

bonds are issued, being Chapter 203 of the Laws of 1917, as unconstitutional and void, for these reasons:

"1. Section 35 of Article 3 of the Constitution provides that no bill shall contain more than one subject. Now Chapter 203 very clearly includes at least two subjects: (a) An amendment to the existing road law of 1909 authorizing the issuance of bonds for road purposes; and (b) the issuance of bonds for the purpose of purchasing roads heretofore constructed in road districts. This is clearly two unrelated subjects.

"2. Chapter 203, in the new matter added, attempts to authorize the purchase of roads in road districts and to authorize the issuance of road bonds for further construction of county roads, and to levy a tax for both of those purposes, all on one ballot without enabling the voter to vote upon the questions separately. Now it is one question to be submitted to a voter whether or not an entire county should assume the debt of only a small part of the county, and it is certainly a distinct proposition whether or not additional money should be expended by the county for road purposes. And it is certainly another question, or rather two questions, whether additional taxes shall be levied for each of these purposes.

"3. I have not been furnished with the Journals of the Legislature showing the due passage of this act. Because of its complicated nature, I should strongly advise that examination be made as to the passage of an act of this character if it is proposed to pursue this negotiation further, or to arrange for a test case to try out the questions involved.

"Yours truly,

"(Signed) Chas. B. Wood."

To hold an Act of the Legislature to be unconstitutional is never a welcome duty and one that the Supreme Court has never performed, except with reluctance, and when upon mature consideration such is the conviction of the court. Waples vs. Marrast, 184 S. W., 180.

The constitutional provision, above cited, (Section 35, Article 3) is 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."

Construing this constitutional provision, it has been held that the provision of an Act entitled "An Act in relation to assignments for the benefit of creditors and to regulate the same and the proceedings thereunder," avoiding all such liens as would allow the debtor merchant to remain in possession of his stock and sell it in the usual course of trade, is germane to the subject matter of the Act. (Duncan vs. Taylor, 63 Texas, 647.)

In McMeans vs. Finley, 32 S. W., 524, it was held that the present constitutional provision prohibiting more than one subject, does not apply where *two matters* are incorporated in the Act which are germane to each other and parts of the same general subject-matter. In this case it was held that the then well-known Act of 1895 prohibiting "prize fighting and pugilism" and "fights between men and animals" was not violative of the section of the Constitution prohibiting any bill from containing more than one subject. Chief Justice Gaines, speaking from the Supreme Court, used the following language:

"It is admitted that the subject is expressed in the title, but the contention is that the act contains more than one subject. * * * Its object is to suppress contests for physical supremacy, whether between man and man, or man and beast, by prohibiting such contests, whether entered into for a prize or a wager, or as a public exhibition. The subject matter of the act is such physical contests, and it is but one subject, within the meaning and intent of the Constitution. The fact that 'a pugilistic encounter between man and man' and 'a fight between a man and a bull or any other animal,' are specified, makes the object of the law, nevertheless, one, in legal contemplation, and the subject matter single."

In the case of T. & P. Ry. Co. vs. Stoker, 113 S. W., 3, the Court of Civil Appeals of the Second District, certified the following question to the Supreme Court with reference to the constitutionality of the Stenographers Act of May 25, 1907:

"1. Whether or not the title of the Act of the Thirtieth Legislature of Texas, approved May 25, 1907, providing for the appointment of stenographers, etc. (General Laws, 1907, page 509, Chapter 24) contains more than one subject in contravention of Section 35, Article 3, of the Constitution?"

The caption of this Act reads as follows:

"An act providing for the appointment of official stenographers for district courts by the judges thereof to report cases; and providing for the method of making up and filing the statement of facts of all evidence introduced in the trial of causes; providing for the compensation of such stenographers; providing for the appointment of special stenographers in county courts, for their compensation, and for making and filing of statements of fact in civil causes tried in the county courts."

In answer to this certified question, Associate Justice Williams, speaking for the Supreme Court, used the following language:

"The different provisions of the statute, as stated in the title, may be considered properly as the regulation of one subject, which is the subject of the bill, viz., the preservation by the proper persons of the evidence taken in trials and of questions arising out of it, and the statement thereof in authentic form for the information of the appellate courts upon appeal. The provisions for the appointment and compensation of stenographers are incidental to and in aid of this general purpose, and we see no good reason why all of the provisions could not properly be included in one bill." (T. & P. Ry. Co. vs. Stoker, supra.)

The Workmen's Compensation Act was enacted at the Regular Session of the Thirty-third Legislature (Acts 1913, Chapter 179) and the caption thereto read as follows:

"An act relating to employers' liability and providing for the compensation of certain employes and their representatives and beneficiaries, for personal injuries sustained in the course of employment, and for deaths resulting from such injuries, and to provide and determine in what cases compensation shall be paid, and to make the payment thereof the more certain and prompt by the creation of an insurance association to insure and guarantee such payments and of an industrial accident board for the investigation of claims and for the adjudication thereof for consenting parties, fixing the membership and powers of said board and its compensation and duties, and the method of its appointment, and the terms of office of its members, and fixing also the powers, duties and liabities

(liabliities) of said insurance association and the extent of control over the same to be exercised by the Commissioner of Banking and Insurance; and providing also for the insurance of payments of compensation to employes by certain other insurance companies and organizations, and declaring an emergency."

It was held by the Court of Civil Appeals of the Seventh District, in the case of Memphis Cotton Oil Co. vs. Tolbert, 171 S. W., 309, that this Act has but one subject, in compliance with Section 35, Article 3 of the Constitution. Chief Justice Huff, speaking for the Court, said:

"We have concluded that the subject of the act is stated in the title, and that there is not more than one subject conained therein. The ends to be reached are more than one, but all relate to the employer's liability and the proceedings for the compensation of certain employes, etc. * * * We regard the following authorities as in point on the question as to what may be considered under the subject and as related to the subject and whether or not there is more than one subject named in the title. Railway Co. vs. Stoker, 102 Texas, 60. 113 S. W., 3; Nalle vs. City of Austin, 103 S. W., 825; Taggart vs. Hillman, 42 Texas Civ. App., 71, 93 S. W., 245; Railway Company vs. Smith, 54 Texas, 1; Stone vs. Brown, 54 Texas, 341; Focke vs. State (Cr. App.), 144 S. W., 267."

And the Supreme Court, in Middleton vs. Texas Power & Light Company, 185 S. W., 566, construing the same Act, held:

"The act contains but one general subject; its purpose is one general object; and its title sufficiently expresses it."

In an opinion construing the Permanent Ware House Bill, enacted at the Second Called Session of the Thirty-third Legislature, being Chapter 5 of the Acts of the Special Session, the Attorney General held that the provisions of the Act regulating cotton gins are germane to the general subject and are valid and binding provisions thereof; that 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. (1914-16 Opinions Attorney General, 678; see Fahey vs. State, 11 S. W., 109; Ex Parte Hernan, 77 S. W. 225; Mull vs. Indianapolis (Indiana) 81 N. E., 657; People vs. McBride, (Illinois) 84 N. E., 865.) This opinion was sustained by the Court of Criminal Appeals in Ex Parte White, 198 S. W., 583.

The Act that empowers counties and subdivision thereof to issue bonds for the purpose of "constructing, maintaining and operating" roads (passed in 1907 and amended in 1909 and 1917) derived its authority from the 1903 amendment to Section 52, Article 3, of the Constitution. Construing this amendment, Chief Justice Phillips, in Aransas County vs. Coleman-Fulton Pasture Company, 191, S. W., 553, said:

"By the amendment of 1903, authority is given by Section 52 of Article 3 of the Constitution to any county, any political subdivision of a county, any number of adjoining counties, etc., acting under legislative provision, upon a vote of a two-thirds majority of the duly qualified resident property taxpayers of the district or territory to be affected thereby, in addi-

tion to all other debts, to issue bonds in any amount not in excess of one-fourth of the assessed valuation of the real property of such district or territory, for, among other purposes, the following:

" 'The construction, maintenance and operation of macadamized, graveled or paved roads and turnpikes, or in aid thereof.' "

* * * * * * * * *

"The amendment of 1905 to Section 52 of Article 3, which includes the subdivision quoted at the beginning of this opinion, was adopted at a later time than any of the provisions * * * referred to. Upon the general subject of road improvement, it marked a radical departure from the previous policy of the State. It was the response to a public demand that provision be made whereby the State, and every section of the State, might be supplied through voluntary taxation with adequate, durable and permanent roadways. * * * The purpose of the amendment was a *broad one, its scope was large, its spirit liberal.*"

The part of the above quoted opinion underscored and emphasized by me is, I think, very persuasive of what our Supreme Court would hold should it become necessary for it to pass upon the constitutionality of the Road District Act of 1917.

We think the purpose set out in Section 52, Article 3, of the Constitution, and in the session laws, is broad enough to authorize the purchase of improved roads if such purchase is necessary in supplying the county with adequate, durable and permanent roadways.

In the case of Ostrander vs. Salmon, (Ida.) 177 Pac., 692, it was held that the word "construction" in a statute authorizing municipalities to issue bonds for the "construction" and maintenance of waterworks, does not limit the power given by an act empowering municipalities to acquire, by purchase or otherwise, waterworks or plants and illuminating plants, and to supply the municipality and the inhabitants thereof with water and light; and the very fact that a 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 either all, or a part of, a general system of waterworks, hence a municipality may issue bonds for the purpose of purchasing waterworks already constructed. In the case of Seymour vs. City of Tacoma, 32 Pac. 1077, the Supreme Court of the State of Washington, held, in effect, that the word "construct" includes the power to purchase when it relates to the construction of internal improvements.

It has been held that the terms "construction" and "establishment" are synonymous and interchangeable. See Larson vs. Webster, (Iowa) 130 N. W., 165. And in the case of Dick vs. Scarbrough, 53 S. E. 86, the Supreme Court of South Carolina, considering a statute of that state authorizing municipalities to issue 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 the 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., 772.

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, 91 S. W., 221; Smith vs. Grayson County, 44 S. W., 921.

In his letter disapproving this bond issue Mr. Wood states:

"Now Chapter 203 very clearly includes at least two subjects; (a) an amendment to the existing road law of 1909 authorizing the issuance of bonds for road purposes; and (b) the issuance of bonds for the purpose of purchasing roads heretofore constructed in road districts."

While it is true that Section 1 of Chapter 203 is an amendment to the Road District Act of 1909, yet its main purpose was to authorize counties and subdivisions thereof to issue *serial* bonds and to limit the period of time in which such bonds should run for not exceeding thirty years. In reference to such period of time this section contains the following:

"The bonds may mature * * * not to exceed thirty years from their date, *except as otherwise provided in Articles* 637a *and* 637b *hereof.*"

Section 2 of the Act contains Article 637-a and 637-b, and these two articles authorize a county to issue bonds for the purpose of purchasing improved district roads and the further construction of roads throughout such county. It will thus be seen that that part of the Act relative to the issuance of bonds for the purchasing of improved district roads and the further construction of roads throughout the county was, by the Legislature, referred to and considered in connection with the provisions of Section 1, which authorize a county or subdivision thereof to issue road bonds as an original proposition.

In reference to Mr. Wood's second objection, will state that the new matter added to Chapter 2, Title 18, R. S., 1911, by the Act of 1917, covers the one general subject, viz., county road improvement bonds. One tax levy only is necessary to provide interest on and sinking fund therefor. In School District No. 11 vs. Chapman, 152 Federal, 887, it was held that the power to issue bonds "for the purpose of purchasing a site for and erecting thereon a school house or schoolhouses and furnishing the same," authorizes an issue for the single purpose of erecting a schoolhouse. In this connection, attention is directed to Article 2857, R. S. 1911, authorizing the levy of taxes and issuance of bonds by independent school districts in this State: the purpose being "for the purchase of sites and the purchasing, construction, repairing or equipping public free school buildings within the limits of such incorporated districts." It has never been contended that this purpose covers two subjects, viz., the purchase of the site and the construction of the building, for the simple reason that the purchase of a site is necessary to the construction of a school building—the one is dependent upon the other.

As to the legislative history of this law, will say: This Act was Senate Bill 370; it was introduced by Senator McCollum, of McLennan County; was "read first time and referred to Committee on Roads,

Bridges and Ferries" (Senate Journal, 35th Leg., p. 469); on March 16, 1917, it was by said Committee reported back to the Senate "with recommendation that it do pass and be not printed" (Senate Journal, p. 1303); the Coommittee report that the bill be not printed was adopted and the bill was read a second time and passed to engrossment; on motion by Senator McCollum the constitutional rule requiring bills to be read on three several days was suspended and the bill put on its third reading and final passage (Senate Journal, p. 1324); the Committee on Engrossed Bills reported that it had been carefully compared and found correct (Senate Journal, p. 1342); on March 20th the House of Representatives informed the Senate that the bill had been passed by the House (Senate Journal, p. 1577); the President Pro Tem. of the Senate gave notice of signing and did sign the bill in the presence of the Senate after its caption had been read (Senate Journal, p. 1616); the Committee on Enrolled Bills reported that it had carefully examined and compared the bill and that it was correctly enrolled and had been presented to the Governor for his approval (Senate Journal, p. 1646).

The roads already constructed by various road districts in Bell County form a part of the General Road System for that county. The funds derived from the sale of the bonds issued by such districts originally were, by statute, required to be paid out by the county treasurer upon warrants issued by the county clerk, upon certified accounts of the district's road superintendent and approved by the county commissioners court. See Article 632, R. S., 1911. In order to extend the benefit of the constitutional amendment throughout a county having therein one or more bonded road districts and thereby completing and making more adequate and permanent the general road system for that county, the Legislature, by the Act of 1917, especially authorized such counties to issue road improvement bonds for the purpose of purchasing roads already constructed and *further* constructing roads throughout the county. The purchase of improved district roads is, we think, incidental to and in aid of the general purpose.

Applying the doctrine announced by the appellate courts of this State in construing Section 35, Article 3, of the Constitution, we conclude that Chapter 203, Acts of 1917, contains but one subject, viz., the general subject of road improvement, and the provisions of the Act authorizing the purchase of improved roads already constructed by road districts are germane to such general subject. * * *

Yours very truly,

W. P. DUMAS,
Assistant Attorney General.

February 4, 1918.

The Honorable Commissioners Court of Bell County, Belton, Texas.

GENTLEMEN: Referring to the adverse opinion of Judge Charles B. Wood on your Special Road Bond Issue of $694,000, I beg to submit the following as a supplement to the brief furnished you by my assistant, Mr. Dumas:

The objection of Judge Wood is not that the subject matter of legislation is not properly expressed in the title of the Act, but is, that the bill contains two unrelated subjects prohibited by the Constitution.

Judge Wood furnishes no brief or argument to sustain his naked statement, and from this manner of treating the subject I have concluded that he disposed of the same hastily and without mature consideration; in fact, this is almost proven by the circumstance that Judge Wood heretofore approved a Nolan County bond issue under this statute, and thus impliedly endorsed its validity.

Assuming, however, that the objection he now urges is well taken, his approval of the Nolan County bonds would not be on answer to his objection.

The objection raised to this statute, in my opinion, is not well taken and on this point my mind is perfectly clear.

In all prior legislation on this subject the authority of counties or political subdivisions or defined districts of a county to issue bonds for the purpose of constructing, maintaining or operating macadamized, graveled or paved roads and turnpikes, or in aid thereof, has been treated together as one subject matter in the same bill as germane and related.

In fact, the Constitution treats these different objects as a part of the general subject of *Road Improvement.*

Section 52 of Article 3 of the Constitution reads in part "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 * * * upon a vote of a two-thirds majority * * * may issue bonds * * * for the construction, maintenance and operation of macadamized, graveled or paved roads and turnpikes, or in aid thereof."

The objection of Judge Wood, therefore, cannot rest on the fact that counties, as well as political subdivisions and defined districts, are in the same Act authorized to issue road bonds, but he must rest his objection upon the fact that counties are permitted under the Act of 1917 to issue bonds for the *purchase of district roads already created.*

Is the grant of express authority to the counties to issue bonds, to purchase roads and turnpikes already constructed the introduction of a new and entirely unrelated subject?

Mr. Dumas in his brief has cited a number of authorities to the effect that a power given to issue bonds to "construct, maintain or establish" carries by implication the power to purchase the thing already established. For instance, the power to issue bonds to "construct" waterworks carries the implied power to purchase waterworks already constructed (117 Pac., 692). As related to the subject of internal improvements, the word "construct" includes the power to purchase (32 Pac., 1077). Authority to issue bonds "for the purpose of enlarging, extending or establishing waterworks" carries the power to purchase waterworks already constructed (53 S. E., 86).

As illustrating the trend of thought and liberality of construction indulged by our own courts on this road improvement subject, attention is called to the opinion of the Court in the case of Smith vs. Grayson County, 44 S. W. 922, in which the Supreme Court refused a writ of error.

Section 9, Article 8, of the Constitution, provides that "the Legislature may pass local laws for the maintenance of public roads and highways without the local notice required for local or special laws." It was urged in this case that the Constitution limits the purpose for which local laws may be enacted to the maintenance of roads already constructed and would not authorize the passage of a statute creating a road system. In disposing of this question the Court said:

"We do not think the word 'maintenance' as used in this section of the Constitution was intended to be used in this restricted sense. By the use of the words 'maintenance of public roads and highways' the framers of the Constitution had reference to maintaining a system of public roads and highways which would include all the necessary powers to provide and keep up a system of highways."

To the same effect is the decision in the case of Dallas County vs. Plowman, 91 S. W. 221.

It follows, therefore, that the specific authority given the counties by the Act of 1917 to issue bonds for the purchase of and for the taking over of improved roads already constructed by road districts added nothing to the power that the counties already possessed.

Under the grant of power to issue bonds to "construct, maintain and operate" roads there was included by implication the power to purchase roads already constructed and the statute in question was in that respect simply a declaration of the law as it already existed, and was in effect simply the regulation of the procedure as to the exercise of this power.

If prior to the Act of 1917 Bell County had issued these bonds under the authority given in Section 52 of Article 3 of the Constitution for "the construction, maintenance and operation of macadamized, graveled or paved roads and turnpikes, or in aid thereof," and if the commissioners court had found in the county roads already constructed just as they exist today, owned either by private or quasi public corporations, could it not, if all parties at interest agreed on the terms, have purchased these roads with the proceeds of the bonds?

If not, why not?

If this is true, and in my opinion the conclusion is inevitable, how can it be said that there are two unrelated subjects in the Bill. when in fact one is so inseparably related to the other that it exists by implication. Judge Wood falls into error as to the real purpose and meaning of the new matter added by the Act of 1917. He says in his letter:

"* * * Chapter 203 in the new matter added attempts to authorize the purchase of roads in road districts and to authorize the issuance of road bonds for further construction of county roads and to levy a tax for both of these purposes all on one ballot without enabling the voter to vote upon the question separately. Now it is one question to be submitted

to a voter whether or not an entire county should assume the debt of only a small part of the county, and it is certainly a distinct proposition whether or not additional money should be expended by the county for road purposes. And it is certainly another question, or, rather, two questions, whether additional taxes shall be levied for each of these purposes."

I respectfully suggest that it was never intended by the Legislature to submit but one purpose—that is to say, the issuance of bonds necessary to pay for roads already constructed, and such additional amount of bonds that might be considered necessary to "further construct" roads, to the end that these district roads purchased might be connected up, in the language of the Act and "merged into and (to) become a part of a general county system of public roads."

The Legislature intended this as one proposition to be submitted as such and adopted or rejected as an entirety. This is conclusively shown by the language prescribed for the ballot, which is "for" or "againt" "the issuance of bonds for the purchase of district roads and the further construction, maintenance and operation of macadamized, graveled or paved roads and turnpikes, and for the levy and collection of a tax to provide for interest and sinking fund for said bonds."

The courts everywhere say that an Act of the Legislature will not be declared unconstitutional until it appears to be so beyond a reasonable doubt.

Great liberality is indulged by the courts in passing on the question of a duality of subjects in a bill. The purpose of this provision (Section 35, Article 3), is tersely stated by our Supreme Court in the case of Breen vs. State, 44 Texas, 305, as follows:

"To prevent the bringing together into one bill subjects diverse in their nature and having no necessary connection with a view to combine in their favor the advocates of all, and thus secure the passage of several measures neither of which could succeed on its merits. The provision was also intended to remedy another practice by which through dexterous management clauses were inserted in bills of which the title gave no intimation, and thereby pass bills through the Legislature while many members were unaware of their real scope and effect."

While this provision of the Constitution has been held mandatory, still as a settled rule of construction in its application the most liberal construction has been given to make the whole law constitutional where the part objected to as infringing this provision could be considered appropriately connected with or subsidiary to the main object of the Act as expressed in the title (47 Texas 556; 82 Texas 502).

Where all the provisions of an act are subsidiary to and legitimately connected with and tend to effect and enforce its main object, which is sufficiently clear and definitely expressed in the title, though the subsidiary provision is not expressed, the law is not subject to the objection that two subjects are embraced in the title (82 Texas 377; 97 Texas 721).

The provision prohibiting more than one subject does not apply where two matters are incorporated in the Act which are germane to each other and parts of the same general subject matter (88 Texas 521). The Constitutions of 1845, 1861, 1866 and 1869 contained this provision:

"Every law enacted by the Legislature shall embrace but one *object*, and that shall be expressed in the title."

The language of the Constitution of 1876, under which we are now controlled, uses the language "*subject*" instead of "*object.*"

In commenting on this change our Court of Criminal Appeals in Fahey vs. State (27 Crim. App., 158, 11 S. W. 108), stated that in the preceding Constitutions the word "object" was used instead of the word "subject." It may be presumed, said the court, "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."

I beg to suggest that Judge Wood ought to be requested to reconsider this matter, because I believe on reconsideration and careful examination of the authorities he will come to the conclusion reached by this Department.

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

OP. NO. 1891—BK. 51, P. 36.

PUBLIC SECURITIES—WARRANTS—FUNDING AND REFUNDING BONDS.

1. The Attorney General is not required to pass upon the legality or the validity of warrants.
2. Authority to issue new bonds and to exchange them for outstanding bonds does not imply that an authority also exists to exchange such bonds for warrants or other evidences of the debt of the county.
3. Commissioners court would not be authorized to issue bonds to refund the current warrant indebtedness of the county.

March 1, 1918.

Hon. H. J. Passmore, County Judge, Goliad, Texas.

DEAR SIR: In your communication of the 27th ult., you submit the following:

"Would you approve a time warrant, or bond issued without a vote, to refund current warrant indebtedness, for about three thousand dollars, providing same was properly issued, and a part of the special road tax set aside to provide a fund for interest and sinking fund?"

Replying, I beg to say:

1. The Attorney General is not required to pass upon the legality or validity of warrants.

2. Chapter 1, Title 18, R. S., 1911, deals with the issuance of county and municipal bonds, and Article 608 thereof authorizes the issuance of "any bond issue for a sum less than two thousand dollars when issued for the purpose of repairing buildings or structures for the building of which bonds are allowed to be issued," without submitting the question to popular vote.

Chapter 3, Title 18, R. S., 1911, deals with the subject of funding, refunding and compromising the bonded debts of municipalities in this State, and Article 657 thereof provides:

"Where bonds have been legally issued or may be hereafter issued by any county for any of the purposes named in Article 610, new bonds bearing the same or a lower rate of interest may be issued in conformity with existing law, in lieu thereof."

Abbott in his work on Public Securities lays down the following rule:

"Where the right to refund applies to a particular debt or forms of indebtedness, obligations not of the class or form specified cannot be taken up and refunded."

The Supreme Court of Ohio, in the case of Muskingum County Commissioners vs. State, 85 N. E., 652, held that the county commissioners were authorized by Section 2834a, Revised Statutes of Ohio, 1906, to issue new bonds and to exchange them for outstanding bonds but that they were not authorized to exchange them for promissory notes or other evidences of the debt of the county. The section of the statute construed in that case provides in part as follows:

"Or when it shall appear to the trustees, board of education or commissioners of any township, school district or county to be for the best interests of such township, school district or county to renew, refund or extend the time of payment of any bonded indebtedness which shall not have matured and thereby reduce the rate of interest thereon, such trustees, board of education or commissioners shall have authority to issue for that purpose new bonds, and to exchange the same with the holder or holders of such outstanding bonds if such holder or holders shall consent to make such exchange and to such reduction of interest."

We think the commissioners court would not be authorized to issue bonds to refund the current warrant indebtedness of the county.

The statute prohibits the commissioners court from issuing any bonds, except those designated in Article 608, above, unless the proposition for their issuance has been first submitted to a vote of the qualified voters who are property taxpayers of the county, and unless a majority of said voters voting at the election be in favor of the proposition.

Yours very truly,
W. P. DUMAS,
Assistant Attorney General.

OP. NO. 1897—BK. 51, P. 73.

PUBLIC SECURITIES—CITIES AND TOWNS—SCHOOLS AND SCHOOL DISTRICTS—MUNICIPAL BONDS.

1. Cities and towns incorporated under the general laws are authorized by ordinance to levy and collect such ad valorem tax for the support and maintenance of public free schools and erection and equipment of school

buildings as the electors may determine.

2. The amendment to Article 925 R. S. 1911 (Ch. 14, 3rd Sess. Acts, 1917) also operates as an amendment to Article 882, and, as said Article 925 now authorizes such cities and towns to levy a tax in such amount as the electors may determine for the erection and equipment of school buildings, authority is therefore conferred on such municipalities to issue bonds for such purpose.

March 13, 1918.

Hon. L. R. Sloan, Mayor, Whitesboro, Texas.

DEAR SIR: In your communication of the 12th instant, addressed to the Attorney General, you request to be advised whether your city can issue school building bonds to the amount of $30,000—the taxable values being about $1,250,000, and outstanding bonds aggregating $18,000.

Replying, I beg to say:

Chapter 14, General Laws of the Third Called Session of the Thirty-fifth Legislature, amended Article 925, R. S., 1911. This Article, as amended, provides, in part, as follows:

"The city or town council * * * of any city or town in this State incorporated under the general laws * * * may levy and collect twenty-five cents on the one hundred dollars' valuation * * * for current expenses and may levy and collect an additional twenty-five cents on the one hundred dollars' valuation for the purpose of the erection and equipment or the purchase of public buildings, waterworks, sewers and other permanent improvements, *except building sites and buildings for the public free schools within the limits of such city or town* * * * and shall have power, by ordinance, to annually levy and collect such ad valorem tax for the support and maintenance of public free schools and for the *erection and equipment* of public free school buildings in the city or town, where such city or town is a separate and independent school district, as the electors of any such district may determine under the provisions of Chapter 169, Acts of the Thirty-fifth Legislature. Within the meaning of this article shall be included all such separate and independent school districts that the management and control of the public free schools therein has been assumed or may hereafter be assumed by a city or town under the provisions of Chapter 17, Title 48, Revised Civil Statutes of Texas, 1911, and amendments thereto. * * *"

Article 925 prior to this amendment, authorized a city incorporated under the general law to levy and collect only 25c on the $100 valuation for the construction of public buildings, which included buildings for school purposes, and Article 882, R. S., 1911, authorized such cities and towns to issue bonds for the purpose of providing the public improvements contemplated by said Article 925. The Article last mentioned authorized such cities and towns—

"* * * to issue coupon bonds * * * to bear interest not exceeding 6 per cent per annum; 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. * * *"

Both Articles 802 and 925 were passed at the Second Called Session of the Thirty-first Legislature and were embraced in one Act, namely, Chapter 23, of said session acts. This Act amended Article

486, R. S., 1895, but the 1911 codifiers saw fit to "cut it in twain" and set it out in the Revised Statutes as Articles 882 and 925. However, in construing a revision of the statutes the assumption is, that the codifiers and the Legislature did not intend to change the laws as they formerly stood.

Braun vs. State, 49 S. W., 620.
Phipps vs. State, 36 S. W., 783.
Berry vs. State, 156 S. W., 635.
American and English Ency. of Law, Vol. 26, p. 717.
Sutherland on Statutory Construction, p. 180.

We are therefore of the opinion that the amendment to Article 925, R. S., 1911, also operates as an amendment to Article 882 and that as the statute now authorizes cities and towns incorporated under the general law to levy a tax in such amount as the electors may determine for the purpose of erecting and equipping school buildings, authority is also conferred upon such city or town to issue bonds for that purpose. See Chapter 1, Title 18, R. S., 1911, dealing with the general provisions and regulations as to the issuance of bonds by cities and towns incorporated under the General Law.

A careful examination of said Chapter 14, Acts of the Third Called Session of 1917, and Chapter 169, Acts of the Regular Session of 1917, will show that the Legislature has authorized a school tax for any amount adopted by the qualified voters of a city or town that has assumed control of its schools; and such tax, when voted, can be used for the support and maintenance of the city public schools and for the erection and equipment of school buildings.

Under Chapter 1, Title 18, no bonds can issue, unless the proposition therefor has been submitted to the people.

From all of the above, it will be seen that your city can issue the school house bonds in the amount desired, provided, of course, the proposition has been regularly submitted to the qualified voters and is adopted.

Yours very truly,
W. P. DUMAS,
Assistant Attorney General.

OP. NO. 1896—BK. 51, P. 76.

PUBLIC SECURITIES—INTEREST AND SINKING FUND—TRANSFER OF FUNDS—CITY DEPOSITORY.

1. City would not be authorized to transfer the interest paid by city depository on the bond interest and sinking fund account to any other fund or account.
2. Interest accruing on money deposited in city depository for the purpose of paying interest and sinking fund on bonds becomes a part of such fund, and to transfer such interest would be to transfer a portion of the interest and sinking fund in violation of law.

March 20, 1918.

Hon. A. L. Davis, Mayor, San Marcos, Texas.

DEAR SIR: I have your letter of the 19th instant, in which you state that the city of San Marcos has several bond issues outstanding, and, as required by statute, a tax is levied each year sufficient to pay the required interest and sinking fund; that there is usually a considerable sum of money on hand belonging to the interest and sinking fund account, which sum draws interest from the city depository at the contract rate; that this interest has been accumulaing for several years and the result is, that the city now has a surplus in the interest and sinking fund over and above what is necessary to take care of the interest on the respective bond issues and create the legally required sinking fund for the discharge of the bonds at maturity, and you request this Department to advise whether it would be legal for the city to take the interest paid by the city depository on the interest and sinking fund account and utilize said interest for general purposes, rather than to allow it to accumulate to the credit of the interest and sinking fund account.

Replying, I beg to say that after carefully re-considering this question, I am still of the same opinion as verbally expressed to you when in the office the other day; that is, the city would not be authorized to transfer the interest from "the interest and sinking fund account" to the general fund, as this accrued interest becomes a part of the interest and sinking fund account and to transfer it to another fund would be to transfer a part of such account and would therefore be illegal.

Article 2459, R. S. 1911, provides in part as follows:

"No warrant shall be drawn by the mayor and secretary upon any of the special funds created for the purpose of paying the bonded indebtedness of said city, in the hands of the city treasurer, or in the depository, for any purpose whatsoever other than to pay the principal or interest of said indebtedness, or for the purpose of investing said special fund according to law. * * *"

The funds of a city while in its depository should be regarded as in the hands of an agent of the law and should be held to be disbursible by it only in the way designated by law. See Capps vs. Citizens National Bank of Longview, 134 S. W. 808, and authorities therein cited.

In the case of Echelby vs. Board of Education, 63 N. E., 586, the Supreme Court 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 deposit, is required to account to the school district for such interest. The Court said:

"* * * 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."

Very respectfully,
W. P. DUMAS,
Assistant Attorney General.

OP. NO. 1928—BK. 51, P. 260.

PUBLIC SECURITIES—LEVEE IMPROVEMENT DISTRICTS—COUNTIES—TAXATION—MUNICIPAL AND PUBLIC CORPORATIONS.

1. Property owned by a county can be included in a levee improvement district. Sections 1 and 7 of House Bill 28, Acts Fourth Called Session Thirty-fifth Legislature.

2. A levee improvement district cannot effect a lien on county property to secure the payment of bonds issued by such district, as such property would not be subject to taxation by the levee improvement district.

3. The law confers no authority upon the commissioners court to levy a tax for the purpose of bearing the county's pro rata share of the expense of building a levee by a levee improvement district. Section 9, Article 8, Constitution of Texas, and Article 2242, R. S. 1911.

4. When a levee improvement district has been created by the proper authority, it becomes a governmental agency and a body politic and corporate.

Words and Phrases, "General County Purposes," "Other Permanent Improvements."

May 10, 1918.

Hon. H. E. Traylor, County Judge, Corsicana, Texas.

DEAR SIR: In your communication of the 30th ult., addressed to the Attorney General, you state:

"We have in this county a county farm located within territory which is desired to be included within a levee district. Of course it is contemplated to issue bonds to pay for the work of building the levee, and as the bonds will have to be approved by your department it is desired to lay the matter before you prior to taking steps in the matter.

"1. Can a levee district be created to include property owned by a county?

"2. If the district can be created, is it permissible to effect a lien on county property to secure the payment of bonds?

"3. Property belonging to a county not being taxable, what arrangements can be made by a county to take care of its pro rata share of the expense of building a levee?"

Replying, I beg to say:

I assume that the district in question is to be created under the provisions of House Bill No. 28 passed at the recent called session of the Thirty-fifth Legislature.

I will endeavor to answer your questions in their order:

(1) Property owned by a county can be included in a levee improvement district. Section 1 of House Bill No. 28 reads as follows:

"There may be created within this State conservation and reclamation districts, to be known as levee improvement districts, for the purpose of constructing and maintaining levees and other improvements on, along and contiguous to rivers, creeks and streams, for the purpose of reclaiming lands from overflow from such streams, and for the proper drainage and other improvement of such lands, all as contemplated by Section 59, Article 16, of the Constitution of this State, which said districts shall have and may exercise all the rights, powers and privileges given by this act, and in accordance with its directions, limitations and provisions."

Section 7 of said Act contains the following provisions:

"If, upon the hearing of such petition, it be found * * * that the proposed improvements are desirable, feasible and practicable, and would be a public utility and a public benefit, and would be conducive to public health, then such court shall so find and render judgment reciting such findings and creating and establishing such district, * * * which order shall define the boundaries of such district. * * *"

(2) We think your second question should be answered in the negative. Section 39 of said Act provides that when bonds have been issued by a levee improvement district, taxes are to be levied upon all real property and railroads within the district based upon and proportioned, (as to each piece of property) to the net benefits which it shall have been found will accrue to such property from the completion of the plan of reclamation, and said taxes shall be sufficient in amount to pay interest on and provide sufficient sinking fund for such bonds and they shall be annually levied during the life of such bonds. Section 43 of said Act provides that—

"Taxes levied under this act shall be a lien upon the property against which they are assessed, and shall be payable and shall mature and become delinquent as may be provided by law for State and county taxes, and upon failure to pay such taxes when due the same penalty shall accrue and be collected as may be provided by law in case of non-payment of State and county taxes."

But Article 7507, Subdivision 5. R. S., 1911, exempts the following property from taxation:

"All lands, houses and other buildings belonging to any county, precinct or town used exclusively for the support or accommodation of the poor."

It would not be legal, therefore, to effect a lien on such county property, as the same would not be subject to taxation by the levee improvement district.

In answer to your third question, will state that the statute confers no authority upon the Commissioners Court to levy a tax for the purpose of bearing the county's pro rata share of the expense of building by a levee by a levee improvement district. Section 9, Article 8, of the Constitution, empowers a county to levy the following taxes:

(a) Twenty-five cents for general county purposes;

(b) Fifteen cents to pay jurors;

(c) Twenty-five cents for the erection of public buildings, streets, sewers, waterworks and other permanent improvements;

(d) Fifteen cents for roads and bridges;

(e) Fifteen cents special road tax, upon a vote of the people.

See also Art. 2242, R. S., 1911.

A levee improvement district is a distinct unit or entity with power to exercise the functions of its creation. Section 7 of said Act declares that when a levee improvement district has been created by the proper authority, it becomes a governmental agency and "a body politic and corporate."

In Simmons vs. Lightfoot, 146 S. W. 871, Judge Dibrell, speaking for the Supreme Court, used the following language:

"An independent school district may embrace a city or town with the same boundaries, but for purposes different from the city or town, and with different administrative officers. Thus formed, it may, by a vote of the people, levy and collect a tax for maintenance or other purposes, and as a separate and distinct unit move in the same orbit with the city or town. The county government, with its extended limits, embraces the city government with its more contracted bounds; and the two entities, distinct and separate, move, one within the other, without impairment to either."

A tax for the county's pro rata part of the expenses of the construction of a levee by a levee improvement district would not be a tax for "general county purposes" nor do we think the term "other permanent improvements" would apply to improvements made by a municipality or public corporation other than the county.

Yours very truly,
W. P. DUMAS,
Assistant Attorney General.

PUBLIC SECURITIES—ROAD DISTRICTS—MUNICIPAL BONDS—ASSUMPTION OF ROAD DISTRICT BONDS BY COUNTY.

1. Reference to Chapter 1, Title 18, Revised Statutes, 1911, in Chapter 203, Acts of 1917, is a clerical error.
2. When the bonded debt of a road district has been finally paid off and discharged, such road district is automatically abolished.
3. The assumption by the county of the bonded debt of a road district relieves such district of the debt and consequently it no longer exists as a body corporate for the purpose for which it was created.
4. If the county issues bonds to take over the bonded debts of road districts therein, there is nothing in the law to prevent the establishment of other road districts out of portions of the territory formerly comprising the old districts.
5. A county can issue bonds for an amount necessary only to take up the outstanding debts of road districts, or it can issue bonds for the purpose of taking up the debts of such districts and for the further purpose of constructing roads throughout the county.

June 26, 1918.

Hon. Jos. B. Dart, County Attorney, Boerne, Texas.

DEAR SIR: The Attorney General is in receipt of your letter of the 18th instant, in which you request the opinion of this Department on the following:

(1) Chapter 203, Acts 1917, provides that a county may hold an election for the purpose of assuming the bonded debts of road districts "under the provisions of Chapter 1, Ttitle 18, or Chapter 2, Title 18, Revised Civil Statutes of this State, 1911, Compilation," but Chapter 1 authorizes the issuance of bonds by a majority vote, while Chapter 2, Title 18, requires a two-thirds majority vote.

In reference to the above, you ask the following questions:

Could an election be called under the provisions of Chapter 1 for the purpose of taking up the road construction bonds issued by Kendall Conty Road Districts 1 and 3, requiring only a simple majority, And if carried, would the provisions of Article 613 be construed to require that all of the old indebtedness of the county be added to the

new indebtedness to exceed the 5 per cent maximum or does said Article mean that the new indebtedness shall not exceed the 5 per cent maximum?

(2) If the election for the purpose of taking over road district bonds is carried and such district bonds are canceled as required by Article 637b, Chapter 203, Acts 1917, are the road districts automatically abolished or do they still exist for the purpose of further bond issues? And can other road districts be formed out of parts of the old districts and bonds issued in accordance with Chapter 2, Title 18?

(3) Is it necessary that the issues of county bonds for the purpose of taking over the road district bonds be in excess of the road district debts or can the county bonds be voted for an amount necessary only to take up the outstanding debts of the road districts.

Replying, I beg to say:

(1) The reference to Chapter 1, Title 18, R. S. 1911, in the Act of 1917, should be treated as a clerical error, for the Legislature could not have intended a county to do an impossible thing, namely: Assuming county obligations authorized to be incurred under different statutes and different constitutional provisions. Section 2 of the Act of 1917 was passed for one purpose only, namely: To authorize a county to take over or assume the bonded debts of road districts. The only authority for the issuance of road district bonds is that set out in Chapter 2, Title 18, R. S. 1911, or a special county road law wherein provision is made for the issuance of road construction bonds, and such bonds can only be issued after the proposition therefor has received a two-thirds majority of the qualified property taxpaying voters of the county or district voting at the election held for that purpose. The intent of the Legislature is made clear and certain by reference to Article 637-b, in which it is provided that the proposition to issue county bonds to take over road district bonds "shall receive the necessary favorable vote," and which necessary favorable vote is two-thirds majority.

Chapter 1, Title 18, R. S. 1911, authorizes the issuance of bonds for the purpose of improving and maintaining roads and bridges and the maximum tax therefor is 15c on the $100 valuation of taxable property within the county. No district or political subdivision can issue bonds for any purpose under Chapter 1, Title 18.

It will thus be seen that the proposition for the issuance of bonds by a county to take over the bonded debts of road districts must receive a two-thirds majority of the vote cast at the election held for that purpose.

The Constitution (Section 52, Article 3) and Chapter 2, Title 18, R. S. 1911, authorize a county or defined district therein to issue road construction bonds "in addition to all other debts," but the aggregate amount of bonds issued by such county or district cannot exceed one-fourth of the real property values within such county or district.

(2) When the bonded debt of a road district has been finally paid off and discharged, such road district is automatically abolished. The assumption by the county of the bonded debt of a road district relieves such district of the debt and consequently it no longer exists

as a body corporate for the purpose for which it was created. Paragraph 1, of Article 637-b, contains the following provisions:

"No tax shall ever be levied or collected therefor under the original election in such district or districts and the sinking funds then on hand to the credit of any such district or districts shall be passed to the sinking fund account of the county."

If a county issues bonds to take over the bonded debts of the road districts therein, there is nothing in the law to prevent the formation or establishment of other road districts out of portions of the old districts, because, as above stated, the assumption of the bonded debts of the old districts automatically abolishes them. However, the territory comprising such new district cannot issue road construction bonds in excess of 25 per cent of its real property values—and such territory's pro rata part of the county road debt, assumed by virtue of the Act of 1917, must be taken into consideration.

(3) The Act of 1917 (Art. 637-a) authorized a county to issue bonds "for the purpose of purchasing or taking over the improved roads already constructed" in the road districts thereof "*and* of further constructing, maintaining and operating macadamized, graveled or paved roads and turnpikes throughout such county." This Act does not, in my opinion, require the county to issue bonds in excess of the amount necessary to take over or assume road district debts, for we believe that if this statute should be construed by the courts, they would hold the word "and" as synonymous with "or."

"The popular use of 'or' and 'and' is so loose and so frequently inaccurate that it has infected statutory enactments. While they are not treated as interchangeable, and should be followed when their accurate reading does not render the sense dubious, their strict meaning is more readily departed from than that of other words, and one read in place of the other in deference to the meaning of the context." (Sutherland on Statutory Construction, Sec. 252; Witherspoon vs. Jernigen, 76 S. W., 445-557.)

In construing statutes, it is the duty of a court to ascertain the clear intent of the Legislature. In order to do this, the courts are often compelled to construe "or" as meaning "and" and again "and" as meaning "or." See United States vs. Fisk, 70 U. S. (3 Wall.) 445-447).

In North Springs Water Company vs. Tacoma, 47 L. R. A. 214, it was held:

"It is a well settled rule of statutory construction that all words and phrases used in a statute shall be understood and construed according to the approved and common usage of the language, and that some meaning shall be given to every word used. * * * It is equally, however, a well settled rule of construction that, if no sensible meaning can be given to a word or phrase, or if it would defeat, manifestly, the real object of the enactment, it should be eliminated; also, that, for the same reason, words may be rejected as surplusage; also, to carry out the intention of the Legislature, another word may be read for the word 'used,' where the word 'used' would manifestly defeat the legislative intent, and the substitution of the other would carry it out. These may be said to be exceptions to the general rule as above announced, but the exceptions, as

will be seen by an examination of the authorities, are almost, if not quite, in the passage of the Levee District Act of 1918 the Legislature preserved a method whereby taxes in such districts be "equitably distributed." Section 19, 21, 24 and 40.

To hold that a county would be required to issue bonds in excess of the amount necessary to take over or assume the bonded debts of road districts for the further construction of roads, would manifestly defeat the real object of the law, namely, the assumption by the county of the bonded debts of road districts.

We think, therefore, a county can issue bonds for an amount necessary only to take up the outstanding indebtedness of the road districts, or, if deemed expedient, it can issue bonds for the purpose of assuming such district debts and for the further purpose of constructing roads throughout the county.

Very respectfully,
W. P. DUMAS,
Assistant Attorney General.

OPINIONS AS TO SCHOOLS AND SCHOOL DISTRICTS.

OP. NO. 1666—BK. 48, P. 227.

SCHOOLS—COUNTY SUPERINTENDENTS—EXPENSES.

A county judge who is also ex officio county superintendent is entitled to one hundred dollars per annum for stamps, stationery, etc.
Revised Statutes 1911, Article 2758.

October 5, 1916.

Hon. W. F. Doughty, State Superintendent, Capitol.

DEAR SIR: In your favor of October 4th, addressed to the Attorney General you enclose a communication from Sam O'Bryant wherein he desires to be advised whether or not he as ex officio county superintendent is entitled to expense money in the sum of one hundred dollars per year for stamps, stationery, expressage and printing to be paid by the commissioners court out of the county's general funds as is provided by Article 2758, R. S. 1911.

You refer Judge O'Bryant's letter to this Department, and request an opinion thereon.

Replying to your inquiry, we beg to advise that in our opinion the county judge as ex officio county superintendent is entitled to this allowance to be paid from the general funds of the county. We base our conclusion in this matter upon the varius statutes applicable to county superintendents and county judges acting as ex officio county superintendent, and upon the fact that although a county judge in those counties not having a county superintendent elected is nevertheless by statute made an ex officio superintendent and clothed with the authority of a superintendent elected, as is provided by law.

Article 2763, Revised Statutes, is in the following language:

"In each county in this State having no school superintendent, the county judge shall be ex officio county superintendent of public instruction, and shall perform all the duties required of the county superintendent in this chapter."

In addition to the bond as county judge required by Article 1732 in a sum of not less than $1,000 nor more than $5,000 to be determined by the commissioners court, the county judge as ex officio county superintendent shall execute a bond in the sum of $1,000, as is provided by Article 2764.

It is true that the allowance of $100.00 per year for stamps, stationary, etc., was placed in Section 40 of Chapter 124 Acts 1905 by an amendment to such section to be found in Chapter 111 of the Acts of 1907, and that Section 40 of the Act of 1905 is under the heading "County Superintendent" in the latter act, which subdivision is dealing with county superintendents elected as therein provided. Immediately following the subdivision relating to county superintendents in the act of 1905 is the subdivision relating to ex officio

county superintendents, the first section of this subdivision being Section 42 of the Act, which is now Article 2763 of the Revised Statutes above quoted. We do not believe the fact that the provision for $100.00 allowance was placed by amendment in a section embodied in the subdivision relating to county superintendents elected would limit such an allowance to the latter officer only and deprive the ex officio superintendent of same. The same duties are required of an ex officio superintendent that are required of a superintendent elected, and the purpose of this appropriation is to enable the officer whether he be elected or exercises the functions by reason of being county judge, to efficiently discharge the duties imposed upon him by the law.

We therefore advise that a county judge and ex officio county superintendent is entitled to an allowance of $100.00 per annum for stamps, stationery, etc., the same as the county superintendent elected under the statutes.

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

OP. NO. 1673—BK 48, P. 266.

SCHOOLS—BUILDING PERMITS—POWER OF SCHOOL SUPERINTENDENT IN ISSUING PERMITS.

It is necessary for a city council in a city having assumed control of its schools to obtain a building permit from the superintendent of public schools in such town for the erection of a school building, the cost of which shall not exceed four hundred dollars.

The authority of the school superintendent in the issuance of building permits is limited by the act authorizing the same and he has no authority to make requirements other than those prescribed in the act.

Chapter 120, Acts Thirty-third Legislature.

Articles 925, 2874, Revised Statutes 1911.

October 27, 1916.

Hon. W. F. Doughty, State Superintendent, Capitol.

DEAR SIR: The Attorney General is in receipt of your letter in which you propound to this Department for an opinion thereon, two questions as follows:

1. Is the city superintendent of schools required by law to issue a permit for the erection of a school building when the school building is erected and paid for out of the proceeds of bonds of a municipality rather than the bonds of the independent school district in which the school house is built?

2. Is the city superintendent of schools authorized to consider other items than those specifically named in the School House Building Law when issuing permits for the erection of school houses under his jurisdiction. In this connection I desire respectfully to call your attention to pages 116 to 118, inclusive, of the Public School Laws of Texas as found in Bulletin 48 of this department.

Answering your two questions in the order propounded, we beg to say that in cities and towns having assumed control of their schools

the authority is vested in the city council to order bond elections and levy the taxes necessary to create a sinking fund and pay the interest on such bond for the purpose of erecting a school building.

Article 2874 of the Revised Statutes of 1911 dealing with this subject is in the following language:

"Towns or cities which have assumed, or may hereafter assume control and management of the public free schools within their limits may also provide for building sites and buildings for such public free schools and institutions of learning, in the manner and under the restrictions and limitations provided in Article 925, Revised Statutes, relating to cities and towns."

By Article 925 referred to in this statute city councils are authorized to levy a tax not to exceed twenty-five cents on the one hundred dollars valuation for the purpose, among other things, of the construction or purchase of public buildings and other improvements and it is provided in this article that within the meaning thereof shall be included building sites and buildings for the public free schools and institutions of learnng within these cities and towns which have assumed or may assume hereafter the exclusive control and management of the public free schools and institutions of learning within their limits. It therefore appears that the bonds issued for the purpose of erecting school buildings in cities and towns having assumed control of their schools are the bonds of the city and not of the school district and upon the sale of such bonds the proceeds thereof are the property of the city and not of the district, although Article 2872 of the Revised Statutes of 1911 vests the exclusive control and management of school property in the board of trustees and also vests in such board the title to all houses, lands and other property owned, held, set apart or in any way dedicated to the use and benefit of the public free schools of such city or town.

The control of the proceeds of bond issues authorized for the erection of school buildings has been before the courts of this State so far as our investigation developes in but a single instance, to wit: the case of Hamilton vs. Bowers, 146 S. W., 629. In this case the court in discussing the control of such proceeds refers to the case of Peck-Snead Company vs. City of Sherman reported in 26 Texas Civ. App., 208, and said:

"So far as we have been able to ascertain, this question has not been directly decided by any of our higher courts. In the case of Peck-Snead Co. vs. City of Sherman et al., 26 Texas Civ. App. 208, 63 S. W. 340, the plaintiff sued the city of Sherman and the board of school trustees of that city upon a contract for furnishing a heating system for a school building, which was being constructed in said city. The contract was alleged to have been executed by the board of school trustees; and it is further alleged 'that said board had in its possession, and was entitled to receive from the city and from the State, at the time the contract was made, ample funds available for such purposes, to wit, about $20,000, with which to pay plaintiff the sum mentioned in the contract, as well as to otherwise complete said (school) building.' The trial court sustained general demurrers interposed by the defendants and dismissed the suit.

"In affirming the judgment of the court below, the Court of Civil Appeals for the Fifth District say: 'It is contended by the plaintiff in error that the board of trustees had authority under the statute to contract for

the construction of school buildings. Article 4010, Revised Statutes, confers on such boards the same powers, control, management and government of and over the public free schools within its jurisdiction as may be by law conferred on the city council. Article 4022 gives to the city council authority to construct school buildings. Hence it is argued that the school board had the power to contract for such buildings. Article 4034, Revised Statutes, authorizes the city to provide free school buildings in the manner and under the restrictions and limitations prescribed in Article 486, where it is provided that the city council may levy taxes and issue bonds for the purpose of constructing or purchasing public buildings, including building sites and buildings for public free schools. A free school building so purchased or constructed is a public building of the municipality and one of its public improvements. Dwyer vs. Hackworth, 57 Texas, 245. Before any contract made by a city for any public improvements, not intended to be paid out of its current revenues, is binding on the city, provisions must be made to meet the obligations of the contract. McNeal vs. City of Waco, 89 Texas, 83; 33 S. W., 322. It is clear that the school board had no authority to create or raise a fund to be used in constructing a school building. It is certain that the board could not legally appropriate all the funds coming into its possession to such purposes. The board could use the funds under its control only for the purposes directed by the council or permitted by law. If the city had legally provided a fund for the purpose of constructing the building in question, and had placed the funds at the disposal of the board, then the power of the board to make the contract set out in the petition might be conceded; but no such facts are alleged. * * * We conclude that, as it is not shown that the board was authorized by the city to construct the building or to use any of the funds received or receivable from the city for that purpose, or that it had authority to appropriate any of the State funds to that end, the board was without legal power to enter into the contract relied on by plaintiffs in error.'

"While the point was not directly before the court, this opinion seems to hold that the city is not required to place at the disposal of the school trustees funds which it has provided for the construction of school buildings."

In this case the court in denying the right of the trustees to contract for the expenditure of the proceeds of the bonds, holds in effect that while a city council may deliver such proceeds to the school trustees to be expended, it is not its duty so to do.

It therefore appears that primarily the authority is vested in the city council to contract for and supervise the erection of school buildings, but that in event the council may so desire it may deliver the proceeds of bond issues for school building purposes to the board of trustees of such city or town whereupon such board would have the authority to contract for and supervise the construction of such building.

In the case presented by you, however, it appears that the construction of the school building was under the direction and supervision of the city council, and it is under this state of facts you desire an opinion as to whether or not it would be the duty of the city council to procure from the city superintendent a permit for the erection of such building.

Section 13 of Chapter 120 of the acts of the Thirty-third Legislature, is as follows:

"That no public school building shall be constructed in the State of Texas at an expense of more than four hundred dollars, until the board of school trustees of the district or city or town in which the work is to be done shall have first secured a school building permit from the officer

legally authorized to grant such permit, certifying that the plans and specifications of said proposed building conform to the hygienic, sanitary and protective regulations established by this Act for public school buildings in Texas. The petition for said permit shall be made in writing, and shall set forth such details of the plans and specifications as are necessary to pass upon the legality of the lighting, hearing (heating), ventilation, sanitation and fire protection in such proposed building. For buildings in a common school district the county superintendent of public instruction of the county in which the school is to be located, and for buildings of an independent school district, or in a city or town that has assumed control of its schools, the superintendent of public schools in that district or city or town is hereby authorized, empowered and required to examine all plans for all proposed public school buildings, costing over four hundred dollars, and to grant permits only for such buildings, as conforms to the requirements of this Act, and to make a report to the State Department of Education of all such permits granted, transmitting all evidence."

It will be observed that in the above act it is not provided that the city council shall procure a building permit from the city superintendent. However, the intent and purpose of this law is expressed in the opening sentence of such section; that is, that no public school building shall be constructed at an expense of more than four hundred dollars without a permit being granted. We think the purpose of the Legislature was to require all public school buildings to be erected under a permit from a superintendent and that it was not the purpose of the Legislature to limit the requirement of the permit only to those buildings being erected under the supervision and direction of boards of trustees. In other words, we are of the opinion that the act contemplates all public school buildings erected within this State whether under the supervision of school trustees or of the city council, and that the expression "no public school building shall be constructed" controls the expression in the act to the effect that the school trustees shall obtain a permit.

Answering your second question, we beg to advise that a school superintendent in granting a permit is limited to those requirements set forth in the act and that he has no authority to go beyond the act and make requirements as to the plans and specifications and erection of the building that to him may seem proper.

The power of a public officer must be derived from the statute, and any act of his in excess of the authority so granted or at variance with or beyond the scope of his powers is void. Houston Tap Railway vs. Randolph, 24 Texas, 332; Jones vs. Muisback, 26 Texas, 237; Bayha vs. Carter, 26 S. W. 137.

We therefore answer your second question, and say that a school superintendent has no authority to make other requirements in the erection of a school building than those prescribed in the act regulating the erection of public school buildings.

Yours truly,

C. W. TAYLOR,
Assistant Attorney General.

OP. NO. 1674—BK. 48, P. 272.

SCHOOLS—EMINENT DOMAIN.

The power of eminent domain can not be exercised except upon legislative authority granted in expressed terms.

The Legislature of this State not having granted the power of eminent domain to boards of school trustees such boards do not possess the power. Constitution, Article 1, Section 17.

November 2, 1916.

Hon. T. B. Greenwood, County Attorney, Wichita Falls, Texas.
Attention Hon. John Davenport, Assistant County Attorney.

DEAR SIR: The Attorney General is in receipt of your letter of October 31st, reading as follows:

"I have been requested by the trustees of one of the school districts of this county to advise them as to whether or not they have the right, under the laws of this State to condemn land and take it for school grounds. This school has one acre of ground upon which the building is now located and they wish to buy two adjoining acres and the parties who own this land want $100 per acre for it when it is not worth more than possibly $25 per acre.

"I have been informed that your department has ruled that land can be condemned for such purposes but I have been unable to find any law to permit this proceeding. The law does provide that the Governor can have land condemned for State institutions."

From the above provision of the Constitution flows the Legislative right to exercise the power of eminent domain in the manner therein provided, and for that body to delegate such power to such boards or individuals as in its discretion it may determine.

The manner of exercising this power is defined in 10 American and English Encyclopaedia of Law, Second Edition, 1052, as follows:

"The exercise of the power of eminent domain is a matter entirely under the control of the Legislature. No restrictions are placed upon this body with respect to its duties in this regard, except such as are found in the Constitution. The power can be exercised in no case unless the initiative force proceeds from the Legislature. The necessity, the occasion, time, and manner of its exercise, are wholly legislative questions."

The delegation of this power by the Legislature to agents is treated in this work, as follows:

"While the Legislature may exercise the power of eminent domain directly, it usually delegates it to agents. This may be done by special act of the Legislature in granting a charter to the agent; or, since the personality of the agent is of little importance, general laws may be enacted granting the exercise of the power to all who fulfill the conditions and meet the requirements of the act. Where there have been passed both a general act and a special charter, if they are consistent and the special charter was granted before the enactment of the general law, the company may condemn land in the manner prescribed in the charter."

In the case of International Bridge & Tram Railway Company vs. McLane, 28 S. W. 454, the Court of Civil Appeals in discussing the exercise of the power of eminent domain said:

"The power of eminent domain as an incident of sovereignty is vested in the Legislature, and can only be exercised by virtue of legislative enactment; and the exercise of the power, being against common right, can not be implied or inferred, but must be given in express terms or by necessary implication. 'If the act is silent on the subject, and the powers given by it can be exercised without resort to condemnation, it is presumed that the Legislature intended that the necessary property should be acquired by contract.' 'Thus, the authority to construct and maintain * * * bridges does not carry with it the right to condemn property.' Mills, Em. Dom. Section 48; Lewis Em. Dom. Sections 237-240. In this State our Legislature has not extended to incorporated bridge companies the right to exercise the power of eminent domain (Revised Statutes, Article 642); and, as we have seen, the power is not given by necessary implication. Hence, as before intimated, the judgment of condemnation is absolutely void, and could not, even if the damages had been properly assessed, notwithstanding defendant in error's satisfaction with it, be recognized by an affirmance."

It thus appears that until the Legislature has granted this authority in expressed terms, no board, corporation or individual may exercise the power. The Legislature of this State has not conferred such power upon boards of school trustees, and therefore same does not exist.

School property being for a public use, it is well established by the authorities of the various courts of the Union that the Legislature may confer upon such boards power to appropriate property for the use of schools under the right of eminent domain conferred by the Constitution.

Mills on Eminent Domain, Section 17.
Williams vs. School District No. 6, 33 Vt., 271.
Board of Education vs. Hackmann, 48 Mo., 243.
Long vs. Fuller, 68 Pa. St., 170.

We therefore advise that in the opinion of this Department boards of school trustees cannot exercise the power of eminent domain.

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

OP. NO. 1677—BK. 48, P. 322.

COUNTY BOARD OF SCHOOL TRUSTEES.

1. Their powers to expend money out of the school funds of the county and of school district.
2. Their powers in the creation of common school districts and common county line school districts.
3. Have no authority to expend any portion of the county school funds or the funds of common school districts for necessary surveys in the creation of school districts.
4. The commissioners court should authorize the payment of expenses for necessary surveys made in the creation of common school districts out of the general fund of the county.

5. In the creation of common county line school districts the commissioners court of each county should authorize the payment of the expenses for necessary surveys of its portion of the territory of the district out of the general fund of the county.

November 21, 1916.

Hon. T. H. Postell, Center, Texas.

DEAR SIR: In a letter to this Department you state that the county boards of education of Shelby and San Augustine Counties a few months ago created a common county line school district; that it became necessary, when an election to determine whether or not bonds might be issued was determined upon, to have the whole district surveyed and platted; that a request was made of the commissioners court of Shelby County to have this done, or to pay the proportionate part of the expense of such survey incurred on account of the work done in Shelby County. Your letter proceeds as follows:

"In this particular case the survey has been made; the court has not ordered it made and only one district in the county is interested in having it made, but the county is asked to pay for said survey from the county funds.

"(1) Does the law require the commissioners court to pay for surveys ordered by the county board of education?

"(2) Does the county, or does each county, pay for its proportional part of said survey, or does the county having the school under control pay for the whole of the survey made for the county line district?"

Replying thereto, we call you attention to the following provisions of Section 58, Chapter 100, of the Acts of the Regular Session of the Thirty-second Legislature:

"In creating a common county line school district the *commissioners court* of each county having territory in the school district sought to be created, *before such district shall be created, shall each pass an order describing the territory* desired to be created into such school district by *metes and bounds*, giving the acres and direction with the *exact length* of each line contained in such description *and locating each corner* called for upon the ground, and shall also give the acres of each survey and parts of survey of land contained in such district, together with a *map* showing conditions upon the ground as described in the field notes, giving the number of acres of land contained in each county; also showing the *exact position and location of the county line* in the territory created into a common county line school district."

Clearly, under the provisions of the statute quoted, in the creation of common county line school districts, when the authority to do this was vested in commissioners courts, it was the duty of such courts to provide an exact and accurate description of the territory to be included in the district, together with a correct and accurate map of the same. Stricter language could hardly have been used. If in the creation of such a district an exact and accurate description of the territory, together with an accurate map of the same was not in possession of the courts, it was their duty to use the necessary means to secure such an accurate description and map. If correct surveys had not theretofore been made of the territory and correct maps prepared, then it was the duty of such courts before attempting

to create a county line district to have such surveys made and maps prepared.

It remains then to determine whether this duty rested on the commissioners courts at the time the district in question was created. In your letter you merely state that this district was created some months ago. If this district was created prior to June 19, 1915, then the statute above quoted is the only statute that applies. If it was created after June 19, 1915, then Chapter 36 of the General Laws of the Regular Session of the Thirty-fourth Legislature had gone into effect and the provisions of that Act must be considered.

Section 4 of said Act contains the following provision:

"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."

It is the opinion of this Department that it was the intention of the Legislature by the use of the language just above quoted to take from the commissioners court the power and authority of creating common school districts, common county line school districts and changing the boundaries thereof, which had theretofore been vested in them and to vest the power and authority in such matters in the county board of school trustees.

That it was the intention of the Legislature to entirely divest the commissioners court of all such power, is shown by the provisions of Section 4a of said Act. This section is as follows:

"The district court shall have general supervisory control of the actions of the county board of school trustees in creating, changing and modifying school districts."

Since June 19, 1915, therefore, the duty of creating common county line school districts rests upon the county school boards of the counties having territory in the district. The districts, however, must be created in the manner provided for in Section 58 of Chapter 100 of the Acts of the Regular Session of the Thirty-second Legislature, a portion of which section has been quoted heretofore in this letter. In fact, the duties of the county boards of trustees would clearly appear by a reading of said section if the words "county board of trustees" were substituted for the words "commissioners court." Each board must pass an order describing the territory by metes and bounds, giving the exact length of each line and locating each corner called for, giving the number of acres contained in each survey and furnish an accurate map showing these things and also the exact position and location of the county line. It would be almost impossible to do this without having actual surveys made. We think, therefore, said boards could have the necessary surveys made.

To determine whether said boards could legally expend any of the school funds of the counties for such purpose, it will be necessary to consider those portions of the statutes relating to the expenditure of the school funds of counties and school districts and relating to

the powers of such boards to contract for the payment of surveys made out of such funds.

Section 7 of said Chapter 36 provides that the board of county school trustees "shall constitute a body corporate * * * may acquire and hold real and personal property, sue and be sued, and may receive bequests and donations or other moneys or funds coming legally into their hands, and may perform other acts for the promotion of education in the county."

Section 9 of said Act is as follows:

"Upon receiving notice from the State Superintendent of Public Instruction of the amount of State available school funds apportioned to the county, exclusive of all independent districts having each more than one hundred and fifty scholastics, it shall be the duty of the county school trustees, acting with the county superintendent, to apportion all available State and county funds to the school districts as prescribed by law."

No other power in reference to school funds is expressly conferred by statutes upon the county board of school trustees. We think these statutes would not authorize an expenditure by the county board out of the school funds of the county or of the districts of the county for surveys, especially in view of the restrictions placed by other statutes upon the expenditure of school funds.

Article 2772 of the Revised Statutes, which is a part of an Act passed in 1905, states what use can be made of the school funds of a county. This Article is as follows:

"The public school funds hereafter shall not be expended except for the following purposes:

"(1) The State and county available school funds shall be used exclusively for the payment of teachers' and superintendents' salaries and fees for taking scholastic census.

"(2) Local school funds from district taxes, tuition fees of pupils not entitled to free tuition, and other local sources, may be used for the purposes enumerated for State and county funds and for purchasing appliances and supplies, for the payment of insurance premium, janitors and other employes, for buying school sites, buying, building and repairing and renting school houses, and for other purposes necessary in the conduct of the public schools, *to be determined by the board of trustees*, the accounts and vouchers for county districts and communities to be approved by the county superintendent; provided, that, when the State available school fund in any city or district is sufficient to maintain the schools thereof in any year for at least eight months and leave a surplus, such surplus may be expended for the purposes mentioned herein."

In addition to the above statute we call attention to the following provision contained in Section 50-c of Chapter 100 of the printed General Laws of the Regular Session of the Thirty-second Legislature, which relates to common county line school districts:

"The funds of such school district (meaning county line school district) shall be used as is provided by law for the use of the different kinds of school funds."

It will be noted that the purposes for which the available school funds can be used are definitely and specifically stated in subdivi-

sion 1 of Article 2772 and that no portion of the available school fund could be used to pay for the survey of a school district.

It will also be noted that certain purposes for which the local school funds can be used are specified in subdivision 2 of said Article and then the following clause is added:

"And for other purposes necessary in the conduct of the public schools, *to be determined by the Board of Trustees.*"

Expenditures for the purpose of the survey of a district would not be authorized by any of the language of said sub-section 2, unless by that contained in the clause just quoted. It is clear to us that the words "the board of trustees" mean the board of trustees of the district and not the county board of school trustees, both because of the connection in which the words are used and because of the fact that said Article is a portion of an Act passed in 1905 and at that time the office of county school trustee had not been created. We think therefore that the clause "for other purposes necessary in the conduct of the public schools to be determined by the board of trustees" refers to the expenditure of moneys for the purposes of schools in districts which have already been created and not to the expenditure of moneys in the creation of new districts.

In this instance the surveys were made and descriptions of the territory were furnished to the county board before the district was created and before it had any trustees or funds.

We are, therefore, of the opinion that the County Board of School Trustees are without authority to expend any portion of the county school fund or of the funds of any school district of the county for the purpose of making surveys.

The duty of subdividing the county into convenient school districts, however, is imposed upon them. This carries with it the power necessary to perform the duty. A county school trustee is a county officer. The duties imposed upon him are county duties. The subdivision of a county into school districts to provide proper educatonal advantages to school children of the county, is a county affair. Expenses incurred for necessary surveys in making the subdivisions should be paid out of the general fund of the county. In the creation of a common county line school district the commissioners court of each county should authorize the payment out of the general fund of all expenses incurred in a necessary survey of the territory of the district situated in said county.

Very truly yours,

J. C. WALL,
Assistant Attorney General.

OP. NO. 1682—BK. 48, P. 351.

CITY SCHOOLS—TAXATION—ADDED TERRITORY.

A city which has assumed control and management of its schools, may add territory thereto for school purposes only; and such territory, when added, becomes subject to taxation to the extent of 50 cents for main-

tenance of schools, when levied as authorized by the statute (by vote); and also liable for its pro rata tax for school building bonds.

December 6, 1916.

Hon. W. F. Doughty, State Superintendent, Capitol.

DEAR SIR: The Department acknowledges receipt of your letter of the 3rd instant, which reads in part as follows:

"Article 7, Section 3, of the Constitution of the State of Texas, fixes the limit of taxation for school purposes in various districts of this State. The language of the Constitution as just cited, reads as follows:

" 'Provided, that a majority of the qualified property tax-paying voters of a district voting at an election to be held for that purpose, shall vote such tax not to exceed in any one year 50 cents on the hundred dollars valuation of the property subject to taxation in such district, but the limitation upon the amount of school district taxes, therein authorized, shall not apply to incorporated cities or towns constituting special and independent school districts.'

"Article 11, Section 10, of the Constitution, reads as follows:

" 'The Legislature may constitute any city or town a special and independent school district and when the citizens of any city or town have a charter, authorizing the city authorities to levy and collect a tax for the support and maintenance of a public institute of learning, such tax may be levied and collected, if at an election held for that purpose, two-thirds of the taxpayers of such city or town shall vote for such tax.'

"Article 2883, Revised Statutes, 1911, authorizes cities which have assumed control of the public free schools within their limits to extend the corporate lines for school purposes only. This article contains, among other things, the following provisions:

" 'The added territory shall bear its pro rata part according to taxable values of any school debt or debts that may be owed or contracted by said city or town to which it shall have been added and shall not bear any part of any other debt that may be owed or contracted by said city or town. The property of the added territory shall bear its pro rata part of all school taxes *but of no other tax.*'

"In view of the foregoing provisions of the Constitution and the statutes as affecting the question of taxation in the school districts, particularly in incorporated cities and towns that have assumed control of the public free schools, I desire to ask the following questions:

"First: If the corporate limits of a city that has assumed control of its schools be extended, in accordance with Article 2883, Revised Statutes, 1911, what will be the limit of taxation for school purposes in that portion of the district outside of the city limits?

"Second: If the limit of taxation for school purposes in such districts be in excess of 50 cents on the hundred dollars valuation, may such excess be voted as a school tax or must it be voted as a municipal tax?

"Third: In the event such districts are permitted, in your opinion, to levy and collect a tax in excess of 50 cents on the added territory whether such tax be levied and collected as a school tax or whether it be levied and collected as a municipal tax, may it be used for the purpose of maintaining the schools of a district or may it be used only as a bond tax?

"Fourth: If the limit of taxation in territory that may be added to cities and towns that have assumed control of their schools be in excess of 50 cents, may all cities and towns that have assumed control of their schools either under the general statutes or by special act of Legislature, levy and collect the excess above 50 cents either as a school tax or as a municipal tax?"

Replying to your first question, beg to call your attention, in addition to the Constitution and statutes quoted by you, to R. S. Article 2876, which reads:

"If, at an election held for that purpose at which none but property taxpayers, as shown by the last assessment rolls, who are qualified voters of such city or town, shall vote, two-thirds of those voting shall vote in favor thereof, such an amount shall be raised by taxation not to exceed one-half of one per cent, in addition to the pro rata of the available school fund received from the State, as may be necessary to conduct the schools for ten months in the year."

The statute last above quoted affects only cities which have by an election held for that purpose assumed control and management of their schools, and the limitation upon the amount of taxes authorized to be levied under said Article (50) is conclusive; but such limitation, we think, only applies to a maintenance tax for the maintenance of the schools.

Article 2883 R. S. 1911, authorizes cities which have assumed control of the schools to extend the corporate lines for school purposes only, and further provides that, "the added territory shall bear its pro rata part, according to taxable values, of any school debt or debts that may be owed or contracted by said city or town to which it shall have been added," etc.

The language "may be owed or contracted" should, we think, be construed to mean any debts which may be owed or *may be contracted*, giving a future tense meaning to the words. If the words "debts that may be owned or contracted" mean debts owed or contracted prior to the time of the extension of the corporate boundary lines, then the added territory could not be held for any part of such debt, or for taxes previously voted, since, if given such a construction the statute would be unconstitutional.

Cummings vs. Gaston, 109 S. W., 476.
City of Eagle Lake vs. Lakeside Sugar Refining Co., 144 S. W., 709.
City of Eagle Lake vs. Lakeside Rice Mills Co., 144 S. W., 712.
Crabb vs. Celeste Independent School District, 146 S. W., 528.

Where a statute is susceptible of two constructions, one in accordance with, and the other in violation of, the Constitution, it is presumed that the Legislature intended to use the language in the sense consistent with the Constitution.

G. B. & C. N. G. Ry. Co. vs Gross, 47 Texas, 428.
Mitchell County vs. City National Bank, 91 Texas, 374.

It must then be held that the Legislature intended the use of the words "debts that may be owed or contracted" as applicable to debts owed or contracted after the extension of the corporate line.

Under Article 2884, Revised Civil Statutes, 1911, towns and cities which have assumed control and management of the public free schools within their limits may provide for building sites and buildings for such schools in the manner, etc., provided in Article 925, which article authorizes the issuance of bonds for building sites and buildings for public free schools. It is the clear intent of the statutes, we think, that such control and management of the schools, after extension of the corporate lines for school purposes only, would extend over and cover the added territory. Otherwise the annexation

of the added territory would be of no effect; and hence we conclude that all questions on the assumption of debt for school building purposes should be submitted to the voters of the city, and including those within the added territory.

Therefore, we answer your first question to the effect that the territory added to a city for school purposes only is subject to the payment of the 50c tax when authorized to be levied and collected in the manner provided by the statute, and that such added territory is also subject to any tax levied for the purpose of paying interest and accumulating sinking funds for school building bonds voted subsequent to the annexation of such territory. In each instance it can be legally liable for the tax or indebtedness only after an election has been held in the city, including the added territory, such tax for school building purposes, together with other permanent improvement purposes, not to exceed the constitutional limitation of twenty-five cents on the $100.

Our answer to your first question is also an answer to your second and third questions.

Replying to your fourth question, beg to advise that none of the provisions of the Constitution or statutes herein quoted or referred to apply to a city which is chartered by a special Act of the Legislature or which has voted its charter and in which charter the control and management of the schools is vested in the city, the amount of tax for school purposes being governed alone by the provisions of the charter itself. The citizens in the adoption of a special charter may make any apportionment of the constitutional $2.50 on the $100 authorized to be levied.

Yours very truly,

W. M. HARRIS,
Assistant Attorney General.

OP. NO. 1685—BK. 48, P. 367.

PUBLIC SCHOOLS—COMPULSORY EDUCATION.

The sixty, eighty or one hundred day periods, as the case may be, that children of certain ages are required to attend the public schools in this State, begin upon the day fixed by law for the beginning of schools, or upon such date as may be fixed by the district school trustees and run for sixty, eighty or a hundred consecutive days.

The parent or guardian of a child has no authority to select certain days within the term aggregating the compulsory educational period.

Chapter 49, Acts of the Regular Session of the Thirty-fourth Legislature.

December 15, 1916.

Hon. Granville Jones, County Attorney, Gainesville, Texas.

DEAR SIR: The Attorney General has your letter of December 11th, reading as follows:

"Section 71a relating to compulsory school attendance, provides that every child under fourteen years of age shall attend school for a period of sixty days during the current year.

"Section 71b provides that unless otherwise authorized by district school trustees, such period shall begin at first day of school term.

"Hon. W. F. Doughty has ruled that this means that the child shall attend for sixty consecutive days; from my reading of the law, I take it to mean the same thing, and I have so advised the county superintendent, but he tells me that he is having trouble with some parties getting children to attend; that they want to construe the law to mean child shall attend any sixty days during term.

"We desire a holding from you, as a ruling from the Attorney General's Department would be accepted as a true construction of the law, and I wish you would advise me what you think of this proposition."

The exact language of the legislative act referred to by you is found in Section 1 of Chapter 49, Acts of the Regular Session of the Thirty-four Legislature, and is as follows:

"Every child in this State who is eight years and not more than fourteen years old shall be required to attend the public schools in the district of its residence, or in some other district to which it may be transferred, as provided by law, for a period of not less than sixty days for the scholastic year, beginning September 1, 1916, and for a period of not less than eighty days for the scholastic year beginning September 1, 1917, and for the scholastic year 1918-19, and each scholastic year thereafter a minimum attendance of 100 days shall be required. The period of compulsory school attendance at each school shall begin at the opening of the school term unless otherwise authorized by the district school trustees and notice given by the trustees prior to the beginning of such school term; provided, that no child shall be required to attend school for a longer period than the maximum term of the public school district where such child resides."

The proper construction of statutes of this character is that the number of days designated shall be consecutive from the date of beginning, as, for instance, an Act of the United States Congress limiting the sessions of territorial legislatures to sixty days' duration means sixty days consecutive days from the beginning of the session. Cheyney vs. Smith, 23 Pacific 680.

However to arrive at the legislative intent in this matter it is needless to go beyond the Act itself. Section 4 of the Act provides that any child not exempted from the provisions of this Act may be excused for *temporary* absence due to personal sickness etc. Had it been the intention of the Legislature that the parent or guardian of the child might select any sixty days of the term it would have been useless to provide that temporary absence might be excused.

Again it is provided in Section 5 that no child under fourteen years of age not lawfully excused from attendance upon school shall be employed by anyone during the school hours in any occupation *during the period* which the child is required to be in school as provided by this Act. This clearly indicates that it was the purpose of the Legislature to provide a period of sixty successive days. Also we find in Section 8 of the Act that the superintendents and principals of the various schools of the county shall, within five days from the date that the provisions of the Compusory Attendance Act applies to said school, report to said county superintendent the names of all children subject to the provisions of this Act, who have not enrolled in said school, etc. This expression indicates a purpose on the part of the

Legislature to require the acts therein indicated to be performed within five days from the date of the beginning of the school or within five days from the date fixed by the school trustees for the beginning of the compulsory attendance period.

The first portion of Section 9 of the Act is in the following language:

"If any parent or person standing in parental relation to a child within the compulsory school attendance ages who is not properly excused from attendance upon school for some one or more of the exemptions provided in Section 2 of this act fails to require such child to attend school regularly for such period as is required in Section 1 hereof, it shall be the duty of the attendance officer who has jurisdiction in the territory where said parent or person standing in parental relation resides *to warn such parent or person standing in parental relation, etc.*, * * *"

In said Section 9 we also find the following language:

"Each day that said child remains out of school after said warning has been given or after said child has been ordered in school by the juvenile court, may constitute a separate offense."

If the parent, guardian, or person standing in parental relation to the child, would have the option to select the days aggregating the required number, then it would be useless to require such person to execute the excuses in writing demanded by the Act, for the reason that no such excuse would be necessary and no accounting would have to be made for the absence of the child until and after the expiration of the school term, at which time it should be ascertained that the child, or children, had not attended the school for the required number of days.

In our opinion, the language of the entire Act, construed as a whole, is susceptible of no other construction than that the Legislature intended the sixty, eighty and one hundred-day periods, respectively, to be consecutive scholastic days, and that such periods shall begin either upon the date of the beginning of school or on such day as may be fixed by the school trustees.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

OP. NO. 1750—BK. 49, P. 207.

SCHOOLS AND SCHOOL DISTRICTS—TAXATION.

A district incorporated for school purposes only has authority to levy a tax upon a vote not to exceed fifty cents on the $100 valuation of property in the district.

An act of the Legislature authorizing a district incorporated for school purposes only to collect a tax in excess of fifty cents would be unconstitutional and void.

Chapter 169, Acts of the Thirty-fifth Legislature, authorizes the collection of a tax in excess of fifty cents for school purposes in an incorporated town having control of its schools.

Such chapter does not increase the bond limit for school purposes. In towns having assumed control of their schools, school buildings are erected from bond issues provided for in Articles 882 and 925 and under a tax not to exceed twenty-five cents on the $100 valuation for public buildings and other permanent improvements.

Constitution, Section 3, Article 7.

Articles 882 and 925, and Articles 2877, 2878, 2879 and 2880, as amended by Chapter 169, Acts of the Thirty-fifth Legislature.

April 30, 1917.

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

DEAR SIR: The Attorney General is in receipt of your letter of April 26, as follows:

"I am informed that Senate Bill 470, which was enacted by the Thirty-fifth Legislature, regular session, and signed by the Governor, provides that incorporated cities and towns acting as independent school districts may vote local school taxes in excess of fifty cents on the one hundred dollars' valuation of property. I am not clear relative to the scope of this new law, and as many questions are being asked this Department with reference thereto, I submit the entire law for your consideration. I desire, in particular, answers to the following questions:

"1. Under said new law, may an independent school district incorporated for school purposes only under the general statutes of the State, or by special act of the Legislature, vote a local school tax in excess of fifty cents on the one hundred dollars' valuation of property?

"2. In case question number one is answered in the affirmative, is the former limit of twenty-five cents on the one hundred dollars' valuation of property for taxation for bond purposes in independent school districts also removed?

"3. Does the new law referred to raise the limit for taxation for school purposes above fifty cents on the one hundred dollars' valuation of property in cities and towns which have taken over the exclusive control of their schools?

"4. In case question number three is answered in the affirmative, is the bond tax limit raised for such school districts?

"As many school districts are now making provisions for school taxes for another year, your usual promptness in answering these inquiries will be appreciated."

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

First. Under authority granted by Section 3, Article 7 of the Constitution, the Legislature of this State is authorized to provide for the formation of school districts by general or special law. This section of the Constitution also provides that the Legislature may authorize an additional ad valorem tax to be levied and collected within all school districts heretofore formed or hereafter formed for the future maintenance of public free schools and the erection and equipment of school buildings therein, provided that a majority of the qualified property tax paying voters of the district voting at an election to be held for that purpose shall vote such a tax not to exceed in any one year fifty cents on the $100.00 valuation of property subject to taxation in such district.

It is provided in this section, however, that the limitation upon the amount of school tax herein authorized shall not apply to incorporated cities or towns constituting separate and independent school districts. It is upon the above provisions of the Constitution that there is predicated all acts of the Legislature creating independent school districts and authorizing the levying of a tax therein by the consent of the qualified voters of such district. Therefore, if the act in question relates at all to districts incorporated for school purposes only it must come within the above provision of the Constitution, in order that the same may be valid. The Act of the Thirty-fifth Legislature referred to is embodied in the printed laws of the Regular Session of the Thirty-fifth Legislature, as Chapter 169, beginning at page 380. This Act is an amendment to and re-numbering of Articles 2877, 2878, 2879 and 2880, of Chapter 17, Title 46, of the Revised Civil Statutes of the State. The effect of the Act of the Legislature under discussion is to repeal Article 2876, Revised Civil Statutes of 1911, and insert in lieu thereof, as No. 2876, an amendment to Article 2877. Article 2877, as originally enacted, provided that upon a two-thirds vote of the qualified, property tax paying voters a city or town having assumed control of its schools could levy and collect not exceeding one-half of one per cent ad valorem taxes for the support and maintenance of the public free schools in the city or town. By the amendment to this Article it is provided that upon a majority vote of the qualified, property taxpaying voters of such city or town, the city council or board of aldermen or city commission of such city, town or village, shall have power, by ordinance, to annually levy, and collect such ad valorem taxes for the support and maintenance of public free schools and for the erection and equipment of public free school buildings in the city or town. It is provided by this Article that the proposition submitted to be voted upon may be for such a rate of ad valorem tax not exceeding such per cent as may be voted by a majority vote of all votes cast at any such election.

By Article 2877, as amended by this Act, it is provided that it shall be the duty of the city council or board of aldermen to annually thereafter levy such additional tax as may be necessary for the support and maintenance of the public schools and for the erection and equipment of public school buildings for nine months in the year, not to exceed the rate of tax voted.

Article 2878, as amended, contains substantially the same language with reference to the duty of the city council or board of aldermen with reference to the assessment and levy of the tax.

It appears from the above, such amendment being to those articles of the statute relating solely to incorporated cities and towns having assumed control of their schools, that it was not the intention on the part of the Legislature that this Act should extend to and the privileges therein granted be exercised by districts incorporated for school purposes only, but that it should relate only to towns having assumed control of their schools and we therefore answer your first question in the negative, by saying that independent school districts incorporated for school purposes only can not levy a tax in excess of fifty cents on the $100.00 valuation of property. Neither does this Act of

the Legislature attempt to confer such authority. If such had been attempted it would have been violative of the above quoted Section 3, Article 7 of the Constitution, and therefore void.

Second. The negative answer to your first question precludes the necessity for an answer to your second.

Third. Replying to your third question we beg to say that under the last clause of Section 3 of Article 7 of the Constitution the limitation of fifty cents on the $100.00 valuation of property that may be levied for school purposes upon a vote of the people does not apply to incorporated cities or towns constituting separate and independent school districts, and therefore in those cities and towns having assumed control of their schools and thereby become independent districts a tax in excess of fifty cents on the $100.00 may be levied upon a vote.

In the case of Snyder vs. Baird Independent School District, 102 Texas, 4, the Supreme Court of this State had under consideration the validity of a tax levied in the Baird independent school distict, created by a special act of the Legislature. In this case the court said:

"It is claimed on the part of the appellee in this case that the independent school district in question is an incorporated town or city and therefore that it is not subject to the limitations prescribed in Section 3 of Article 7 above quoted, and this is the only question that is now before this court. The Attorney General asserts that the Legislature has the power to incorporate as much territory into a city as it chooses, whether it be intended for city purposes or not. We are not prepared to agree to this broad proposition, but according to our view of the law and the article of the Constitution now under consideration, it is not necessary to decide that question. The question to be decided is not whether the Legislature might create a city embracing more territory than was intended for municipal purposes, but what does the Constitution mean when it says that the independent school districts which are to be exempted from the limitations prescribed in it shall be 'incorporated towns or cities?' Sections 4 and 5 of Article 11 prescribe the manner in which cities and towns may be incorporated for municipal purposes and it is evident that in dealing with this matter the amendment to Section 3 of Article 7, adopted in 1883, had reference to towns incorporated for municipal purposes which, according to the provisions of the law as then or thereafter in force, had assumed control of their schools and thereby become independent school districts.

"The distinction between a district incorporated for school purposes only and a town or city which constitutes an independent school district must be kept in view, for upon that distinction depends the proper solution of the question certified. A corporation for school purposes only is not an incorporated city or town as specified in the Constitution, but is simply the incorporation of a school district which may embrace the town or city only or it may embrace a town or city and rural territory." (102 Texas, 8-9.)

The holding in this case was to the effect that the Baird independent school district was not an incorporated city or town authorized to exceed the limitation placed by Section 3, Article 7, as to the amount of tax that might be levied for school purposes.

It appears, therefore, that the limitation upon the amount of tax that may be voted, levied and assessed for school purposes in a town having assumed control of its schools is limited only by the limitation

placed upon the total amount of taxes that may be levied and collected in such city or town.

We therefore answer your third question in the affirmative.

Fourth. Answering your fourth question we beg to advise that under these articles of the statute the Legislature has conferred no power upon cities and towns to issue bonds. They are issued under entirely different articles of the statute, to wit: Articles 882 and 925 R. S., 1911.

Article 882 of the Revised Statutes is as follows:

"Art. 882. May issue bonds for public improvements; regulations as to.—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, to bear interest not exceeding six per cent per annum; 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; and provided, also, that the amount of bonds issued for street improvement purposes shall never reach an amount where the tax of fifteen cents on the one hundred dollars valuation of property will not pay current interest and provide a sinking fund sufficient to redeem them at maturity; and the amount of bonds legally issued under acts passed prior to the adoption of the present Constitution shall not be computed and estimated in the amount of bonds which may be issued for the above named city improvements."

Whide Article 925, referred to in Article 882, is in the following language:

"Art. 925. May levy tax for interest and sinking fund on certain bonds; for current expenses, permanent improvements, roads, etc.—The city or town council of any city or town in this State incorporated under the general law shall have the power, by ordinance, to levy and collect an annual ad valorem tax, sufficient to meet the interest and sinking fund on all indebtedness legally incurred prior to the adoption of the constitutional amendment in 1883, regarding the power of cities and towns to levy and collect taxes, etc., and 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 public buildings, waterworks, sewers, and *other permanent improvements* within the limit of such city or town, and shall also have power, by ordinance, to levy and collect a tax not exceeding fifteen cents on the one hundred dollars valuation of property for the construction and improvement of the roads, bridges and *streets* of such city or town within its limits. Within the meaning of this article shall be included building sites and buildings for the public free schools and institutions of learning within those cities and towns which have assumed, or may assume hereafter, the exclusive control and management of the public free schools and institutions of learning within their limits."

It will be noted that the authority granted in the above copied articles of the statute is for the issuance of bonds, for the construction or purchase of public buildings, waterworks, sewer and other improvements, and that the aggregate amount of the bonds so issued shall never reach an amount where the tax of twenty-five cents on

the $100.00 valuation of property will not pay the current interest and provide a sinking fund sufficient to pay the principal at maturity.

We therefore advise, in answer to your fourth question, that the amendment here under discussion does not have the effect to raise the bond limit for school purposs in such town.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

OP. NO. 1755—BK. 49, P. 222.

SCHOOLS AND SCHOOL DISTRICTS—COMMON SCHOOL DISTRICTS.

1. Tax rate can be increased to a rate not exceeding 50 cents on the $100.00.
2. Consolidation of common school districts, tax, etc.

May 5, 1917.

Hon. Frank Kemp, County Attorney, Greenville, Texas.

DEAR SIR: The Attorney General is in receipt of your letter of the 25th ult., in which you submit the following:

"Under Articles 2828, 2833 and 2841 of the Revised Statutes of 1911, when a school district has a specific rate of maintenance tax for more than two years, said rate being less than 50 cents on the $100.00 valuation of taxable property in said district, can said district hold an election to determine whether or not said rate shall be increased to a tax of and at the rate of not exceeding 50 cents on said valuation, and, if so, can they do the same when bonds have been voted and the specific rate of the maintenance tax and bond tax is less than 50 cents on said valuation, the district wanting the 50 cents rate in order to get the State aid, the bonds payable one each year and thereby reducing the rate of the bond tax each year, and the district wanting to keep the 50 cents rate? If not, could they vote off the specific rate and then vote the said rate not exceeding 50 cents, the same conditions as to the bonds existing, and, under the same conditions, can the district vote to increase the said specific rate to 50 cents on said valuations?

"Where a district is re-established by consolidation of another district with it, for example, say Nos. 1 and 2 are consolidated, the order is made by the board re-establishing district No. 1, by consolidating No. 2 with and making it a part of No. 1, retaining the full name and number of said No. 1, can the trustees of No. 1 continue to act, or is it necessary to have new trustees?

"Are the hours for opening and closing polls at trustee elections the same as applies to general and primary elections?"

In answer to your first question, will say that Article 2833, R. S., 1911, provides that any time after the expiration of two years after any district has levied such tax, twenty taxpaying qualified voters, or a majority of the voters in the district, may have an election held to determine whether such tax shall either be abrogated, increased or diminished. It will thus be seen that the district in question having had such tax for a period of more than two years, under this

Article it would have the authority to hold an election for the purpose of increasing it.

After carefully looking into the question, I have reached the conclusion that the tax rate can be increased at a rate *not exceeding fifty* cents on the $100 for Article 2820 specifically states that the petition for the tax election

"shall designate either the specific rate of tax to be levied, or a rate of tax not exceeding fifty cents on the one hundred dollars valuation of property."

An election for this purpose would have no effect upon the bond tax. A common school district is authorized to levy and collect a maintenance and bond tax not exceeding fifty cents on the $100 valuation. However, the bond tax cannot exceed twenty-five cents on the $100 valuation, but such bond tax must be taken from the fifty cents maintenance tax. In other words, such district has a maximum bond tax of twenty-five cents and a maximum maintenance tax of fifty cents, and if such district would have, for example, an outstanding bonded indebtedness and a bond tax of twenty cents will be sufficient to provide interest and sinking fund, then the maintenance tax would be automactically increased five cents and would thus amount to thirty cents, or in other words, a reduction in the rate of the bond tax automatically increases the rate of the maintenance tax, provided it is voted.

In this connection I will state that although Article 2833 provides that at any time after the expiration of two years after any district has levied a tax upon itself, another election can be held for the purpose of either abrogating, increasing or diminishing such tax, yet it is my opinion that where an old district has taken in new territory and has been reestablished by proper authority, it could hold at once an election for the purpose of voting a tax for the entire district as created or newly established and such election would ipso facto abrogate the tax theretofore voted and applicable to the old district or the territory annexed thereto. This Department, in an opinion rendered the county attorney of Rusk County, of date November 13, 1915, held in line with the opinions of the courts in Crabb vs. Celeste Independent School District, 146 S. W. 528, and Davis vs. Payne, 179 S. W. 60, with reference to the application of a tax voted in a district prior to consolidation but in that opinion the Attorney General used the following language:

"Answering the question propounded by you will say that while I think the school trustees would be authorized to expend the funds collected by reason of the maintenance tax for the benefit of the entire district as consolidated, but this would be unjust and unequal taxation and would work a hardship on certain portions of the district, and I think it would be advisable and for the best interests of the district to vote another maintenance tax for the benefit of the whole district."

In answer to your second question, I will state—

1st. After both common school districts Nos. 1 and 2 are abolished and a new common school district is created and designated as

Common School District No. 1, it would be necessary to elect a new board of trustees for the district as consolidated.

2nd. If, however, District No. 2 is abolished by annexation to District No. 1 and after such annexation the district continues to be known as Common School District No. 1, then it would be unnecessary to hold an election for new trustees.

In answer to your third question, will state that Article 2912, R. S. 1911, provides that in all elections "general or primary, the polls shall be open from eight o'clock in the morning until seven o'clock in the evening." The hours for opening and closing polls of trustee elections are the same as prescribed by this Article.

Trusting the above answers to your question are full and sufficient, and with my best regards, I am,

Yours very truly,

W. P. DUMAS,
Assistant Attorney General.

OP. NO. 1771—BK. 49, P. 296.

SCHOOLS AND SCHOOL DISTRICTS—APPEALS—LOCATION AND CONSOLIDATION OF SCHOOLS.

Appeals may be taken through the various steps provided by the school laws from a decision of the board of trustees of a common school district in refusing to consolidate two or more schools in such district, upon request of patrons and interested parties of the district.

Articles 2752, 2823, 2824, 4509 and 4510, R. S., 1911, Section 10, Chapter 36, Acts of the Thirty-fourth Legislature.

May 23, 1917.

Hon. W. F. Doughty, State Superintendent, Capitol.

DEAR SIR: The Attorney General is in receipt of your letter of May 22nd, as follows:

"This is to request your official opinion on the question as to whether or not an appeal may be taken from the decision of the board of trustees of a common school district in refusing to consolidate two or more schools in the district upon request of patrons and interested parties of the district. In this connection I would respectfully call your attention to Section 149, School Laws of Texas, 1915, same being Section 71, Chapter 124, Acts of the Twenty-ninth Legislature. This section of law confers the authority upon boards of trustees of common school districts to determine the number of schools to be located in a district and to select the points at which the schools shall be taught. I would also respectfully call your attention to Sections 21, 22, 41, 148 and 178 of the School Laws of Texas, the same being Articles 4509, 4510, 2752, R. S., 1911, and Section 70, Chapter 124, Acts of the Twenty-ninth Legislature, and Section 10, Chapter 36, Acts of the Thirty-fourth Legislature, respectively.

"As stated above, the question is whether or not an appeal may be taken from the action of a board of trustees in a common school district in refusing to consolidate two or more schools upon request of patrons and other interested citizens."

In reply thereto we beg to advise that in the opinion of this Department appeals will lie through the various steps provided by the school laws of this State for the action of the Board of School Trustees of a Common School District, in consolidating or refusing so to do of two or more schools in the district, upon request of patrons and interested parties of the district.

The right of the Trustees of Common School Districts to determine the number and location of the schools in such district is expressly given by Article 2824, Revised Statutes, 1911. This Article reads in part as follows:

"Art. 2824. School trustees shall determine how many schools shall be maintained in their school districts, and at what points they shall be located. * * *"

This authority is clear and explicit and vests in the trustees the power to determine the number of schools to be maintained in their district, as well as the points at which such school or schools shall be located. If, therefore, in the judgment of the Board of Trustees there is being maintained more schools than are necessary then it would be within their power to consolidate them into one. We will quote briefly from the various statutes referred to by you, relating to the system of appeals in school matters.

Section 21 of the School Laws, being Article 4509, Revised Statutes, reads in part as follows:

"* * * Appeals shall always lie from the rulings of the State Superintendent to the State Board of Education."

Section 22 of the School Laws, being Article 4510, Revised Statutes, prescribing the general duties of the State Superintendent reads in part as follows:

"* * * He shall hear and determine all appeals from the rulings and decisions of subordinate school officers and all such officers and teachers shall conform to his decision, unless they are reversed by the State Board of Education."

Section 41 of the School Laws, being Article 2752, Revised Statutes, confers upon the County Superintendent the immediate supervision of all matters pertaining to public education in his county. He is given authority over all the public schools within his county, except such of the independent school districts as have a scholastic population of five hundred or more. It is expressly provided in this Section that in Independent Districts having less than five hundred scholastics all appeals shall lie to the county superintendent and county board of education, and from the decisions of the county superintendent and county board to the State Superintendent and to the State Board of Education. While the right of appeal to the county superintendent is not expressly granted in this section in matters concerning common school districts, as it is in independent districts of a population of less than five hundred scholastics, yet he is given all authority over such common school districts and their affairs, and

we are of the opinion that it was the intent and purpose of the Legislature by the wording of this section to make the county superintendent one step in the appeals prescribed by the various articles relating to such matters.

Section 178, which Section is Section 10 of Chapter 36, Acts of the Thirty-fourth Legislature, 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 therefore appears that the steps in the appeal in school matters are from the board of trustees to the county superintendent, thence to the county board of trustees, thence to the State Superintendent, and thence to the State Board of Education.

In an opinion rendered by this Department to the State Superintendent, under date of June 16, 1916, reported in the Reports and Opinions of the Attorney General, 1914-16, beginning at page 575, this Department held that an appeal would not lie from the action of the board of trustees of an independent district annexing territory upon a legal petition of the voters in such district. As will be observed from this opinion, it is predicated upon the peculiar language of the statutes with reference to appeals and the annexation of adjacent territory, as well as Section 4a of Chapter 36, Acts of the Thirty-fourth Legislature, and we held in that opinion that the right of appeal to the scholastic courts did not exist, as the jurisdiction to determine such matters was vested in the district court, under its supervision and control of the action of the county board of trustees in creating, changing and modifying school districts.

In the case presented by you, however, the rule is different. The question of the number and location of schools in common school districts is by express provision of the statute left to the trustees of that particular district, and relates to the internal management of the affairs of such district.

The courts of this State have uniformly held that until the various appeals provided for in school matters have been pursued such courts will not obtain jurisdiction of cases arising under the school law.

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. Fundenberger, 105 S. W., 1017.
Nance vs. Johnson, 84 Texas, 401.
Adkins vs. Heard, 163 S. W., 127.

The case of Caswell vs. Fundenberger, 105 S. W. 1017, was an appeal from an order of the district judge dissolving a temporary injunction restraining the defendant from building a school house in a certain common school district. This injunction was dissolved upon a showing made that the system of appeals provided by the school law had not been pursued prior to the securing of the injunction. In this case the court said:

"We think that it was the intention of the school laws to place such matters primarily under the control of the school authorities, subject, of course, to the final control of the courts in a proper case. The law provides for an appeal from the action of the school trustees first to the superintendent of public education and from his decision to the State Board of Education. Section 25, c. 124, p. 271, Acts Twenty-ninth Legislature; Nance vs. Johnson, 84 Texas, 401, 19 S. W. 559. The petition did not allege that such appeal had been taken. This was made ground of exception to the petition which was sustained by the judge, and the plaintiffs declined to amend." (105 S. W., 1018.

In the case of McCollum vs. Adams the higher court reversed the decision of the district court in granting an injunction involving the consolidation of two schools being maintained in District No. 4 of Kimble County.

It appears that the appeals provided for had not been taken through the various scholastic courts, and in this case it was held that until such appeals were taken no right to resort to the courts for relief existed. In this case it is said:

"The trustees of school districts are vested with the management and control of the public schools, with the power to employ and dismiss teachers. They shall determine how many schools shall be maintained in their respective school districts, and at what points they shall be located. They shall determine when the schools shall be opened, and when closed. They shall contract with teachers, and manage and supervise schools, subject to the rules and regulations of the county and State superintendents. They shall approve all teachers' vouchers, and all other claims against the school fund of their district. Acts Twenty-ninth Legislature, p. 281, c. 124, Section 70, 71. And 'the superintendents of public instruction shall be charged with the administration of the school laws and general superintendency of the business relating to the public schools of the State. He shall hear and determine all appeals from the rulings and decisions of subordinate school officers, and all such officers and teachers shall conform to his decisions unless they are reversed by the State Board of Education.' Acts Twenty-ninth Legislature, p. 271, Section 25.

"It is clear that the matter in controvery pertains to the administration of the school laws, which the superintendent of public instruction is charged with the duty of administering; for it involves the management and control, by the trustees of school district No. 4 of Kimble County, as it existed when the controversy arose and the suit was instituted, and their action in determining that only one school should be maintained (the one at London) in the district during the scholastic year of 1905-06, as well as their right to contract with teachers for that school, and to approve vouchers for their services. There is no allegation in plaintiff's petition that there was ever any appeal from the action of appellants, as such trustees, in discontinuing school No. 2, and maintaining only what has theretofore been known as 'school No. 1,' during that scholastic year, to the superintendent of public instruction, as is provided for by section 25, above quoted; and it is apparent from the evidence in the record before us, as well as from the findings of fact by the trial judge, that no such appeal was taken. It is clear from the authorities (Harkness vs. Hutcherson, 90 Texas, 383, 38 S. W., 1120; Nance vs. Johnson, 84 Texas, 401, 19 S. W., 559; Caswell vs. Fundenberger (Texas Civ. App.) 105 S. W., 1017; Watkins vs. Huff (Texas Civ. App.) 63 S. W. 923; Town of Pearsall vs. Woolls (Texas Civ. App.) 50 S. W. 959) that plaintiffs had no right to resort to the courts for relief in this matter until they had exhausted their remedy by appeal to the superintendent of public instruction, who is charged with the administration of the school laws, to whom appeals in matters like those in question must be made."

We think the above a sufficient citation from the authorities to sustain the proposition announced above, and we therefore advise that the usual course of appeals lies from the action of the board of trustees of the common school district, in granting or refusing a petition to consolidate two or more schools in such district.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

OP. NO. 1785—BK. 49, P. 407.

SCHOOLS AND SCHOOL DISTRICTS—INDEPENDENT SCHOOL DISTRICT ELECTIONS—MUNICIPAL BONDS.

1. Where board of school trustees of an independent school district orders an election to be held on a day less than thirty days from the date of the order and the facts show that such failure to comply with the provisions of Article 2853 did not affect the result of the election, it would not render the election void.

2. Elections should not be set aside for any mere irregularity or mere informality which cannot be said in any manner to have affected the result. Courts are anxious to sustain, if possible, the popular will rather than to defeat it.

July 7, 1917.

Hon. Olin Culberson, Hillsboro, Texas.

In re Osceola Independent School District.

DEAR SIR: Referring to our conference on July 4, in regard to the discrepancy in ordering the election for the bonds proposed to be issued by this district:

The record shows that on April 23, 1917, the school board ordered this election to be held on May 19, 1917, the same being 27 days from the date of the order, but the notice was posted on April 24 the same being 26 days before the day of election.

Article 2858, R. S. 1911, provides that bond elections to be held in independent school district may be ordered by the trutsees on the written petition of at least twenty taxpaying voters "at any time not less than thirty days from the date of the order."

Article 2859, R. S. 1911, provides that public notice of the election shall be given by placing notice in three different portions of the district "at least twenty days before said election."

I have carefully examined the Senate Journal of the Twenty-ninth Legislature and followed the course of this law from its introduction in the Senate to its final passage, but failed to find in any of the amendments thereto information relative to the days required for ordering the election and the days required for posting the notices of election.

It is an established principle of election law that an election is not to be set aside for any mere irregularity or mere informality which cannot be said in any manner to have affected the result of the election. The authorities tend to show that the courts are always anxious to sustain, if possible, the popular will rather than to defeat it.

Dillon on Municipal Corporations, Vol. 1, Sec. 374, and authorities therein cited.

The Attorney General has repeatedly held that failure to post notices of elections for the full length of time required by statute will not render the election void, unless it be shown that such failure affected the result of the election (1912-14 Attorney General's Report, 649).

In the case of Norman vs. Thompson, reported in the 72 S. W. 64, the Court of Civil Appeals held that under the then Revised Statutes, Article 3387, relative to local option elections and providing that the clork of the court shall post five copies of the order of election at different places within the proposed limits for at least 12 days prior to the date of election, etc., the fact that one copy of the order was posted only nine days before the election, does not render it invalid where the voters of the county had actual notice of the election and the result was not affected by a failure to post the copy of the order the full 12 days. The opinion in this case was written by Justice Howard Templeton, one of the ablest lawyers that ever graced an appellate bench, and with his usual force and clearness he closed the opinion with these words:

"* * * The overwhelming weight of authority is unquestionably in favor of the contention of appellee that the failure to give the statutory notice of an election, if the voters had knowledge of and participated in the election, so that the result thereof was not affected by the failure to give notice in the manner prescribed by law, will not vitiate the election. We do not desire to be understood as disparaging the notice required by the statute. When such notice is not given, the evidence offered to show actual notice will be closely scrutinized, and, unless it is sufficient to show with reasonable certainty that no injury has resulted from the failure to give precise legal notice the election will not be declared void."

The object of our election laws is to secure a fair expression of the popular will in the most convenient manner and a failure, therefore, to comply with provisions not essential to attaining that object should not render an election void in the absence of language clearly showing that such was the legislative intent.

See: Davis vs. State, 12 S. W., 962.
Snead vs. State, 49 S. W., 595.
Voss vs. Terrell, 34 S. W., 170.

It is my opinion that the words "not less than thirty days" are directory only, for the reason that an inconsistency seems to exist in the Act, in that the election is to be ordered to be held on a day "not less than thirty days" from the date of the order, but the following article states that the notice of election shall be posted for not less than twenty days. The object of the statute requiring notices of an election to be posted is simply to provide a notice to the voters, and in the case of Norman vs. Thompson, above, it was correctly held by Judge Templeton that "to hold the election void because one of the notices was not posted for quite the full time would accomplish no

good purpose if the voters had actual notice of the election and "to hold otherwise would be to sacrifice the purpose and spirit of the law to form and literalism, and this cannot be permitted."

As stated above, the election notices were posted within the time prescribed by statutes and as the weight of authority is in favor of the conclusion arrived at by Judge Templeton in Norman vs. Thompson, above, the failure to post notice within the time prescribed by statute would not render the election void, if the evidence shows that such failure did not affect the result, it is my opinion that the same principle would be held applicable to this case. In other words, where a board of school trustees orders an election to be held on a day less than thirty days from the date of the order, and the facts show that the board's failure to comply with the provisions of Article 2853 did not affect the result, in my opinion, it would not render the election void.

Yours very truly,
W. P. DUMAS,
Assistant Attorney General.

OP. NO. 1824—BK. 50—P. 1.

SCHOOLS AND SCHOOL DISTRICTS—COUNTY AUDITOR.

The effect of Chapter 134, Acts of the Thirty-fifth Legislature, amending the County Auditors Law, with reference to common school districts, is to confer upon the county auditor the authority to examine all books, records and vouchers of such districts and to keep a ledger showing the financial transactions thereof. It does not confer upon the county auditor the right to prevent the payment of the voucher simply by a refusal to approve the same. Neither does it confer upon such officer the general power and control over the finances of school districts, as is conferred upon him with reference to general county finances.

Chapter 134, Acts of Thirty-fifth Legislature.
Chapter 2, Title 29, Revised Statutes, 1911.
Title 48, Revised Statutes, 1911.

June 27, 1917.

Hon. H. L. Washburn, County Auditor, Houston, Texas.

MY DEAR SIR: The Attorney General is in receipt of your communication of recent date, as follows:

"Several years ago the Attorney General held that the Auditor's Law applied to the school funds of the county. The supervision was exercised in this county until 1916, at which time one of the school districts enjoined the auditor from exercising the authority over the funds. The injunction was granted by the lower court and sustained by the higher court. See 185 S. W. 592, School District 25 vs. Houston National Exchange Bank et al.

"At the last session of the Legislature, an act was passed relating to auditors and among other things on page 339 of the Acts of the Regular Session, will be found Art. 1467, providing that auditors keep a record of common school district receipts and disbursements, install bond register, etc., and Art. 1468 is amended and the auditor is given right to inquire into the correctness of accounts of the common school districts.

Will you please advise me what this latter Article means in your opinion when taken in connection with the holding of the Court of Appeals? Would it have the effect as giving an auditor the same jurisdiction over school funds as he has over county funds, or does it mean that he is simply limited to keeping the set of books showing the transaction of the several districts? In the event of the latter holding, what is meant by 'inquire into the correctness of same?' If an auditor found a voucher incorrectly or illegally issued by a trustee and he had no right to hold up the vouches prior to payment, would any purpose be served by such inquiry?

"We desire to have your construction of this amendment before taking any steps to check the accounts of the school funds, and in the event that you have not already ruled upon this matter, your opinion in the premises would be appreciated."

Replying thereto you are advised that in the opinion of this Department the Act of the Legislature referred to is insufficient to confer upon the county auditor the jurisdiction over the expenditure of funds of common school districts that he now exercises over the expenditure of the ordinary funds of the county. We are led to this conclusion by a consideration of the Act of the Thirty-fifth Legislature construed in connection with what is known as the County Auditor's Law of this State, and in the light of the case of Houston National Exchange Bank et al. vs. School District No. 25, Harris County, reported in Vol. 185, S. W., 589.

The Act of the Thirty-fifth Legislature adds to Chapter 2, Title 29 of the Revised Statutes, Article 1467a and amends Article 1468, as follows:

"Article 1467a. It shall be the duty of the auditor to install in his office, a school ledger and keep in this ledger an accurate account of all funds received and all funds disbursed by the common school districts of his county. He shall also install in his office, a bond register showing all the school bonds issued by the common schools of his county, the rate of interest they bear, the date they were issued, the date they are to be paid, and he shall also keep an interest and sinking fund account of school bonds of each common school district of his county.

"Sec. 6. That Article 1468 be amended to read as follows:

"Article 1468. Access to and right to examine account, orders of commissioners courts, all vouchers given by trustees of common school districts. He shall have continual access to and shall examine all the books, accounts, reports, vouchers and other records of any of the officers, the orders of the commissioners court, relating to finances of the county and also to examine all vouchers given by the trustee of all common school districts of the county and *to inquire into the correctness of same.*'

If this law gives to the county auditor the authority to reject and prevent the payment of vouchers issued by the proper authorities in school districts such authority must be found in the language of Article 1457a, which makes it the duty of the auditor to install in his office a school ledger and keep in this ledger an accurate account of all funds received and all funds disbursed by the common school district of his county and, in the language found in amended Article 1468, as amended, which makes it the duty of the county auditor to examine all vouchers given by the trustees of common school districts and to inquire into the correctness of same. The question that presents itself is this: "Is the language here used sufficient to add to the

procedure already set out in the statute, with reference to the approval of school vouchers, the additional safeguard of the approval of the county auditor and vesting in that official the authority to disapprove such vouchers and prevent their payment after they have run the course prescribed by the school laws of the State?"

It is from a consideration of the various statutes authorizing the issuance of vouchers by the trustees of common school districts and their approval by the county superintendent that we have arrived at the conclusion that the Legislature did not use language sufficient to confer upon the county auditor this authority. In our opinion the language used by the Legislature, as disclosed by this Act, is sufficient only to confer upon the auditor the authority to examine all books, records and vouchers of common school districts and to make a complete audit thereof, with the additional power and authority, as well as the duty, to keep a complete set of books with each of such districts.

It is evident, from the language of the new Act, that it was not the purpose of the Legislature to confer upon the county auditor all of the powers exercised by him in county affairs. It could not be contended that this Act subjects school districts to the provisions of Article 1480. which provides that contracts shall be let upon competitive bids, upon advertisements by the county auditor. Neither do we think it could be contended that claims against school districts should be submitted to the county auditor for examination and approval before they are ordered paid by the school trustees, as is the case of claims against the county, under the provisions of Article 1421, Revised Statutes. Neither is this language thus used susceptible of the construction that the county auditor after his examination shall stamp his approval upon the claim, as is the case in bills against the county, under the provisions of Article 1482.

Article 1485, Revised Statutes, provides that all warrants on the county treasury, except warrants for jury service, must be countersigned by the county auditor. We find no language in the Act of the Thirty-fifth Legislature which could by any construction be held to mean that a warrant issued by the trustees of a school district must bear the signature of the county auditor.

The Act of the Thirty-fifth Legislature being an amendment of the County Auditor's Law must be construed as though originally a part thereof. By the terms of the new Act it deals with the duties of the county auditor only as applicable to common school districts and is not dealing with his duties, with regard to the general finances of the county. In this sense it is a special law with reference to common school districts and being embodied in the general county auditor's law these special provisions must be held to control the general provisions with reference to the finances of the county.

The general law, as has been seen, provides that accounts and bills and all claims against the county must first be presented to the county auditor. No provision of this character is made with reference to claims against the school district. The general law provides that the county auditor must stamp his approval upon claims against the county, while no such provision is made with reference to school districts. The general law provides that all warrants against the

county, except those for jury service, must be countersigned by the county auditor. No such provision as this is made with reference to warrants issued by the trustees of a school district. In other words, the new Act contains its own limitations and we can not read into it the general authority conferred upon the county auditor when the Act itself does not carry such authority. If it had been the purpose of the Legislature to have placed the finances of school districts under the care of the county auditor, as it had done with the general finances of the county, then it should have so expressed itself in language the same or equivalent to that used in the general County Auditor's Law, dealing with general county finances. Having not done so we do not feel it the province of this Department to read into the Act of the Thirty-fifth Legislature an authority that is not contained in the plain language of the Act.

In the case of Houston National Exchange Bank vs. School District No. 25, Harris County, a suit was brought against the Bank at Washburn, and the county auditor, by the school district, for the purpose:

1st. Of restraining the auditor from in any manner interfering with the affairs of the district, and from claiming and asserting any authority to act as auditor of such district.

2nd. To restrain the bank from paying warrants audited and signed by the auditor; and,

3rd. To compel said bank, as depository of the funds of the school district to pay all warrants legally drawn against the funds, without requiring same to be approved or audited by said county auditor. This case, of course, arose under the county auditor's law, prior to the amendment here under discussion.

The Court of Civil Appeals, after reviewing the various articles of the statute, relating to the appointment, salary and duties of the county auditor, as well as those provisions of the school law dealing with the contracts for supplies for such districts, said:

"A careful study of these articles leads us to the conclusion that, if the auditor's law was intended to apply to the common school districts, then the whole system of school laws were thereby practically abolished and repealed by implication. The commissioners' court and not the trustees of the district, must be satisfied with and direct the auditor to accept the bid. The auditor accepts the bid and thereby closes the contract, destroying the power conferred upon the board of trustees, 'to make all contracts,' etc., and the State and county school superintendents lose their power of revision and control.

"Article 1481 provides that all bills and accounts must be filed in ample time for the auditor to examine and approve the same before the meeting of the commissioners' court, and that no account shall be paid until the same has been examined and approved by the county auditor, thereby taking from the county superintendent of public instruction the authority to approve vouchers, and by inference, at least, requiring them to go before the commissioners' court with the auditor's approval before they can be paid. In fact, Anderson vs. Ashe, 99 Texas, 447, 90 S. W., 874, and Yantis vs. Montague, 50 Texas Civ. App., 403, 110 S. W., 162, each hold that the auditor's approval is a condition precedent to the exercise of jurisdiction over the claim by the commissioners' court.

Article 1477 of the auditor's law says:

"He shall have he power to adopt and enforce such regulations, etc., as he may deem essential to the speedy and proper collections, checking

and accounting of the revenues and other funds and fees belonging to the county."

Article 1478 says:

"All deposits that are made in the county treasury shall be upon a deposit warrant issued by the county clerk in triplicate," etc., "the treasurer shall retain the original; the duplicate shall be signed and returned to the county clerk for the county auditor, and the triplicate signed and returned to the depositor," etc.

"We feel that it is useless to quote further from the auditor's act in order to show that the funds over which he is given an oversight and control are strictly county funds, and are not school funds, and that it is apparent therefore that the Legislature did not intend to include the school funds in the term 'money, funds, fees or other property for the use of, or belonging to the county,' found in article 1467 of the auditor's law." (185 S. W., 592-593.)

So with the law here under discussion we are of the opinion that it was not the purpose of the Legislature to confer upon the county auditor the authority conferred upon him with reference to county finances, in the sense that he would have the authority to disapprove vouchers and merely by such disapproval prevent their payment. His authority to examine into the correctness of such vouchers to our minds was conferred merely for the purpose of giving him the right to audit such vouchers and if in his judgment same were unlawfully drawn to report the same to the proper authorities of the county, for such action as might be indicated thereby. We find no language in this Act making the approval of the county auditor a necessary prerequisite to the payment of the voucher by the county treasurer or depository. We believe that the purpose of the Legislature will be met by a construction of this statute to the effect that the same gives to the county auditor the power and makes it his duty to keep a ledger, showing the financial transactions of each school district, and in addition thereto the power and duty to make a complete audit of the finances of such districts at any and all times which to him may seem just and proper.

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

OP. NO. 1804—BK. 50, P. 30.

SCHOOLS AND SCHOOL DISTRICTS—BOUNDARIES—COUNTY SCHOOL TRUSTEES.

The authority vested in county school trustees to create school districts and change school district lines is applicable only to school districts established under the general laws and not to school districts created by Special Act of the Legislature, unless authority so to do is conferred by the provisions of the Act creating the district.

August 4, 1917.

Hon. C. M. Beard, Representative, Milano, Texas.

DEAR SIR: You have submitted to this Department the question

relative to the authority of the county board of trustees to change the laws of a school district created by Special Act of the Legislature.

Replying, I beg to say:

The Legislature by Act approved on March 5, 1915 (General Laws Thirty-fourth Legislature, page 68, Section 2), provided that the general management and control of the public schools in each county of the State shall be vested in five county school trustees elected from the county at the time and in the manner pointed out in the provisions of the Act. Section 4 provided that "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 make changes in school district lines."

The Thirty-fifth Legislature at its First Called Session created the Smyrna Common School District. Section 1 of this Special Act defines the boundary lines of said district.

Section 2 provides:

"The Smyrna common school district as created by this Act is hereby vested with all the rights, powers, privileges and duties imposed and conferred upon common school districts in Texas created under the general laws governing common school districts."

We do not think that the language used in Section 2, above quoted, shows that it was the intent of the Legislature to authorize the county board of trustees of Milam County to reduce the boundary lines of said district. The Legislature by authority conferred in Section 3 of Article 7 of the Constitution has the right to lay off territory into school districts by either general or special law. As stated above, the county school trustees are now clothed with the authority heretofore conferred upon county commissioners' courts with reference to the establishment of school districts and the changing of school district lines. This authority is conferred by the general law, and, in our opinion, a county board of trustees would not be authorized to take from or add to the territory of a school district created by Special Act of the Legislature unless specifically authorized so to do by a provision in the Special Act. In our opinion, the provisions of Section 2, by which all rights, powers, privileges and duties imposed and conferred upon common school districts created under the general law are conferred upon the Smyrna Independent School District, mean that this district, created by Special Act, is authorized to levy a maintenance tax, elect trustees, contract with teachers and hold elections for the purpose of issuing bonds to construct or equip the public free school buildings, and inasmuch as the county board of trustees of Milam County is not given specific authority to change the boundary lines of this district, we think that the lines of this district can be reduced by only one method and that is a Special Act of the Legislature changing such boundary lines.

This Department has held that "the question of annexing contiguous territory to municipal corporations has been before the courts * * * 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 corporaion or by general law applicable to such corporations."

You are, therefore, advised that in the opinion of this Department the authority vested in the county board of trustees to create school districts and change school district lines is applicable only to school districts established under the general laws and not to school districts created by Special Act of the Legislature, unless authority so to do is specifically conferred by a provision in the Special Act creating the district.

Yours very truly,
W. P. DUMAS,
Assistant Attorney General.

OP. NO. 1827—BK. 50, P. 139.

CITIES AND TOWNS—CONSTITUTIONAL LAW—SCHOOLS AND SCHOOL DISTRICT—MUNICIPAL BONDS.

1. Section 3 of Article 7 of the Constitution supersedes Section 10 of Article 11 and prescribes the rule to be followed in cities and towns specially chartered, as well as within all other school districts of the State.
2. City operating under a charter passed by the Legislature cannot put into its charter a provision in conflict with the Constitution.

October 8, 1917.

Hon. W. F. Doughty, State Superintendent, Capitol.

DEAR SIR: We have your letter of the 3rd instant, requesting the opinion of this Department on the following questions:

1. Under the Constitution and laws of the State must bonds for school purposes in the City of Austin be voted by two-thirds majority vote of the property taxpaying voters, or by a simple majority?

2. Can a city operating under a charter passed by the Legislature put into its charter a provision in conflict with the Constitution?

Replying, I beg to say:

It appears that on October 2, 1917, an election was held in the City of Austin for the purpose of voting school bonds, at which 853 votes were cast for and 558 votes were cast against the bonds. The election did not carry by a two-thirds majority.

The charter of the City of Austin was granted at the Regular Session of the Thirty-first Legislature and became effective on February 3, 1909, and Section 23 of Article 12 thereof provides, in part, as follows:

"The action of the City of Austin in taking charge of the public free schools within its limits by proceeding had in the month of August, 1880, is hereby validated and the city is hereby constituted a separate and independent school district under the Constitution and laws of the State. * * * "

And under subdivision 2 of Section 2 of Article 12 of the Austin charter the city council is authorized, by ordinance

"To raise such further amount as may be necessary for the maintenance of the public schools of the city not to exceed thirty-three and one-third cents on the one hundred dollars worth of taxable property, unless the qualified voters of the city shall by a two-thirds vote provide for an increase in such amount, and in no event shall it exceed fifty cents on the one hundred dollars valuation."

There are two constitutional provisions, viz.: Section 3 of Article 7 and Section 10 of Article 11 that affect the first question presented. It is provided by Section 3 of Article 7 that the Legislature may authorize an additional ad valorem tax within all school districts heretofore formed or hereafter formed for the further maintenence of public schools and the erection and equipment of school buildings therein, provided "a majority of the qualified property taxpaying voters" of the district vote such tax not to exceed in any one year fifty cents on the one hundred dollars valuation of the property subject to taxation in such district, "but the limitation upon the amount of school district tax herein authorized shall not apply to incorporated cities and towns constituting separate and independent school districts."

The amendment to Section 3 of Article 7, declared adopted September 25, 1883, made the maximum tax at 20c on the $100 and provided that "two-thirds of the qualified property taxpaying voters of the district * * * shall vote such tax"; the amendment declared adopted February 2, 1909, made the maximum tax at 50c on the $100 and provided for a *majority vote;* and the amendment declared adopted September 24, 1909, did not affect the amount of tax nor the vote necessary therefor.

I will state in this connection that prior to the amendment of 1883, Section 3 of Article 7 merely provided for setting apart each year not more than one-fourth of the general revenue of the State and for a poll tax of one dollar for the benefit of the public free schools.

Section 10 of Article 11 of the Constitution reads as follows:

"The Legislature may constitute any city or town a separate and independent school district. And when the citizens of any city or town have a charter, authorizing the city authorities to levy and collect a tax for the support and maintenance of a public institution of learning, such tax may hereafter be levied and collected, if at an election, held for that purpose, two-thirds of the taxpayers of such city or town shall vote for such tax."

In the case of State vs. Brownson, 94 Texas, 436, 61 S. W., 114, the Supreme Court of this State held that after the amendment to Section 3 of Article 7, in 1883, Section 10 of Article 11, above, was unnecessary and that "although not repealed, is practically superseded." The Court said:

"The provision quoted from Section 10 of Article 11 is clearly permissive only, and does not make it the duty of the Legislature to constitute every incorporated town or city a separate school district. This provision would hardly have been inserted if amended Section 3 of Article 7 had been a part of the original instrument. Under the amendment, the Legislature clearly had the power to make a city or town an independent

district, even had there been no express provision to that effect. Therefore the express provision, although not repealed, is practically superseded by the amendment."

In the case of Cummins vs. Gaston, 109 S. W., 476, it was held by the Fort Worth Court of Civil Appeals that Section 3 of Article 7, as amended in 1883, "traverses the same subject matter as the provision of Section 10, Article 11, * * * and * * * while not repealing virtually supersedes the express provision of Section 10 of Article 11"; and that said amendment authorized the creation of two separate classes of school districts, viz.: a district in which an incorporated city or town may be included, together with contiguous territory outside the limits of the city or town, and a district in which the limits of the school district were confined to the municipality. The decision in this case was reaffirmed by the Texarkana Court of Civil Appeals in Jenkins vs. DeWitt, 115 S. W., 610.

The City of Dallas was chartered by Act of the Legislature effective April 13, 1907, and subdivision 2 of Section 2 of Article 2 thereof reads, in part, as follows:

"In accordance with *Section* 10, *Article* 11, of the State Constitution the City of Dallas may levy a special tax for one or more years for the purchase of ground, erection of buildings, and the support and maintenance of a seminary, academy, or high school, in connection with the public schools of the city, and may also levy a special tax in accordance with the State law for the purpose of erecting additional public school houses or repairing those already built, or for the purchase of grounds therefor. * * * The aggregate tax levied for either or all of said purposes in any one year shall never exceed one-fourth of one per cent. * * * No such tax shall be levied until the qustion shall have been submitted to a vote of the taxpayers, at an election, by those entitled to vote thereon under the Constitution of the State."

It will be observed that the tax above mentioned was only required to be levied "in accordance with Section 10 of Article 11," which section specifically provides that "two-thirds of the taxpayers of such city or town shall vote for such tax."

On April 2, 1912, an election was held in the City of Dallas upon a proposition for the levy and collection of a special school tax for the purpose of repairing school buildings, but the proposition failed to secure a two-thirds majority. At first blush, it was thought that the tax failed to carry, there being 3,232 votes for and 1,713 votes against it. The question was finally submitted to Attorney General Lightfoot and it was concluded in a well written opinion by Assistant Attorney General Walthall that Section 10 of Article 11 of the Constitution was superseded by Section 3 of Article 7 as amended, and that Section 3 of Article 7 prescribes the rule to be followed in cities and towns specially chartered, as well as within all other school districts of the State. This opinion further declared that—

"The charter of the City of Dallas provides that such tax shall be levied in accordance with the State Law and if Section 3 of Article 7 of the Constitution, as amended in 1908, supersedes and takes the place of Section 10 of Article 11 of the Constitution * * * then it follows that the

tax must be levied in accordance with Section 3 of Article 7, as that is the State law upon the subject." (25 Opinions Attorney General, 337.)

It is, therefore, the opinion of this Department that—

(1) Inasmuch as the 1909 amendment to Section 3 of Article 7 of the Constitution is the last expression of the people upon the subject, the provision in the Austin charter requiring a two-thirds majority vote in school tax elections is without force and effect, and therefore a majority vote only is necessary to carry the tax.

(2) The Home Rule Amendment (Section 5 of Article 11) directly prohibits any city charter or ordinance passed thereunder containing "any provision inconsistent with the Constitution of the State," and no argument or citation of a court decision is necessary to show that the Legislature is without authority to delegate in a city charter a power which that body itself cannot exercise.

Very respectfully,

W. P. DUMAS,
Assistant Attorney General.

OP. NO. 1833—BK. 50, P. 179.

CITIES AND TOWNS—SCHOOLS AND SCHOOL DISTRICTS—BOUNDARIES—ANNEXATION OF TERRITORY—COUNTY SCHOOL TRUSTEES—MUNICIPAL BONDS.

1. County school trustees were by the Act of 1915 authorized to exercise the authority theretofore vested in the county commissioners' court with respect to subdividing the county into school districts and making changes in school district lines.

2. The limits and boundaries of a common school district having an outstanding bonded indebtedness cannot be decreased until said bonds and the accrued interest thereon have been fully paid; but it is provided by Chapter 28, Acts First Called Session Thirty-fifth Legislature, that where a school district is brought in whole or in part within the limits of an incorporated city or town and such district has an outstanding bonded indebtedness, then such incorporated city or town shall become bound and liable for the payment of such proportion of the bonded indebtedntss of such district as the assessed value of the portion of such district so brought within the city or town bears to the whole assessed values of such district so encroached upon.

October 19, 1917.

Hon. Ed R. Bumpass, Secretary Public School Board, Terrell, Texas.

DEAR SIR: I am in receipt of your favor of the 11th inst., in which you state that certain citizens living in the North Terrell School District No. 72, adjacent to the city limits of the City of Terrell, petitioned the city commission that certain territory of that district be attached to the City of Terrell for school purposes; that the city commissioners under the law referred same to the city school board and at a meeting of the board it approved the petition and recommended that the city commission accept the petition and thereafter the city, by ordinance, made the district a part of the Terrell Independent

School District; that these proceedings were regular and were filed for record at Kaufman with the county commissioners' court and the county board of school trustees.

You state, however, that prior to this action on the part of the City of Terrell it appears that the board of county school trustees consolidated the Colquitt School District and High Point School District and gave a part of North Terrell District No. 72, adjacent to the corporate limits of the City of Terrell on the West, to the Colquitt-High Point Consolidated School District, thus throwing the citizens adjacent to Terrell on the West into the Colquitt-High Point District; that prior to the annexation of the part of the territory of North Terrell District No. 72, the Colquitt-High Consolidated District by proper petition had an election ordered and held for the purpose of issuing school bonds aggregating $5500, which election carried, and that the parties who petitioned the city commission of Terrell to annex their land to the Terrell Independent School District object to their property being subject to taxatton for the purpose of paying the bonds recently voted by the Colquitt-High Point Consolidated District.

Replying, I beg to say:

The board of county school trustees were by the Act of 1915 authorized to exercise the authority theretofore vested in the county commissioners' court with respect to subdividing the county into school districts and making changes in school district lines. (Chap. 36, Section 4, General Acts of 1915). Therefore, I fail to see how the authority of the county school board in creating the Colquitt High-Point Consolidated District can be questioned and do not think it could be legal grounds to disapprove a bond transcript when presented by that district for examination and approval by this Department.

I have not yet received the bond record for the Colquitt-High Point District, but when I do receive it, I assure you that the same will receive careful attention and if you desire to submit a brief contesting the approval of these bonds, I will be glad for you to do so and assure you that it will also receive my careful attention.

I think the recent ordinance passed by the city commission of Terrell is violative of Article 2842, R. S. 1911, and also Chapter 28, Acts First Called Session of the Thirty-fifth Legislature. The bond election was held in the Colquitt-High Point District before the annexation of a part of said district to the City of Terrell Independent School District. It is provided by Article 2842, R. S. 1911, that the limits and boundaries of a common school district shall never be decreased until said bonds and the accrued interest thereon shall have been fully paid, and it is provided by Chapter 28, Acts First Called Session Thirty-fifth Legislature, that where an independent or common school district is brought, in whole or in part, within the limits of an incorporated city or town and such district has an outstanding bonded indebtedness, then such incorporated city or town "shall become bound and liable for the payment of such proportion of the bonded indebtedness of such independent or common school district, as the assessed value of the portion of such independent or common

school district so brought within the incorporated limits of such city or town, shall bear to the whole assessed values of such independent or common school district so encroached upon, as such assessed values are shown upon the last preceding county tax assessment rolls, and thereafter such incorporated city or town shall pay, either directly or through the officers of such independent or common school district, the proportion of the interest and principal of such bonded indebtedness for which they so become liable."

Chapter 28, above, became a law on May 19, 1917. If the election held in the Colquitt-High Point District was a legal election and the bonds are issued in compliance with the statutes governing the issuance of bonds by common school districts, liability for the bonds would be fixed against all the territory included in the district as created by the recent order of the county board of trustees, and the bond record must necessarily show that the territory in dispute is a part of the Colquitt-High Point District.

You are, therefore, advised that inasmuch as the Colquitt-High Point District has voted bonds, the only legal way for the City of Terrell to annex any part thereof would be in compliance with the provisions of Chapter 28, Acts of the First Called Session of the Thirty-fifth Legislature.

Yours very truly,
W. P. DUMAS,
Assistant Attorney General.

OP. NO. 1892—BK. 51, P. 21.

SCHOOLS AND SCHOOL DISTRICTS—COUNTIES—UNORGANIZED COUNTIES—TAXATION.

1. County board of school trustees of parent county can create one or more school districts in an unorganized county attached thereto for judicial and other purposes.
2. After the creation of a common school district in an unorganized county qualified voters therein can make application to the county judge of the parent county for maintenance tax election.
3. Local school district tax can be levied in common school districts in unorganized counties in the same manner as such taxes are levied in common school districts in organized counties.
4. All taxes due by non-residents on property situated in unorganized counties shall be collected by the State Comptroller.

February 28, 1918.

Hon. W. F. Doughty, State Superintendent, Capitol.

DEAR SIR: The Attorney General is in receipt of your letter of the 26th instant, reading as follows:

"The unorganized county of Loving is attached to Reeves County for judicial and other purposes.

"Please advise this Department regarding the following questions:

"1. As to procedure in the organization of school districts.

"2. Can local school taxes be levied in the usual way?

"3. If local school taxes are levied, how can they be collected in view of the law which requires that non-residents pay taxes to Comptroller?

"4. In the event the law is inadequate on this subject, would the State Superintendent, under Article 4511 R. S., 1911, be authorized to prescribe a rule of action whereby the people of Loving County could organize for school purposes, levy and collect taxes for the support of their schools?"

We will endeavor to answer your questions in their order:

(1) Article 2816, R. S. 1911, provides that—

"The *commissioners court* of any organized county to which any unorganized county is attached for judicial purposes, may, and, upon the written petition of not less than ten resident citizens of such unorganized county, shall create such unorganized county into *one or more school districts*, and shall cause an order to that effect to be entered upon the minutes of said court."

It is provided by Chapter 36, Section 4, Acts of 1915, that "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."

As Loving County is attached to Reeves County for judicial and other purposes, it will therefore be seen that the county board of school trustees of Reeves County, being vested with the authority heretofore conferred upon commissioners courts with reference to schoool districts, can create the unorganized County of Loving into one or more school districts.

(2) After the creation or establishment of a common school district in an unorganized county, if a majority of the property taxpaying voters residing in such district wish to tax themselves for the purpose of supplementing the State school fund appropriated to said district, they can make application to the county judge of the county to which the unorganized county is attached for judicial and other purposes, and it shall be the duty of such county judge to order the election in the same manner as prescribed for common school district tax elections in organized counties.

It is provided by Article 2915, R. S. 1911, that each unorganized county attached to an organized county for judicial purposes shall be attached for election purposes to some one of the commissioners precincts of such organized county.

It is provided by Article 2913, R. S. 1911, that the commissioners court at its August term may, if it deems proper, divide the county and also the county attached thereto for judicial purposes into "convenient election precincts, each of which shall be differently numbered and described by natural or artificial boundaries."

It is provided by Article 2836, R. S. 1911, that the commissioners court shall at the time of levying taxes for county purposes also levy upon the common school district or districts the rate of tax said district has voted upon itself, and this, in our opinion, applies to all common school districts within the county and to all common school districts within the unorganized county attached thereto for judicial

and other purposes. In other words, local school district taxes can be levied in common school districts in unorganized counties in the same manner as such taxes are levied in common school districts in organized counties.

(3) In answer to this question, will state that all property situated in unorganized counties "owned by residents of such unorganized counties" shall be assessed by the tax assessor of the organized county to which such unorganized county is attached for judicial purposes and collected by the tax collector of such organized county (See Art. 7588, R. S. 1911).

It is the duty of the Comptroller to assess and collect the "State and county taxes on all lands" situated in unorganized counties "owned by non-residents thereof." (See Constitution, Article 8, Section 12; Revised Statutes 1911, Articles 7587 and 7589, etc.) The section of the Constitution here referred to contains the following language:

"Lands lying in and owned by non-residents of unorganized counties * * * shall be assessed and the taxes thereon collected at the office of the Comptroller of the State."

We think the words "taxes thereon" apply to all taxes, namely, State, county and local and that it is the duty of the Comptroller of Public Accounts to collect local school district taxes due by non-residents who own lands in such school districts.

We are informed by the Comptroller's Department that the tax rate in the common school district or districts within unorganized counties is certified to the State Comptroller by the county clerk of the parent county and is collected by the Comptroller from the non-residents only and remitted by the Comptroller out of a special fund in the State Treasury to the parent county to be placed to the credit of the common school district in the unorganized county.

(4) In answer to your fourth question, will state that, in our opinion, the law is not inadequate on this subject and that you would not be authorized to exert the authority conferred upon you as State Superintendent by Article 4511, R. S. 1911.

Very respectfully,

W. P. DUMAS,

Assistant Attorney General.

OP. NO. 1903—BK. 51, P. 110.

SCHOOLS AND SCHOOL DISTRICTS—TEACHERS' CONTRACTS.

The board of trustees of an independent school district may legally enter into contracts with teachers for a longer period than one year.

Where the Board of Trustees of a city or town or independent district have elected a superintendent they may also select a principal of the high school. The principal of the high school is merely a teacher and therefore a contract with such principal need not be limited to one year. Article 2895 Revised Statutes, 1911.

March 28, 1918.

Hon. W. F. Doughty, State Superintendent, Capitol.

DEAR SIR: The Attorney General has your communication propounding two questions for an opinion thereon from this department, such questions being as follows:

"1. What period of time may be covered in a contract between teacher and trustees in an independent school district?"

"2. Article 2895, R. S., 1911, clearly provides that the school board may employ a superintendent for a period of two years. Does this same article also authorize the school board to employ a high school principal for a period of two years in an independent or municipal district where the high school principal is under the supervision of the school superintendent?"

In reply to your inquiries we beg to say that we find nothing in the Statutes of this State regulating the employment of teachers in independent districts limiting the period of time which may be covered by such contracts.

Questions of this character have arisen in the courts upon the right of school trustees to enter into contracts with teachers when such contracts extend beyond the term of office of the trustees. While there are some authorities to the contrary, the great weight of authority is to the effect that such contracts are valid.

This was expressly decided in the case of Pearsall vs. Woods, 50 S. W. 959. In that case the Court said:

"It is well settled, also, that a board of school trustees may make contracts for teachers for the term of school succeeding their term of office. Taylor vs. School Dist. (Wash.) 47 Pac. 758; Splaine vs. School Dist. (Wash.) 54 Pac. 766; Farrell vs. School Dist. (Mich.) 56 N. W. 1053; Caldwell vs. School Dist. 55 Fed. 372; Gates vs. School Dist. (Ark.) 14 S. W. 656. There is nothing that we find in our statutes that deprives them of this power."

In addition to the cases cited in Pearsall vs. Woods, we refer also to the following:

Farrell vs. School Dist., 56 N. W., 1053.
Town of Milford vs. Zeigler, 27 N. E., 303.

In the case of Reubelt vs. The School Town of Noblesville, 106 Ind. 478, the Supreme Court of that State in discussing a question of this character, said:

"It may be that instances will occur when the authority to employ teachers and superintendents in advance of the incoming of a new member of the board may be abused, but the possibility is not very great, as but one member goes out at a time. But the fact that the authority may be abused, is not a sufficient reason for holding that it does not exist. On the other hand, desirable teachers and superintendents might be lost to the schools, if the board were not authorized to employ them until after the election in June."

In the case of Caldwell vs. School District No. 7, 55 Fed. 372, the U. S. Circuit Court for the district of Oregon used this language:

"In other states, where there is no statute limiting expressly or by implication the time for which such a contract may be made, the decisions uniformly concede the power to the directors to enter into agreements for a period longer than their terms of office. Gates vs. School Dist. (Ark.) 14 S. W., 656; Reubelt vs. School Town, 106 Ind., 480, 7 N. E., 206. In this State there is no such limitation by statute, and it is not perceived that any principle of public policy would prohibit the making of a contract for a period of two scholastic years."

A teacher in the public schools of this State is not an officer. He is merely an employe and his connection with the schools is purely contractory. State vs. Gray, 91 Mo. App. 444; Butler vs. Regents, 32 Wis. 124.

There being no statute limiting, expressly or by implication, the right of trustees of independent districts to contract with teachers for a period of more than one year, we are of the opinion that same may be done.

In those districts having elected a superintendent for a term not to exceed two years under Article 2895 R. S., 1911, in which districts they have also selected a principal of the high school, we see no objection to the election of such principal for a period of two years. The use of the language "superintendent" or "principal" in this article of the statutes contemplates one position under one of two names; that is to say, the person so selected is denominated either a superintendent or principal of the schools. Whether selected as superintendent or principal, the duties are the same; that is, a general supervision of the schools of the town.

In the case you present the election of a superintendent, complies with this statute. In addition to the superintendent, the trustees have seen proper to select a principal of the high school. The person so selected is but a teacher in the high school, and the contract entered into between the Board and the principal would be governed by the rules laid down in the preceding portion of this opinion.

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

OP. NO. 1902—BK. 51, P. 125.

SCHOOLS AND SCHOOL DISTRICTS—TEACHERS' CONTRACTS—DELINQUENT TAXES.

School trustees may issue warrants in favor of school teachers to be paid from delinquent taxes when collected. Article 2824, R. S.

March 29, 1918.

Hon. W. F. Doughty, State Superintendent, Capitol.

DEAR SIR: In your letter addressed to the Attorney General you enclose a communication addressed to you by Mr. J. H. Bright, Superintendent of the Sweetwater schools, requesting you to obtain an opinion from this department upon the following questions:

"Can the board of trustees for an independent school district make obligations with teachers for salaries to be paid out of funds collected upon delinquent tax rolls, the collections being made subsequent to the year for which such taxes were assessed and in which year such obligations were made? Or, stating the same question a little differently, do the funds collected from delinquent tax rolls in a subsequent scholastic year become the funds of the year within which such taxes are collected, to the exclusion of an obligation made during the year for which such taxes are assessed, said obligation being based upon said delinquent tax rolls?"

Replying to Mr. Bright's questions, we beg to say that in the opinion of this department the board of trustees of the independent school district may lawfully issue warrants against the prospective collection of taxes for the current year. It appears from Mr. Bright's communication that on account of the drouth and the legislative act barring forced collection of taxes, about twenty-five per cent of the taxes for the current year are delinquent, causing a deficit of about twenty-five hundred dollars in the funds from which teachers are paid.

Article 2324 R. S. 1911, directing school trustees to determine the number of schools to be maintained in their districts, etc., directing the trustees to contract with teachers and manage and supervise the schools, concludes with this proviso:

"That trustees in making contracts with teachers shall not create a deficiency debt against the district."

Under this provision of the statute the courts have held that any debt contracted by the trustees in excess of the funds for the current year is void. See Collier vs. Peacock, 54 S. W., 1025.

The above provision first found place in the statutes of this State in the Act of 1884, being Section 53, Chapter 25, Acts of the special session, Eighteenth Legislature, which act repealed so much of Chapter 3, Title 78, of the Revised Civil Statutes of Texas as referred to public free schools outside of incorporated cities and towns having assumed control of their schools. This act was carried into the statutes of 1895, and the section referred to became Article 3959 of such revision. This article is contained in Chapter 11, Title 86, which chapter relates to school communities, corresponding to the present common school districts.

Article 3959 became Section 71 of the 1905 compilation of the school laws, being Chapter 124, Acts Regular Session Twenty-ninth Legislature. This latter act was subdivided, certain portions thereof applying to common school districts, while other portions apply to independent school districts, and others to towns and villages incorporated for school purposes only. This section was carried into the revision of 1911 as Article 2824, contained in Chapter 15, entitled "Common School Districts."

In the case of G. C. & S. F. Ry. Co. vs.. Blum Independent School District, 143 S. W. 353, Article 2827, being placed under the head of common school districts was held to apply only to those districts and not to independent districts. The doctrine announced in the

Blum case applied to Article 2824 would relieve independent school districts of the inhibition against the creation of the deficiency debts, and therefore the case of Collier vs. Peacock, *supra*, would have no application.

The case presented by you, however, is not an undertaking on the part of the trustees to create a deficiency debt against the district in the sense that they are entering into contracts calling for amounts in excess of the prospective funds for the year. It is a well recognized principle that in the appropriation of funds the Legislature is not confined to the amount actually in the treasury, but may make appropriation in anticipation of the collection of taxes for the year. Taxes levied to create a general fund of a school district constitute a fund against which warrants may be drawn within the amount of such levy, though the money may not have been collected and on hand in the fund with which to pay the same.

School District of Lincoln vs. Fisk, 84 N. W. 401.

It will be recalled that for the scholastic year of 1915-1916 there was a deficiency of something like $1,000,000 in the apportionment made by the State Board of Education. The question was presented to this department as to whether or not delinquent taxes collected during the ensuing year might be applied to the payment of this deficiency. This department answered that delinquencies collected and placed in the treasury during the fiscal year beginning September 1, 1915, might be applied to the school apportionment for the year 1914-1915. The opinion of this department recited that it was a well known fact that during the fiscal year of 1914-1915 financial conditions were greatly disturbed on account of the extremely low price of cotton occasioned by the European war, and as a result thereof the collection of the revenue of the State was somewhat retarded. The unprecedented drouth in a large section of the State has brought about a financial condition equally, if not more, distressing than that occasioned by the very low price of cotton during the early period of the war.

It is true that it is contemplated by our statutes that the schools for each year should be run upon funds available for that particular year. However, the taxes levied and assessed for the particular year in this case are to be used to defray the expenses of the school for that year, the payment of such expenses being deferred until the collection of the delinquencies for the year. It is not a case of paying the debts of the previous year from the available fund of the present, but simply deferring payment of current expenses until the collection of taxes levied and assessed for the present year but have gone delinquent.

We therefore advise you that in our opinion the trustees of the Sweetwater Independent District may lawfully issue warrants to the extent of the taxes levied and assessed, even though they may not be collected, and that such warrants may be paid from the taxes when collected.

Very truly yours,

C. W. TAYLOR,

Assistant Attorney General.

OP. NO. 1910—BK. 51, P. 139.

SCHOOLS AND SCHOOL DISTRICTS—CONSTITUTIONAL LAW.

An act of the Legislature passed without the necessary two-thirds vote in each House takes effect ninety days after adjournment.

Statutes speak from the date they take effect, and any act done under such statutes prior to the taking effect thereof, is void.

April 9, 1918.

Hon. W. F. Doughty, State Superintendent, Capitol.

DEAR SIR: In your favor addressed to the Attorney General you enclose a letter addressed to you by W. O. Willingham, Superintendent of Stanton public schools, from which it appears the school authorities at Stanton were under the impression that House Bill No. 790 enacted by the Thirty-fifth Legislature creating the Stanton Independent School District went into immediate effect, and acting upon such impression they proceeded to elect a board of trustees and voted a tax in said district.

Mr. Willingham desires instruction from your department as to how to proceed in the collection of the taxes, and you submit the letter to us for an opinion.

Replying thereto, I beg to advise that upon receipt of your communication we made an investigation in the Secretary of State's office and find that the original enrolled bill signed by the Governor does not show an aye and nay vote upon the passage of this measure in either House. We have also investigated the journals of the House and Senate and they show that in neither House was an aye or nay vote taken. Therefore this bill, notwithstanding the emergency clause, took effect ninety days after adjournment of the Regular Session, or June 20, 1917. Anything done under this Act prior to the date it took effect would be absolutely void, and this would include the election of trustees and the vote to determine whether or not a tax should be levied.

M. K. & T. Ry. Co. vs. State, 100 Texas, 420.
G. H. & S. A. Ry. Co. vs. State, 81 Texas, 572.
Scales vs. Marshall, 96 Texas, 140.
Lewis' Sutherland on Statutory Construction, Sections 182, 183.

In the case of M. K. & T. Ry. Co. vs. State, *supra,* the Supreme Court of this State said:

"Article 3, Section 39, of our Constitution provides: 'No law passed by the Legislature, except the General Appropriation Act, shall take effect or go into force until ninety days after the adjournment of the session at which it was enacted, unless, in case of an emergency, which emergency must be expressed in a preamble or in the body of the Act, the Legislature shall, by a vote of two-thirds of all the members elected to each House, otherwise direct; said vote to be taken by yeas and nays, and entered upon the journals.'

"The Act under examination did not have the emergency declaration, hence it did not go into effect until the 14th day of July, 1905, but that fact will not affect the question of its validity, for the railroads were not required to take notice of it until it became operative. (Cooley,

Const. Lim., 188; Price vs. Hopkins, 13 Mich., 319). The Constitution of Michigan contained this language: 'No Public Act shall take effect or be in force until the expiration of ninety days from the end of the session at which the same was passed, unless the Legislature shall otherwise direct.' In Price vs. Hopkins, cited above, Judge Cooley said: 'To make this Act operate as notice from its passage, seems to us to violate the constitutional provision we have quoted. To do that, we must hold that it has at least the effect and force of notice, during a period when the Constitution has declared it shall not take effect or be in force, and when the obvious design and intention was that it should have no force or effect whatever.' There is a conflict in the authorities upon this point, but we believe those cited are supported by the better reasoning. The words, 'or go into force,' used in our Constitution, emphasize the idea that the law is without vitality until the ninety days shall expire."

We therefore advise you that it would be necessary for the Stanton Independent School District to select trustees and call an election to determine whether or not a tax may be levied in such district as those acts done prior to the taking effect of the act are invalid.

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

OP. NO. 1914—BK. 51, P. 162.

INDEPENDENT SCHOOL DISTRICTS—LOCAL SCHOOL TAX ON PERSONAL PROPERTY.

1. Tangible, movable, personal property is taxable for district school purposes only in the district where it is actually physically situated on January 1st, of the year the tax is levied.
2. Where a person lives in an independent school district but owns cattle which are kept and pastured in another school district, the trustees of the independent school district have no authority to levy the local tax of the independent school district against such cattle.

April 11, 1918.

Hon. Lex Smith, County Attorney, Fairfield, Texas.

DEAR SIR: We have a letter from you, stating the following facts and asking the following questions:

"Mr. J. A. Hill lives in independent school district No. 1. The county assessor and collector assesses and collects taxes for said district. Mr. Hill owns cattle on a ranch in another part of the county, outside of said school district. The assessment rolls charge Mr. Hill with school tax on said cattle.

"Can said independent school district No. 1 require Mr. Hill to pay this part of his taxes—that is, the tax on said cattle—for said school district?"

Replying thereto, we beg first to call attention to the following provisions of Article 7508, R. S., and Article 7510, R. S.:

Art. 7508. "All property shall be listed for taxation between January 1 and April 30 of each year, when required by the assessor, with reference to the quantity held or owned on the first day of January in the year

for which the property is required to be listed or rendered. * * * "

Art. 7510. "All property, real and personal except such as is required to be listed and assessed otherwise, shall be listed and assessed in the county where it is situated; and all personal property, subject to taxation and temporarily removed from the state or county, shall be listed and assessed in the county of the residence of the owner thereof, or in the county where the principal office of such owner is situated."

We next call attention to the following provisions of Article 2877, as amended by an Act of the Thirty-fifth Legislature, relating to the levying of tax in a city or town constituting an independent school district:

"If the vote of the taxpayers is in favor of said tax, then it shall be the duty of the council or board of aldermen annually thereafter, to levy upon the taxable property *in the limits of such district*, in accordance with the usual assessment of taxes for municipal purposes. * * * "

We next call attention to the following provisions of Article 2857, relating to the levying of taxes in independent school districts not constituted solely of a city or town:

"Trustees of a district that has been or may hereafter be incorporated under general or special laws, for school purposes only, shall have power to levy and collect an annual ad valorem tax not to exceed fifty cents on the one hundred dollars valuation of 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, etc. * * * "

It will be noted that by the terms of Article 2877 the City Council or Board of Aldermen of a city constituting an independent school district are authorized to levy the local school tax only upon the taxable property "in the limits of such district," and by the terms of Article 2857 the trustees are authorized to levy the local taxes of the district only on taxable property "of the district." We think these two terms have the same meaning and should be construed to mean the taxable property situated within the limits of the district on the first day of January of each year.

This was the construction placed upon a similar term contained in Article 939, R. S., regulating the manner and mode of making tax lists in cities, by the Court of Civil Appeals in the case of City of Tyler vs. Coker, 124 S. W. 729, from which we make the following quotation:

"These provisions would appear to hange the rule which seems to be adopted in some jurisdictions, of making the rolling stock of railroad companies taxable at the place of the corporate domicile. The terms 'lying or being within the limits of any city or incorporated town' etc., when applied to the tangible and movable personal property, would hardly be considered as meaning other than that the property must be actually physically within the limits of the municipality where it is sought to be taxed, in order to be subject thereto."

The rule as to the situs of personal property for taxation is thus stated by the Supreme Court in the case of Ferris vs. Kimble et al., 75 Texas, 477.

"From the authorities quoted, we conclude that the following rules are in force in this State with regard to the residents of this State:

"(1) Personal property, except when it is otherwise provided, is situated where its owner resides and is taxable only there.

"(2) *Tangible personal property situated in any town or city of this State is subject to taxation at the place where it is situated.*

"(3) Intangible personal property, such as credits, are taxable only at the place of residence of the owner, without regard to where they are kept or deposited, and equally without regard to how they were earned or to the place of residence of the debtor."

Cattle constitute what is termed "tangible personal property" and therefore are subject to taxation only at the place where they are situated on January 1st, of the year in which the particular tax is levied. If the cattle of Mr. Hill were not situated within the independent school district on January 1st of the year when the tax was levied, the trustees of the school district had no right to make the levy, although Mr. Hill resided within the limits of the district. These cattle were taxable only in the district where they were actually situated on January 1st. It will be manifestly unjust to subject them to taxation in both districts.

Very truly yours,

JOHN C. WALL,

Assistant Attorney General.

OP. NO. 1921—BK. 51, P. 234.

SCHOOLS AND SCHOOL DISTRICTS.

Where there is a vacancy in the office of one of the trustees in a common school district and one of the remaining trustees signs a teacher's voucher, the other refusing to do so, an appeal will lie to the county superintendent.

A vacancy in the office of school trustee of a common school district should be filled by the county board of trustees.

May 1, 1918.

Hon. O. B. Wigley, County Attorney, Newton, Texas.

DEAR SIR: From your letter of April 14th, it appears that in one of the common school districts of your county there is one vacancy in the office of trustee, leaving only two remaining. One of these trustees has approved certain teachers' vouchers and the other trustee has refused to approve same. You state that the matter has been presented in proper form for approval by the county superintendent, who has held that the teachers are entitled to pay for their work, ruling that the other trustees shall sign the vouchers. Under this state of facts you desire to know what course should be pursued in the matter.

Replying thereto, I beg to say that this whole matter could probably be solved by the county board of trustees appointing some one

to fill the vacancy in the office of school trustee. See Article 2821 R. S., 1911, as amended by Chapter 199, Acts Thirty-fifth Legislature.

However, in our opinion this is not absolutely necessary to a solution of the question for the reason that an appeal will lie from the action of the two trustees in this case.

Under the provisions of Article 2826, R. S., 1911, the amount contracted by the trustees to be paid a teacher is paid on a check drawn by a majority of the trustees on the county treasurer and approved by the county superintendent. In the case presented by you, there being only two trustees, it would require the signature of both of them for the reason that one is not a majority. By the failure and refusal of one of such trustees to sign this voucher the teacher has been denied the right to collect his salary. The courts of this State have uniformly held that the various appeals authorized by the school laws of this State through the scholastic courts are conditions precedent to the right to appeal to the civil courts of the land, and that such latter courts will not entertain jurisdicion of causes until it shall have first been made to appear that the cause has been prosecuted through the various appeals authorized by the school laws.

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.
Plummer vs. Gholson, 44 S. W., 1.

In the case of Plummer vs. Gohlson, *supra*, Gohlson filed a petition seeking by mandamus to compel Plummer, ex officio county superintendent, to approve a voucher drawn by the school trustees in favor of Gholson for fifty dollars to compensate him for services rendered as a school teacher. No appeal was taken from the action of the superintendent. In reversing and rendering the case upon this ground the Court of Civil Appeals speaking through Judge Key said:

"The plaintiff did not allege in his petition that he had appealed from the action of the county superintendent to the State Superintendent of Public Instruction, as authorized by statute; and the testimony shows that no such appeal was taken. This being the case, under the rule of decisions established by our supreme court, appellee was not entitled to resort to the remedy of mandamus. Nance vs. Johnson, 84 Texas, 401, 19 S. W., 559; Harkness vs. Hutcherson (Texas Sup.), 38 S. W., 1120; Cochran vs. Patillo (Texas Civ. App.), 41 S. W., 537, and cases there cited. According to the doctrine established by these cases, the plaintiff was required to exhaust all the remedies afforded by the school law before he could resort to the extraordinary remedy of mandamus. The statute construed in Nance vs. Johnson, and held to confer the right of appeal from all acts of county school officers to the State Superintendent and to the state board of education, is still in force. Rev. St. 1895, Art. 2938b. As there appears to be no contest about the fact that no appeal was taken from the action of the county judge in refusing to approve the voucher, the case will not be remanded for another trial, but the judgment of the trial court will be reversed, and judgment here rendered

for appellant, without prejudice to appellee's right to appeal to the State Superintendent of Public Instruction. Reversed and rendered."

In the case presented by you, therefore, we are of the opinion that an appeal would lie from the action of the board of trustees to the county superintendent, from the county superintendent to the county board, thence to the State Superintendent and State Board of Education. In the event of a failure to appeal from the action of the county superintendent, which we understand from your letter is in favor of the teacher, then we believe, and so advise you, that the county treasurer would be authorized to pay the voucher without the signature of the other trustees, provided said voucher had the approval of the county superintendent, and in addition thereto there was attached to same the order of the county superintendent overruling the action of the trustee in refusing to sign such voucher.

We are passing simply upon the questions presented by you and are not undertaking to pass upon the facts of this case or upon any question of law as to the right of the teacher to receive salary other than as is herein expressed.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

OP. NO. 1926, BK. 51, P. 245.

SCHOOLS AND SCHOOL DISTRICTS—COUNTY SUPERINTENDENTS.

S. B. No. 26 regulating the salaries of County Superintendents and providing for office expenses takes effect ninety days after adjournment of the Fourth Called Session of the Thirty-fifth Legislature or on June 26, 1918.

Under the last paragraph of Section 1, county superintendents may be allowed by the county school trustees a sum not to exceed two hundred dollars annually for office and traveling expenses. This provision supersedes and by implication repeals that portion of Article 2758, R. S., 1911, authorizing an allowance not to exceed one hundred dollars per year for stamps, stationery, expressage and printing.

While the provision with reference to an allowance for office and traveling expenses is contained in the paragraph dealing with counties having a scholastic population of ten thousand, or more, yet such provision relates to each class of counties according to population, and does not relate alone to counties having a scholastic population of ten thousand or more.

May 3, 1918.

Hon. Frank Kemp, County Attorney, Greenville, Texas.

DEAR SIR: You desire to know when Senate Bill No. 26 relating to the salary of County Superintendents will take effect and also the construction placed by this department upon such law with reference to office expenses of the County Superintendent.

Replying thereto I beg to hand you herewith copy of this act from which you will observe that it passed the House by a vote of seventy-eight ayes and thirty-seven nays and that the House adopted the free

conference report by sixty-nine ayes and thirty-four nays, which vote is insufficient to put the law into immediate effect and therefore it goes into effect ninety days after adjournment of the Fourth Called Session, or June 26, 1918.

Article 2758 provides that the County Superintendent shall be allowed any sum not to exceed one hundred dollars per year for stamps, stationery, expressage and printing to be paid by the Commissioners' Court out of the general county funds. The last paragraph of Section 1 of the Act of the Fourth Called Session of the Thirty-fifth Legislature provides that in making the annual apportionment to the schools the county school trustees shall make an annual allowance out of State and county available funds for salary and expenses of the County Superintendent.

It is further provided in this paragraph that no County Superintendent of Public Instruction shall be allowed exceeding two hundred dollars annually for office and traveling expenses. The allowance of one hundred dollars made by Article 2758 above referred to is for stamps, stationery, expressage and printing, each of which items is clearly office expense. In our opinion it was the intention of the Legislature in the enactment of Senate Bill No. 26 to include all expenses of the County Superintendent and therefore that the provision with reference to the allowance for expenses supersedes and by implication repeals the allowance contained in Article 2758. Therefore the county school trustees may make an allowance not to exceed two hundred dollars for office and traveling expenses and this allowance is the total amount to which a County Superintendent is entitled for such purposes. In other words, these two provisions of the statute cannot both stand and the superinendent be allowed two hundred dollars for office and traveling expenses and in addition thereto one hundred dollars for stamps, stationery, expressage and printing. These items being office expenses are covered by the latter bill and two hundred dollars is the maximum amount that may be allowed by the County Superintendent for office and traveling expenses.

In this connection we also beg to state that in our opinion the proviso with reference to an allowance for office and traveling expenses, although incorporated in the paragraph dealing with counties having a scholastic population of ten thousand or more, refers to each and all of the counties in the various classifications according to population and does not refer only to counties having a population of ten thousand or more.

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

OPINIONS CONSTRUING STATE HIGHWAY COMMISSION LAW.

OP. N. 1775—BK. 49, P. 355.

A "chauffeur" within the meaning of Section 25, of Chapter 207, Acts Regular Session Thirty-fifth Legislature, is any person who is engaged chiefly in driving or operating a motor vehicle either for wages or salary in the employ of another, or who operates for hire for the transportation of persons or property their own vehicles or vehicles under their control.

One, however, who engages in the activities of a chauffeur casually or as an incident to any employment should not be classed as pursuing the business or occupation of a chauffeur within the meaning of this law.

June 26, 1917.

Hon. Curtis Hancock, Chairman State Highway Commission, Capitol.

DEAR SIR: Under date of the 25th instant you transmit to this department for advice a matter that arises on a communication received from the legal department of the Southwestern Telegraph and Telephone Company at Dallas.

This company, through its attorney, requests your opinion as to the proper interpretation to be placed on Section 25, Chapter 207, Acts Regular Session, 1917, relating to the necessity for chauffeurs to be licensed. In other words, the question calls for a construction of this law as to the sense in which the term "chauffeur" is used in this statute and the persons comprehended thereunder who are required to pay the license tax before engaging in the occupation or business described.

You transmit to this department this inquiry with request that we give you advice touching the question raised.

Section 25 of this act, in defining chauffeurs, uses the following language:

"An application for a license to operate a motor vehicle as a chauffeur (and by chauffeur is meant any person whose business or occupation is that he operates a motor vehicle for compensation, wages or hire) shall be made by mail, etc."

A chauffeur is defined in the Century Dictionary to be "the driver of an automobile."

The person, therefore, who is taxed by this law and to whom a license must be issued is one whose "business" or "occupation" is to drive or operate a motor vehicle for "compensation, wages or hire."

The word "business" as used in laws imposing a license tax has been defined as follows:

"The word 'business' is of large significance and denotes the employment or occupation in which a person is engaged to procure a living."
Allen vs. Commonwealth, 69 L. R. A., 599.
Goddard vs. Chaffee, 79 Am. Dec., 796.

"Business in the sense in which occupation tax is levied does not, generally speaking, mean property. It means the activity, the energy, the capacity, the opportunities by which results are reached, a condition rather than fixed tangible objects for which conditions arise, the occupation, the engaging, the doing of the varied commercial acts and the

taking of the requisite steps from which results conclusions and conditions."
Atlantic Postal Tel. Co. vs. Savannah, 65 S. E., 184.

"The word 'business' in its broad sense embraces everything about which one can be employed and in its narrower sense it signifies a calling for the purpose of livelihood or profit."
Easterbrook vs. Hebrew Ladies Orphans Society, 45 L. R. A. (N. S.,), 615.

The term "occupation" as used in similar statutes has been defined as follows:

"The term 'occupation' is synonymous with calling, trade, business or profession."
City of Topeka vs. Jones, 86 Pac., 162.

"The word 'occupation' is a generic term and is that to which one's time and attention are habitually devoted, vocation, calling, trade, business, and a vocation is an employment, occupation, calling, trade, including professions, as well as mechanical occupation."
Village of Dodge vs. Guidinger, 138 Am. St., 494.

"Occupation, as commonly understood, signifies vocation, calling, trade, the business which one principally engages in to secure a living or obtain wealth."
Joliff vs. State, 109 S. W., 176.
Stanford vs. State, 16 Texas App., 331.
Cohen vs. State, 110 S. W., 66.
Dozier vs. State, 137 S. W., 689.

It will be observed that the terms "business" and "occupation" are used in the law books interchangeably. In the statute under investigation we believe that these terms are used synonymously and are not intended to define two phases of activity.

As seen above, a business or ocupation is a vocation in which one is *principally* engaged in making a living. Therefore the license tax in question is levied upon a person who, in order to make a living, is engaged *chiefly* in driving or operating motor vehicles as a separate and distinct calling. Whether or not in a particular case a person is thus engaged would necessarily depend upon the peculiar facts of that case.

Our Court of Civil Appeals, in the case of Love vs. State, 20 S. W. 978, in applying this doctrine to the facts of that case, said:

"Appellant was convicted of pursuing the occupation of vending medicine without license, and fined in the sum of $262.50, from which he appealed to this court. Conceding the sufficiency of the indictment, and the correctness of the charge of the court, we do not think the evidence sufficient to support the charge. Appellant, as shown by the testimony, has been a colored Methodist preacher for 34 years, and for the past year or two was traveling with the colored Methodist conference as missionary in North Texas. While in the discharge of these clerical duties, for the purpose of 'sorter paying expenses,' he sometimes, at 50 cents per bottle, sold a mixture which he called 'The Oil of Life,' and claimed to be a remedy for rheumatism. He sold three bottles of this mixture in Ellis County, while performing his missionary duties. Appellant testified that he was not in the business of selling this oil, but that his

occupation and profession was that of a missionary preacher. There is nothing in the record suggesting that his occupation was that of a mere cover or excuse to enable him to sell said medicine. 'Occupation' means a vocation, trade or business in which one principally engages to make a living or to obtain wealth. Stanford's Case, 16 Texas App., 331. Appellant cannot be said to be 'one who travels for the purpose of vending medicine,' which is the occupation the law proposes to tax. The judgment is reversed, and the cause remanded. All judges present concurring."

As in the case of the old colored preacher who, in order to "sorter pay expenses," sold the Oil of Life for fifty cents per bottle when he was not preaching about the bread of life to his brethren and sisters, so we may find those whose principal employment is such that it may be incidentally served by the use of a motor vehicle, and yet not bring them within the terms of this law as pursuing the occupation of a chauffeur.

For your general guidance we believe the following general rules may be stated, to wit: The term "chauffeur" includes:

First. All those who, for wages or salary, engage themselves to operate motor vehicles, whether for pleasure or in connection with the pursuit of any business.

Second. All those who operate for hire for the transportation of persons or property their own motor vehicles or vehicles under their control.

It will be borne in mind that in order to be taxed at all one must be engaged in the making of a livelihood chiefly by driving or operating a motor vehicle, either for himself or for another. *Casual* or *incidental* employment of this kind falling short of being the *chief* employment a person pursues for a living would not render such liable to pay this tax.

We can not do more than announce general rules. In the administration of the law the Commission will be called upon often to exercise a sound discretion as to whether or not a particular case under its peculiar facts comes within or falls without the scope of the law.

Yours truly,

B. F. LOONEY,
Attorney General.

OP. NO. 1782—BK. 49, P. 390.

STATE HIGHWAY DEPARTMENT—FUNDS REMITTED TO COUNTIES.

The one-half of the registration fees remitted by the State Highway Department to the respective counties is to be expended by the counties upon highways of the counties, after the submission to and approval by the Commission of the plans of the contemplated expenditures.

Section 23, Chapter 190, Acts of the Thirty-fifth Legislature

July 19, 1917.

The State Highway Department, Capitol.

GENTLEMEN: The Attorney General is in receipt of a letter from

Hon. A. L. Liles, County Auditor at Belton, Texas, reading as follows:

"Referring to Section 23, of the Highway Bill, when we receive the first payment of Bell County's portion of the motor vehicle tax, will this have to be set aside in a special fund and spent on plans approved by the State Highway Department, or can we apportion same to the four commissioners' precincts, as we do the other road and bridge funds?"

It is the policy of this Department, in order to promote harmony between the various departments of the State government, as well as uniformity in the opinions of this Department, to address all communications having to do with any law to the Department charged with the enforcement of such law, and under this rule we are taking the liberty of addressing the opinion to you, in answer to Mr. Liles's inquiry.

Section 23 of Chapter 190, Acts of the Thirty-fifth Legislature, being the Act of the Legislature creating the State Highway Department, is in the following language:

"Sec. 23. All funds coming into the hands of the Highway Commission, derived from the registration fees hereinbefore provided for, or from other sources, as collected, shall be deposited with the State Treasurer to the credit of a special fund designated as 'The State Highway Fund,' and shall be paid only in warrants issued by the State Comptroller upon vouchers drawn by the chairman of the Commission and approved by one other member of the Commission, such vouchers to be accompanied by itemized sworn statements of the expenditures, except when such vouchers are for the regular salaries of the employes of the Commission. The said State Highway fund shall be expended by the State Highway Commission for furtherance of public road construction and the establishment of a system of State highways, as contemplated and set forth in this Act; provided, that semi-annually, on the first days of September and March, respectively, beginning with September 1, 1917, one-half of the gross collections of registration fees from all motor vehicles and motorcycles, received from the several counties of the State by the State Highway Department, as provided in this Act, shall be remitted to the county treasurer in the counties from which such collections were respectively made; and provided further, that such allotment of registration fees to the counties, shall constitute a special fund to be expended by or under the direction of the commissioners courts of the respective counties in the maintenance of the public roads of such counties in accordance with plans approved by the State Highway Department."

A reading of the entire Act will disclose its general purpose to be the construction throughout the State of a system of coordinated highways, together with local or market roads, for the benefit and convenience of the several communities. In furtherance of this general plan language is used in Section 23, above quoted, to the effect that the one-half of the gross collections remitted to the several counties shall be respectively used by them in the maintenance of their roads, in accordance with plans approved by the State Highway Commission.

This language protects the general system outlined by the Act, and requires approval of expenditures or plans upon which expenditures are made by the Highway Commission before the counties could expend their half of the fund upon their roads. This would

preclude the commissioners' court from allotting the funds thus received to the several commissioners precincts, to be expended as other road and bridge funds. It will be noted that this Article requires that the respective allotments shall constitute special funds of the several counties, to be expended under the direction of the commissioners court. This gives to the commissioners court the direction and control of the expenditure of the fund, but in such expenditure they are limited by the further provision of the Act, that the same must be upon plans approved by the Highway Department. Any other interpretation of this Section of the Act would be to defeat the general scheme and purpose of the same, to wit: A coordinated system of highways, together with the local or market roads leading thereto.

This allotment from the State Highway Department does not become a part of the general county road and bridge fund, but remains as a special fund, to be expended in the manner set out by the Act creating the same. When the commissioners court desires to make an expenditure from this fund they should designate the roads, the character of maintenance desired and submit the plans in detail to the State Highway Department, and upon their approval or disapproval would depend the right of the commissioners court to proceed with the work.

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

OP. NO. 1783—BK. 49, P. 402.

STATE HIGHWAY DEPARTMENT—CHAUFFEUR'S LICENSE.

A party running a service car must take out a chauffeur's license in addition to the license fee upon the car operated by him.
Section 16, Chapter 190, and Section 25, Chapter 207, Acts Thirty-fifth Legislature.

July 16, 1917.

State Highway Department, Capitol.

GENTLEMEN: A county attorney has submitted to this department the following question:

"Is it necessary for a person who is running a service car and who owns the service car and who runs it himself to take out a license as a public chauffeur in addition to paying his taxes."

As is the practice of this department, we take the liberty of addressing this opinion to you.

We are of the opinion that a person operating a service car should, in addition to registering his car and paying the license fee thereon, take out a license as a chauffeur and pay the fee required by law. The license fee required by Section 16 of Chapter 190, Acts Thirty-

fifth Legislature, is a fee paid for the privilege of operating the machine upon the highways of the State, while the fee paid by a chauffeur under Section 25, Chapter 207, is a fee paid by a person whose business or occupation is the operation of any motor vehicle for compensation, wages or hire for the privilege of pursuing that vocation. The two license fees thus paid are separate and distinct; the one upon the machine, the other upon the occupation of chauffeur, and a person therefore owning his own machine operating the same as a service car should pay the license fee under Section 16, Chapter 190, and in addition thereto the chauffeur's fee under Section 25, Chapter 207.

Yours truly,

C. W. TAYLOR,
Assistant Attorney General.

OP. NO. 1784—BK. 49, P. 404.

STATE HIGHWAY DEPARTMENT—CHAUFFER'S LICENSE.

A person in the employ of a mercantile establishment whose duty it is to drive the automobile delivery is a chauffeur within the meaning of the Act, although when not engaged in delivering goods he does other work about the store.

A person under eighteen years of age cannot be licensed as a chauffeur and therefore a person under this age cannot act as a chauffeur at all. Sections 25 and 26, Chapter 207, Acts Thirty-fifth Legislature.

July 17, 1917.

State Highway Department, Capitol.

GENTLEMEN: We are in receipt of a letter from a county attorney containing the following statement of facts, and inquiry based thereon:

"Durch Bailey, a boy under 18, but about grown in size who has been employed as a delivery boy in a grocery store and who is very anxious to learn the dry goods business, has recently been employed by the month, by Tucker, Hayter & Co., a corporation, doing a general mercantile business in this city. They state that he has been employed for, and his duties are, general work in the store, such as sweeping the floor, general salesman in the different departments, keeping stock and delivering all merchandise sold, in an automobile. He is delivering packages in an automobile far less than half of his time, to be precise, last Friday it required two hours and thirty minutes of his time; the remainder of his time is spent in the store as a salesman, etc., simply learning the business. However, he delivers all packages in an automobile.

"Now, is he a 'chaufeur?' If so, he being under 18, Tucker, Hayter & Co. will have to secure some other help and the probabilities are that he will lose his employment."

As is the custom of this department, we are addressing this opinion to you and sending copy thereof to the county attorney.

It appears to us that the facts stated in his letter present even a stronger case than those considered in previous opinions to your department, for it appears therefrom that the boy in question is recognized as the delivery boy and it is his duty to deliver all packages

delivered from the store and that such deliveries are made by the use of an automobile. He is regarded in the store as the one person whose duty it is to drive the automobile in making such deliveries. It is immaterial as to the amount of time consumed each day. Some days when trade is light there might be no call for his services, while again, during the heavy trade seasons of the year his services as the driver of the delivery automobile might be in constant demand. So it is not a question of the amount of time consumed. The question is —is this young man the one who is relied upon at all times to drive the automobile in making deliveries of packages? This can safely be said from your letter to constitute his chief duty. It is merely when he is not engaged in this duty that he performs other services about the store. His chief and principal occupation is that of driving the automobile delivery.

Section 25 of the Act in question contains the following clause:

"Upon the receipt of such application, and provided the department is satisfied that the applicant is a proper party to whom a chauffeur's license should be issued, and is over eighteen years of age, they shall issue to him a distinguishing number or mark and shall also issue to him his license certificate in such form as the department may determine."

It therefore appears that no license may be issued to a chauffeur who is under the age of eighteen years, and as the young man in question in this case is but seventeen, no license could be issued to him.

Section 26 of the Act prescribes a penalty for those operating motor vehicles as chauffeurs when not licensed, and therefore the young man could not operate a machine as a chauffeur at all.

Yours truly,

C. W. TAYLOR,

Assistant Attorney General.

OPINIONS AS TO TAXATION.

OP. NO. 1676—BK. 48, P. 319.

TAXATION—GROSS RECEIPTS TAX—OIL COMPANIES—CORPORATIONS—PARTNERSHIPS. R. S. ARTICLE 7385.

A corporation and an unincorporated firm cannot form a lawful partnership for the production of oil, and if engaged in this business jointly must be considered for the purposes of taxation as operating separately, and each should pay the beginning tax under Revised Statutes, Article 7385.

November 20, 1916.

Hon. E. B. House, State Revenue Agent, Capitol.
Attention Mr. Thomas.

DEAR SIR: Your letter stating the facts upon which you desire an opinion of this office is as follows:

"I ask for the following ruling, and will use the proper names of the facts at issue as the parties ask for this ruling:

"McAllister & Brown, is a partnership, whose office is in Wichita Falls, and The Farabee Oil & Gas Company, is a corporation, with office in Wichita Falls, and the records in the Secretary of State's office show that The Farabee Oil & Gas Company's charter was filed in said office on July 17, 1916.

"Both of the above named are producing oil on joint property, and both McAllister & Brown and The Farabee Oil & Gas Company claim that only one of the above named should pay the State of Texas the beginning quarter tax as set out in Article 7385, Chapter 2, Title 126, R. C. S., 1911.

"It is admitted that both are producers of oil, but on this joint property.

"Now the question: Must The Farabee Oil & Gas Company pay the beginning quarter tax as well as McAllister & Brown? Shall each of them pay the tax in question as oil producers or operators of oil wells within this State.?"

In reply to the above question we direct your attention to the fact that Revised Statutes, Article 7385, imposes the beginning tax upon 'any individual company, corporation, firm or association.'' It is shown in your letter that McAllister & Brown is a partnership and therefore a firm engaged in the production of oil. They are bound, therefore, to pay the beginning tax. Your letter likewise shows that The Farabee Oil and Gas Company is a corporation engaged in the production of oil. It is, therefore, subject to the beginning tax. The contention is, however, that the partnership, McAllister & Brown, and the corporation, The Farabee Oil and Gas Company, are operating jointly and that the one tax paid by McAllister & Brown is sufficient for their joint operations.

In reply to this we beg to direct your attention to the fact that The Farabee Oil and Gas Company, being a corporation, has no corporate authority to enter into a partnership with McAllister & Brown, and that, therefore, in law it must be considered as producing oil on behalf of its corporate entity, disassociated from any al-

leged partnership with McAllister & Brown. The authorities in this State hold uniformly that a corporation chartered under the laws of this State has no authority to enter into partnerships. The rule has been stated as follows: It may be conceded as a general proposition that corporations without special authority can not enter into an agreement or partnership, and if they do that as between themselves such an agreement can not be enforced.

El Paso, etc., Ry. Co. vs. Kelley, 83 S. W., 857.
Corralitos Co. vs. McKay, 72 S. W., 624.
White vs. Pecos Land Company, 45 S. W., 207;
Sabine Tram Co. vs. Bancroft, 40 S. W., 837.

In the last cited case the defendants entered into a contract of partnership with a corporation for the manufacture and sale of logs, defendants to furnish and operate a saw mill and the corporation to furnish the logs.

Held: The corporation could not recover on defendant's failure to receive the logs and operate the mills, since the entire contract was vitiated by the illegality of the partnership, the corporation having no authority to enter into a contract of partnership.

However, the rule is elementary and it is unnecessary to discuss the question further.

The Farabee Oil and Gas Company, a corporation, and the McAllister & Brown, a firm, an unincoporated partnership, can not enter lawfully into a partnership contract and therefore they must be classed the one a corporation, subject to the tax, and the other a firm, likewise subject to the tax.

We answer your question directly then, and state that in our opinion the tax should be collected from each of these concerns.

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

OP. NO. 1678—BK. 48, P. 329.

POWERS AND DUTIES OF BOARD OF EQUALIZATION IN CITIES OF FIVE THOUSAND OR LESS

1. After the board of equalization at the adjourned meeting provided for in Articles 950 and 951, R. S., 1911, have equalized the value of all property upon the assessor's lists or books and have approved the lists or books showing such equalization and returned them to the city tax assessor, such lists or books are not thereafter subject to revision by said board.

2. Only one meeting of said board, after the adjourned meeting provided for in Articles 950 and 951, is authorized by statute. That is the meeting authorized in Article 952, R. S. At this meeting it is the duty of the board only to examine the general rolls made up by the tax assessor from the lists and books approved by the board at said adjourned meeting and ascertain whether the general rolls as so made up are correct. If found to be correct, the general rolls should be approved. If

found incorrect, the board should make or have made corrections so as to make the general rolls conform to the lists and books approved by the board at their adjourned meeting provided for in Articles 950 and 951, R. S.

November 21, 1916.

Hon. Carey Leggett, County Attorney, Port Lavaca, Texas.

DEAR SIR: We have a letter from you in which you ask the following question:

"After the city board of equalization have met in compliance with Article 952, R. S., have finally examined and equalized the value of all property on the assessor's lists or books, have approved said lists and returned them to the assessor with their approval and the assessor has prepared his general rolls as required by law ready for examination and approval by the board of equalization, if found correct, can the said board of equalization, before this final approval, though it is found correct, make any changes in the valuations already determined upon?"

Replying thereto, we beg to state that this question is answered by the provisions contained in Articles 951 and 952, R. S.

Article 951 is as follows:

"The board of equalization shall meet at the time specified in said order of adjournment, and shall hear all persons the value of whose property has been raised, and, if said board is satisfied they have raised the value of such property too high, they shall lower the same to its proper value."

Article 953 is as follows:

"The action of said board at the meeting *provided for in Article* 951 shall be final, *and shall not be subject to revision by said board or by any other tribunal thereafter.*"

The meeting mentioned in Article 951 is the adjourned meeting of the board provided for in Article 950. According to the terms of the article last mentioned the board, after raising the value of property appearing on the books of the assessor that should be raised and after correcting all errors in such books, shall "adjourn to a day not less than ten nor more than fifteen days from the date of adjournment, such day to be fixed in the order of adjournment, and shall cause the secretary of said board to give written notice to the owner of such property or to the person rendering the same of the time to which said board may have adjourned * * * that such owner or person rendering such property may at that time appear and show cause why the value of said property should not be raised."

The object of this meeting is to give persons the values of whose property has been raised an opportunity to show cause why it should not have been raised and to determine whether the valuations fixed on such property are too high.

It appears from your letter that the adjourned meeting provided for in Articles 950 and 951, R. S., was held; that at said meeting all property on the assessor's lists or books was examined and equalized; that said lists and books were then approved and returned by the

Board to the assessor to enable him "to make up therefrom his general rolls," and that the assessor has actually made up his general rolls therefrom.

These being the facts, we think said board does not now have the power and authority to revise their figures for, in plain and unambiguous language, Article 953 provides that "the action of said Board at the meeting provided for in Article 951 (which was the adjourned meeting just above referred to) shall be final *and shall not be subject to revision by said board.*"

Indeed, after the adjourned meeting referred to is held, only one other meeting of the board is authorized or provided for by statute. That is the meeting provided for in Article 952, R. S., in the following language:

"The board of equalization after they have finally examined and equalized the value of all property on the assessor's lists or books, shall approve said lists or books and return them, together with the list mentioned in Article 949, that he may make up therefrom his general rolls as required by law; and, when said general rolls are so made up, the board shall *meet again to examine said rolls and approve the same, if found correct.*"

It is the opinion of this department that if the general rolls made up from the lists and books approved by the board and returned by it to the assessor are, at the meeting referred to in Article 952, found correct, it is the duty of the board merely to approve the same. It is further the opinion of this department that if said general rolls so made up are, at the meeting referred to in Article 952, R. S., found incorrect, then it would be the duty of the board to correct said rolls or have them corrected and that said board could only make such corrections as would make the general rolls conform to the lists and books approved by them at their adjourned meeting and returned by them to the tax assessor.

Duck vs. Peeler, 74 Texas, 268; 11 S. W., 1111.
Clawson Lumber Company vs. Jones, 20 Texas App., 208; 49 S. W., 909.

The foregoing observations do not apply to cities of more than five thousand population, which by authority of Chapter 147 of the General Laws of the Regular Session of the Thirty-third Legislature, may have adopted, or may hereafter adopt, charters containing provisions for the equalization of taxes different from those provided in the General Laws.

Art. 11, Sec. 5, of the Constitution.
Scollard vs. City of Dallas, 42 S. W., 640.

Yours very Truly,
JNO. C. WALL,
Assistant Attorney General.

OP. NO. 1680—BK. 48, P. 333.

ASSESSOR AND COLLECTOR OF TAXES—CITY OR TOWN—INDEPENDENT SCHOOL DISTRICT—FEES AND COMMISSIONS.

City assessor and collecter of taxes is also assessor and collector for an independent school district, where boundaries of district are co-extensive with city.

November 22, 1916.

Honorable J. R. Fuchs, City Attorney, New Braunfels, Texas.

DEAR SIR: The Department acknowledges receipt of your letter of several days ago which reads as follows:

"The City of New Braunfels is a municipal corporation, incorporated under the General Laws of the State of Texas. The New Braunfels independent school district was created by Special Act of the Legislature in the year 1913. See Special Laws of 1913, page 140, Chapter 43. The limits of the city and said district are identical. For convenience sake we will designate the city of New Braunfels as the 'city' and the independent school district of New Braunfels as the 'district.'

"Said city elects a city assessor and also a city collector—two separate offices. The city assessor's compensation is fixed by city ordinance, a copy of which you have in your possession. When the said district was created the city assessor was elected by the board of trustees of said district as the assessor of said district. He receives as such no separate compensation from the said district, but said district would and did reimburse the city for its pro rata of the commission said assessor must receive. It was the mutual understanding between the said two governments—city and school district—that the city would fix the compensation which the assessor was to receive and the school district would reimburse the city for its share as above stated.

"In the year 1915, however, the said school board without any notice to the city, passed a resolution, whereby the board agreed to pay the city assessor as assessor for said district the same compensation as the city. See exhibit 'A,' hereto attached.

"The city assessor accepted the position as assessor of the city of New Braunfels with full knowledge of the fact that he was also to be assessor of said district, and that he would not receive any further compensation than that fixed by the city ordinance. He had no knowledge or notice of the ordinance passed by the school board, until the time of payment in 1916 came. In other words, he acted in this dual capacity with the understanding and belief that he would receive the compensation fixed by city ordinance and no more.

"Neither the city assessor, nor the city collector, gave any bond to the said district, nor did either one of them take an oath of office as assessor or collector of the independent school district. The bond they did give is only an obligation to the city, covering only city assessments and city taxes.

"The city paid their assessor the sum of $709.38. The school board paid the same assessor the sum of $288.00. The attached statement, marked exhibit 'B,' will show you more in detail the total assessment, and how the city made its calculations, also how the school board arrived at its figures.

"The situation in a nut shell is this, that the assessor has received a salary of nearly $1,000.00 for about two or three month's work. This was not the intention of the city, it was not the intention of the school board, and the city assessor at no time expected to receive this exorbitant salary. It was generally accepted as a fact by the public and they understood that said assessor was to receive a salary of about $700.00 all told, which was to cover his work for the city as well as for the inde-

pendent school district. Now the question:

1. Is there any way by which this money—that is the amount which the assessor has received over and above the amount that it was the intention to pay him—can be legally recovered either by the city or by the school board?

2. Can the city recover anything from the school board by reason of their agreement?

3. Is there any legal way in which this loss of $288.00 to the public can be saved to them? (No matter whether it goes into the treasury of the city or school district.)

4. Did the schood board have the legal right to elect the city assessor as the assessor of said district?

5. Is the city assessor, by reason of the fact that he accepted the city assessor's office with the full understanding that the work he was doing as city assessor should also inure to the benefit of the school board and that he accepted the office with the understanding that he would receive only the compensation provided by ordinance, estopped from accepting any further compensation?

6. If the board of trustees of the independent school district had no legal right to elect the city assessor as assessor of the independent school district, then did the person who held the office of the city assessor vacate said office when he accepted the pay from the school district, which payment was made prior to the time that the city paid him?

7. If the district can legally elect the city assessor as its assessor, then is there any limitation on the salary or commission they can pay him?

"An opinion by your Department is most respectfully requested on these questions in the interest of the city and the independent school district, to enable us to settle the question now before us as well as for our future guidance."

For the purpose of this opinion, it is not necessary that we quote the various provisions of law applicable to assessor and collector of taxes for an independent school district and those applicable to assessor and collector of a city or town. I am directed by a conference of the members of this Department to say, that it is the opinion of the Department, that your questions are answered by Revised Statutes, Article 2881, which reads:

"In an independent school district constituted of a city or town having a city assessor and collector of taxes, such assessor and collector of taxes shall assess and collect the taxes for school purposes; provided, that in a city or town having an assessor and collector of taxes, the levy of taxes for school purposes shall be based upon the same assessment of property upon which the levy for other city purposes is based; it is further provided, that, in such a city or town, the assessor and collector of taxes shall receive no other compensation for collecting school taxes than the compensation paid him for assessing and collecting city taxes; and taxes for school purposes in such a city or town shall be assessed and collected as other city taxes are assessed and collected."

That said Article 2881 as incorporated in Revised Statutes of 1911, is a part of Section 165 of the school laws as enacted by the Twenty-ninth Legislature, 1905, a general act dealing with the whole subject of schools, and a general revision of the school laws; that said Section 165 is incorporated in said general Act under the subdivision "Independent School Districts," and was intended to apply to a situation such as stated in your letter; and, notwithstanding the separation of said section by the codifier and placing a part

thereof under the chapter and title dealing with cities which have assumed, or may assume, control of the schools, it has the effect to constitute the city assessor and collector, the assessor and collector, for the independent school district; that the object of the law was to obviate the necessity for useless officers and minimize the expense of administration.

I am further directed to advise, that in the opinion of the Department, the contract entered into between the city assessor and collector and the Board of Trustees of the Independent School District of New Braunfels was unauthorized and the amount paid the city assessor and collector by the independent school district for assessing and collecting the taxes of the district may be recovered by the board of trustees of the independent school district in a suit brought by it for that purpose.

Each of the questions propounded by you save your question No. 7, has been answered in the foregoing paragraphs of this opinion and your question No. 7 is also answered by said Article 2881 of the Revised Statutes in the following language:

"It is further provided that, in such a city or town, the assessor and collector of taxes shall receive no other compensation for collecting school taxes than the compensation paid him for assessing and collecting city taxes", etc.

We, therefore, advise that the assessor and collector of the City of New Braunfels, who is also assessor and collector for the New Braunfels Independent School District, may receive only such fees and commissions for his services as are allowed by ordinance of the City Council, as provided by Article 941 of the Revised Statutes.

Yours very truly,
W. M. HARRIS,
Assistant Attorney General.

OP. NO. 1679—BK. 48, P. 338.

CITY CHARTERS, AMENDMENT OF—TAXATION—CITY OF ABILENE—SCHOOL TAX.

City charter may be amended only by vote of qualified voters of city. Only limitation upon amount of taxes that may be levied by city having special charter is limitation expressed in the charter, not to exceed the constitutional limitation of two and one-half dollars on the one hundred dollars valuation; and the qualified voters in the adoption of charter, or amendment thereto, may make any apportionment of the two and one-half per cent limit they may consider proper.

November 22, 1916.

Honorable E. W. Morris, Secretary, Board of Trustees, Abilene, Texas.

DEAR SIR: The Department acknowledges recipt of your letter of a few days ago in which you state, in substance, that the city

charter of the City of Abilene provides that the limit of taxation for the purpose of maintenance of schools and interest and sinking fund on all school building bonds shall be one-half of one per centum on the one hundred dollars valuation; that said city charter provides for the levy of one dollar and sixty cents on the one hundred dollars valuation of property for all city purposes; that by a special act of the Thirty-third Legislature, the Legislature attempted to grant authority to the city to appropriate a certain amount from the general fund of the city to take care of the interest and sinking funds required to be accumulated for school building bonds, leaving the entire one-half of one per centum provided by the charter for the maintenance of the city schools: that the validity of said special act has been questioned; and you desire to know whether the city should continue to apply the fund derived from the fifty cent levy entirely to maintenance and continue to appropriate the amount necessary to take care of the interest and sinking fund out of the general fund as provided by said special act of the Legislature of 1913.

By reference to the Constitution, Article 11, Section 5, it appears that a constitutional amendment was adopted at a general election held on November 5th, 1912, taking from the Legislature authority to grant or amend charters of cities having more than five thousand inhabitants, and placing this authority in a majority of the qualified voters of a city, subject to limitations that may be prescribed by the Legislature. (See Harris' Constitution of Texas, Article 11, Section 5.)

An amendment to the Constitution takes effect and becomes operative from the date of its adoption, regardless of the date of the canvassing of the result or proclamation of the Governor.

Peck vs. Swindle, 68 Texas, 242, 4 S. W., 478.
Baker vs. State, 24 S. W., 31.

Therefore, said amendment to the Constitution, Article 11, Section 5, placing authority in a majority of the qualified voters of cities to adopt or amend their charters was effective, insofar as the authority of the Legislature to grant or amend city charters is concerned, from and after November 5th, 1912, and the Act of the Thirty-third Legislature attempting to amend the charter of the City of Abilene was without effect.

We, therefore, advise you that the only limitation upon the amount of taxes that may be levied by a city having a special charter is the limitation expressed in its charter, not to exceed of course the constitutional limitation of two and one-half dollars on the one hundred dollar valuation of property in the city, prescribed by Article 11, Section 5 of the Constitution; and the charter commission proposing such charter, or the qualified voters of such a city, have the power to make any apportionment of the two and one-half per cent tax limit they may see proper.

See Lufkin vs. City of Galveston, 63 Texas, 437.
Muller vs. City of Denison, 21 S. W., 391.

We, therefore, advise that the city charter of the City of Abilene may be amended in the manner provided by Chapter 147, General Laws of the Thirty-third Legislature, 1913, at page 307, and apportion the taxes as they may consider necessary for the various city purposes; for instance, the charter amendment may authorize the levy of seventy-five cents for maintenance of schools, an additional seventy-five cents to provide interest and sinking funds on all bonds issued by the city, or to be issued, including school building bonds, and an additional one dollar for general current expenses of the city.

Yours very truly,
W. M. HARRIS,
Assistant Attorney General.

OP. NO. 1681.

TAXATION—EXEMPTION FROM TAXATION.

Constitution, Article 8, Section 2; Revised Statutes, Article 7507, Section 6.

1. Institutions of purely public charity are exempt from taxation under the laws of Texas.

2. A hospital does not lose its charitable character by reason of the fact that those recipients of its advantages who are able to pay are required to do so, where the furtherance of its charitable purposes and its benefits are refused to none on account of inability to pay therefor; the mere fact that charity patients are placed in charitable wards which may differ in some respects from the rooms for which charges are made, would not make the hospital any the less a purely public charity.

November 27, 1916.

Honorable A. D. Dyess, County Attorney, Belton, Texas.

DEAR SIR: Some days since, Honorable N. P. Woodward, city attorney of Temple, wrote this Department for an opinion upon certain matters which will be shown in the excerpt from his letter, but since the law does not permit us to write a formal opinion on the question, except to county attorneys, and since the question appears to be one of joint interest both to the county and city of Temple, we have concluded that it would be appropriate for us to write the opinion direct for your information in administering the county's affairs, and forward a copy to Mr. Woodward, for his information as city attorney.

Mr. Woodward's letter states the facts and suggests the questions for determination, as follows:

"The city council of the City of Temple has requested me to write for your opinion on the following matter:

"On the 12th day of October, 1898, the Kings Daughters Hospital Association, of Temple, Texas, filed its charter with the Secretary of State; section 11 of the charter provdes:

"The purposes for which this corporation is formed are benevolent and charitable; to own, control and operate a hospital or hospitals for the care and attention of the sick, injured, infirm, disabled and other per-

sons, especially the friendless who are in need of and are without means to procure medical or surgical attention. But this corporation, in the management of such hospital or hospitals as it may own or control, shall have authority to take in and care for patients for hire and pay, and to receive and charge for its care and attention, but such sums so received shall be for the purpose of the use of the corporation as a charitable and benevolent institution, and under no circumstances for private gain to the members hereof.

Section VI of the charter provides:

"Said corporation shall have no capital stock; but for the accomplishment of its legitimate purposes, is, and shall be entitled to own, hold, sell, lease, rent, control and handle all such real and personal property as shall be necessary or convenient to the conduct of its business, and the accomplishment of the legitimate purposes of its organization, and shall have all the rights, privileges and authorities granted to corporations of like character, under the laws of the State of Texas.

"Of course you may inspect the original charter in the office of the Secretary of State, but I think the above paragraphs will serve to give a full idea of the purpose of the corporation.

"The City of Temple has now assessed the buildings and grounds of the Kings Daughters Hospital Association for city taxes, and the members of the association have objected on the ground that it is conducted for 'purely public charity.'

"The members of the association admit that they charge for patients the same as all other hospitals; but that they have a charity ward, and that they put patients in this ward who are unable to pay; that the rooms which they rent out are probably better than the charity rooms; that the proceeds from the rental of the rooms, for fans, operating rooms, etc., are applied to the payment of the house doctor, nurse hire, etc., and that no one reaps any benefits from the hospital; that they have also used the profits to build aditional rooms, put in better equipment, and that they owe on this; then there is a conflict as to whether charity patients receive the same care as patients who pay their way through; some saying that charity patients have been turned away to make way for patients who are able to pay, while others state that the reverse is, or should be, the case.

"Therefore, the city council, before going any further in the matter, asked me to write you for your opinion as to whether or not this concern should, or could under the law, be made to pay taxes on its buildings and grounds."

Section 2 of Article 8 of the State Constitution authorizes the Legislature to exempt from taxation "institutions of purely public charity." Section 6 of Article 7507, Revised Statutes of this State, exempts institutions for "purely public charity" from taxation, in the following language, to-wit:

"Public charities.—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 profits, 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" (R. S., 1911, Art. 7507, Section 6.)

It is plain from the statute just quoted, that the purpose of the Legislature was to exempt institutions for purely public charity, from taxation. The definition of a public charity in this provision, however, is to be ignored, for the reason that it does not define the public charity as contemplated by the Constitution, but defines fraternal beneficiary associations which are not public charities under the laws of this State; that portion of it, however, which does have the effect of exempting buildings belonging to institutions of purely public charity, etc., should, in my opinion, be given effect, notwithstanding the trespass of the Legislature in attempting to include as public charities, those things which are not of this class of institutions. The question then is, whether or not the Kings Daughters Hospital Association of Temple, is an institution of "purely public charity."

Our view of the matter is, that it is an institution of purely public charity. You will note from the purpose clause of its charter, that all funds received by the institution, from whatever source, are to be devoted to the general purposes of the institution, which is to operate a hospital for the care and attention of the sick, injured, infirm and disabled, and especially the friendless who are in need of and are without means to procure medical or surgical attention.

The authorities appear to be conclusive upon the question that this institution is one of purely public charity, even though a charge is made for the use of its rooms, or services, from those who are able to pay. The rule is, that this character of an institution as a public charity is not affected by charging those able to pay for the use of its rooms.

Jenson vs. Maine Eye & Ear Infirmary, 33 L. R. A., (N. S.) 147.

The Illinois courts laid the rule down as follows:

A hospital is none the less of a public character within the statutes, making it lawful for a county to contribute to the support of any public non-sectarian hospital located within its limits, by the fact that those patients received by it who are able to pay are required to do so, or that it receives contributions from outside sources so long as all the money it receives is devoted to the general purposes of charity and none of it goes to the benefit of any private individual or corporation organized for profit.

Fordham vs. Thompson, 144 Ill., 342, (Exact page 347.)

A corporation conducted a hospital, and its only source of income was from donations and receipts from patients who were able to pay for treatment received. It received all patients who applied, and gave free accommodations to all patients, except that the free cases were accommodated in wards instead of private rooms. Any regular medical practitioner was privileged to send patients to the hospital and treat them there, and the institution made no profits. Held, that the institution was within Hurd's Rev. St. 1905, c. 120, p. 2, ex-

empting from taxation "all property of institutions of public charity." Gorman Hospital of Chicago vs. Board of Review of Cook County, 84 N. E. 215, 216, 233 Ill. 246.

A corporation maintaining a hospital and dispensary, a school of medicine and training school for nurses, which charges no tuition fee except for the postgraduate courses in medicine, and then only sufficient in amount to pay the cost of maintenance, and which receives all persons within its capacity presenting themselves for treatment, regardless of whether they are able to pay, is an "institution of public charity," within the statute exempting the property of such institutions from taxation. Board of Review of Cook County vs. Chicago, Policlinic, 84 N. E., 220, 221, 233 Ill. 268.

Within the statute exempting from taxation all property of institutions of public charity, when actually and exclusively used for such charitable purposes, and not used with a view to profit, is a hospital of an order of Sisters organized not for pecuniary profit, but for conducting hospitals and training schools for nurses—the women who become members of the corporation conveying all their property to it, and binding themselves to engage in caring for sick and injured patients in its hospitals for the remainder of their lives, for which they receive nothing but their board, clothing, and a room in which to live; the corporation and hospital being controlled by a board selected from among the Sisters; all sick or injured, not having contagious diseases, who seek admission to the hispital, being received and cared for, without reference to creed, race, or financial condition, except that those able to pay have the more desirable rooms; all money received from every source being used in maintaining, extending and improving the hospital; and those admitted to the training school being given only their support for their services; and this, though only a small per cent. of the patients received are charity patients, all such who apply being received, and though only physicians who subscribe to and are governed by the principles of medical ethics promulgated by the American Medical Association are permitted to practice in the hospital, it not being conducted for the purpose of benefiting the physicians of that class. Sisters of Third Order of St. Francis vs. Board of Review of Peoria County, 83 N. E. 272-274, 231 Ill. 317.

In the case of Jenson vs. Maine Eye and Ear Infirmary, cited above, the hospital was held to be an institution of purely public charity, although it charged compensation for the use of its rooms to those who were able to pay. The Court held that the facts clearly showed that the corporation was not a money making organization organized for profit, but purely a charitable institution having no stockholders and paying no dividends.

In discussing the question, the court in part said:

"The defendant is a charitable institution. It is so declared by a decision of our own court. In Farrington vs. Putman, 90 Me., 405, 38 L. R. A., 339, 37 Atl., 652, it is said referring to this very defendant: 'Here is an institution, and the only one of the kind in the State, and virtually a State charitable institution of the most beneficient and humane kind, seeking money for supporting its very life and existence, and to enable

it to render assistance free of charge to the poor of the State suffering from disease of the eye and ear.' The constituent elements which are regarded as characteristic of charitable institutions are defined in Weber Hospital Asso. vs. McKenzie, 104 Mo. 320, 71 Atl. 1032, as follows: 'It comes within the letter and the spirit of a charitable corporation whose distinctive feature is that it has no capital and no provision for making dividends or profits, deriving its funds mainly from public and private charity, and holding them in trust for the object of the institution.' The same doctrine is also emphatically established in Massachusetts. In McDonald vs. Massachusetts General Hospital, 120 Mass. 432, 21 Am. 529, the court says: 'The corporation has no capital stock, no provision for making dividends or profits, and whatever it may receive from any source it holds in trust to be devoted to the object of sustaining the hospital and increasing its benefit to the public, by extending or improving its accommodations and diminishing its expenses. Its funds are derived mainly from public and private charity; its affairs are conducted for a great public purpose—that of administering to the comfort of the sick, without any expectation on the part of those immediately interested in the corporation of receiving any compensation which will inure to their own benefit, and without any right to receive such compensation. This establishes its character as a public charity.'

It is claimed, however, that the defendant charges a compensation for the use of its rooms to those who are able to pay, and thereby loses one of the essential attributes of a charitable institution. But this in no way changes the character of the institution. In the McKenzie case, above cited, the testator provided in his will that part of the income from his estate should be used for the maintenance of a 'free hospital.' In this case it was contended that it was the purpose of the testator 'to establish a hospital absolutely and entirely free,'—not one which might provide a certain number of free beds to charity patients, and that neither of the hospitals claiming to meet the conditions of the bequest claimed to be free in this sense. But the court, in construing the word, says: 'Nor is the word "free" used in the sense of without compensation from anyone receiving its benefits. Such a hospital is practically unknown. Income may be received from such as are able to pay, and yet the hospital be free.' It is the opinion of the court that the defendant is a charitable institution in fact and in law." (35 L. R. A., (N. S.) p. 143.)

The authorities also seem to be quite uniform in support of the proposition that an institution does not lose its charitable character and can seek exemption from taxation by reason of the fact that those recipients of its benefits who are able to pay are required to do so where no profit is made by the institution and the accounts so received are applied in furthering its charitable purposes and its benefits are refused to none on account of inability to pay therefor.

Louisville vs. Nazareth Literary Institute, 36 S. W., 994.
Kentucky Female Orphans School vs. Louisville, 100 Ky., 470.
Appeal Tax Ct. vs. St. Peter's Academy, 50 Md., 470.
Hennépin County vs. Brotherhood of Gethsemane Church, 38 Am., 298.
State vs. Powers, 10 Mo. Appeals, 263.
Sisters of Charity vs. Collector, 52 N. J. L., 373.
People vs. Purdy, 58 Hun. (N. Y.), 386.
North Hampton County vs. LaFayette College, 128 Pennsylvania State, 132.
St. Joseph's Hospital Assoc. vs. Ashland County, 96 Wis., 636.

Hospitals in which all are received without distinction and those who are unable to pay are treated free are universally regarded as institutions of purely public charity and exempt from taxation.

In addition to the cases cited above we cite the following:

Mass. Gen. Hospital vs. Summerville 101 Mass. 319.
Pennsylvania Hospital vs. Delaware County, 169 Pa. State, 305.

In the late case of City of Dayton vs. Trustees of Speers Hospital, the Court of Appeals of Kentucky held that the hospital was an institution of purely public charity. This hospital was founded under the will of Mrs. Speers, by the terms of which the trustees named by her were to erect and conduct a hospital in such a manner that it would do the greatest good. The hospital received private patients for pay, public patients went there on their own accord, or were sent there by the county and never by cities; no patients were kept without charge, but some of them who came on their own accord failed to pay and no one had been turned away for inability to pay. The profit derived from private patients went into the general fund of the hospital and was used for its maintenance. The court held that the hospital property was exempt from taxation as a public charity, since whatever is done or given gratuitously in relief of the burdens or for the advancement of public good, is a public charity and an institution founded and endowed as purely a public charity does not lose its character as such under the tax laws, because it receives revenue from the recipients of its bounty sufficient to keep it in operation, and because since the institution was founded for the general public good and not for profit given, and since the public received all the benefits of the same, it was a public charity.

Concerning the matter the court said:

"It does not appear that it was ever intended that any private gain should result to any person in the operation of the trust created by the donor in setting apart the fund for the erection and maintenance of the hospital. The supervision of its operation was given to the court of the highest equitable jurisdiction in the county, and the power to name the trustee was vested in the same tribunal; thus stamping it with evidences of its public character. In its operation no one has been excluded from its benefits. The county in which it is situated and the nearby cities have used it as an instrumentality to care for their indigent sick, and to procure surgical and medical treatment for them. It is true the county and cities have compensated the institution for the care and treatment of their poor and friendless sick, but in a sum less than the actual cost to the institution for caring for them. One-half of the inmates have received the services of the physicians, as well as the nursing and their board, free of any charge to them. While a charge is made against every patient other than the ones who are consigned there by the county or cities, it does not appear that any one has ever been turned away or excluded from its benefits because of poverty or inability to pay for the benefits. Private patients are received, who pay the institution for their rooms, boarding, and nursing and pay their physicians for their treatment but the funds received from this source are all devoted to the general expenses of the hospital. A building and grounds and furniture are not adequate to maintain a hospital. The nurses must be paid, fuel and lights, water and food provided and some one to superintend and direct the operations of the hospital. The fact that the institution receives a revenue from the recipients of its bounty sufficient to keep it in operation does not take from its character as a purely public charity, where it was founded and endowed as such, and when all of the receipts go to providing for the purposes for which it was created and maintained. The municipalities and the county itself in which the institution is located, and whose duty it is to care for the indigent sick of each of them, respectively, have, by its use been saved the burden of erecting an institu-

tion of the kind of their own or otherwise caring for such sick.

"In 6 Cyc. 900 a public charity is defined:

"To be a gift to be applied consistently with the existing laws for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government.

"The Speers Hospital has been so conducted and was so endowed and maintained that no private gain has come to any one, and all of its benefits go the public." (176 S. W., 363-364.)

A similar holding under somewhat similar facts is made in the case of Mason County vs. Hayswood Hospital, 179 S. W., page 1050.

We are of the opinion, that the mere fact that the charity patients are placed in charity wards which may differ in some respects from the rooms for which charges are made would not make the King's Daughters Hospital Association any the less a purely public charity This holding seems to be well supported by authority.

German Hospital of Chicago vs. Board of Review, 84 N. E., 215.

You are advised, therefore, that under the facts stated by Mr. Woodward in his letter we are of the opinion that King's Daughters Hospital Association of Temple, Texas, is an institution of purely public charity and exempt from taxation to the extent and in the manner provided by the Constitution and laws of the State of Texas.

Yours very truly,

C. M. CURETON,

First Assistant Attorney General.

OP. NO. 1689—BK. 48, P. 398.

COLLECTION OF DELINQUENT TAXES BY SUIT.

1. The procedure which obtained prior to the time House Bill 40 went into effect still obtains. The mailing of notices by the tax collector to delinquent owners, as provided in House Bill 40, is merely in addition to the procedure which theretofore obtained.

2. Although notices have been mailed in accordance with the provisions of House Bill 40, still publication must be made in accordance with the provisions of Articles 7687, 7688 and 7692, R. S.

January 4, 1917.

Hon. Clay Cotton, County Attorney, Palestine, Texas.

DEAR SIR: We have a letter from you in which you state that there are about 65 suits to be filed for the collection of delinquent taxes in your county; that the notices required by House Bill 40 have been given to the delinquent owners; that the last delinquent list published by the commissioners court was about eight years ago; that nearly all the taxes involved in the suits referred to accumulated since said publication. Then your letter contains the following request:

"Kindly advise me when said publication shall be made, that is, whether it shall be made before notices are issued by the tax collector or whether it should be published before the county attorney files suit, or at what time must the commissioners court publish the same."

Replying thereto, we beg to state that Article 7687, R. S., among other things, provides that—

"Upon the completion of the delinquent tax record by any county * * * it shall be the duty of the commissioners court to cause the same to be published in some newspaper published in the county for three consecutive weeks, * * * and a publisher's fee of twenty-five cents shall be taxed against such tract or parcel of land so advertised; which fee, when collected, shall be paid into the county treasury."

Article 7688 contains the following provisions:

"Twenty days after the publication of such notice, or as soon thereafter as practicable, the commissioners court, or the county judge acting for said court, shall file a list of all lands so advertised for taxes due for any year or number of years, the tax on which remains unpaid, with the county clerk of the county in which such lands are located, * * * and are to be sold under the provisions of this Act; for all the taxes, interest, penalty and costs and shall cause suit to be filed in the name of the State of Texas, in the district court of said county * * * stating therein, by apt reference to the lists or schedules annexed thereto, a description of all lands or lots in such county upon which taxes and penalty have remained unpaid for any year or number of years since the first day of January, 1885, and the total amount of such taxes, with interest computed thereon to the time fixed for the sale thereof at the rate of six per cent per annum, and shall pray for judgment, etc."

Article 7687 was not repealed or in any manner modified or amended by the Act of the Regular Session of the Thirty-fourth Legislature, known as House Bill 40. In fact, while House Bill 40 provides for written notice to be mailed to the record owners of property upon which taxes are delinquent, the Act itself shows that the Legislature did not intend to substitute such character of notice for notice by publication. This is clearly shown by the following provision contained in Section 2 of House Bill 40:

"It shall not be necessary to publish said delinquent tax records and supplements thereto, if the delinquent list for each year has been advertised as required by Article 7692 of the Revised Civil Statutes of 1911."

Article 7692 referred to has to do with the publication each year of the list of lands and lots on which the taxes for the preceding year only are delinquent. This article contains the following provisions:

"If no personal property be found for seizure and sale as above provided, the collector shall, on the 31st 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. * * * When such list of lands and lots delinquent for the preceding year only, is corrected, as provided for in this Article, then such lists shall be immediately advertised as provided for in Section 5 of this Act, (Art. 7687 of this Chap-

ter), and, after such advertisement suit shall be instituted against delinquents for all taxes and penalties due, in the district court as above provided."

It will be seen that Article 7687 refers to the publication of the delinquent tax record and that Article 7692 refers to the publication each year of the list of lands and lots upon which taxes for the preceding year only remain unpaid. But it will also be noted that each of these articles requires the publication called for in Article 7688, R. S.

The procedure for the collection by suit of delinquent taxes which obtained prior to the passage of House Bill 40 still obtains, unless it is that provision of Article 7688, which says that the commissioners court "shall cause suit to be filed in the name of the State of Texas, in the district court of said county," House Bill 40 making it mandatory upon the part of the county attorney to file such suits, whether ordered to do so or not. In other words, by House Bill 40 the Legislature did not intend to change the procedure for the collection of delinquent taxes which theretofore obtained but merely required that in addition to such procedure the tax collector should mail to each record owner of lands upon which taxes were delinquent a certain character of notice advising "that unless the owner * * * shall pay to the tax collector the amount of taxes, interest, penalty and costs set forth in such notice within ninety days from the date of notice, then, in that event the county or district attorney will institute suits."

You are, therefore, advised that although the tax collector of your county has mailed the notices required by House Bill 40 to the delinquent owners, publication must still be made in accordance with the provisions of Article 7687. This publication must be made for three consecutive weeks and twenty days after the publication has been completed the commissioners' court should "file a list of all lands so advertised for taxes due for any year or number of years, the tax on which remains unpaid, with the county clerk of the county in which such lands are located."

To prevent any possible chance of having a defect in procedure, we think the publication should be begun at least forty-two days before June 1st, 1917, and each year thereafter in counties of less than fifty thousand inhabitants, and forty-two days before January 1st, 1918, in counties of more than fifty thousand inhabitants and at least forty-two days before June 1st of each year thereafter.

The tax collector in your county should have prepared in duplicate a delinquent tax record as required by House Bill 40, or, if the county has a delinquent tax record, but one which does not include the delinquent taxes for as many as two years, he should prepare in duplicate a supplement thereto. Whether this has been done or not, however, you could properly proceed with your tax suits by advertising the delinquent tax lists.

Very truly yours,
JOHN C. WALL,
Assistant Attorney General.

OP. NO. 1690—BK. 48, P. 402.

DELINQUENT TAXES—OFFICER'S COSTS.

Where an outgoing county attorney files suit for delinquent taxes and vacates the office prior to a collection by a settlement of judgment and the case is prosecuted to final settlement by his successor, the fees allowed by statute should be divided equally between the outgoing county attorney and his successor.

Where suits for delinquent taxes are filed during the term of one incumbent of the district's clerk's office and finally disposed of by collection of judgment and costs by his successor, the fees allowed by statute to such officer should be divided between the two in proportion to the amount of work done by each, calculated upon the basis of fees allowed in other suits.

January 5, 1917.

Honorable J. P. Word, County Attorney, Meridian, Texas.

DEAR SIR: The Attorney General has your letter reading as follows:

"I wish you would advise me on the following proposition.

"Where the outgoing county attorney had filed tax suits and the delinquent party comes in and pays off the tax and costs after the new county attorney has taken charge of the office who should be entitled to the fees.

"I wish your answer to the above question to also apply to the district clerk."

Replying to your first question, we beg to say that Chapter 147 of the Acts of the Thirty-fourth Legislature in respect to the amount of fees therein allowed amends Article 7691 only as to the amount of such fees, and leaves in force the remainder of that Article. There is containd in the Article named the following provision:

"Provided that those county attorneys who have heretofore or may hereafter institute said suits shall be entitled to an equal division with their successor 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."

This proviso was considered by the Court of Civil Appeals in the case of Swayne, County Attorney vs. Terrell et al., 48 S. W. 218, and a construction given thereto according to the plain import of the language used. That is to say, a county attorney who files suit and goes out of office before judgment is obtained is entitled to an equal division of the fees with his successor in office who prosecutes to final judgment the suit filed by his predecessor.

We therefore advise that in the suits instituted by your predecessor the fees allowed under Section 3 of Chapter 147, Acts of the Thirty-fourth Legislature should, upon collection, be divided equally between you.

Your second question relating to the division of the fee provided by statute in such matters for the district clerk, is not easy of solution. It will be noted that while Article 7691, Revised Statutes, provides for an equal division of the fees paid between the two county attorneys, it contains no such proviso relating to a division of the fees between the former and present district clerk.

There are many cases holding that under statutes providing commissions to county attorneys for the collection of penalties, etc., that the attorney in office at the date the collection is made is entitled to all the commissions although his predecessor may have filed the suit, prosecuted the same to judgment and did all of the work required of the attorney except the mere act of making the collection upon an execution, or otherwise. See Flynt vs. Jones County, 50 Southwestern, 203. It was also held that a clerk in office at the time of the collection of the judgment is entitled to all the commissions allowed by the statute.

McHugh vs. Reese, 149 S. W., 743.

The case presented by you, however, is of a different character. The law does not provide that the statutory fee allowed for the district clerk shall be paid for making the collection. It simply provides that "the district clerk shall be entitled to a fee of one dollar and fifty cents in each case to be taxed as costs of suit." It does not provide, as in the case above referred to, that the fee is paid for the collection of the judgment and consequently the cases above cited would not be authority for holding that the district clerk in office would be entitled to all of the fee of one dollar and fifty cents allowed where cases are prosecuted to final judgment, nor all of the one dollar allowed in case of settlement before judgment.

If we could determine that all fees accrue upon the filing of the suit, then it would be proper to hold that the clerk in office at the date of the collection of the fee should deliver same to his predecessor under Articles 3892 and 3900, Revised Statutes. On the other hand, if we could determine that the fees herein provided for did not accrue until the final determination of the suit, then it would be equally proper to hold that the clerk in office at the date of the collection would be entitled to the entire fee. However, there is no basis in law for either of such holdings indicated. Fees accrue at the date of the performance of the service and in other cases the clerk would be authorized to render a bill for his services at the close of each term of court.

In the statute under discussion, the Legislature has seen fit to allow to the district clerk the lump sum of $1.50 for all the services performed by him in such case in lieu of the various items of fees allowed by the fee-bill in ordinary litigation in his court.

In our opinion, the proper solution of the question presented by you, is to advise the present incumbent in the office of the district clerk, and his predecessor, to divide the fee in each delinquent tax case in accordance with the work performed by each upon the basis of the fees allowed by the fee-bill for each item, giving to each his proportionate part of the $1.50, or the $1.00, as the case might be, as he would receive of the total amount of costs, were such costs collected under the fee bill in the ordinary civil case.

The above holding is in consonance with the holding of this Department in Opinion No. 931, wherein it is held that upon the death of the county treasurer his successor would be entitled to such a per-

centage of the maximum compensation as his term of service during the year bears to the full year. In other words, if the deceased treasurer had served three months and his successor served nine months, the former would be entitled to $500.00, and the latter $1500.00.

The solution of this question presented in this opinion is analogous to the holding of the Court in the case of Trumbull vs. Campbell, 8 Ill. 502. In this case the Legislature has made an appropriation for certain services to be rendered by the Secretary of State. A portion of the services was rendered by the then incumbent of the office—his successor completed the service. The court held that the first officer was not entitled to receive the whole amount of the appropriation unless he had performed all the services and further held in effect, that each officer was entitled to payment in proportion to the amount of services actually rendered by him.

In the case of Clark vs. Waters, Thirty-fifth La. Annual Reports, 451, the Court held if the board is composed of three members each collecting fees for services performed, the fee should be divided equally between the three—there being in fact, but one office the duties of which are exercised by three. The Court said:

"If the duties of the office were to be performed by three persons, it was just and natural that the emoluments of the office were contemplated to be divided and partaken of in equal proportions by the three persons composing the office."

We cite this case as authority for the proposition that where the statute makes no division of the fees for services performed by more than one officer, that neither is entitled to all the compensation. The rule laid down in this case, however, as to an equal division between the officers, is not applicable to the question under discussion for the reason that the two incumbents of the office of district clerk are not joint officers and where such is the case the rule announced in the case of Trumbell vs. Campbell, *supra,* to the effect that the compensation may be divided between the two in proportion to the amount of services performed is the only fair, equitable, and to our minds, legal division of the fees allowed for the services and we therefore advise you as herein indicated.

With respect.

Very truly yours,
C. W. TAYLOR,
Assistant Attorney General.

OP. NO. 1696—BK. 48, P. 452.

Circumstances under which parsonages are exempt from taxation in the State of Texas.

January 29, 1917.

Hon. V. B. Goar, Johnson City, Texas.

DEAR SIR: I am in receipt of your letter of the 17th instant, re-

questing me to advise you whether church buildings and parsonages are exempt from taxation.

The Court of Civil Appeals for the Third District, held, in the case of State vs. M. E. Church, South, appealed from the district court of Lampasas County, and reported in 163 S. W. 628, that the parsonage in controversy was exempt from taxation. But Chief Justice Key, speaking for the Court, said in the opinion rendered that

"If the State ever had any case, we think it was swept away and destroyed when it admitted that the property in question forms a part of the property of the church."

Article 8, Section 2, of our Constitution, contains the following provision:

"* * * the Legislature may, by general laws, exempt from taxation public property used for public purposes, *actual places* of religious worship * * * etc."

The question, therefore, turns on whether or not the lot and building, known as a parsonage, is a part of the property of the church. Such being the case, we think the Court in the above case was eminently correct in holding as it did. But each case must rest upon the facts.

Subdivision 1, of Article 7507, Revised Statutes, 1911, exempts "public school houses and houses used *exclusively* for religious worship."

In the States of Georgia, Indiana, Louisiana, Minnesota, New Jersey, Ohio, and Rhode Island, the courts have passed upon the question of whether a parsonage, a manse, or other buildings occupied as the home of the pastor of a church, may be legally exempted from taxation, holding such property to be taxable. 78 Ga., 541; 38 Ind., 3; 31 Am. Rep., 234; 12 Minn., 395; 27 Minn., 303; 45 Minn., 229; 41 N. J., 117; 25 Ohio St., 229; 34 Am. Rep., 597.

I find two decisions, however, holding to the contrary. In the 65 Wisconsin Reporter, 567, it was held that a private house leased by a church for a home for the pastor for one year was not subject to taxation for such year, but this decision was under a statute providing for the exemption of "parsonages, whether occupied by pastor permanently or rented for his benefit. * * * The leasing of such parsonages shall not render them liable to taxation." Revised Statutes, Wisconsin, Sec. 1038. The other is a Missouri case, reported in 91 Mo. Rep., 671. The bishop's house in St. Louis was held exempt under the statutes of that State upon the grounds of its being "used for purely charitable purposes." It was shown that this house was erected by the Methodist Church for the purpose of being used as a residence by any bishop who might be sent by the church authorities to reside in St. Louis, and the point that its purpose was one of pure charity was urged and sustained by the court.

As stated above, however, each case must rest upon the facts; and, if the facts show that the parsonage is so used as to come within the definition given by our Constitution as an "actual place of religious

worship," it would not be subject to taxation, otherwise it would be subject to taxation.

The Courts almost universally lay down the rule that provisions of the statutes exempting property from taxation are to be strictly construed; that all reasonable intendment will be indulged in favor of the State, and nothing will be held to be exempt which does not clearly come within the exempting provision.

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

OP. NO. 1735—BK. 49, P. 65.

DELINQUENT TAX SUITS—FEES OF COUNTY OR DISTRICT ATTORNEY.

1. The county or district attorney is entitled only to the fee provided in House Bill 40 in each suit filed by him, no matter how many years taxes against property have been delinquent. He is not entitled to the fee mentioned in the Act for each year taxes have been delinquent.
2. The Act contemplates that all taxes delinquent against a piece of property shall be included in the same suit and that all lands of an owner against which taxes are delinquent shall be embraced in the same suit if possible.
3. The fee provided in House Bill 40 accrues to the office of county or district attorney as soon as the suit is properly filed and the delinquent owner must pay the same, although he make settlement during the pendency of the suit.

March 29, 1917.

Hon. Edwin F. Vanderbilt, County Attorney, Lockney, Texas.

DEAR SIR: We have a letter from you in which you ask whether a county attorney is entitled to only one fee of $5.00 for the first tract of land included in each suit and $1.00 for each additional tract included therein, or whether he is entitled to such fee for each year such lands were delinquent.

Replying thereto, we beg to state that it clearly appears throughout the Act passed at the Regular Session of the Thirty-fourth Legislature, commonly known as House Bill 40, that it was intended by the Legislature that when suit was filed for the collection of delinquent taxes against the lands and lots of an owner, the suit should embrace all delinquent taxes, interest and penalty past due against such lands, and that, if possible, all lands of an owner against which taxes has become delinquent, should be included in the same suit.

We call your attention to the following portions of said Act as showing such intention:

In Section 1 it is provided that the notice to be mailed to the tax collector shall show "the amount of taxes appearing delinquent or past due and unpaid against all such lands and lots 'according to the delinquent tax records' of the county; that such notice shall contain a brief description of the lands or lots and *various sums or amounts* due against such lands or lots, *for each year* they appear to be delinquent according to such records." It is further provided in said sec-

tion that the collector shall furnish to the county or district attorney duplicates of the notices mailed to the taxpayers "together with similar statements, or in lieu thereof, lists of lands and lots located in such counties containing amounts of State and county taxes due and unpaid, *and the years for which due,* on lands or lots appearing on such records in the name of 'unknown' or 'unknown owners,' or in the name of persons whose correct address or place of residence * * * said tax collector is unable by the use of due diligence to discover or ascertain."

In said section it is also provided that the notice shall recite that unless the owner "shall pay to the tax collector *the amount of taxes, interest, penalty and costs set forth in such notice* within ninety days from date of notice, then, and in that event the county or district attorney will institute suits not later than January 1st, next, for the collection of such moneys * * * and whenever any person * * * shall pay to the tax collector *all of the taxes, interest, penalties and costs* shown by the records aforesaid to be due and unpaid against any tract, lot or parcel of land *for all of the years* for which said taxes may be shown to be due and unpaid," redemption receipt shall be issued.

In Section 3 of the Act it is provided that by a certain time the county or district attorney shall "file and institute suits, as otherwise provided by law, for the collection of *all delinquent taxes due at the time of the filing of 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 suit the county or district attorney shall receive a fee of $5.00 for the first tract of land included in each suit, and $1.00 for each additional tract included therein," etc.

Article 7691 was not repealed in any sense by House Bill 40. House Bill 40 merely substitutes a larger fee as compensation to county and district attorneys for their services in connection with delinquent tax suits. That the Legislature never intended that county attorneys should receive more than one fee for their services in delinquent tax suits is clearly shown by the following provision of Article 7691:

> "In no case shall the compensation for said county attorney be greater than $5.00 for the first tract in one suit and $1.00 for each additional tract, if more than one tract is embraced in the same suit to recover taxes, interest, penalty and costs."

The county attorney performs no service in the collection of delinquent taxes until it comes to the filing of suit.

No one could reasonably conclude that the Legislature intended the county attorney should receive fees for years in which he rendered no service whatver—for years in which he not only rendered no service, but was not even in office.

You are therefore advised that the express provisions of House Bill 40 show that all taxes delinquent against any piece of property should be embraced in the same suit, and that a suit against a delinquent owner should include all taxes past due and owing by such

owner on any and all property he owns, and that the county attorney shall receive only one fee in such a suit, no matter for how many years taxes have been delinquent.

In your letter you also ask the following questions:

"In cases, where after filing the suit and before final judgment is had, such delinquent taxpayers pay the amount of tax, interest, penalties and accrued costs to the county collector, would such county attorney's fee be less than where such suit is prosecuted to a final judgment, or would it be the same. If it would be less what would his fee amount to?"

Replying thereto, we call attention to the following provision of Section 3 of House Bill 40:

"Provided, that for the work of *filing such suits*, the county or district attorneys 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, etc."

You are therefore advised that the fee mentioned in the portion of said section above quoted accrues to the office of county or district attorney upon the proper filing of the delinquent tax suit and is the only fee now provided for the services of such officers in connection with the collection of delinquent taxes. If after the proper filing of such suit, and before final judgment, the taxpayer pays the amount of tax, interest, penalties and accrued costs, the county or district attorney is entitled to the sum of $5.00 for his services.

What we mean by the proper filing of suit can be clearly illustrated in the following manner:

House Bill 40 provides certain procedure in addition to the procedure provided by law prior to the time said Act went into effect. This procedure consists of the mailing of a certain kind of notice by tax collectors to the delinquent owners. After ninety days have expired since the mailing of such notice and after twenty days have expired from the time publication was made of the delinquent tax record, as provided in Articles 7678 and 7688, Revised Statutes of 1911, and the tax, interest, penalties and costs of publication still remain unpaid, the county or district attorney could properly file suit but not prior to that time.

The object and purpose of providing that a notice should be mailed to the delinquent owner and that such notice should state "that unless the owner or owners of such lands or lots described therein shall pay to the tax collector the amount of taxes, interest, penalty and costs set forth in such notice within ninety days from date of notice, then, and in that event, the county or district attorney will institute suits not later than January 1st, next, for the collection of such moneys, and for the foreclosure of the constitutional lien existing against such lots," were to give the delinquent owner ninety days within which to pay his taxes, penalty, interest and accrued costs, without incurring the expense of a tax suit. This was also the object and purpose of the twenty days from date of publication provided for in Article 7688 of the Revised Statutes. If the county or district attorney should therefore file suit against a delinquent owner prior

to the expiration of such time, he should receive no fee whatever because such suits would not be properly instituted and the delinquent owner could not properly under the law be charged with the fee provided for such officers in delinquent tax suits.

You are therefore advised that no fee accrues to the office of county or district attorney in connection with the delinquent tax suit, unless such suit was properly filed. You are further advised that if suit has been properly filed and the delinquent owner pays the tax, penalty, interest and accrued costs during the pendency of the suit, the county or district attorney is still entitled to the entire fee provided in House Bill 40, it being the intention of the Legislature to substitute the fee therein provided for the fee theretofore provided to such officers by Article 7691 of the Revised Statutes of 1911.

You also ask whether the fee provided in House Bill 40 is in addition to the fee provided to county or district attorneys in Article 7691, R. S.

As hereinbefore stated, it was clearly the intention of the Legislature to substitute the higher fees provided in House Bill 40 for the fees theretofore provided in Article 7691. You are therefore advised that the fee provided in House Bill 40 is in addition to the fee provided in Article 7691, R. S.

Very truly yours,
JOHN C. WALL,
Assistant Attorney General.

OP. NO. 1726—BK. 49, P. 70.

DELINQUENT CITY TAXES.

1. The procedure for collection of delinquent city taxes is that provided in Articles 7693 and 7699 of the Revised Civil Statutes of 1911, and is the same procedure provided for the collection of delinquent State and county taxes prior to the passage of House Bill 40.
2. The fees for the district clerk in suits to collect delinquent city taxes are the same provided to him in suits to collect delinquent State and county taxes.
3. The fees of the city attorney in suits to collect delinquent city taxes are the same as the fees provided by law to district or county attorneys for the collection of delinquent State and county taxes prior to the passage of House Bill 40.
4. The fee of the district clerk in suits for the collection of delinquent city taxes is a fee of office and must be accounted for under the provisions of the Fee Bill.

March 13, 1917.

Hon. T. J. Newton, County Attorney, San Antonio, Texas.

DEAR SIR: We have a letter from you enclosing a letter from Mr. V. H. Howard, county auditor, in which he asks you whether the costs of district clerks in suits of municipalities to recover delinquent taxes are to be considered as ex officio fees, or are they to be reported as other fees of office.

Replying thereto, we beg to state that the procedure for the collec-

tion of delinquent city taxes provided by the general law is contained in Article 7699 of the Revised Statutes of 1911. This article provides in substance that when any lists or blocks of land situated within the corporate limits of a city or town "have been returned delinquent or reported sold to said city or town for the taxes due thereon, the city council may prepare lists of delinquents in the same manner as is provided for in Article 7685; and when such lists shall be certified to as correct by the mayor of said city or town, the city council may direct the city attorney to file suit in the district court of the county in which said city or town is situated for the recovery of the taxes due on said property, together with penalty, interest and cost of suit; which suits may be brought in the same manner as is provided in Article 7687 of this Chapter, for the bringing of suits by the county attorney."

In other words, the procedure provided by general law for the collection of delinquent city taxes is the same which was provided by general law for the collection of delinquent county and State taxes, prior to the passage of House Bill 40. House Bill 40 has nothing to do with the collection of delinquent city taxes. It merely sets forth additional procedure for the collection of delinquent State and county taxes by suit.

Article 7693 R. S., 1911, also provides:

"Any incorporated city or town or school district shall have the right to enforce the collection of delinquent taxes due it under the provisions of this chapter." (Meaning Chapter 15 of Title 126 of the Revised Statutes of 1911.)

Article 7691 is a portion of said Chapter 15 and sets forth the fees the district clerk shall receive in suits for the collection of delinquent State and county taxes, which fees, therefore, are the same the district clerk is entitled to receive in suits for the collection of delinquent city taxes. As to the fees of the district clerk in such suits, this article provides:

"And the district clerk shall be entitled to a fee of one dollar and fifty cents in each case, to be taxed as cost 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, that where two or more unimproved city or town lots belonging to the same person and situated in the same city or town shall also be included in the same suit and costs, except those of advertising, which shall be twenty-five cents for every ten lots, or any number less than ten, taxed against them collectively just as if they were one tract or lot; and 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 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 district clerk shall receive 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."

You are, therefore, advised that the fee of the district clerk in a suit prosecuted to judgment in the district court for the collection

of delinquent city taxes is one dollar and fifty cents, unless the delinquent owner during the pendency of the suit pays the amount of the taxes, interest, penalties and accrued costs, in which event the fee of the district clerk will be only one dollar in each case.

You are further advised that this fee is a fee accruing to the office of district clerk, as much so, as if the suit were for the collection of delinquent State and county taxes, and must be accounted for by the clerk under the provisions of the Fee Bill, in determining the maximum amount of the fees of his office he should receive.

Prior to the passage of the amendment to the fee bill at the regular session of the Thirty-third Legislature, which amendment is Chapter 121 of the printed General Laws of said session, the fees of district clerks in suits for collection of delinquent taxes were not to be considered in determining the maximum amount such officer should receive.

Article 3893, R. S., 1911, which is a portion of the old Fee Bill, provided that the "fees allowed by law to district and county clerks, county attorneys and tax collectors in suits to collect taxes, shall be in addition to the maximum salaries fixed by this chapter." This article, however, was amended in the Act of the Regular Session of the Thirty-third Legislature, which has been referred to. As amended it does not contain the provision to the effect that the fees of district and county clerks, county attorneys and tax collectors in suits to collect taxes shall be in addition to the maximum salaries fixed by the Fee Bill. This clearly shows that the Legislature intended that after the amendment to the Fee Bill passed at the Regular Session of the Thirty-third Legislature went into effect, the fees of the officers in delinquent tax suits theretofore exempt from the operation of the Fee Bill, should no longer be so exempted. This amendment went into effect December 1, 1914. Therefore, all fees accruing to the office of district clerk in delinquent tax suits prior to December 1, 1914, did not come within the provisions of the Fee Bill, but were "in addition to the maximum salary fixed for the office." All fees accruing to said office in such suits after December 1, 1914, must be considered in determining the maximum amount the district clerk shall receive.

We do not have a copy of the charter of the city of San Antonio and do not attempt to pass upon any provision it may contain in reference to the collection of delinquent taxes. We are merely passing upon the question as it is affected by the General Law relating to cities and towns. Your city charter might contain provisions which would make this opinion inapplicable.

Very truly yours,
JOHN C. WALL,
Assistant Attorney General.

OP. NO. 1722—BK. 49, P. 104.

TAXATION.

1. Where the validity of a particular tax levied against the property of an owner is questioned and is involved in litigation, the owner, by a tender of payment of the other tax levied against his property and not in dispute, is relieved of the penalty fixed by law for failure to pay taxes by a certain time, whether the tax collector does or does not receive the amount of undisputed taxes.
2. A county attorney is not entitled to 10 per cent on the first $1000 of delinquent taxes collected by him by suit and 5 per cent on all sums over that amount. He is entitled only in each case to the fee provided by House Bill 40.
3. The fee provided in House Bill 40 to county and district attorneys in suits to collect delinquent taxes accrues to the office of county or district attorney when the suit is filed, and the county or district attorney is entitled to such fee although the delinquent owner makes payment of the taxes during the pendency of the suit.

April 3, 1917.

Hon. J. F. Clarkson, County Attorney, San Diego, Texas.

DEAR SIR: We have your letter of March 29th, together with copy of the opinion of the San Antonio Court of Civil Appeals in Cause No. 5824, The State of Texas, Appellant vs. Charles Hoffman, Appellee, Appeal from Duval County. Your letter is in part as follows:

"Now there are quite a number of taxpayers who will not make a tender of their taxes due the State and county unless I file the suits against them or press those I have filed to a judgment, and under the court's opinion I will not be allowed a fee under the tax law for the work of filing these cases. Yet, unless these suits are filed and the defendants forced to make a tender they may indefinitely postpone making a tender or paying their taxes."

Then you ask the following question:

"Would I be entitled to 10 per cent on the first $1000 collected by such suits in any one case, and 5 per cent on all sums over that amount?"

Replying thereto, we beg to state that we think you have misconstrued the effect of the opinion of the Court of Civil Appeals in the Hoffman case. In that case the legality of the tax levied against the property of Mr. Hoffman for court house and jail purposes was questioned. Before the taxes which were unquestioned became delinquent, he tendered payment of the same to the collector. Thereafter, and still before the taxes became delinquent, he obtained an injunction restraining the county attorney from suing for the court house and jail tax. By tendering the taxes which were not in dispute and involved in the litigation prior to the time they became delinquent, he did not become liable for any penalty and costs, so far as such taxes were concerned. This view is sustained by well considered opinions of the Supreme Court.

See Ry. Co. vs. Scanlan, 44 Texas, 651.
Harrison vs. Vines, 46 Texas, 20.
Rosenberg et al. vs. Weeks, 67 Texas, 584.
Blane vs. Meyer, 59 Texas, 92.

These cases clearly decide that whether the collector should receive or refuse to receive the money tendered in payment of taxes not in dispute and not involved in litigation, no penalty or interest will accrue.

Answering now the particular question you have asked, we beg to state that a county attorney is not entitled to 10 per cent on the first $1000 of delinquent taxes collected by suits and 5 per cent on all sums over that amount. The fee he shall receive in such cases is the fee provided for in Chapter 147 of the printed general laws of the Regular Session of the Thirty-fourth Legislature, commonly known as House Bill 40.

Section 3 of this Act provides "that for the work of filing (delinquent tax) suits, the county or district attorney shall receive a fee of $5.00 for the first tract of land included in each suit, and $1.00 for each additional tract included therein," etc. This fee accrues only upon the filing of suit and accrues at the time suit is filed. If the delinquent owner tenders payment of his taxes after suit has been properly filed, he is liable for the fee of the county or district attorney as well as for the costs of suit which have accrued. Of course, no suit could be properly instituted until the provisions of House Bill 40 as to notice had been complied with and until the 90 days after the date of such notice had expired and until there had been twenty days publication of the delinquent tax record as required by Articles 7687 and 7688, Revised Statutes, 1911.

The county attorney is entitled to only one fee in each delinquent tax suit, no matter how many years taxes against the given piece of property may be delinquent and each suit against a delinquent owner should embrace the taxes delinquent against his property for all years and all property of the delinquent owner should be included in the same suit, if this is possible.

Yours very truly,
JOHN C. WALL,
Assistant Attorney General.

OP. NO. 1723—BK. 49, P. 101.

DELINQUENT TAX SUITS.

1. The fee provided in House Bill 40 to county or district attorneys accrues immediately upon filing suit.
2. The Legislature intended in House Bill 40 to substitute the fee therein provided to county or district attorneys in each delinquent tax suit for the fee theretofore provided to such officers under Article 7691.
3. The fee accrues to the office of county or district attorney when suit it filed and such officer is entitled to such fee, although the taxes, penalty and interest may be paid during the pendency of suit.

April 3, 1917.

Hon. C. J. O'Conner, Breckenridge, Texas.

DEAR SIR: We have your letter of March 31st, which is in part as follows:

"Article 7691 of Vernon's Sayles' Civil Statutes says that where suit is brought against a delinquent taxpayer and he desires to come and pay off the amount of taxes and costs during the pendency of the suit, the County Attorney shall only be allowed a fee of $2.00 on the first tract and $1.00 on each additional tract. But the law passed by the Thirty-fourth Legislature in 1915 states that in counties of less than fifty thousand inhabitants, the attorney shall receive a fee of $5.00 in each case and does not say anything as to what fee he shall receive where the suit is compromised."

You then ask an opinion of us as to whether that part of Article 7691, as to the fees of county attorneys, where settlement is made during the pendency of the suit, was repealed by House Bill 40.

Replying thereto, we beg to state that it is the opinion of this Department that it was the intention of the Legislature in passing House Bill 40 to substitute the fee for county and district attorneys therein provided for the fees theretofore provided by Article 7691 of the Revised Statutes of 1911.

In Section 3 of House Bill 40 it is provided "that for the work of filing (delinquent tax) suits, the county attorney or district attorney shall receive a fee of $5.00 for the first tract of land included in each suit, and $1.00 for each additional tract included therein," etc.

Therefore, the fee accrues as soon as suit is properly filed. Settlement of the suit while it is pending would not deprive the county or district attorny of the fee which accrued immediately upon the proper filing of the suit.

Very truly wours,
JOHN C. WALL,
Assistant Attorney General.

OP. NO. 1743—BK. 49, P. 165.

Where a third party pays the taxes of a delinquent owner the lien of the State can not be transferred to such third party.

April 27, 1917.

Hon. Frank Stephenson, County Attorney, Orange, Texas.

DEAR SIR: We have a letter from you, which is in part as follows:

"I am bringing quite a number of suits for delinquent taxes, and contemplate filing a great many more. A great many of the delinquents are unable to pay the taxes and are desirous of having the same paid for them by a certain other party who will furnish money for that purpose. However, the party so furnishing the money, and so paying the taxes, will not do so, unless he has transferred to him the lien which the State and county has. If we can transfer the lien to the party paying the taxes such will facilitate collections a great deal and be quite an accommodation to all concerned. The party who contemplates so assisting the delinquents cannot take a deed of trust as in ninety per cent of the instances the property delinquent is the homestead of the delinquent. If the lien can be transferred, should actual receipts be issued, or only a certificate to that effect? Would such a payment be an extinguishment of the lien? Can the State transfer its tax liens? Confine your opinion to facts where the advancement of the tax money is with acquiescence and direction of the

delinquent, as we would not want to transfer any lien without such acquiescence."

Without entering into general discussion of the subject of subrogation, we will state the following general principles:

The object of the rule of subrogation is to give the paying surety all the remedy that the creditor has against the principal debtor. Faires vs. Cockerell, 88 Texas, 428, 31 S. W., 190, 639.

Subrogation is a mode which equity adopts to compel the ultimate payment of a debt by one who in justice, equity and good conscience ought to pay. Murphy vs. Smith, 50 S. W., 1040.

The right of subrogation does not necessarily depend upon privity of contract. Jones Lumber Company vs. Villegas, 28 S. W., 558; Tarver vs. Land Mort. Bank, 27 S. W. 40, 93 Texas 721.

It might be merely an equitable assignment which puts the parties where they would be if an actual assignment had been made. Faires vs. Cockerell, 88 Texas, 428, 435. It might, however, arise from the agreement of parties. Cason & Brother vs. Connor, 83 Texas 26.

When a surety is compelled to pay a debt of the principal, subrogation to the right of the creditor follows: Darrow vs. Summerhill, 58 S. W. 158, 94 Texas, 71; Lane vs. Scott, 57 Texas, 367; Murrell vs. Scott, 51 Texas 520; Baker vs. Wahrmund, 23 S. W. 1023; Jourdan vs. Hudson's Ex'r., 11 Texas 82.

But subrogation is not for a stranger or volunteer. Oury vs. Saunders, 77 Texas 278; Whiteselle vs. Texas Loan Agency, 27 S. W. 309, 93 Texas 743; Brown vs. Dennis, 3 S. W., 272; Jones Lumber Co. vs. Villegas, 28 S. W. 558.

An answer to your inquiries would involve the question of subrogation where the party paying the delinquent tax has no interest in or valid claim to the land against which the State had a lien for the tax, but paid the same under an agreement with the State and the delinquent owner that he would have as security for the money advanced by him the constitutional and statutory lien provided to the State against the land. We have found no decision by the higher courts of this State which involves just such a state of facts. We have found only the following expression by appellate courts when the question of the subrogation to the lien of the State for payment by a third party of taxes against land was involved:

In the case of Moores vs. Wills, 5 S. W., 677, the Supreme Court said:

"But admitting that such lien (meaning the lien of the State for delinquent taxes) existed, and Moores paid it, having no interest in or valid claim upon the land to protect, would it not be deemed a volunteer payment by a stranger to which doctrine of subrogation would not apply? Sheld. Subr."

In the case of McCormick vs. Edwards, 6 S. W., 33, the Supreme Court again said:

"As a general rule, where property is sold for the purpose of satisfying a lien, and the sale is set aside, the purchaser becomes subrogated to the rights of the lien-holder, and may enforce, for his own benefit, the

lien against the property. French vs. Grenet, 57 Texas, 273; Howard vs. North, 5 Texas, 290. This is called by an eminent text writer an 'equitable assignment,' (3 Pom. Eq. Jur. Sec. 1211, and note 1); but it seems that our courts hold that a void tax deed carries with it no equities. Robson vs. Osborne, 13 Texas, 298; Pitts vs. Booth, 15 Texas, 453. After a careful research, we have found no case in which a purchaser at a void tax sale has, without the aid of a statute, been permitted to recover even the taxes lawfully assessed upon the land and paid by his purchase.

"It would seem equitable that he should at least recover the taxes which the land-owner ought to have paid, and which he failed to pay. Many states have accordingly passed statutes regulating this subject, and giving the relief indicated; so far as we have been able to discover, whenever this relief has been given or sanctioned by a court of last resort, it has been by virtue of statutory law. Flinn vs. Parsons, 60 Ind., 573; Everett vs. Beebe, 37 Iowa, 452; Petitt vs. Black, 8 Neb., 52; Hart vs. Henderson, 17 Mich., 218; Hosbrook vs. Schooley, 74 Ind., 51; Brown vs. Evans, 15 Kan., 88; Coats vs. Hill, 41 Ark., 149. See, generally, 2 Desty, Tax'n., p. 1010, sec. 157 et seq. It is held in California that the purchaser, if the sale be void, has no remedy. (Harper vs. Rowe, 58 Cal., 233); and also in Tennessee, (Ross vs. Mabry, 1 Lea, 226. See, also, authorities there cited). We conclude, therefore, that appellant was not entitled to recover of appellee either the purchase money or the taxes upon the land. Neither was plaintiff entitled to recover the money paid to redeem the land from the sale to the State for taxes made previous to his purchase. Having no title to or lien upon the land by virtue of his tax purchase and deed, his payment to the State must be deemed the voluntary payment of a stranger, which entitles him to no equity. Sheld. Subr. Sec. 41".

In the case of Furche vs. Mayer et al., 29 S. W., 1099, the Court of Civil Appeals, said:

"In the case of ordinary liens, one who discharges the lien at the request of the lienholder, or does so by agreement between the debtor and lien holder, or to protect himself from the lien, becomes subrogated to the rights of the original lien holder. We find no well-considered case holding a person entitled to subrogation where he pays off the lien debt simply upon the request of the debtor, unaccompanied by an agreement of subrogation to the discharged lien, or circumstances from which such an agreement may be implied. No agreement or subrogation, or facts from which it may be reasonably implied, were alleged in this case, and we do not think the facts alleged entitled appellant to that relief. Fievel vs. Zuber, 67 Texas, 277, 3 S. W., 273. Aside from this view of the case, we do not think the statutory lien existing in favor of the government for taxes due is that character of lien to which one may enforce the equitable right of subrogation. McCormick vs. Edwards, 69 Texas, 106, 6 S. W. 32."

There is no statute in this State giving the right of subrogation where a third party pays the taxes of a delinquent owner. And while the matter is involved in some doubt, we are of the opinion that, in the absence of such a statute, you would not be authorized to transfer the lien of the State to the person who paid the taxes which were delinquent against the lands of another. The State, of course, is interested in collecting delinquent taxes, but the person who advances money to pay the taxes of another is very much interested. We do not attempt to advise him. He should follow the advice of private counsel.

Yours truly,

JOHN C. WALL,

Assistant Attorney General.

OP. NO. 1747—BK. 49, P. 177.

TAXATION—EXEMPTIONS—CEMETERIES.

All lands used exclusively as places for the burial of the dead, except such as are held with a view to profit or speculation, and the sale thereof, are exempt from taxation.

In order that such property may be exempt from taxation, it is necessary that the same shall be in actual use for the purposes indicated, or intended for such use.

Where the property is intended for such use it is necessary that some active steps shall have been taken to prepare the ground for the intended use. It is only such property of cemetery associations that is in actual use as a burial ground or held for that specific purpose that is exempt from taxation, and any property owned and held by such association for any other purposes, or rented out, is not so exempt.

The temporary use of such property for other purposes will not deprive the same of the exemption. Land purchased by a cemetery association with the intent to use the same at some remote and indefinite future date is not exempt from taxation. In order for lands of such association to be exempt from taxation it is not essential that they shall be actually occupied by the graves of the dead. The lands that have been plotted and are being taken up by the gradual growth of the occupied portion of the cemetery are exempt.

The exemption does not extend to and include funds, investments or securities owned by the Association. Laws exempting property from taxation are strictly construed.

Sections 1 and 2, Article 8, Constitution.

Articles 7507, Revised Statutes, 1911.

April 27, 1917.

Hon. Mike T. Lively, County Attorney, Dallas, Texas.

DEAR SIR: The Attorney General has your letter of April 23rd, reading as follows:

"The Tax Assessor of this county is in doubt concerning the following matter:

"A cemetery association at Lancaster, in this county, has had real estate deeded to it in fee simple, a condition of the conveyance being that the revenue arising from same is to be used exclusively for the up-keep and maintenance of the cemetery. The real estate, however, is not used for burial purposes.

"Query: Is this property subject to taxation?"

As your communication does not fully state the character, location and use of the property deeded to the Cemetery Association it will be necessary in this opinion to review more at length the authorities touching the various questions arising in matters of this character than would have been the case had you stated the exact facts surrounding this transfer.

It is contemplated in this State that taxation shall be equal and uniform. It is provided in Section 1, Article 8, of the Constitution:

"Taxation shall be equal and uniform; all property in this State, whether owned by natural persons or corporations, other than municipal, shall be taxed in proportion to its value."

The above is couched in general language and is therefore applicable to all property, unless otherwise expressly exempted by some provision of the Constitution.

Section 2 of Article 8 exempts certain property held and used for certain specific purposes. This Article, insofar as applicable here, is as follows:

"* * * the Legislature may by the 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 * * * and institutions of purely public charity; and all laws exempting property from taxation other than the property above mentioned shall be null and void."

Upon authority granted in the above quoted section of the Constitution the Legislature of this State enacted what is now Article 7507, of the Revised Statutes, exempting the class of property so named from taxation.

Subdivision 2 of this Article, which Subdivision relates to graveyards and burying grounds, is as follows:

"All lands used exclusively for graveyards or grounds for burying the dead, except such as are held by any person, company or corporation with a view to profit, or for the purpose of speculating in the sale thereof."

Bearing in mind the provisions of Section 1, Article 8, of the Constitution, that all property must bear its just portion of the public expense the rule that exemptions from taxation should be strictly construed is made manifest.

In Rosenberg vs. Weeks, 67 Texas, 585, the Supreme Court of this State says:

"The exemptions allowed by our laws are very few and such as are called for by an enlightened public policy.".

In Morris vs. Masons, 68 Texas, 702, it is said:

"The burden of showing that an exemption from taxation exists rests upon the party who claims it."

This case cites a long list of authorities, and further holds:

"The reason of these rules would seem to be, that it is but just and equitable that the property of all persons and associations of persons should bear the burdens of government in equal proportion; and hence it is to be presumed that the lawmakers did not intend to make an exemption in favor of any class, unless that intention be clearly expressed."

In the following cases also the rule that exemptions for taxation must be strictly construed and that the purpose of the State to abandon its right to tax should not be presumed is fully set out and declared:

St. Louis Lodge No. 9, B. P. O. E. vs. Koeln, 191 S. W. 329.
McMullins vs. Mt. St. Mary's Cemetery Association, 144 S. W. 109.

In Jones Brothers vs. City of Louisville, 135 S. W., 301, the Su-

preme Court of Kenutcky, it is held that exemptions from taxation are derogatory to common right and will not be extended beyond the express requirement of the statute, strictly construed.

See also Bloomington Cemetery Assn. vs. People, 170 Ill., 377.
State vs. Lange, 16 Mo. App., 468.

In support of this proposition we quote from Lewis' Sutherland on Statutory Construction, Section 539, as follows:

"Not only is all legislation for taxation, but also for exemption from taxation or any other common burden or liability to be strictly construed. The principle is well settled that the power of exemption, as well as the power of taxation, is an essential element of sovereignty and can only be surrendered or diminished in plain and explicit terms. * * * The right of taxation is an attribute of sovereignty. It is inherent in the State and essential to the perpetuity of its institutions; consequently, he who claims exemption must justify his claim by the clearest grant of organic or statute law. Every presumption is against any surrender of the taxing power, and every doubt must be resolved in favor of the State. Unless the intention to surrender that power is manifested by words too plain to be mistaken, it must be held still to exist. Statutes and provisions exmpting persons or property from taxation are strictly construed. * * * Legislation which is claimed to relieve any species of property from its due proportion of the general burdens of government should be so clear that there can be neither reasonable doubt nor controversy about its terms. The language must be such as leaves no room for discussion. Doubts must be resolved against the exemption."

From the above citation of authorities it is clear that if the property in question is exempt from taxation it must fall squarely within the provisions of the Constitution and statute making exemption from taxation of places of burial not held for private or corporate profit, for in such terms are couched both the Constitution and the statute.

As said above, the use of this property not being made clear by your communication, it will be necessary for us to discuss and cite authorities upon several propositions which arise as corollaries to the original rule announced herein that property to be exempt from taxation must be plainly made so by the Constitution and the statute.

Whether or not property of cemeteries and cemetery associations is exempt from taxation is discussed in 37th Cyc. 945, as follows:

"f. Cemeteries and Cemetery Associations.—An exemption of cemeteries from taxation will apply to land acquired and set apart for burial purposes and either actually in use therefor or intended so to be used, provided, in the latter case, that some active measures have been taken to prepare the ground for use as a cemetery; and although a cemetery conducted as a mere source of private or corporate profit is not within the exemption laws, the mere fact that the lots in it are sold for purpose of interment does not give it this character. Only so much of the land owned as is used or intended for burial purposes is exempt, and not other portions which are used for entirely different purposes, or rented out; nor can the exemption be claimed in respect to land purchased by the owners of the cemetery with the intention of employing it for the same purpose at some indefinite future time; but this does not mean that only such land is exempt as is actually occupied by burial plots and graves. The exemption will also cover permanent improvements placed on the land and necessary

to its use as a burying ground; but will not include personal property, such as horses, hearses, carriages, tools and other articles used for burial or about their cemeteries, or funds, investments, or securities owned by the cemetery association."

A long list of authorities is cited under each of the propositions announced in the above text and we will next discuss and quote briefly from some of those authorities.

The first proposition announced is that exemption of cemeteries from taxation will apply to land acquired and set apart for burial purposes and either actually in use therefor or intended so to be used.

In Oakhill Cemetery Company vs. Wells, 78 N. E. 350, the Appellate Court of Indiana, says:

"A tract of land purchased by an incorporated cemetery association for cemetery purposes and platted into lots for cemetery purposes could properly be said to be used exclusively for cemetery purposes, but this is not equivalent to saying that the lots are used for burial purposes and that they are now in use for such purpose."

In Metairie Cemetery Association vs. Board of Assessors, 37 La. Ann. 32, it is held that a cemetery set apart and used for burying the dead is a place of burial within the meaning of Article 207 of the Constitution and as such exempt from taxation, unless leased or used for purposes of private or corporate profit or income. In that case the Court said:

"In establishing this exemption, the law concerns itself exclusively with the quality and use of the property, and not at all with its ownership or disposition. So long as it retains the character of a 'place of burial,' it matters not who owns it, how often it may change hands nor at what prices—as a 'place of burial' it remains exempt. The sale of property is not an use of it within any signification, technical or general, of that word.

"Every cemetery belongs to some owner; and the lots therein are not usually given away, but are sold to persons desiring to acquire them for purposes of interment. If the law had intended to exempt such 'places of burial,' only on condition that they should not be sold, it would have said so. Under such construction, the unoccupied lots of perhaps every cemetery in New Orleans, would be equally liable to taxation with those of plaintiff. Indeed, churches, hospitals, orphan asylums and other exempt property are equally subject to be sold at the will of the owners, and on the same theory might lose their exemption. Possible profits on such sales are not matters of judicial concern.

"But such construction would be absurd; because, then, *until sold*, the condition of the law would not have been violated; and, *when sold*, how could the property be taxed to the seller? Thus in the instant case, the property assessed is admitted to be the *unsold* portion of the cemetery. As we have held, it is 'a place of burial,' within the intendment of the law. It is clear from the evidence that it is not used for any purpose of profit or income; and it has not been sold. Then in what way has any breach of the condition which excludes exemption been committed?" (37 La. Ann., 36.)

In the case of Hoboken vs. North Bergen, 43 N. J. Law, 146, there was involved the right of the town to collect a tax upon that portion of a cemetery wherein no bodies were interred. In holding the same not subject to taxation the Court used the following language:

"Adjoining the house were five acres, within the boundaries of the seventeen-acre tract, not yet used for burial purposes. This land the superintendent cultivated. He did not receive any money compensation from the city for his services at the cemetery, but had the use of the house and the five acres lying contiguous thereto.

"The house and the five acres constitute the property assessed.

"The general tax law of the State exempts cemeteries from taxation.

"It is, however, contended that the exemption under the general laws extends only to the land actually used for burial purposes, and that arable land within the boundaries of a cemetery, although adjoining the part occupied by graves, is liable to taxation.

"Such construction of the general act is too narrow. The space required for burial purposes constantly increases, and a reasonable quantity of land for future occupancy should be provided. Land acquired for such purpose is not taxable. Seventeen acres is not an unreasonable quantity of land for a cemetery in the vicinity of the city of Hoboken." (43 N. J. L., 148).

In the case of Oakhill Cemetery Association vs. Pratt, 29 N. E. 7, it appears that the Cemetery Association owned property within the City of Rochester, but that by an ordinance of the city no bodies might be buried therein. In discussing whether or not this property of the Association although not actually used as a burying ground was subject to taxation the Court said:

"So long as Oak Hill Cemetery exists as a corporation it must hold its property exclusively for cemetery purposes; and, while burials cannot now be made therein, the ordinance prohibiting them may be repealed or modified at any time, so as to allow them. There is no provision in the statute that its land shall be exempt from taxation only so long as burials are authorized to be made therein. The exemption is absolute."

To like effect as the above is Appeal Tax Court vs. St. Peter's Academy et al., 50 Md. 352.

Rosenblatt vs. Wesleyan Cemetery Assn., 11 Mo. App., 560.

It is the rule, however, that where land is held by a cemetery association and claimed as exempt from taxation that some steps must have been taken to prepare the ground for use as a cemetery, nor is it sufficient that the land was purchased or acquired with the intent to use the same at some remote and indefinite future time.

In Woodlawn Cemetery vs. Everett, 118 Mass., 354, the Court of that State uses this language:

"It is expressly agreed in the case stated that no part of this land has been used for burials, or divided off or laid out into lots or permanent avenues, and that no attempt has been made to sell it for purposes of burial. The use of a parcel of land for growing trees or shrubs, cutting turf, and depositing stone, wood and other materials, to be ultimately used in preparing and ornamenting a cemetery, is no dedication of such land itself for the purposes of a cemetery or burial place for the dead." (118 Mass. Rep., 362.)

In Rosehill Cemetery vs. Kern, 147 Ill. 495, the Supreme Court of that State said:

"We do not wish to be understood as holding that cemetery grounds are only exempt from taxation when burials have been actually made upon

them, or that the necessities of the corporation may not be reasonably anticipated by appropriating grounds to burial purposes before they are absolutely demanded, so as to bring them within the exemption. This, we think, is done by this company when it 'makes up' sections, or, otherwise acting reasonably in good faith, actually devotes its grounds, as a body, to immediate use for burials. It cannot, however, by platting a large body of land and appropriating a fraction of it to actual burial purposes, escape taxation of the whole. The decree of the Superior Court is in harmony with the views here expressed and the former decision of this court above referred to." (147 Ill. Rep., 495.)

In People vs. Cemetery Company, 86 Ill. 339, it is said:

"Now, is it reasonable to suppose that the Legislature ever contemplated to invest this Company with the power to hold the remaining 400 acres of land free from taxation, by the doing of a few trifling acts upon it? The act must receive a reasonable construction—that will carry out the object and purpose of the charter, and at the same time protect the public from imposition by the mere pretenses of the corporation that its interests require 400 acres of land to be held subservient to a tract of 100 acres in actual use."

(86 Ill. Rep., 339).

See also Trinity Church vs. New York, 10 Howard Practice (N. Y.), 138.
State vs. Lakewood Cemetery Assn., 93 Minn., 191.

The use of the property in question, as indicated in your letter, probably brings that property more nearly within the following rule, that is that only that property used for cemetery purposes, for the burial of the dead, is exempt from taxation and that such property as may be owned and held by the Association, but used for other purposes or rented out, although the revenue derived therefrom may be used exclusively for the support and maintenance of the cemetery, is not exempt from taxation.

In Bloomington Cemetery Association vs. People, 170 Ill., 377, the Court in discussing the question said:

"It will be noticed that the sole and exclusive object of the association was to lay out, enclose and ornament a plat or piece of ground to be used as a burial place, and the exemption is in these words: 'Said piece of ground so held and platted shall be exempt from taxation and execution.' It would require a construction more liberal than is applied to statutes exempting property from taxation, to bring within this exemption clause a separate adjoining lot, purchased, held and used, not for burial purposes, but for an office and dwelling of the custodian of the grounds and for a supply of water. If a strict construction were once departed from, it would not be difficult in many cases to prove that property of great value, not strictly within the terms of the exemption, is yet within its spirit, by showing that it is in the highest degree useful for the purpose to which the exempted property is devoted. Section 3 of Article 9 of the Constitution of 1870 provides that such property as may be used exclusively for cemetery purposes may be exempted from taxation by general law, and the general law on the subject is that 'all lands used as graveyards or grounds for burying the dead' shall so be exempt. 2 Starr & Curtis' Stat., Chap. 120, Sec. 2." (170 Ill. Rep., 378-379.)

In the case of People vs. Cemetery Company, 86 Ill. 336, the Court said:

"It may be and probably is a profitable investment for this company to hold 153 acres of land free from taxation, but when the company has

made no use of the property except to remove therefrom a quantity of earth and sand and erect thereon a stable and a few houses to be occupied by the company's horses and men, we cannot believe the holding of the property for such a purpose is useful to promote the object for which the Legislature passed appellee's charter, nor do we believe it was ever contemplated by the Legislature to give appellee such a great privilege not shared by the public at large. Appellee has the right, under its charter, to purchase and hold 500 acres of land; it has in actual use about 100 acres, which, by the terms of the charter, is exempted from taxation." (86 Ill. Rep., 339.)

The court in this case held that this excess property was not exempt from taxation under the exemption clause, to the effect that all estate, real or personal, held by the company, actually used by the corporation for burial purposes or for the general uses of lot holders or subservient to the burial purposes and which shall have been platted and recorded as cemetery grounds shall be exempt.

In the case of the State vs. Lange, 16 Mo. App,. the Court held that a charter exemption of property from taxation, "so long as the same shall remain dedicated to purposes of the cemetery" cannot be made to include a lot of ground which is rented out to a third person who uses it as a residence for the purpose of husbandry.

In that case the court said:

"We do not decide that the corporation has forfeited its right to hold this smaller tract exempt from taxation, we simply hold that the exemption never attached thereto, because whatever the purposes were for which it may have acquired it, it has never been and it is not now a cemetery. Nor do we place any particular stress on the fact that this tract is divided from the cemetery by a public road, except in so far as the highway makes a fixed and defined boundary. Our conclusion would be the same if the dividing line consisted of a fence, or of a furrow drawn across the ground, provided the two tracts by any fixed line of demarkation were separated from each other, the one being used for the purposes of husbandry, and the other for the purposes of interment.

"We are fortified in our conclusion by a carefully decided case, covering almost the identical ground. In the People vs. the Cemetery Company (86 Ill., 336) the exemption claimed rested on much broader ground. The charter exemption there covered not only all lands held by the corporation for burial purposes, but also those *subservient to burial uses.* The lands claimed as exempt there were platted and recorded as cemetery grounds, and the corporation had erected on them several buildings occupied by men in its employment, and stables wherein its horses were kept, and as occasion would require, the sand and mould was taken from such tract and used for the improvement of the other tract of the company which was in actual use as a cemetery. The two tracts were also separated by a highway. It was claimed by the company that the term 'subservient to burial uses' brought the land within the exemption, but the claim was denied by the court. See also St. Mary's College vs. Crowl, 10 Kan., 442.

"We are referred to nothing by relator militating against the position which we have herein taken. We are referred to the case of the State ex rel. vs. Powers (10 Mo. App., 264), affirmed by a divided court above (74 Mo., 476), as opposed to the judgment rendered herein by the trial court. Whilst the result reached in that case is not in conflict with the judgment rendered by the trial court in this case, or with this opinion, yet we are free to say that some things were said in the hospital case, by the learned judge who delivered therein the opinion of this court, which do not meet with our unconditional approval." (16 Mo. App., 471-472.)

See also Mulroy vs. Churchman, 60 Iowa, 719.

The mere fact that the Cemetery Association receives some small revenue for the primary use of a portion of its property is not inconsistent with the purposes of holding and preparing the land for burial.

People vs. Stilwell, 190 N. Y., 292.

It is also held that a surplus arising from the proceeds of sales from a greenhouse located on the cemetery grounds would not deprive such property of its right to exemption.

It is said in State vs. Lakewood Cemetery Association, 93 Minn., 194:

"The use of a small portion thereof for a greenhouse for the purpose of growing flowers and plants to be used in beautifying the grounds, clearly, in our judgment, falls within the authority conferred upon appellant. It is a matter of common knowledge that greenhouses are maintained by many of the large cemetery associations throughout the country, and the sale of a small amount of the surplus stock is but an incident to the general management. We are of the opinion the land so acquired is exempt from taxation." (93 Minn. Rep., 194.)

See also to like effect Rose Hill Cemetery Co. vs. Kern, 147 Ill., 483.

The rules as announced herein, however, do not go to the extent of making subject to taxation all of the lands of a cemetery not actually used for interment purposes subject to taxation. That is to say it is not essential that every foot of the land must be occupied by graves.

See 93 Minn., 191, and also 190 N. Y., 284, supra.

These exemptions do not extend to and include funds, investments or securities owned by the association.

In Commonwealth vs. Lexington Cemetery Company, 70 S. W. 280, it is held that funds of a cemetery company, derived from the sale of lots, are not exempt from taxation under the constitution, Section 170, and the Kentucky statute, Section 4026, exempting from taxation places for burial not held for private or corporate profit and "institutions of public charity."

In the case of the State vs. Wilson, president of Baltimore Cemetery Company, 52 Md. 638, it is held that where a charter of a cemetery company authorized it to hold real and personal property and provided that the land of the company dedicated to the purpose of a cemetery shall not be subject to taxation of any kind, that such exemption embraced the land and improvements, but not a fund invested in stocks, the interest of which is for the maintenance of the cemetery.

See also Metairie Cemetery Assn. vs. Board of Assessors, 37 La. Ann., 32.
Muhlenberg vs. Evans Cemetery Co., 1st Woodward's Decisions (Pa.), 323.
The Tax Cases, 12 Gill & Johnsons (Md.), 117.

In a long list of authorities it is held that property belonging to a religious organization and used as a place of residence for the pastor, commonly known as a parsonage, manse or rectory, is not exempt from taxation as a place of religious worship.

See St. Edward's College vs. Morris, 82 Texas, 1.
First Presbyterian Church vs. City of New Orleans, 31 Ann. Rep., 224.
People vs. Camp Meeting Assn, 160 Ill., 578.
Conn. Spiritualist Camp Meeting Assn. vs. East Lynn, 54 Conn., 152.
First Church vs. Lynn County, 70 Iowa, 396.
All Saints Parish vs. Brockline, 59 N. E., 1003.
Ramsey Co. vs. Church of the Good Shepherd, 44 Minn., 229.

We could cite numerous other authorities announcing this rule, but we take it that the above will suffice for this opinion.

Neither is such residence occupied by the pastor of a church exempt from taxation as a building belonging to institutions of purely public charity.

Barbee et al. vs. City of Dallas, 64 S. W., 1018.
Morris vs. Masons, 68 Texas, 698.
Redd vs. Morris, 72 Texas, 554.
Redd vs. Johnson, 53 Texas, 284.

We cite the above authorities as establishing the proposition that property, in order to be exempt as a charity, must be property used as a portion of the charitable institution and as being analogous with the question under discussion that the property of a cemetery or burial ground, to be exempt, must be a portion of such cemetery or burial ground. In our opinion, this property, if exempt at all, must be so under that provision of the Constitution, Section 2, Article 8, exempting places of burial not held for private or corporate profit, as this is the specific purpose mentioned in the Constitution for which, if property is so used, it will be exempt, and being specifically mentioned would exclude it from the general clause exempting institutions of purely public charity.

We therefore advise you, in accordance with the discussion and authorities hereinabove contained, that if the property in question is held by the Cemetery Association for use as a cemetery with the purpose and intention of using the same as a place for the burial of the dead whenever the same may become necessary by the filling up of the present grounds, then, although it may be primarily otherwise used, from which use the association derives a revenue, yet the same would be exempt from taxation. If, however, the property is not situated or so constructed that it could become the place for the interment of the dead, but on the other hand is held exclusively for the revenue that might be derived therefrom, then, under the great weight of authority, as hereinabove stated, the same would not be exempt. When you have ascertained the exact facts as to this property you can, from this opinion, readily advise the association whether or not the same is subject to taxation.

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

OP. NO. 1757, BK. 49, P. 234.

CITIES AND TOWNS—CITY ATTORNEYS AND COUNTY ATTORNEYS.

1. Powers of cities incorporated under general laws to collect delinquent city taxes by seizure and sale are those conferred in Chapter 13, Title 126, R. S. 1911.

2. Powers of such cities to collect such taxes by suit are those conferred in Chapter 15, Title 126, R. S. 1911.

3. If the Council of such city has by ordinance dispensed with the office of City Attorney, they may, by ordinance, employ special counsel to collect delinquent city taxes by suit.

4. The collection of delinquent city taxes by suit is a function of the office of City Attorney and he is the proper person to file and prosecute the suit.

5. A city or town council has the right to employ special counsel to aid the City Attorney in the collection of such taxes by suit.

6. A County Attorney may be employed for such purpose.

May 9, 1917.

Hon. J. A. Drane, County Attorney, Pecos, Texas.

DEAR SIR: We have a letter from you making the following inquiries:

"Where a town or city of 3,000 population is organized under the general laws of the State and has due it delinquent taxes, what method must it employ for the collection of same, and can the County Attorney be employed for such purpose, and if so, what fees may be paid him to collect said taxes by suit? Does the delinquent tax act passd by the Legislature for 1915 apply to the collection of delinquent city taxes, and if not, under what law can payment of such taxes be enforced?"

Replying thereto, we beg to state that Chapter 7 of Title 22 provides the method for the collection of delinquent city taxes by seizure and sale. We especially call attention to Articles 957 and 960, inclusive, R. S. 1911.

In addition to the powers conferred in these articles and the procedure prescribed, cities and towns incorporated under the general law are likewise by statute given the power and authority conferred by general law for the collection of delinquent State and county taxes by seizure and sale. Thus Article 961 provides:

"The provisions of Chapter 13 of Title 126, in reference to the seizure and sale of real and personal property for taxes, penalties and costs due thereon, shall apply as well to collectors of taxes for towns and cities as for collectors of taxes for counties and collectors of taxes for cities and towns shall be governed, in selling real and personal property, by the same rules and regulations in all respects as to time, place, manner and terms and making deeds, as are provided for collectors of taxes for counties, except as in this Chapter otherwise provided."

Chapter 13 of Title 126 referred to provides the procedure to be followed in the collection of delinquent State and county taxes by seizure and sale.

As to the collection of delinquent city taxes by suit we call attention to Article 7693, R. S., which is as follows:

"Any incorporated city or town or school district shall have the right to enforce the collection of delinquent taxes due it under the provisions of this Chapter."

We also call attenton to Article 7699, R. S., which is as follows:

"In any incorporated city or town, in which any lots or blocks of land situated within the corporate limits of said city or town have been returned delinquent or reported sold to said city or town for the taxes due thereon, the city council may prepare lists of delinquents in the same manner as is provided for in Article 7685, and when such lists shall be certified to as correct by the mayor of said city or town, the city council may direct the city attorney to file suit in the district court of the county in which said city or town is situated, for the recovery of the taxes due on said property, together with penalty, interest and costs of suit; which suit may be brought in the same manner as is provided in Article 7687 of this Chapter, for the bringing of suits by the county attorney."

You are therefore advised that the powers of a city or town incorporated under the general laws of this State to collect delinquent city taxes by seizure and sale are those conferred in Chapter 7 of Title 22, and in additon those conferred in Chapter 13 of Title 126, and the procedure for the collection of taxes in this manner is set forth in said two chapters.

You are further advised that the powers of a city or town incorporated under the general laws to collect delinquent city taxes by suit are those conferred in Chapter 15, Title 126, R. S., and the procedure for the collection of such taxes by suit is set forth in said chapter. As to the procedure to be followed we particularly call attention to Articles 7685, 7687, 7688 and 7689.

Answering now your inquiry as to whether the common council of a city or town incorporated under the general law may employ the county attorney or special counsel, other than the city attorney, to collect delinquent city taxes by suit, we call attention to other provisions of the general law.

Article 784, R. S., among other things, provides:

"The municipal government of a city shall consist of a city council, composed of the mayor and two aldermen from each ward * * *; provided, that where the city or town shall not be divided into wards, the city council shall be composed of the mayor and five aldermen, * * *. The other officers of the corporation shall be a treasurer, an assessor and collector, a secretary, a city attorney, a marshal and city engineer, and such other officers or agents as the city council may from time to time direct; provided that the office of treasurer, assessor and collector, city attorney and city engineer may be dispensed with by an ordinance of the city or town council; and the powers and duties herein prescribed for such officers may be conferred by said council upon other officers."

It will thus be seen that in the article creating these offices it is specifically provided that a city or town council may by ordinance dispense with all of them except the offices of mayor, alderman, city secretary, marshal and city engineer.

Later on in Article 809 it is provided:

"A city council or a town council of any city or town within this State having less than three thousand inhabitants, according to the last pre-

ceding census, may, by an ordinance of said (city) council or town council, as the case may be, dispense with the office of marshal, and at the same time, by such ordinance, confer the duties of said office upon any peace officer of said county; provided that when the city marshal has been elected by the people, he shall not be removed during his term of office under the provisions of this Article."

It would be unreasonable to presume that the Legislature would by law authorize the incorporation of the inhabitants of a certain territory, without intending that the corporation should have the power and authority necessary for the accomplishment of the purposes of the incorporation. Thus it would be unreasonable to presume that the Legislature, when it authorized the incorporation of cities and towns, had the idea that the functions of a municipal government could be carried on without the use of revenue derived from some method of taxation, yet the Legislature provided that a city or town council by ordinance might dispense with the office of tax assessor and collector. It is but reasonable then to conclude that the Legislature intended, in an instance where by ordinance the city council of a city or town incorporated under the general law had dispensed with the office of city assessor and collector, it had the power to employ some agent to assess and collect the taxes necessary for carrying on the functions of the city government. Likewise, it must be assumed that the Legislature intended that, where the city council had dispensed with the office of city attorney it could employ some agent or attorney to represent the city in the collection by suit of delinquent taxes.

This conclusion is strengthened when we consider the provisions of Article 938, R. S., which are as follows:

"The city council may and shall have full power to provide, by ordinance, for the prompt collection of all taxes assessed, levied and imposed under this Title, and due or becoming due to said city, and are hereby authorized, and to that end may and shall have full power and authority to sell, or cause to be sold, real as well as personal property, and may and shall make all such rules and regulations, and ordain and pass all ordinances, as they may deem necessary to the levying, laying, imposing, assessing and collecting of any of the taxes herein provided."

It thus appears that a city or town incorporated under the general law should by ordinance provide for the collection of delinquent city taxes. The ordinance, of course, should not provide a means or method of procedure inconsistent with the provisions of the general law. If, however, the office of city attorney had by ordinance been abolished, the city or town council could by ordinance designate an agent for the collection of city taxes and provide the compensation such agent should receive.

See Brand vs. City of San Antonio, 37 S. W., 340.
City of Rood House vs. Jennings, 29 Ill. Ap. 50.

The doctrine is thus stated in 28 Cyc. on pages 589 to 590:

"Except where it is otherwise provided by statute, charter provisions, or ordinances, it is generally held that a municipality has power, either implied or under particular charter provisions, to employ an attorney."

We will now consider the question of whether a city or town council, in a city or town incorporated under the General Law, has the right to employ special counsel for the collection of delinquent taxes by suit, where the office of city attorney has not been dispensed with by ordinance.

In deciding this question we should first determine what duties are imposed by general law upon city attorneys and whether one of the functions of such office is representing the city in the collection by suit of delinquent taxes.

The only duties directly imposed by statute upon city attorneys are those mentioned in Article 911, R. S., to the effect that all prosecutions in the corporation court "shall be conducted by the city attorney of such city, town or village, or by his deputy." This relates alone to prosecutions in the corporation court for offenses against city ordinances and penal statutes. In Article 920 it is provided that "the council or board of aldermen of each city, town or village shall, by ordinance, prescribe the compensation and fees which shall be paid to the * * * city attorney * * * , which compensation and fees shall be paid out of the treasury of the said city, town or village."

No duty of collecting by suit delinquent city taxes is directly imposed by general law upon city attorneys. The provision of the statute on this subject is that contained in Article 7699, R. S., which has been heretofore quoted in the following words:

"When such lists (meaning lists of delinquents) shall be certified to as correct by the mayor of said city or town, the city council may direct the city attorney to file suit in the district court of the county in which said city or town is situated, for the recovery of the taxes due on sad property, together with penalty, interest and costs of suit."

In other words, by the terms of this statute it does not become the duty of the city attorney to file and prosecute suits to recover delinquent city taxes until after the delinquent lists have been prepared and corrected and he has been directed by the city council to file such suits. The statute merely imposes upon the city or town council the duty to direct him, at the proper time, to file the suits. We think this duty is mandatory upon the part of city and town councils and that the statute is not merely directory, because the public have an interest in having the act done and have a right that the power shall be exercised.

Rains vs. Herring, 68 Texas, 468; 5 S. W., 399.
Dallas vs. Dallas Street Ry., 95 Texas, 268; 66 S. W., 835.
Mayor vs. Merriott, 9 Md., 174.
Rock Island County Sup're vs. U. S., 4 Wall., 435.

The first and the natural thought on the subject is, that, where a city has a city attorney, either elected by the people or appointed by the council, such attorney would be the proper person to represent the city in all legal matters involving the interest of the city, whether they were of the nature of offenses against ordinances and penal statutes or of the establishment and defense of the rights of the city as

plaintiff or defendant in civil actions. In other words, it is natural and reasonable to conclude that, in the absence of restrictions imposed by ordinance, the city attorney is attorney for the city in all matters requiring the services of an attorney. The collection of delinquent city taxes to procure revenue necessary for city purposes is a matter of interest to the city, and, should suit become necessary, the city council and the public would naturally look to the attorney for the city to institute and prosecute the suit. The Legislature recognized this in providing, in such an instance, that "the city council may direct the city attorney to file suit in the district court of the county in which such city or town is situated."

For the foregoing reasons we conclude that the representation of the city in suits to collect delinquent city taxes is a natural function of the office of city attorney. On grounds of public policy this is likewise true. City attorneys frequently, if not usually, receive compensation for their services by way of salary fixed by ordinance. No fees are fixed for them by General Law. Everything is left to the city or town council. Representing cities in corporation courts is only a part of their duties. They are usually required to attend the meetings of councils, to advise such bodies in their proceedings, to draw ordinances, prepare transcripts of proceedings had in the issuance of bonds and to perform many other duties. Public policy would therefore require a city or town council, to avail itself of the services of a city attorney, for whose services as attorney a salary or fees had been fixed, before incurring the expense of special counsel.

We have heretofore stated the only duties imposed directly or indirectly upon a city attorney by the General Law. It was not intended, however, that these should be the only duties to be performed by city attorneys. Article 812, R. S., is in part as follows:

> "The city council shall have power from time to time to require other and further duties of all officers whose duties are herein prescribed, and to define and prescribe the powers and duties of all officers appointed or elected to any office under this title, whose duties are not herein specially mentioned, and fix their compensation.

Again, in Article 824, R. S., it was provided:

> "The city or town council shall have power to prescribe the duties of all officers and persons appointed by them or elected to any office or place whatever, subject to the provisions of this title."

Notwithstanding these statutes, we think that, even in the absence of an ordinance, the duties of a city attorney are not merely those prescribed by General Law. Even if there were no ordinance prescribing additional duties, we think there would rest upon a city attorney the duty to perform all the necessary functions of the office of an attorney for the city, such as giving legal advice to the council and representing the city in all matters involving an interest of the city, which would require the skill and knowledge of an attorney.

Under these statutes, however, a city or town council might, by ordinance properly passed, impose upon the city attorney duties which are not natural functions of the office of the city attorney. As

an instance, they might require him to prepare the delinquent list or do many other things partaking of the nature of mere clerical work. It would not become his duty to do work of this nature, unless the duty was specifically imposed by an ordinance properly passed.

In the case of Springer vs. Franklin County, 123 S. W. 1171, the appellate court had under consideration an article of the statutes (7685 R. S.), which is similar in its terms to Article 7699 hereinbefore quoted. This Article, among other things, provided:

"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, in their respective counties and unorganized counties attached thereto, and to have such lists recorded in books to be called the 'Delinquent Tax Record.'"

The Court held that this was not one of the governmental functions annexed to the office of tax collector, "but the performance of a purely clerical service," and that it did not become the duty of the tax collector to prepare the delinquent tax record until the commissioners' court demanded that he should do so. The Court further held:

"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.*"

This case, therefore, can have no weight in determining whether the council of a city or town having a city attorney could employ some other attorney to institute suits for the collection of delinquent city taxes, because the representation of a city or town in suits of this nature is a natural function of the office of the attorney who had been elected or appointed to render necessary legal services to the city. In fact, it has been held in another State that a contract between a city and an attorney for the performance of legal services which the law requires the city attorney to perform, is *prima facie* void. (Clough vs. Hart, 8 Kansas, 487.)

We, therefore, think that when the delinquent lists have been certified to as correct by the mayor of a city or town, having a city attorney, it is the duty of the city council to direct the city attorney to file suits for collection of delinquent city taxes and that then the duty rests upon such city attorney to institute and prosecute such suits. We think, however, the city has the implied power to employ an attorney to assist the city attorney in the filing and prosecution of such suits. This has been expressly decided in this and other states.

City of Denison vs. Foster, 28 S. W., 1052.
Brown vs. City of San Antonio, 37 S. W., 340.
Wagner et al. vs. Porter, 56 S. W., 560.
Wilmington vs. Ryan (N. C.), 54 S. E., 543.

Smith vs. City of Sacramento, 13 Cal., 531.
Mount Vernon vs. Patton, 94 Ill., 65.
New Athens vs. Thomas, 82 Ill., 259.
State vs. Heath, 20 La. Ann., 172.
Denver vs. Weber (Colo.), 63 Pac., 304.

Of course, the city should by ordinance, properly passed, provide for the collection of delinquent taxes and, if the compensation of the city attorney is not fixed as a salary for all duties to be performed by him, should in such ordinance, or by separate ordinance, provide the compensation he should receive for his services. If counsel to assist him is employed, this likewise should be done by ordinance and the compensation for such counsel should be therein provided.

You also ask whether the council of a city or town incorporated under the general law could employ the county attorney to represent the city in suits for the collection of delinquent city taxes.

Replying thereto, we beg to state that this Department is of opinion that the county attorney might properly be employed to assist the city attorney in filing and prosecuting such suits and that if a city or town has by ordinance dispensed with the office of city attorney, the council could employ the county attorney to file and prosecute such suits.

This would not be in violation of either Sections 33 or 40 of Article 16 of the Constitution.

Section 33 prohibits the accounting officer of the state from drawing or paying a warrant upon the treasury in favor of any person for salary or compensation as agent, officer, or appointee, "who holds at the same time any other office or position of honor, trust or profit, under this State or the United States, except as prescribed in this Constitution," and the county attorney does not come within these terms.

Section 40 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."

Under the provisions of this section, a county attorney could not hold the office of a city attorney, but we think he could be specially employed by the city council to represent the city in the particular matter of the collection by suit of delinquent city taxes. Of course, the employment and the compensation he is to receive should be by ordinance properly passed.

Very truly wours,
JOHN C. WALL,
Assistant Attorney General.

OP. NO. 1768—BK. 49, P. 311.

PUBLIC PARKS—CITIES AND TOWNS—TAXATION—MUNICIPAL BONDS.

Chapter 79, Acts of 1917, affords no benefits to cities and towns in addition to that granted by general law or special charter, unless it be the authority to levy and collect a tax not exceeding 10 cents for park purposes, and which must be paid out of the 25 cent tax for permanent improvements.

May 31, 1917.

Hon. J. W. Chancellor, Mayor, Bowie, Texas.

DEAR SIR: I have your letter of the 24th instant, addressed to the Attorney General, requesting construction of Chapter 79, General Laws of 1917, and in reply thereto, beg to advise that the 5c tax prescribed by Section 1 of the Act for the purchase and improvement of lands for use as parks, and the 5c tax prescribed by Section 3 of the Act for the maintenance of such parks, cannot be collected in excess of the constitutional limit, or 65c, which cities of less than 5000 inhabitants are permitted to levy and collect.

Section 4 of Article 11 of the Constitution provides that cities and towns having a population of 5000 inhabitants or less may levy, assess and collect an annual tax not in excess for any one year of one-fourth of one per cent to defray the expense of their local government.

Section 9 of Article 8 of the Constitution provides that—

"* * * No * * * city or town shall levy more than twenty-five cents for city * * * purposes and not exceeding fifteen cents for roads and bridges * * * and for the erection of public buildings, streets, sewers, water works and other permanent improvements, not to exceed twenty-five cents on the one hundred dollars' valuation in any one year * * *"

It is provided by Article 925, R. S. 1911, that a city or town incorporated under the General Law shall have power to levy and collect taxes in the following amounts and for the following purposes:

"(a) Twenty-five cents for current expenses;
"(b) Twenty-five cents for constructing or purchasing public buildings, water works, sewers and *other permanent improvements*
"(c) Fifteen cents for the construction and improvement of roads, bridges and streets."

It will thus be seen that a city or town cannot exceed the limit prescribed by the Constitution in levying taxes for park purposes, the fact that the Legislature grants such authority to the contrary notwithstanding.

It was evidently the intention of the Legislature to limit cities or towns incorporated under the General Law to an amount not exceeding five cents for purchasing and improving lands for use as city parks and not exceeding five cents for the purpose of properly maintaining such parks, making a total of ten cents maximum for park purposes. I do not think this Act really gives cities and towns any substantial aid in this direction, because as I construe Article 925 and Article

882, R. S. 1911, a city or town incorporated under General Law would be authorized to use a part of the 25c tax, for the purpose of constructing or purchasing public buildings, water works, sewers and other permanent improvements, in the purchase and maintenance of public parks.

Mr. Abbott in his Work on Public Securities, Section 118, uses the following language:

"The incurring of debts for objects having for their purpose the protection and the betterment of the good morals and health of the people has always been regarded not only legitimate but praiseworthy. To supply the opportunity for diversion and amusement in the open air is a purpose of this character and may be effected through the establishment and maintenance of public parks and boulevards."

In the case of Shoemaker vs. United States, 147 U. S. 282, the Court held that—

"Land taken in a city for public parks and squares by authority of law, whether advantageous to the public for recreation, health or business, is taken for a public use."

In Wilson vs. Lambert, 168 U. S. 611, the Court held:

"That the taking the grounds of individuals in a city to convert into a public square is taking the property for public use as much so as if such grounds were converted into a street. * * *"

and further gave voice to the view that—

"The effort made to distinguish between streets and highways, as constituting proper subjects of taxation for special benefits, and public parks, as matters of such a general nature as not to justify special assessment, does not appear to us to be successful."

In the case of Kansas City vs. Ward, 35 S. W. 301, the Court held:

"Public parks in densely populated cities are manifestly essential to the health, comfort and prosperity of their citizens. It is universally conceded, and not disputed in this case, that such improvements are a public use. * * *"

In the case of Brightwell vs. Kansas City, 134 S. W. 87, the Court held:

"In the construction of a street or sewer the city acts ministerially, and is liable for the torts of its servants, but in planning and procuring the land for such improvement it acts as an agency of government and is not liable for the torts of its servants. So with its parks and boulevards. In planning them, in condemning the necessary land, and in levying special taxes to pay for such land, the functions are those pertaining to sovereignty, but in the subsequent work required to convert raw land into parks and boulevards, the city acts in its private corporate capacity."

I am of the opinion, therefore, that Chapter 79, Acts of 1917, affords no benefit to cities and towns in addition to that granted by general law or by special charter, unless it be the authority to levy and

collect a tax not exceeding ten cents for park purposes which must be taken out of the twenty-five cents for permanent improvements and other improvements.

In this connection, however, I direct attention to the caption of the Act which authorizes cities and towns to levy and collect a tax not to exceed 5c on each $100 of assessed valuation for each year for the purchase and improvement of lands for city parks. The caption provides for manner of acquiring the lands for park purposes and provides for the management and control of the parks, but no where is the additional 5c for the purpose of maintaining such parks mentioned in the caption of the Act. (See Ft. Worth & D. C. Ry. vs. Loyd, 132 S. W. 899, and authorities therein cited.)

It would require a careful and complete investigation of this question before I would be willing to approve any bonds issued for park purposes under the Act in question.

Very Respectfully,
W. P. DUMAS,
Assistant Attorney General.

June 6, 1917.

Hon. J. W. Chancellor, Bowie, Texas.

DEAR SIR: Under date of the 31st ult., I wrote you that Chapter 79, Acts of 1917, affords no benefits to cities and towns in addition to that granted by general law or special charter, unless it be the authority to levy and collect a tax not exceeding 10c for park purposes and which must be paid out of the 25c tax for permanent improvements and directed attention to an apparent discrepancy in the caption of the Act and stated that it would require a careful and complete investigation of this question before I would be willing to approve any bonds issued for park purposes under the Act in question.

After carefully reconsidering the opinion, I note there exists a slight inconsistency, for if bonds are issued under this Act for park purposes, they would not be disapproved, provided the 25c tax, or any part thereof, prescribed by Article 925, R. S. 1911, for permanent improvements would be sufficient to provide for interest and sinking fund.

Very truly yours,
W. P. DUMAS,
Assistant Attorney General.

OP. NO. 1795—BK. 49, P. 393.

CORPORATIONS, REPORT OF—BOARDS OF EQUALIZATION—PRIVILEGED.

The reports made to the Secretary of State by corporations under Chapter 153, General Laws passed by the Regular Session of the Thirty-third Legislature are privileged reports and cannot be furnished Board of Equalization of the State for the purpose of enabling them to equalize taxes.

July 14, 1917.

Hon. C. J. Bartlett, Secretary of State, Capitol.

DEAR SIR: In your request to us for an opinion you present the letter of Hon. Jesse N. Brown, County Judge of Tarrant County, as containing the question which you desire answered. This letter reads as follows:

"The Board of Equalization, in its work finds great difficulty in arriving at the value of some of our big corporations. In fact one not familiar with the business conducted by the various concerns mentioned, would have no way of even approximating the value of their taxable property. It requires a techinal knowledge that is not possessed by any member of the board, and as a consequence we have to take their rendition, whatever it may be, when common sense tells us that in many instances their rendition is too low. But how much too low, we have no sort of idea. For this reason I suggest that you secure the information contained in the annual report of the concerns mentioned in the attached list. These reports are filed with the Secretary of State at Austin, Texas, and would be of great value both to the State and county because of increased taxes which they ought, in my judgment, pay. I feeel sure the Secretary of State would permit you to secure a copy of these annual reports. An early action on your part, in an effort to aid us will be appreciated."

From the foregoing it appears that you desire to be advised whether or not you have authority under the law to furnish the county or other boards of equalization reports made by corporations under Chapter 153 General Laws passed at the Regular Session of the Thirty-third Legislature. This Chapter in part reads:

"Sec. 1. All corporations that are new required by law to pay an annual franchise tax shall, between the first day of January and the first day of February of each and every year, be required to make a report to the Secretary of State on blanks furnished by him, which report shall give the authorized capital stock of the corporation, the capital stock issued and outstanding, the surplus and undivided profits of the corporation, the names and addresses of all the officers and directors of the corporation, the amount of mortgages, bonded or other indebtedness of each corporation and the amount of the last annual, semi-annual or quarterly dividend. If the capital stock issued and outstanding, plus the surplus and undivided profits, shall exceed the authorized capital stock, the franchise tax shall be based on this amount instead of the authorized capital, but if it shall be less, then the franchise tax shall be based on the amount of capital stock, but no corporation shall be required to pay a greater rate of franchise tax by reason of its having a surplus than a corporation that has no surplus.

"Sec. 2. Any corporation which shall fail or refuse to make the report as provided in Section 1 hereof, shall be subject to a fine of ten dollars for each and every day after the first day of February that they shall fail to make such report. The Attorney General of this State is hereby empowered and directed to bring suit against such corporation in either of the district courts of Travis County in the name of the State of Texas for the collection of such penalties that may be due by reason of such failure.

"Sec. 3. The reports required by this act shall be deemed to be privileged and not for the inspection of the general public, but any party or parties who are interested in the subject matter of any report may, upon valid request in writing made to the Secretary of State, secure a copy."

The caption of the Act is as follows:

"An act to require all corporations that are required by law to pay an annual franchise tax to make a report to the Secretary of State between the first day of January and the first day of February, and prescribing what the report shall contain; prescribing penalties for failure to make such report, and providing such reports shall only be subject to inspection by parties who are interested directly in the subject matter of such reports, and declaring an emergency."

It will be noted from Section 3 of this Act, as well as from the caption, that those reports are privileged and not for the inspection of the general public. This privilege applies in all cases except two. The first is that the reports may be used and are in fact primarily to be used by the Secretary of State for the purpose of ascertaining the annual franchise tax of each corporation subject to the law. The second instance of exception of the reports from the protection of the rule of privilege is that the reports are subject to the inspection of "any party or parties who are interested in the subject matter of any report."

These reports being specifically declared to be privileged and subject to inspection, and only to a qualified inspection, it is plain that unless the requested inspection comes in one or the other of these excepted instances that it cannot be granted. This construction is under the familiar rule that the express mention of one thing in a statute is tantamount to an express exclusion of all others. Black on Interpretation of Laws, Sec. 64; Mercein vs. Burton, 17 Texas 219.

We might with propriety extend this rule of construction somewhat further in this instance and say that since the statute prescribes that the information and affidavits required by Chapter 153 is for the purpose of enabling the State to determine the amount of franchise taxes due, that such purpose is an exclusive one and these documents cannot be used for the purpose of assisting boards of equalization in the performance of their duties with reference to other classes of taxes. Such an interpretation would be in harmony with the rule and consistent with the general purpose of the statute to make these communications privileged with only a limited and qualified right of inspection. However, it is unnecessary to predicate our conclusion alone on this proposition. At common law the right of inspection of public records either in person or by an agent was confined to those who had an interest in the subject matter to which the record related. 24 Amer. & Eng. Encyc. of Law, 182; 34 Cyc. 592.

This rule of the common law has been somewhat modified by statutes in the United States, (24 Amer. & Eng. Encyc. of Law, 183), but as will be observed by a reading of Section 3 of Chapter 153. this particular statute has carried us back and made the common law rule apply to this Act; that is, only those who have an interest in the subject matter of these reports can inspect them. The interest demanded as a basis for this right under the common law is that which will enable the person seeking the inspection to maintain or defend an action for which the public documents demanded can furnish evidence or necessary information. It is not essential that the interest of such person be of a private character, but it will be sufficient that he can properly act in some action in relation to the matter as the represen-

tative of the common or public right. 24 Amer. & Eng. Encyc. of Law, 182, 183. For example, a citizen of the State who might desire to discover whether or not the Secretary of State under this Act had properly computed franchise taxes of any particular corporation would be entitled to an inspection of the statutory reports filed by such corporation. 24 Amer. & Eng. Encyc. of Law, 183.

The exercise of such right would be consistent with the general purpose of the statutes as well as the effect of the common law rule which it declares. These various rules, however, are subject to the qualification that when an individual demands access to and inspection of public writings he must have a direct and tangible interest in the matters to which they relate and the inspection must be sought, not out of motives of mere curiosity or speculation, but for some specific and legitimate purpose. 24 Amer. & Eng. Encyc. of Law, 183.

In the present case if the Secretary of State should give certified copies of these reports as made by corporations to him to the various boards of equalization throughout the State, he would at once defeat the fundamental and controlling feature of the statute as such reports are privileged communications, for such an action would set before the public the status of all business corporations of the State in so far as these reports are sufficient to disclose the same. Such construction, as suggested, would result in defeating the specific declaration of privilege. The proposal to make public these reports in the manner suggested is not parallel to a case where an occasional law suit is brought by private parties in which it is necessary for the prosecution or defense to introduce a copy of one or more of these reports. In the last suggested instance the publicity given is small in quantity and consistent with the statutory declaration of privilege and the common law rules above outlined, but to permit a wholesale exposure of these reports to public view by permitting them to be exhibited to boards of equalization throughout the State is entirely inconsistent with the right of privilege declared in the Statute, and we do not believe that it was the intention of the Legislaure that these reports should be used in that manner.

If it be said that the use of these reports by boards of equalization would be of assistance in equalizing taxes throughout the State, we may reply that the Legislature was as fully cognizant of this fact as you are today and that it could with ease have so incorporated permission for such use in the Statute, but it did not do so, and doubtless for reasons consistent with its understanding of the conditions then existing in the State, the evils and the remedies.

You are therefore advised that you have no authority to furnish copies of these reports to Boards of Equalization in the State and that were you to attempt to do so you would immediately subject your office to innumerable injunction suits in which you could not hope to be succesful.

Very truly yours,
C. M. CURETON,
First Assistant Attorney General.

OP. NO. 1781—BK. 49, P. 343.

CONSTITUTIONAL LAW—COUNTY AND DISTRICT ATTORNEYS AND THE ATTORNEY GENERAL.

Chapter 166, Acts Regular Session Thirty-fifth Legislature, relating to inheritance tax.

The Constitution makes the Attorney General and the county and district attorneys the exclusive representatives of the State in the courts of the State.

June 26, 1917.

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

DEAR SIR: You have requested this Department for an opinion as to the scope of your power and authority under the provisions of Chapter 166 of the General Laws of the Regular Session of the Thirty-fifth Legislature relating to the appointment of persons to represent the State in the collection of inheritance taxes.

The Act in question by its caption is described to be:

"An Act to amend Article 7491, Chapter 10, Title 126, of the Revised Civil Statutes of Texas, so as to authorize the Comptroller to appoint and contract with persons to collect inheritance taxes."

The Act undertakes to make no change in the inheritance tax law other than to re-write Article 7491 R. S. 1911.

Before its amendment Article 7491 contained but two provisions, namely: first, the article provided that if no application for letters testamentary or administrative should be made within three months after the death of the decedent leaving property subject to the inheritance tax it should be the duty of the county court to appoint an administrator. Second, the article provided that it should be the duty of the county attorney to report to the county judge all estates in his county subject to the inheritance tax, and a fee was provided for the county attorney for the performance of this service.

The article as amended by the Act of the Thirty-fifth Legislature contains the provision requiring the county judge to appoint an administrator, but it contains no reference whatever to the county attorney, omitting entirely that portion of the old article making it the county attorney's duty to report the estates to the county judge. In place of this portion of the old article the new article authorizes the Comptroller of Public Accounts to appoint and contract with "some suitable person or persons whose duty it shall be to look especially after, sue for and collect the taxes provided by this chapter." It is then provided that such person may receive under the contract not more than ten per cent of the amount of the taxes collected. It then is made the duty of such person to report to the couny judge all estates subject to taxation, showing a purpose to take this duty from the county attorney and to place it upon the person employed by the Comptroller. The amended article contains the further provision that "it shall be the further duty of such person to aid in every pos-

sible way in the collection of such taxes," and it contains the further provision that such person "may represent the State in any proceeding necessary under the provisions of this chapter to enforce the collection of such taxes."

This Department held in an opinion to you dated June 14, 1916, that in the event it became necessary to file suit for the collection of inheritance taxes the tax collector of the county should call upon the county or district attorney to file such suit, and that it would be the duty of the county or district attorney, and he would be authorized to file such suit in the name of the State, and that if judgment were obtained and collected the county attorney would be entitled to the commissions on the judgment prescribed by Article 363 of the Revised Statutes of 1911; that is, commissions of ten per cent on the first one thousand dollars and five per cent on the balance, and that he could collect such commissions in addition to the fee, not exceeding twenty dollars allowed him for reporting the estate to the county judge. We have no doubt but that the Attorney General, as the chief law officer of the State, would have the authority, especially if the county attorney failed or refused to do so to file such suit in the name of the State for the collection of inheritance taxes. It thus appears that before the attempted amendment of Article 7491 by the Thirty-fifth Legislature, the county or district attorneys, or the Attorney General in a proper case, were authorized, and it was their duty, to represent the State in all suits or other proceedings in court necessary for the collection of inheritance taxes.

If the primary purpose of the amended article is to confer upon a person selected by the Comptroller authority and duties otherwise belonging to the county and district attorneys and the Attorney General, the question arises whether the Legislature had the power to enact such law. The duties of the Attorney General are set out in Article 4, Section 22, of the Constitution, as follows:

"The Attorney General shall hold his office for two years and until his successor is duly qualified. He shall represent the State in all suits and pleas in the Supreme Court of the State in which the State may be a party, and shall especially inquire into the charter rights of all private corporations, and from time to time, in the name of the State, take such action in the courts as may be proper and necessary to prevent any private corporation from exercising any power or demanding or collecting any species of taxes, tolls, freight or wharfage, not authorized by law. He shall, whenever sufficient cause exist, seek a judicial forfeiture of such charters, unless otherwise expressly directed by law, and give legal advice in writing to the Governor and other executive officers, when requested by them, *and perform such other duties as may be required by law.*"

The duties of the county and district attorneys are set out in Article 5, Section 21, of the Constitution, as follows:

"*The county attorneys shall represent the State in all cases in the district and inferior courts in their respective counties;* but if any county shall be included in a district in which there shall be a district attorney, the respective duties of district attorneys and county attorneys shall in such counties be regulated by the Legislature."

For many years it was believed, and it was held by the Supreme

Court in the case of State vs. Moore (57 Texas 307), that the county and district attorneys had the authority to represent the State in all cases in the district and inferior courts to the exclusion of the Attorney General, except in those cases in which express authority was conferred by the Constitution on the Attorney General, and the court in the case cited held that a statute authorizing the Attorney General to represent the State in district court in a case other than those expressly named in Section 22 of Article 4, was unconstitutional, on the ground that such authority was conferred exclusively upon the county and district attorneys. The Supreme Court, however, in the case of Brady vs. Brooks, 99 Texas 377, held that the provision of Section 22, of Article 4, that the Attorney General "shall perform such other duties as may be required by law" is of equal dignity with that portion of Section 21 of Article 5, which authorizes the county and district attorneys to represent the State in the district and inferior courts, and that under the provision of Section 22, of Article 4, above quoted, the Legislature had the power to confer upon the Attorney General to the exclusion of county and district attorneys authority to represent the State in certain cases in the trial court. The case of Brady vs. Brooks, however, is not an authority for concluding that the Legislature might authorize persons other than county and district attorneys and the Attorney General to represent the State in trial court, and we have been able to find no case so holding and no authority intimating that such could be done. The case of Brady vs. Brooks merely holds that the two constitutional provisions relating to the duties of the Attorney General and the county and district attorneys are of equal dignity.

The result of these two constitutional provisions is as follows:

The Attorney General is authorized, and it is made his duty to represent the State in all suits and pleas in the Supreme Court of the State in which the State may be a party. It is then made his duty to represent the State in certain specially named cases, as for example suits for the forfeiture of charters, etc. It is then provided that he shall perform such other duties as may be required by law and, as has been shown, under this provision the Legislature may authorize him to file certain suits in the name of the State even to the exclusion of the county and district attorneys. The section of the Constitution with reference to county and district attorneys makes it their general duty to represent the State in all cases in the district and inferior courts. When these two sections of the Constitution are read together, it is manifest that the people intended that the State should be represented in the district and inferior courts and in the Supreme Court only by the county and district attorneys and by the Attorney General. This being the intention declared by the people in the Constitution, the Legislature is without authority to authorize any person, other than the Attorney General and the county and district attorneys, to represent the State in suits pending in the courts named.

But for the provision of the Constitution authorizing the county and district attorneys to represent the State in cases in the district and inferior courts, the Attorney General, who is by the Constitution

made the chief legal representative of the State would alone have the authority to represent the State in suits in the name of the State. The Constitution provides for the election of an Attorney General, and as said by Judge Gaines in the case of Brady vs. Brooks, *supra,* "the very name imports even in ordinary language that he is the chief law officer of the State and is that in use in all common law statutes to designate such officer." Judge Gaines, in the case of Lewright vs. Love, 95 Texas, 157, in discussing the question of the collection by suit of taxes on gross passenger earnings due the State, said:

"Suits to collect debts due the State must as a rule be brought in the name of the State and by its principal law officer, the Attorney General, or by some other *officer* whose duty it is to represent the State in legal proceedings and who may be authorized by statute, and sue for it in the particular class of cases."

In the case of State vs. Cook, 57 Texas 205, the Legislature had authorized the filing of a suit against the State but had failed to name an officer on whom service of citation should be had. The Supreme Court through Chief Justice Gould held that the citation might be served either on the Governor or the Attorney General, saying:

"No statutory method having been provided for bringing the State into court, it was competent for the court to recognize service on the chief executive officer of the State or the Attorney General, *the legal representative of the State,* as sufficient."

The Supreme Court has also held that the authority of the Attorney General specifically conferred upon him to file suits for the forfeiture of charters, etc., is exclusive and that a statute attempting to confer such authority on the county attorney is unconstitutional. State vs. I. & G. N. Ry. Co., 89 Texas 562; Oriental Oil Co. vs. State, 135 S. W. 722.

Judge Denman, in the opinion of the case of State vs. I. & G. N. Ry. Co., *supra,* expressly approved the language of Judge Stayton in the case of State vs. Moore, *supra,* to the effect that "it must be presumed that the Constitution, in selecting the depositaries of a given power, unless it be otherwise expressed, intended that the depository should exercise an exclusive power, with which the Legislature could not interfere by appointing some other officer to the exercise of the power." This being true, and since the Constitution has selected the Attorney General and county and district attorneys as the representatives of the State in all suits in the name of the State in the district and inferior courts and in the Supreme Court, it follows that it is intended that the power and authority thus conferred upon these officials should be exclusive and that the Legislature should not have the power to enact a law conferring or authorizing the conferring of these powers and authorities on any person other than said officers.

The Constitution of the State of Illinois names the Attorney General as one of the constitutional officers. It does not undertake to prescribe express duties for him to perform but contains merely the provisions that he "shall perform such duties as may be pre-

scribed by law." The Legislature of the State of Illinois made an appropriation to the Insurance Superintendent, a State Officer, to pay for legal service and for traveling expenses of attorneys. The Supreme Court of Illinois in the case of Fergus vs. Russell (110 N. E. 130, 143), held that this appropriation was unconstitutional and void for the reason that the Attorney General was by virtue of his office the chief law officer of the State and the only officer empowered to represent the people in any proceeding in which the State is the real party in interest.

On account of the similarity between our Constitution and the Constitution of Illinois, and because the principle involved in the case of Fergus vs. Russell is identical with the principle involved in the Act of the Texas Legislature under consideration, we copy the following from the opinion of the Supreme Court of Illinois in that case:

"It will be observed that the Constitution confers no express powers upon the Attorney General and prescribes no express duties for him to perform. It simply provides that he shall perform such duties as may be prescribed by law. The office of Attorney General was one known to the common law, and under the common law the Attorney General had well-known and well-defined powers, and it was incumbent upon him to perform well-known and clearly prescribed duties. It is not necessary, and indeed it would be difficult, to enumerate all the powers vested in the Attorney General at common law and all the duties which were imposed upon him to perform. It is sufficient for the purposes of the discussion of the point here involved to state that at common law the Attorney General was the law officer of the crown and its chief representative in the courts. * * *

"Under our form of government all of the prerogatives which pertain to the crown in England under the common law are here vested in the people, and if the Attorney General is vested by the Constitution with all the common-law duties which were imposed upon that officer, then he becomes the law officer of the people, as represented in the State government, and its only legal representative in the courts, unless by the Constitution itself or by some constitutional statute he has been divested of some of these powers and duties.

"The Constitution provides, as has been noted, that the Attorney General shall perform such duties as may be prescribed by law. The common law is as much a part of the law of this State, where it has not been expressly abrogated by statute, as the statutes, and is included within the meaning of this phrase. The question presented for our determination is whether, by creating this office under its well-known common-law designation, the Constitution ingrafted upon it all the powers and duties of the Attorney General as known at common law, and gave the general authority to confer and impose upon the Attorney General only such additional powers and duties as it should see fit. * * *

"It is true there were other representatives of the crown in the courts at common law, but they were all subordinate to the Attorney General. By our Constitution we created this office by the common-law designation of Attorney General and thus impressed it with all its common-law powers and duties. As the office of Attorney General is the only office at common law which is thus created by our Constitution, the Attorney General is the chief law officer of the State, and the only officer empowered to represent the people in any suit or proceeding in which the State is the real party in interest, except where the Constitution or a constitutional statute may provide otherwise. With this exception, only, he is the sole official adviser of the executive officers, and of all boards, commissions, and departments of the State government and it is his duty to conduct the law business of the State, both in and out of the courts. The appropriation to the insurance superintendent for legal services and for traveling ex-

penses of attorneys and court costs in prosecutions for violations of insurance laws is unconstitutional and void."

(There has been omitted from this opinion that portion of same which construed Chapter 166, Acts 35th Legislature, as intended to authorize the person selected by the Comptroller to represent the State in suits for the collection of inheritance taxes, to the exclusion of county and district attorneys and the Attorney General. Since the opinion was written the Supreme Court in the case of Maud vs. Terrell, 200 S. W., 375, has construed the act as authorizing the Comptroller's appointee only to assist in the affairs above referred to and as not intended to displace them. The principles announced in the portion of the opinion above printed were sustained by the decision of the Supreme Court.'

Yours truly,
G. B. SMEDLEY,
Assistant Attorney General.

OP. NO. 1800—BK. 50. P. 8.

DELINQUENT TAX SUITS.

The failure of the tax collector to mail out notices to delinquent taxpayers within the time prescribed by statute, while such statutory provision is mandatory so far as the collector is concerned, could not operate to defeat the right of the State to collect such delinquent taxes by suit.

July 31, 1917.

Hon. R. R. Mullen, County Attorney, Alice, Texas.

DEAR SIR: We have a letter from you, as follows:

"In the case of the State of Texas vs. Seidell, 194 S. W. 1118 (advance sheet), the court held Chapter 147 (H. B. 40), Acts of the 34th Legislature, to be consitutional and to be mandatory, and held the State's petition subject to special exemption because same did not allege that the notice had been mailed by the collector.

"By the requirements of the above law, our collector should have had all notices mailed not later than the first day of June, 1917, notifying those delinquent for the year 1916. However, our collector has not been able to get these notices out, but is at the present time ready and willing to mail said notices.

"In your opinion, can the notices be mailed now, and after 90 days from the date of mailing of said notice can a suit be maintained?

"What, in your opinion, is the proper course to pursue in the collecting of delinquent taxes where the notices have not been mailed out within the time mentioned in the law."

Many similar inquiries have also reached this Department.

We have therefore concluded to discuss in a general way the effect of the decision in the Seidell case. We do not have access to the transcript in this case, but the facts involved, as gathered alone from the opinion, are in substance as follows:

Suit to collect taxes delinquent against Seidell's property for the years 1912, 1913 and 1914, was instituted, under the provisions of House Bill 40, on January 11, 1916. The petition failed to allege that the tax collector had mailed notices to the defendant as required by House Bill 40 and had furnished to the county attorney duplicate of

same. Counsel for defendant filed special exceptions to the petition on these grounds.

The trial court sustained this special exception and it seems that thereafter no effort to amend was made but an appeal was taken from the judgment of the court sustaining the exceptions. The Court of Civil Appeals affirmed the action of the trial court in sustaining the exception, among other things saying:

"The act in question went into effect on or about July 29, 1915, and expressly repealed Article 7707 of the Revised Civil Statutes of 1911, and all other laws and parts of laws in conflict with the act. The act has made it incumbent upon the tax collector to furnish certain statements to the county or district attorney, and that statement is a necessary and essential *matter of allegation and proof.* The suits are to be filed and instituted as otherwise provided by law, but in order to prosecute to a successful termination the suits authorized by the act, certain duties are enjoined upon the tax collector, and a statement of the performance of those duties and of certain facts are *absolutely essential to be alleged and proved.* * * *

"When this suit was brought on January 11, 1916, the law of 1915 was in effect, and the suit purports to have been brought under the provisions of the law, and it devolved upon appellant, in order to successfully prosecute the suit, to allege and prove that the requirements of the act had been complied with. There was no such allegation in the petition."

Unquestionably the appellate court was right in holding that it was necessary both to allege and prove that the tax collector had performed the duties required of him by the act as to properly mailing notices to the delinquent owner. It is clear that it was one of the main objects of the act to require the mailing of such notices as a necessary prerequisite to the right to maintain a suit for the collection of the taxes. This is shown not only from the contents of the sections of the act relating to the preparation and mailing of such notices, but also by the fact that the duty thus imposed upon the tax collector is made mandatory and by the fact that the emergency clause expressly states that one of the reasons for asking the suspension of the constitutional rule in the passage of the act is "that innocent purchasers are often embarassed by delinquent tax claims of which they had no notice."

Widespread confusion however has been caused by the following statements made by the Appellate Court in another portion of the opinion:

"The last date, May 1, 1916, on which the notice can be given in counties of less than 50,000 inhabitants does not enjoin upon the tax collector the duty of sending out the notice on that date or afterwards as contended by appellant, but fixes the date after which no notice can be given. It means that in counties having less than 50,000 inhabitants the notice must be given at some time between the date on which the law went into effect and May 1, 1916. The statute is too clear to demand construction."

We confess that it is hard to determine what the court did mean by the use of this language. It appears to us that it was altogether unnecessary to a decision of the issues involved. for the appellate

court to enter upon a discussion of this question. The issue involved was whether the trial court had erred in sustaining the special exceptions to the petition. In deciding the question it was necessary only for the appellate court to say that the petition should have alleged that the requirements of the act as to notices and statements had been complied with by the collector of taxes and that the trial court did not err in sustaining the exceptions. It was entirely unnecessary that the appellate court should go further and decide that the date, May 1, 1916, mentioned in the act "fixes the date after which no notice can be given," and "means that in counties having less than 50,000 inhabitants notices must be given at some time between the date on which the law went into effect and May 1, 1916."

It is therefore the opinion of this department that this portion of the opinion is obiter.

That it was not at all necessary to a decision of the issues involved in this case for the appellate court to hold that the date, May 1, 1916, mentioned in the act, "fixes the date after which no notice can be given" is apparent from the fact that the suit was filed some four months prior to such date, to wit: on January 11, 1916.

The only questions which could have arisen in the case were whether notice had been sent as provided by the act, and whether the ninety days prescribed in the act had expired since the notices were mailed before suit was filed. It was necessary to make such allegations in the petition in order to show that the necessary prerequisites to a suit had been complied with before suit was filed.

The court certainly did not intend to say, and could not have meant, that failure to send notices prior to May 1, 1916, would extinguish the claim and lien of the State for taxes delinquent on Seidell's property. A strict interpretation of the language of the court would be that the tax collector would not have a right to send out any notice after May 1, 1916, of taxes which had become delinquent against the property prior to said date, and since suit could not be properly maintained unless the act had been complied with in reference to notices, therefore the State would be without remedy for the collection of taxes. The appellate court certainly could not have meant the language used to be given this effect. It would be equivalent to a relinquishment of the debt, merely because there had been an error in the procedure prescribed for the collection of the debt.

It would be well to here quote the portion of the act which the court attempted to construe. It is as follows:

"Not later than the first day of May, 1916, in all counties of less than 50,000 inhabitants and not later than the first day of May, 1917, in all counties of more than 50,000 inhabitants, *and not later than the first day of June in every year following thereafter* it shall be the duty of the collector of taxes * * * to mail to the address of every record owner of any lands or lots situated in such counties a notice showing the amount of taxes appearing delinquent or past due and unpaid against all such lands and lots according to the delinquent tax records of their respective counties * * * and it shall also be the duty of the tax collectors of the various counties in this State, not later than the dates named and every year thereafter, to furnish to the county or district attorneys of their respective counties duplicates of all such statements mailed to the taxpayers in accordance with the

provisions of this act, * * * said notices or statements herein provided for shall also recite that unless the owner or owners of such lands or lots described therein shall pay to the tax collector the amount of taxes, interest, penalty and costs set forth in such notice within ninety days from date of notice, then, and in that event, the county or district attorney will institute suits not later than January 1, next, for the collection of such moneys and for the foreclosure of the constitutional lien existing against such lands and lots."

It has always been the opinion of this department that the dates mentioned in the act were not meant by the Legislature as period of limitation or as dates after which no notices might be mailed, but were meant to indicate the time within which the officers mentioned might, by the exercise of reasonable diligence put the act into operation. The duties created by the act are made mandatory upon the officers and the Legislature had in mind, we think, that the officers should perform the duties imposed upon them, on or before the dates mentioned, or they might became liable for the penalties fixed for failure to perform the duties. The Legislature surely could not have meant that the failure of an officer would relinquish the debt of the delinquent owner to the State.

This act went into effect June 19, 1915. At that time many counties in the State did not have proper delinquent tax records and this the Legislature knew. Most of the counties had to prepare new delinquent tax records to comply with the provisions of the act. Because of these facts the Legislature was aware that the act could not be put into immediate operation. Therefore they fixed dates as indicating the time by which, in their opinion, the act could, by the exercise of due diligence, be put into operation in counties of less and in counties of more than fifty thousand inhabitants. The language of the act itself indicates this, because it is provided that the notices must be sent "not later than the first day of June in every year following thereafter"—meaning every year following the date fixed as the time by which the act should be put into effect in the various counties.

This department is therefore of the opinion that the decision in the Seidell case should not be given the effect that failure of the tax collector to mail to record owners on or before May 1, 1916, in counties of less than fifty thousand inhabitants and May 1, 1917, in counties of more than fifty thousand inhabitants, would relinquish the right of the State to taxes then delinquent against land or would destroy the right to collect the same by suit. If the officer failed to mail the notices by such time he might become liable for failure to perform the mandatory duties placed upon him, but the claim and lien of the State, and the right of the State to thereafter institute suit for the collection of taxes, would not be affected thereby. Of course suit could not be properly maintained, however, unless the provisions of the act with reference to notice, publication, etc., had been thereafter complied with.

Yours truly,
JNO. C. WALL,
Assistant Attorney General

OP. NO. 1798—BK. 50, P. 19.

DELINQUENT TAXES—BULK ASSESSMENTS—APPORTIONMENT—POWER OF TAX COLLECTOR TO RECEIVE TAXES ON ONE PIECE OF PROPERTY CONTAINED IN BULK ASSESSMENT.

1. Where two or more tracts of land owned by one person have been assessed in bulk it is the duty of the tax collector in preparing the delinquent tax record or supplements thereto to apportion to each of said pieces of property its pro rata share of the entire tax, penalty and costs, as provided in Article 7685, R. S., and submit such record or supplements thereto to the commissioners' court and Comptroller for approval.

2. The tax collector would have no right to receive an amount as taxes against one of several pieces assessed in bulk until after the apportionment required by Article 7685 had been made and approved by the commissioners court and Comptroller.

August 3, 1917.

Hon. Carey Legett, County Attorney, Port Lavaca, Texas.

DEAR SIR: We have your letter of August 2, making the following inquiry:

"I am writing to ask if after a careful consideration of the provisions of the statute quoted above, if it is your opinion that the owner of property which has become delinquent in the name of another person or corporation, assessed together with other property which does not belong to the taxpayer, should not be permitted to come in and pay the taxes due thereon."

Replying thereto, we beg to state that in Article 7685, Revised Statutes, it is made the duty of the commissioners court in each county to have a delinquent tax record prepared. It is provided that in the preparation of such record:

"It shall be required in bulk assessments to apportion to each tract or lot of land separately its pro rata share of the entire tax, penalty and cost. * * * 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."

You are, therefore, advised that the tax collector of your county would not be authorized, where property has been assessed in bulk, to receive part payment of such assessment, as being the portion due against one of the pieces of property included in the bulk assessment, until the "pro rata share of the entire tax, penalty and cost" against the given piece of property had been made in the preparation of the delinquent tax record, and such record had been approved both by the commissioners' court and the State Comptroller, and a duplicate of such record had been filed with the State Comptroller.

Every tax collector must make annual settlement with the Comptroller's Department. There would be no way for the Comptroller to determine whether the collector should receive credit for the collection of delinquent taxes against the given piece of property unless this course were pursued. Until the apportionment was made and approved by the commissioners court and a record thereof sent to

the Comptroller and approved by him, the assessment would stand on the Comptroller's books merely as a bulk assessment, and he would have no means of determining whether the correct amount of taxes delinquent against the given piece of property had been collected.

Since the collector must make annual settlement with the Comptroller, he should follow the advice of the Comptroller's Department in such matters as this.

Very truly yours,
JNO. C. WALL,
Assistant Attorney General.

OP. NO. 1799—BK. 50, P. 27.

DELINQUENT TAX SUITS—PUBLISHER'S FEES

1. The amount and time and manner of payment of publisher's fees are matteers of contract between commissioners' court and publisher.
2. Unless contract for publication of delinquent tax record or for publication of citations in suits against non-resident or unknown owners otherwise provides the claim of the publisher for compensation for his services becomes due when proper publication is completed and the commissioners' court is authorized to pay the same at such time.

August 3, 1917.

Hon. S. T. Dowe, County Judge, Pearsall, Texas.

DEAR SIR: We have a letter from you, which in substance states that the county attorney of your county has filed a number of delinquent tax suits against non-residents and unknown owners; that he was also compelled to get service by publication in a local newspaper; and that the publisher desires "his fees" for publication, and needs them. Then you ask whether the commissioners court should pay these fees before the suits are terminated, or whether they should be taxed and paid as costs when collected from the defendants.

Article 7698, of the Revised Statutes of 1911, provides the procedure to be followed in suits for collection of delinquent taxes against unknown or non-resident owners. It provides that upon affidavit to the effect that the owners are non-residents, or are unknown, and their names, after inquiry, can not be ascertained, "said parties shall be cited and made parties defendant by notice in the name of the State and county, directed to all persons owning or having, or claiming any interest in the following described lands: * * *; which notice shall be signed by the clerk and shall be published in some newspaper, published in said county one time a week for three consecutive weeks." Then the Article proceeds as follows:

"A maximum fee of two and one-half (2 1-2) cents per line (seven words to count a line), for each insertion may be attached for publishing the citation, as above provided for. If the publishing of such citation cannot be had for compensation provided for in this article, the publishing of the citation herein provided may be made by posting a copy

at three different places in the county, one of which shall be at the court house door."

It would appear from the language quoted that the compensation a newspaper should receive for the publication of citations of this character is a matter of contract between the commissioners court and the publisher, the only restriction being that the commissioners court can not enter into a contract to pay more than two and one-half (2½c) cents per line (seven words to count a line) for each of the three insertions.

No duty is imposd by law upon corporations, firms, or persons owning newspapers, to make publication of notices of this character and depend for compensation therefor upon collection of fees from the defendant in the case.

We are, therefore, of the opinion that the amount of compensation for such publication, and the time and manner of the payment of same are matters of contract between the commissioners court and the publisher. We think, however, that by providing that "a maximum fee of two and one-half (2½c) cents per line for each insertion may be *attached* for publishing of citation, as above provided for," the Legislature intended that two and one-half (2½c) cents per line, or whatever was paid for the publication, might be taxed as costs in the case against the defendant, and collected from him—the money so collected to be paid into the county treasury, and to belong to the county.

This, plainly, was the intention of the Legislature with reference to compensation to publishers for publishing the delinquent tax record, as shown by Article 7687 R. S., which is a part of the same Act. This Article provides for the publication of the delinquent tax record, and fixes the fee and the manner of payment as follows:

"Publisher's fee of twenty-five (25) cents shall be taxed against such tract or parcel of land so advertised; which fee, when collected, *shall be paid into the county treasury*, and the commissioners court of said county shall not allow for said publication a greater amount than twenty-five (25) cents for each tract of land so advertised."

Clearly, by this language it was intended that the amount of compensation to publishers for advertising the delinquent tax record should be a matter of contract between the commissioners' court and the publisher, the only restriction being that the commissioners court should not agree to pay a greater compensation "than twenty-five (25c) cents for each tract of land so advertised." It also clearly appears that the time and manner of payment were intended to be matters of contract, for it is provided that a fee of twenty-five (25c) cents shall be taxed against each tract, and, when collected, *"shall be paid into the county treasury."*

A publisher could not be compelled to publish citations and depend for compensation for his services upon the collection of fees from the defendant in the suit. However, he could contract to make the publications on such terms. If the publisher did not agree to such terms, and the contract was silent on the subject, we think his

compensation would be due as soon as the work was properly performed, and that the commissioners court would be authorized to pay his claim therefor at such time.

Very truly yours,
JOHN C. WALL,
Assistant Attorney General.

OP. NO. 1818—BK. 50, P. 103.

TAXATION—COUNTY SCHOOL LAND.

When county school lands, after having been sold by the county with vendor's lien retained to secure the purchase money, become after several years again the property of the county through foreclosure of the vendor's lien, the lien which attached to the lands for taxes while owned by the purchaser no longer exists.

September 14, 1917.

Hon. L. W. Tittle, Acting Comptroller, Building.

DEAR SIR: You recently advised the Attorney General that in the year 1909 Foard County sold its county school lands situated in Bailey County, retaining a vendor's lien to secure the purchase money, and that in December, 1915, and May, 1916, the county foreclosed its lien for the purchase money on part of the land and again acquired the land through foreclosure sale. The taxes which accrued against the land between the years 1909 and 1915 were in part at least unpaid. You desire to know whether Foard County is liable for the taxes that accrued against the land between the date of sale and the date of the foreclosure, and whether the tax lien still exists against the land which was acquired through foreclosure by Foard County.

By Section 6 of Article 7 of the Constitution the lands granted to the counties for educational purposes are declared to be the property of the counties to which they were granted and the title thereto is declared to be vested in the counties. The counties are authorized to sell the lands in whole or in part. It is further provided that the lands and the proceeds of the same, when sold, "shall be held by said counties alone as a trust for the benefit of the public schools therein." The courts have construed this section of the Constitution very strictly and have held that it prohibits the use of the lands, or any part of the proceeds of the land, when sold, for any purpose whatever other than for the use of the public schools of the county.

Section 9 of Article 11 of the Constitution provides that the property of counties owned and held only for public purposes, and all other property devoted exclusively to the use and benefit of the public, shall be exempt from forced sale and from taxation.

This article of the Constitution has been given by the Supreme Court a construction showing a purpose to protect county school lands from the burdens of taxation, even indirectly as well as directly. In the case of Daugherty vs. Thompson, 71 Texas 192, 9 S. W. 99, the

Supreme Court construed Article 7529 of the Revised Civil Statutes of 1911 (Articles 4791 R. C. S., 1879), which article provided, in substance, that property exempt by law from taxation, if held under a lease for a term of three years or more, should be considered for the purpose of taxation as the property of the person so holding the same and that such person should be taxed on the value of his leasehold interest. The county had sought to collect from a lessee of the county school lands a tax upon his leasehold interest. The Supreme Court held that because of the section of the Constitution above referred to, providing that such lands should be exempt from forced sale and taxation, and the other constitutional provision referred to, to the effect that such lands should be used for the benefit of the public schools, that the lessee could not be taxed. The reasons for this conclusion were, first, that since the Constitution forbade the taxation of the lands, it forbade also the taxation of an estate less than the fee, whether imposed on the county or its lessee; and, second, that the imposition of taxes on the lessee would diminish the rental value of the land and it was not reasonable to suppose that the Legislature intended to do this when the sole purpose of the donation of the lands to the counties, as declared by the Constitution, was to furnish the counties with a school fund. This case was approved by the Supreme Court in the case of Davis vs. Burnett, 77 Texas 4, 13 S. W. 612, and in the case of Continental Land & Cattle Company vs. Board, 80 Texas 491, 16 S. W. 312.

The case of Daugherty vs. Thompson, discussed above, is valuable in this connection principally as showing that the Supreme Court has so construed the constitutional provisions and the statute as to prevent the burdening of the county school lands by taxation, whether directly or indirectly.

It is true that Section 15 of Article 8 of the Constitution provides that the annual assessment made upon landed property shall be a special lien thereon. It has been held also that when county school lands have been sold a lien attaches to the land against the purchaser for unpaid taxes, even though the purchase money due the county has not been paid. See Taber vs. State, 85 S. W. 835. In the case referred to in your letter a lien attached to the land while it was owned by the purchaser and the lien could have been foreclosed while the land remained the property of the purchaser. The foreclosure sale, however, would have been subject to the superior lien in favor of Foard County for the unpaid purchase money.

It does not follow from the constitutional provision, declaring that the annual assessment shall be a lien on the land, that the lien shall continue under any and all circumstances until the taxes are paid. A lien attaches to public school land after it has been sold by the State, although the greater part of the purchase money may not have been paid, but when the sale is canceled by the Commissioner of the Land Office for the failure of the purchaser to pay the interest and the land becomes again the property of the State, the lien which formerly existed in favor of the State for taxes is merged in the title owned by the State. In addition to this, it can not be said that the section of the Constitution which declares that the annual assessment

shall be a lien upon the land is of any greater force or dignity than the two sections of the Constitution which have been referred to, the one declaring that the county school lands shall be devoted exclusively to the public schools and the other protecting them from forced sale and taxation.

If a lien for the taxes existed against the land while owned by the county, it could be foreclosed only through forced sale and the Constitution expressly provides that property owned by the county and devoted to public use shall be exempt from forced sale. The lien therefore could not be foreclosed. A lien which can not be foreclosed is a lien in name only, and not a lien in fact.

We conclude, therefore, that after the lien for the purchase money was foreclosed and the land bought at foreclosure sale by the county, the lien for the taxes no longer existed. We believe that this conclusion is made necessary by the two constitutional provisions which have been discussed—necessary, first, in order that the school land may be devoted exclusively to the use of the public schools and that its use for such purpose may not be hampered or hindered, and necessary, second, because the Constitution expressly provides that property owned by a county devoted to the use and benefit of the public shall be exempt from forced sale and from taxation.

We are inclined to believe that the same conclusion could be based on other reasons. These lands are owned by the counties in their governmental capacity, and the counties, for governmental purposes, are but subdivisions of the State. The lien which existed for taxes was in favor of the State in its sovereign capacity, and the land through foreclosure was acquired by the county in its governmental capacity. The result of the purchase of the land by the county at foreclosure sale was that the county became the owner of the land for the benefit of the public, against which land a lien had existed for the benefit of the public. It seems therefore that the lien would become merged in the title acquired by the county.

It would be unreasonable to conclude that the county after selling its school lands could not foreclose its lien and again acquire title to the land free from the junior lien which had attached by reason of unpaid taxes. If this junior lien were owned by an individual, the county could make the owner of such lien a party to the foreclosure suit and thus destroy the junior lien, but since the lien for taxes is owned by the State, and since there is no method whereby the State may be made a party to the suit for foreclosure of the county's lien, the junior lien can not thus be disposed of in the ordinary way. The only right which a junior lien-holder has when the superior lien has been foreclosed by suit, to which he was not a party, is the right of redemption. The purchaser at foreclosure sale acquires the legal title, subject to this right of redemption. See Garnett vs. Parker, 39 S. W. 147. No provision is made in the law by which the State, as holder of the junior lien securing the taxes, could exercise this right of redemption. On account of the fact that there are no means by which the county can make the State a party to such foreclosure suit, and on account of the fact that there is no method by which the State can exercise an equity of redemption, we are in-

clined to believe that the legal effect of the foreclousre suit and purchase by the county is to destroy the State's lien for taxes, and this without reference to the constitutional provision exempting county school lands from taxation.

For the several reasons hereinbefore set out, we advise you that the tax lien under the circumstances stated in your letter no longer exists against the land. Foard County is clearly not liable for the taxes since it was not the owner of the land when the taxes accrued.

You also ask whether the Comptroller should approve an order issued by the commissioners court of Castro County, to which Bailey County is attached, releasing the State's tax lien against this property. Such an order was, in our opinion, not necessary since the lien has been released as a matter of law. We have not investigated the question therefore as to the authority of the commissioners court to enter an order in any case releasing the State's tax lien. We believe it sufficient to advise you that such entries should be made on the proper records in your office and in the office of the tax collector of Castro County as to show that this land is not charged with delinquent taxes for the years referred to in your letter.

Very truly yours,
G. B. SMEDLEY,
Assistant Attorney General.

OP. NO. 1831—BK. 50, P. 156.

HOUSE BILL 40—DEFINITION OF TERM "RECORD OWNER" AS USED THEREIN—COLLECTION OF DELINQUENT TAXES.

1. The term "Record Owner" as used in House Bill 40 (Chapter 147 General Laws of the Regular Session of the Thirty-fourth Legislature) means the owner of property as shown by the records of the county clerk's office of the county in which the property is situated, which are provided by statute for the recording of instruments "of writing concerning any lands or tenements or goods or chattels or movable property." Article 6823, R. S.

2. The duty is imposed upon tax assessors and tax collectors by the terms of House Bill 40 to exercise reasonable diligence to ascertain the names and addresses of "record owners." The tax collector, in the preparation of the delinquent tax record, should use reasonable diligence to have the same show the names and addresses of "record owners."

3. It is the duty of the county attorney, in the institution of suits, to ascertain the names of "record owners." The duty is imposed by the statutes of the State upon county and district attorneys, in instituting suits for the collection of delinquent taxes, to use reasonable diligence to ascertain the names of record owners of property involved. The duty is, also, imposed upon them to ascertain the name of the actual owner of property involved. If by the exercise of reasonable diligence the county or district attorney can ascertain the name of the actual owner of property involved, although the records of the county fail to disclose the same, it is his duty to do so.

October 13, 1917.

Hon. J. F. Mangum, County Attorney, Crockett, Texas.

DEAR SIR: We have a letter from you making the following inquiry:

"Will you please inform me as to the meaning of 'record owner' as used in the laws of 1915, governing the collection of delinquent taxes. Does it mean the owner of the property as shown by the tax records? Does it means that it is the owner according to the deed records of the county as found in the county clerk's office and the records of the courthouse?"

Replying thereto, we beg first to call attention to Article 6823 of the Revised Statutes of 1911, which is as follows:

"Art. 6823. What may be recorded.—The following instruments of writing, which shall have been acknowledged or proved according to law, are authorized to be recorded, viz.: All deeds, mortgages, conveyances, deeds of trust, bonds for title, covenants, defeasances or other instruments of writing concerning any lands or tenements or goods and chattels or movable property of any description."

We also call attention to Article 6842 of the Revised Statutes, which is as follows:

"Art. 6842. Record of any grants, etc., when notice.—The record of any grant, deed or instrument of writing authorized or required to be recorded, which shall have been duly proven up or acknowledged for record and duly recorded in the proper county, shall be taken and held as notice to all persons of the existence of such grant, deed or instrument."

There are other articles of Chapter 3 of Title 118, Revised Statutes, specifying instruments which can be recorded and the effect of recording the same, but the two articles above mentioned are sufficient for the purpose of a reply to your letter.

The term record owner as used in House Bill 40, which is Chapter 147 of the printed General Laws of the Regular Session of the Thirty-fourth Legislature, is not defined in the Act, and, therefore, it must be assumed that the Legislature meant the owner of property as shown by the records of the county provided by statute for the recording of instruments "of writing concerning any lands or tenements, or goods and chattels, or movable property" of delinquent owners.

House Bill 40 provides that the tax collector shall "mail to the address of every record owner of any lands or lots situated" in the county a certain character of notice. In Section 2 of the Act it is further provided:

"To enable the tax collector to comply with the provisions of Section 1 of this act, it shall be the duty of the tax assessors of the various counties of the State to hereafter enter the postoffice address of each and every taxpayer after his name on the tax rolls, and the Comptroller shall hereafter provide a column for the entry of such address on the sheets furnished the assessors for making up the tax rolls."

It is further provided in Section 2 of said Act that the—

"tax collector in making up said delinquent tax record and supplement, shall examine the records of the district court and the county clerk's office of his county and no tract of land shall be shown delinquent on said delinquent tax record for any year where the records of the dis-

trict court or the county clerk's office show that the taxes for said year have been paid."

In Section 2 of the Act it is further provided:

"In making up the notices or statements provided for in Section 1 of this act, it shall be the duty of the tax collectors of the various counties in the State to rely upon the deliquent tax records compiled, or to be compiled, under the provisions of Article 7685 and Article 7707 of the Revised Civil Statutes of the State of Texas for 1911, which have been approved by the commissioners court of such counties and a duplicate of which has been filed in the office of the Comptroller of Public Accounts of the State of Texas, and which has or shall hereafter be approved by such State officer."

In Section 1 of the Act it is provided that it is the duty of the tax collector to furnish to the county or district attorney duplicates of such statements (notices) mailed to the tax payers in accordance wih the provisions of the Act,—

"or in lieu thereof, lists of lands and lots located in such counties containing amounts of State and county taxes due and unpaid, and the years for which due, on lands or lots appearing on such records in the name or 'Unknown' or 'Unknown Owners,' or in the name of persons whose correct address or place of residence in or out of the county said tax collector is unable by the use of *due diligence to discover or ascertain.*"

These provisions of House Bill 40 are particularly called to your attention to show that a duty is imposed both upon the tax assessor and the tax collector to exercise reasonable diligence to ascertain the names and addresses of the record owners of property and to have the delinquent tax records as nearly accurate as possible.

Of course, in the institution of suits to collect delinquent taxes county and district attorneys must rely mostly on information furnished by the delinquent tax records and the duplicate statements (notices) and the lists furnished by the tax collectors. No provision of House Bill 40, however, makes the delinquent tax records prepared thereunder conclusive as to the names and addresses of the record owners, nor does any statute provide that county or district attorneys in instituting suits for the collection of delinquent taxes shall rely merely upon the information contained in the delinquent tax records. On the contrary it is provided in Article 7698 of the Revised Statutes, in reference to suits against unknown or non-resident owners of land against which taxes have become delinquent, that the county or district attorney shall first make "affidavit setting out that the owner or owners are non-residents, or that the owner or owners are unknown to the attorney for the State, *and after inquiry cannot be ascertained.*"

There are also many decided cases in the State showing that the county or district attorney must make an independent investigation and use reasonable diligence to ascertain the names of delinquent owners. Thus, in the case of Scales vs. Wren, 103 Texas, 304; 127 S. W., 164, Judge Gaines said:

"Where an owner of land has his title on record, ascertainable by the county attorney on inquiry, and he is within the jurisdiction of the court,

he is not a party to nor bound by a judgment and sale of the land for taxes thereunder in a proceeding against the 'unknown owner' of the land."

Again, in the case of Hume vs. Carpenter, 188 S. W., 711, which was a suit in trespass to try title, to regain title and possession of lands which, in a suit for taxes against "Unknown Owners," had been sold and deeded to the purchaser at execution sale, Judge Key said:

"The proceedings which resulted in the tax sale seem to have been regular, and the deed made by the sheriff in pursuance thereof vested title in the purchaser, unless it be shown that at the time the suit was instituted, Street, the officer who represented the State and made the affidavit of unknown ownership either knew or by the exercise of reasonable diligence could have known that the improvement company was the owner of the property. If he had such knowledge or failed to exercise such diligence, the tax title is void; but if he did not have such knowledge and exercised proper diligence in that regard, then that title is valid, although the facts which show the exercise of proper diligence may not be sufficient to constitute an estoppel." 188 S. W., 711.

As further illustrative of the care to be exercised by the county or district attorney to ascertain the name of the record owner, and of the importance to be attached to the records provided by statute pertaining to the ownership of lands, we call attention to the decision of the Court of Civil Appeals in Blanton et al. vs. Nunley et al., 119 S. W., 881, and, also, of the opinion of the Supreme Court in the same case, 126 S. W., 1110, holding:

"That an owner who holds land under a recorded chain of title cannot be properly called 'an unknown owner,' and that hence he could not be considered a party to the suit, and was not bound by the judgment. There was in this case a decree of partition rendered in the Cooke County district court between the heirs of Jackson Davis and others, holding the interest of such heirs, which decree of partition was duly recorded in the office of the clerk of the county court of Hartley County. An inspection of this record would have revealed the fact that H. A. Blanton, Laura White and W. P. Davis were the owners of the land in controversy and hence that they were not unknown owners and hence were not parties to the suit of the State of Texas against the unknown owners of the land." 126 S. W., 1110.

We also call attention to the decision of the Court of Civil Appeals in Mote et al. vs. Thompson et al., 156 S. W., 1105, holding that where the record owner of real estate rendered same for taxes and paid the taxes thereon within the time prescribed by law, a judgment for delinquent taxes in a suit against "Unknown Owners" was void and not within the jurisdiction of the court, and that it might be collaterally attacked by proof of the payment of the taxes.

In the case of Pearson vs. Branch et al., 87 S. W., 222, which was a suit to recover lands sold to satisfy a judgment obtained in a suit against "Unknown Owners," the Court of Civil Appeals held that the owners being in actual possession, and, therefore, necessarily known, a proceeding instituted and pressed to judgment against

"Unknown Owners" does not bind them, citing Hollywood vs. Welhausen, 68 S. W., 329.

We, therefore, conclude that the term record owner as used in House Bill 40 means the owner of the land as shown by the records of the county clerk's office in the county where the land is situated —the records provided to be kept in such office for the recording of "all deeds, mortgages, conveyances, deeds of trust, bonds for title and covenants, defeasances, or other instruments of writing concerning any land or tenements, or goods and chattels, or movable property of any description."

In suits to collect delinquent taxes, however, the duty of the county and district attorney does not necessarily end with ascertaining the name of the record owner of property, that is, the owner of property as shown by such records. That is, if by the exercise of reasonable diligence the county or district attorney could have ascertained the name of the actual or real owner of the property involved, although such record failed to disclose the same, it would be his duty to do so, and to institute suit against the actual owner.

Very truly yours,
JOHN C. WALL,
Assistant Attorney General.

OP. NO. 1832—BK. 50, P. 163.

NOTICE OF PUBLICATION—NOTICE BY POSTING—CHAPTER 179 OF PRINTED GENERAL LAWS OF THE REGULAR SESSION OF THE THIRTY-FIFTH LEGISLATURE CONSTRUED IN CONNECTION WITH ARTICLES 3757 AND 7698 OF THE REVISED STATUTES 1911—GENERAL AND SPECIAL LAWS.

1. The provisions of Chapter 179 of the printed General Laws of the Regular Session of the Thirty-fifth Legislature have application only to such notices as, prior to the passage of the Act, were required by statute to be merely posted. They have no application to such notices as were required by statute to be published.

2. Notices of the time and place of sale of real estate under execution, order of sale or venditioni exponas should be given in the manner provided in Article 3757 of the Revised Statutes. This, in a sense, is a special law dealing minutely and definitely with that particular subject. The provisions of said article, both as to the manner of giving such notice and as to the price of publication, should control.

3. The provisions of said Chapter 179 of the Acts of the Regular Session of the Thirty-fifth Legislature have no application to the manner of giving notice of suit to collect delinquent taxes against non-resident or unknown owners. In such cases citation should be made in the manner prescribed in Article 7698 of the Revised Statutes, and the price of publication mentioned in said article is the only price authorized by statute.

4. Where there is one statute dealing with a subject in a general and comprehensive way and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, but to the extent of any necessary conflict between them the special will prevail over the general statute.

October 15, 1917.

Hon. G. B. Robertson, County Attorney, Bay City, Texas.

DEAR SIR: We have a letter from you calling attention to Article 3757 of the Revised Statutes, relating to the publication and posting of notices of sales of real estate, and to Chapter 179 of the printed General Laws of the Regular Session of the Thirty-fifth Legislature, relating to the publication of notices which, prior to the taking effect of said Act, were required by law to be posted, and asking the following questions:

"1. If publisher refuses to publish for five dollars and sheriff is required under the new law to publish all notices heretofore allowed to be posted, is sheriff compelled to pay for such publication under the new rates?

"2. If publisher refuses to publish under the old rates, has the sheriff authority under the Act of 1903 to post such notices, regardless of Section 4 of Chapter 179 of the Thirty-fifth Legislature?"

Replying thereto, we beg to state that in Article 3757 of the Revised Statutes, it is provided:

"The time and place of making sale of real estate under execution, order of sale, or venditioni exponas, shall be advertised by the officer by having the notice thereof published in the English language once a week for three consecutive weeks preceding such sale, in some newspaper published in said county. * * * Publishers of newspapers shall receive for publishing said sales fifty cents per square for the first insertion and thirty cents per square for subsequent insertions, to be taxed and paid as other costs; for such publication, ten lines shall constitute a square, and the body of no such advertisements shall be printed in larger type than brevier; provided, that no fee for advertising any property in a newspaper under the provisions of this article shall exceed the sum of five dollars. If there be no newspapers published in the county, or none the publisher of which will publish the notice of sale for the compensation herein fixed, the officer shall then post such notice in writing in three public places in the county, one of which shall be at the court house door of such county, for at least twenty days successively next before the day of sale."

In Section 1 of Chapter 179, of the Acts of the Regular Session of the Thirty-fifth Legislature, it is provided:

"That whenever by law notice is required to be given of any act or proceeding, whether public or private, or relating to a judicial, executive, or legislative matter, which notice is now authorized by law or by contract, to be made by posting notices in one or more public places, such notices shall hereafter be given by publication thereof, in a newspaper of general circulation, which has been continuously and regularly published for a period of not less than one year, in the county in which said act or proceeding is to occur."

In Section 4 of said Act it is provided:

"The price to be paid for all publications required by this Act shall be not more than one dollar ($1.00) per square of one hundred (100) words for first insertion, and not more than fifty cents per one hundred (100) words for each subsequent insertion, said publication fee to be taxed as other costs in the case."

In Section 5 of said Act it is provided:

"All laws and parts of laws in conflict herewith be and the same are hereby repealed."

It is the opinion of this Department that Chapter 179 has no application except to notices which, prior to the passage of the Act, were required by law to be merely posted; that it has no application to notices which, prior to its passage, were required to be published; that it has no application to notices of the time and place of sale of real estate under execution, order of sale, or venditioni exponas, because such notices were, by the terms of Article 3757 of the Revised Statutes, required to be published.

Some confusion, however, has arisen because of the fact that Article 3757 provided for the posting of such notices of sale in the event (a) no newspaper was published in the county or (b) there was none the publisher of which would publish the notice of sale for the compensation fixed in said article and because the compensation of newspapers for publishing notices, as fixed in Chapter 179, is different from that provided in Article 3757.

Article 3757 is not referred to in Chapter 179 and is not expressly repealed by it. The two statutes must, therefore, be construed "so that both may stand if they are fairly susceptible of such construction." Conley vs. Daughters of the Republic, 157 S. W. 957.

Before attempting the construction it must be noted that Article 3757 deals minutely and definitely with the particular subject of the giving of notice "of the time and place of making sale of real estate under execution, order of sale, or venditioni exponsas," and that Chapter 179 deals in a general way with the question of the giving of notice in all proceedings in which, prior to its passage, the statute required the giving of the same should be by posting. In other words, one, in a sense, is a special law relating to the giving of notices in certain designated proceedings, while the other is a general law relating to the giving of notices in all proceedings which, prior to the passage of the Act, were required by law to be done by posting. That the one is a special and the other a general law, and also as indicating the rule of construction which should apply, we quote from the opinion of Chief Justice Gaines in the case of Wallis vs. Williams, as follows:

"Technically a special law is a law which applies to an individual or individuals or to some individuals of a class and not to all of a class. But we have no doubt that in its technical sense the laws for the removal of county seats by election are general or public laws and not private Acts.

"But there is another sense in which the word special as applied to laws is used. General is opposed to special and hence any law which makes provision for a special election is a special law in its proper sense. Therefore laws for a local option election, for a stock law election and others of a like character, while general, in a technical sense are freqeuently spoken of not only in ordinary conversation, as special laws, but also by eminent jurists and judges of our higher courts. As pointed out by counsel for appellees in their brief, in Ellis vs. Batts (26 Texas, 707), Judge Moore uses this language: 'It is a well settled rule for the construction of statutes that a general law will not be held to repeal a particular and special one on the same subject.' The law here spoken of, was a general

law but was special in its provisions. So in Hash vs. Ely (100 S. W. 891), Judge Speer says: 'So that the Terrell election law being a general law and the article last quoted a special law, the latter will control,' etc. 'The article last quoted' was Article 1388 of the Revised Statutes in relation to local option elections, which is clearly a general law in its technical meaning. In ex parte Keith (47 Texas Crim. Rep., 283; 83 S. W., 685), Judge Brooks says: 'The Terrell election law is a general law. The local option law is a special statute relating to localities.' Again, in ex parte Anderson (51 Texas Crim. Rep., 239; 102 S. W. 729), the same learned judge uses the language: 'We held there was no conflict between the Terrell election law and the local option law, one being a general and the other a special law.' Again, in speaking of a stock law election, Judge Davidson, in ex parte Kimbrell, uses this language: 'Again, this is a special law, in the comprehensive sense, as distinguished from those Acts of the Legislature which operate generally.' (47 Texas Crim. Rep., 333; 83 S. W., 384). This is enough to show that the laws of the character of laws for determining the question of the removal of a county seat having special provisions differing from the general election law, are frequently spoken of in judicial parlance as special laws." 101 Texas, 397, 398.

The Court, in this case, held that county seat elections being provided for by special statutes, were excepted from the operation of the Terrell Election Law.

It is well established by other decisions of the higher courts of this State that a later statute which is general and affirmative in its provisions will not abrogate a former one which is particular or special. Thus in the case of Hash vs. Ely, 100 S. W., 981, it was said:

"So that the Terrell Election Law being a general law and the article last quoted (being the article relating to local option elections) being a special law, the latter rather than the former will control under a principle of construction too well known to require the citation of authorities."

Again, in the case of Walker vs. Mobley, 103 S. W., 491, the Supreme Court, Judge Brown delivering the opinion, held:

"Considering these sections together, we deduce the conclusion that the election law does not apply to local option elections as to matters in which there is a conflict and that, so far as a *conflict* exists the *local option statute will prevail* and its provisions be applied to the conduct and management of local option elections." 103 S. W., 491.

See, also, the decision of the Court of Civil Appeals in the case of Durham vs. Rogers, 106 S. W., 906, holding that the reasoning of the Supreme Court in the case of Walker vs. Mobley, *supra*, "necessitates a like holding in the elections for the removal of county seats." See, also, Ellis vs. Batts, 26 Texas, 703.

The case of Shaw vs. Lindsley, 195 S. W., 338, was one in which certain proposed changes to the existing charter of the city of Dallas were submitted under the "Home Rule" bill, and the form of ballot was prescribed by the city authorities, as provided in Article 2971 of the Revised Statutes. The election was contested on the ground that the ballot prescribed was in violation of the provisions of the Terrell Election Law. The Court of Civil Appeals held that the Terrell Election Law had no application so far as the ballots of such a city election were concerned.

To the same effect, see opinion of the Court of Civil Appeals in the case of Clark vs. Willrich, 146 S. W., 948, which was a case contesting an election held to determine whether a special maintenance tax should be levied in a Common School District.

It is true that the Terrell Election Law contains the following provision:

"Provided, that in local option, stock law and road tax elections the notices of elections, or any other special election specially provided for by the laws of this State, shall be given in compliance with the requirements of laws heretofore or hereafter enacted, governing said elections, respectively."

And also the provision:

"Provided that this Act shall not interfere with or repeal laws of this State, except as herein specially provided and set forth."

Still, an examination of the authorities cited above will show that in almost every instance the decision was made independently of a consideration of these provisions, and on the principles hereinabove announced.

The case of Gillon vs. Wear et al., 28 S. W., 1015, was a suit for partition where service was had by publication for four weeks against Unknown Owners, as provided by statute, although another statute provided for citation by publication for eight weeks in suits against unknown heirs, where it is sought to divest property. Among other things in said case, the Court held:

"A proceeding for partition under our statute fully authorizes citation by publication for four weeks against unknown owners, and, after such citation, a partition of the property may be made. Rev. Civ. St., Art. 3467a. This Act was passed by the Sixteenth Legislature, and became a law July 24, 1879. There is a general statute providing for citation by publication in suits against unknown heirs where it is sought to divest property, which provides for such publication for eight weeks. Rev. Civ. St., Art. 1236. This Act was passed November 9, 1866. We see no conflict between these two sections of the statute, as one section is general and the other special. The two must be construed together, and it fully appears that citation by publication in suits for partition was not intended to be brought under the general provisions, which come under the General Practice Act, as shown in Rev. St., Art. 1236." 28 S. W., 1015.

This case is cited merely to show that the doctrine has been applied by our higher courts in other than contested election cases.

Coming now to foreign jurisdictions, we find, in the case of Lawyer vs. Carpenter (Ark.), 97 S. W., 663, the doctrine stated as follows:

"A general law does not apply where there is another statute governing the particular subject, irrespective of the date of either the general or the particular law. Neither repeals the other. The particular legislation covers the narrower field where it is applicable." Citing:

Dunn vs. Ouachita Valley Bank (Ark.), 71 S. W., 265.

Mills vs. Sanderson (Ark.), 56 S. W., 779.

Ex parte Morrison (Ark.), 64 S. W., 270.
Chamberlain vs. State (Ark.), 13 S. W., 925.
Thompson vs. State (Ark.), 28 S. W., 794.

In the State of Missouri, the doctrine is thus stated in the case of Ackerman vs. Green (Mo.), 100 S. W., 34:

"Where a statute in relation to special proceedings is complete in itself and covers the entire subject, it is exclusive, and the proceedings under it are governed solely by its provisions." Citing:
Baker vs. Hannibal & St. Jo. R. R., 36 Mo. App., 543.
Schwoerer vs. Christophel, 64 Mo. App., 81.

In the case of Folk vs. City of St. Louis (Mo.), 157 S. W., 75, the doctrine as stated in 36 Cyc., page 1151, was adhered to. This is a very comprehensive and convincing statement of the law on this subject. It is as follows:

"Where there is one statute dealing with a subject in general and comprehensive terms and another dealing with a part of the same subject in a more minute and definite way the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but to the extent of any necessary repugnancy between them, the special will prevail over the general statute. Where the special statute is later it will be regarded as an exception to, or qualification of, the prior general one; and where the general act is later, the special will be construed as remaining an exception to its terms, unless it is repealed by express words or by necessary implication." 157 S. W., 75.

We, therefore, conclude that the provisions of Chapter 179 of the printed General Laws of the Thirty-fifth Legislature have no application to the giving of notices of the time and place of making sales of real estate under execution, order of sale or venditioni exponsas; that Article 3757 is a special law relating to the special proceedings to be followed in these particular matters, and that such proceedings are governed solely by its provisions; that it should be construed as an exception to said Chapter 179 of the Acts of the Thirty-fifth Legislature; and as to matters in which there is a conflict between said articles and said Chapter 179 the provisions of said article shall prevail and control the proceedings in the giving of such notices. See Walker vs. Mobley, 103 S. W., 491.

If the publisher refuses to publish for the maximum amount provided in Article 3757, then the notices must be posted. The rates of publication should be those fixed in said article.

What has been said above applies with equal force to a construction of said Chapter 179 in connection with Article 7698 of the Revised Statutes relating to the publication of citation in suits for the collection of delinquent taxes against unknown or nonresident owners.

Yours very truly,
JOHN C. WALL,
Assistant Attorney General.

OP. NO. 1835—BK. 50, P. 213.

Senate Bill 27, enacted by the Thirty-fifth Legislature, prohibiting the bringing of suits to collect taxes levied for the year 1917 until after January 31, 1919, is constitutional.

November 9, 1917.

Hon. L. W. Tittle, Acting Comptroller, Capitol.

DEAR SIR: I have yours of the 3rd instant, inquiring as to the constitutionality of Senate Bill No. 27, enacted at the Third Called Session of the Thirty-fifth Legislature, which prohibits the bringing of suits to collect taxes levied for the year 1917 until after January 31, 1919.

It seems that you have the idea that this a special law and, as Section 56, Article 3, of the Constitution provides that the Legislature shall not, by a local or special law, extend the time for the assessment or collection of taxes, etc., that this statute is in conflict with this provision of the Constitution.

I do not take this view. The act in question, in my opinion, is a gneral law applicable to every section of the State and to all persons and all classes in the State.

A statute that relates to persons or things as a class is a general law, whilst a statute which relates to particular persons or particular things of a class is special, and comes within the prohibition of the Constitution. See Clark vs. Finley, 93 Texas, 178.

A local law is one the operation of which is confined to a fixed part of the territory of the State. See Clark vs. Finley, supra; Hall vs. Bell County, 138 S. W., 180.

The terms "local law" and "special law," used in the Constitution, are synonymous terms. See Lastro vs. State, 3 Cr. App., 363; Smith vs. Grayson County, 44 S. W., 922.

The act in question is short, and is as follows:

"No suit shall be brought for the collection of taxes levied for the year of 1917 which may become delinquent, until after the 31st day of January, A. D. 1919."

As this is a general law, the provisions of Section 56, Article 3, of the Constitution, are not applicable.

You also suggest a possible conflict with Section 10, Article 8, of the Constitution, which provides that the Legislature shall have "no power to release the inhabitants or property in any county, city or town from the payment of taxes levied for State or county purposes, except in case of great public calamity in such county, city or town, etc." In our opinion, this provision of the Constitution is not applicable, for the reason that the act in question does not release or attempt to release either persons or property from the payment of taxes.

You further inquire whether or not the statute applies to school, drainage or other like districts that have levied taxes for their local needs.

The terms of the statute are all-embracing. There is no exception

in favor of school, drainage or other districts, and we are not justified in writing into the law an exception not made by the Legislature, hence we conclude that the act in question is applicable to school, drainage and other such districts the same as to State and county taxes.

You also ask whether tax collectors will be required to send out the delinquent tax notices provided for in Section 1 of House Bill 40, enacted by the Thirty-fourth Legislature.

In our opinion, they will be required so to do; in fact, this law does not do more or attempt to do more than to prohibit the filing of suits for the delinquent taxes of 1917 until after January 31, 1919. No other provision of our tax gathering law is affected or in any way suspended.

You ask as to the effect this act will have upon the collection of occupation taxes. In our opinion, it is exceedingly doubtful whether the statute has any application whatever to occupation taxes, because an occupation tax cannot become delinquent unless the person involved by the act of delinquency also becomes a criminal.

Article 130 of the Penal Code reads as follows:

"Any person who shall pursue or follow any occupation, calling or profession or do any act taxed by law without first obtaining a license therefor shall be fined in any sum not less than the amount of the taxes due and not more than duoble that sum."

It is very clear that Senate Bill 27 would not suspend criminal prosecutions under this provision of the Penal Code.

You further raise the question as to the right of the tax collector, by virtue of his tax rolls, to seize and sell personal property for taxes, as provided by Article 7624, Revised Statutes.

In our opinion, the provisions of this article are not suspended, as the act in question, as before stated, goes no further than to prohibit the filing of suits, hence tax collectors are free to use this remedy in the collection of taxes, notwithstanding Senate Bill 27.

The remaining question that you raise is whether or not this act impairs the obligations of contracts in that many counties and subdivisions of counties have issued and sold bonds and other securities that are now outstanding; for the payment of interest thereon and the accumulation of a sinking fund for their redemption taxes must be levied and collected.

Under our view, Senate Bill No. 27 simply affects one of the remedies provided by law for the collection of taxes; that is, it suspends for a time the right to file suit for taxes.

The doctrine is universal that there can be no vested interest in a remedy; that the same may be changed by the Legislature at will without impairing contracts so long as a substantial remedy is left for the assertion of legal rights. This principle is tersely stated by Judge Roberts in the case of Treasurer vs. Wygall, 46 Texas, 457, as follows:

"The general rule is that the Legislature may by law change, modify or otherwise regulate the remedy, provided a substantial remdy is left for the assertion of a right and there is no vested right in a particular remedy."

(DeCordova vs. The City of Galveston, 4 Texas, 470; Cooley's Constitutional Limitation, 361.) There are numerous Texas cases announcing the same doctrine; in fact, the doctrine prevails everywhere.

In view of this principle and, furthermore, as this question is one that concerns the holders of securities only, we do not believe public officials should be deterred from observing this statute by reason of this consideration.

I trust I have in the foregoing responded to all the questions you raise, and beg to remain,

Yours very truly,

B. F. LOONEY,
Attorney General.

OP. NO. 1839—BK. 50, P. 217.

TAXATION—EXEMPTION—PUBLIC COLLEGES AND PUBLIC ACADEMIES.

1. All public colleges, public academies, all buildings connected with the same and all lands "immediately connected" with public institutions of learning are exempt from taxation. Constitution, Art. 8, Sec. 2; Art. 7505, R. S. 1914.
2. The word "building" is construed to embrace the land on which the buildings are located, the whole being used for school purposes.
3. As to the quantity of land exempt from taxation upon which public colleges or public academies are located, presents an issue of fact to be determined by the local authorities in each case, the quantity of land being exempt from taxation being dependent upon the number and location of buildings, the land necessary for playgrounds, etc.
4. Lands used for farming and pasturage purposes, in connection with public colleges or public academies, are not per se exempt from taxation.

November 14, 1917.

Honorable J. F. Mangum, County Attorney, Crockett, Texas.

DEAR SIR: The Attorney General's Department is in receipt of your letter of date November 12th, which reads as follows:

"Mary Allen Seminary is an educational institution located at this place, and, in addition to the grounds upon which its buildings are located, it owns two hundred and seventy-five acres of land adjoining the same, which is used and cultivated by the employes of the institution, the entire proceeds being used in the maintenance of the seminary, and no part of same being used for profit. The entire tract of land is under the immediate control and management of the officers of the institution. Please advise me whether or not under these circumstances the 275 acres of land is exempt from taxation under the provisions of Article 7505 of the Revised Statutes of Texas."

Subdivision 1, Article 7505, R. S. 1914, relating to the exemption from taxation of school property, provides as follows:

"All public colleges, public academies, all buildings connected with the same and all lands immediately connected with public institutions of learning, are exempted from taxation."

The Constitution of our State, Article 8, Section 2, exempts from

taxation "all buildings used exclusively and owned by persons, or associations of persons, for school purposes, and the necessary furniture of all schools."

The word "building" is construed to embrace the land used in connection with it. It has been the policy of the State to encourage educational enterprises by exempting them from the burdens of government, and there is nothing to warrant the inference that the framers of the Constitution, in the use of the word "buildings," intended to discriminate against private schools. Ground used for the recreation of the students and to supply the school table with vegetables, which was necessary and used for the proper and economical conduct of the school, is exempt. Cassiano vs. Ursuline Academy, 64 Texas, 673.

However, in the case of St. Edward's College vs. Morris, tax collector, 17 S. W., 512, our Supreme Court held, in substance, that land owned and used by the proprietor of a private school, in such manner as to enable him to conveniently and cheaply supply the table of the boarding house kept by him for pupils, though contiguous to and immediately connected with land used exclusively for school purposes, is not within the limitations placed upon said property by Article 8, Section 2, of the State Constitution, which empowers the Legislature to exempt from taxation "all buildings used exclusively and owned by persons or associations of persons for school purposes." Neither is such land exempt under another clause of the above section of the Constitution, which exempts from taxation "public property used for public purposes."

The suit of St. Edward's College vs. Morris, above mentioned, was brought to enjoin the sale of 499 acres of land, belonging to appellant corporation, for taxes due for the year 1889, which, on trial, resulted in a judgment, enjoining the sale of about 5 acres of the land, the balance of the tract being held subject to sale. The corporation owned the entire tract, which was conveyed to it to be used for school purposes and thereon was maintained a boarding school. The findings of fact, relating to the use of the land, are as follows:

"The buildings used for said school on January 1, 1889, were situated on the 499 acres of land, part of the Del Valle grant, belonging to plaintiff. These buildings included recitation rooms, dormitories, gymnasiums, and outhouses, which, with the playgrounds, included about five acres of said land. Of the balance of said 499 acres, about 160 acres was in the state of cultivation (that is, was a farm), but only about two-thirds of it was cultivated in 1889. On this farm was an orchard and garden. The remainder of the land was a pasture. The school was and is a boarding school and had a large number of students boarding in the institution at a cost of about fifteen dollars per month. Said house and five acres of land were owned and used exclusively for school purposes, January 1, 1889. The balance of said 499 acres of land was used as a farm and pasture, and the produce raised on the farm during 1889 was used to feed the stock on said farm, consisting of six horses, two mules, eighty-five cattle and twenty-four hogs. The pasture was used to pasture the farm stock, not for hire. The hogs slaughtered were used to supply tables for the boarding school; no stock sold, no produce sold, for profit or revenue, but only to supply the tables for said boarding school."

"The court ascertained the value of the five acres held to be exclusively used for school purposes in proportion to the entire assessment, and dissolved the injunction theretofore granted, in so far as it restrained the

sale of the balance of the fund, to enforce the balance of the assessment It is now claimed that the court erred in not holding the entire tract exempt from taxation."

An appeal was had from the judgment of the district court, and the Supreme Court, in passing upon the issues thus submitted, used the following language:

"The only part of the Constitution of this State which can have any bearing on the question before us is Article 8, Section 2, which provides that '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 and institutions of purely public charity; and all laws exempting property from taxation, other than the property above mentioned, shall be void.' It can not be claimed that the property of appellant is public property used for public purposes, for to give it such character it is believed that the ownership should be in the State or some of its municipal subdivisions, and it may be that its use would have to be not under their control, but for a purpose for which the State or such municipal subdivisions are authorized to use property held by them for the benefit of the public. It will be observed, however, that the section of the Constitution quoted does not give exemption, but was intended to provide the limitations thought necessary to be placed on the power of the Legislature to exempt property from taxation; and it becomes necessary to inquire whether the Legislature had the power to give exemption from taxation to appellant's property, owned and used as it was, and, if so, whether such exemption has been given by the Legislature. That clause of the Constitution which empowers the Legislature to exempt from taxation 'all buildings used exclusively and owned by persons, or associations of persons, for school purposes,' 'is the only one that can have any application to this case.' The construction to be placed on the word 'building' was considered in Cassiano vs. Ursuline Academy, 64 Texas, 676, and in Red vs. Morris, 72 Texas, 554, 10 S. W., 681. These are cases in which exemption of city property was claimed on the ground that it was used exclusively and owned by persons or associations of persons for school purposes, and it was held that the word 'building' would include the lots on which they stood, the whole being used for school purposes, which embraced the recreation of pupils attending the school. It is now claimed, however, that under the word 'building' should be embraced all lands which may be used by the owner in a manner which contributes to enable him to conveniently and cheaply supply the table for a boarding-house, kept for pupils, when the land thus used is contiguous or immediately connected with the land used exclusively for school purposes. We are of opinion, however, that the Constitution withdraws from the Legislature the power to exempt lands owned by persons or associations of persons which are thus used; and this is evidently the construction placed on the Costitution by the Legislature. Under the power given to exempt from taxation public property used for public purposes, public school-houses, 'and grounds attached to such buildings necessary for the proper occupancy, use, and enjoyment of the same,' have been exempted, unless leased or otherwise used with a view to profit. Rev. St. Art. 4673. But, even under the terms of this statute, such an exemption as the plaintiff claims could not be given when the ownership was public, and the purpose for which used also public, unless the grounds were necessary for the proper occupancy, use, or enjoyment of the public school-house. The statute also exempts from taxation 'all public colleges, public academies, all buildings connected with the same, and all lands connected with public institutions of learning.' Under this exemption, which has reference to public colleges and academies, the connection of building, and of lands referred to, may not be one of mere contiguity, but one of connected use, for a common purpose, public in its nature, and not foreign to the leading pur-

poses for which the public colleges and academies are established and maintained. Public schools, colleges, and academies may, under authority of law, be established for the purposes of giving instruction in mechanics, agriculture, or other pursuit, which can be done practically only by having lands which may be used for the purpose of giving practical instruction, and in such a case all buildings and lands used for such a purpose would evidently be exempt. The public purpose to be subserved by public schools, colleges and academies is public instruction, and there is nothing in the Constitution or the statutes of this State which indicates an intention that anything shall be exempted from taxation which does not more or less directly tend to that end. In reference to the exemption from taxation of property, when used exclusively and owned by persons or associations of persons for school purposes, the statute simply repeats the language of the Constitution which permits the exemption to be made; thus indicating an intention to make the exemption in such cases more restrictive than is the exemption when given to public school-houses, public colleges, and public academies. The Constitution, as well as the statutes, make the distinction between public property and private property owned and used for school purposes, and that the property in question is not public within the meaning of these laws, is to clear. It may have been convenient to have lands, in connection with those used for school purposes, and thus supply much that went to furnish the table of a boarding school; but we are of opinion that the lands so used by appellant were not used exclusively for school purposes. The court below held to be exempt from taxation as much of the land as the Constitution would permit the Legislature to exempt, or as it had attempted to exempt, and its judgment will be affirmed."

Therefore, in conformity with the decision of our Supreme Court in the above case, this department is of the opinion that the exemption from taxation of buildings used for school purposes includes the lots or the acreage upon which such buildings are situated; the whole being used for school purposes and being necessary for such purpose, but does not apply to land included in a farm cultivated in connection with such school, nor of grazing land used for the live-stock which may be owned by said school. As to how much land would be exempted upon which the buildings are situated, and which may be required for the necessary use of the school buildings, presents an issue of fact to be determined by the local authorities in each case.

In the case above quoted, five acres of land was held to be exempt in that instance; considering the number and location of the building, it may be more or less dependent upon the location of buildings, play grounds, etc.

Yours truly,
W. J. TOWNSEND,
Assistant Attorney General.

OP. NO. 1851—BK. 50. P. 286.

OCCUPATION TAX—STATUTORY CONSTRUCTION.

A county may collect from medicine shows an occupation tax of $2.50 per day until the aggregate of such tax reaches twenty-five dollars, being one-half the amount of the tax collected by the State upon such occupation.

Section 1, Article 8, Constitution; Section 38, Article 7355 and Article 7357, R. S., 1911.

December 15, 1917.

Hon. George W. Johnson, County Attorney, Texarkana, Texas.

DEAR SIR: The Attorney General has your letter as follows:

"Will you please advise me by return mail whether or not a man who is the owner and keeper of a show giving exhibitions of music, etc., as outlined in Section 38 of Article 7355 of the Revised Statutes of 1911, when considered in view of Article 8, Section 1 of the Constitution of this State, is liable for an occupation tax payable to the county of $2.50 for every such performance or exhibition throughout the entire year, or is liable for county tax of not to exceed one-half the tax levied by the the State.

"The points involved are whether or not the exhibitor is liable under Section 38 of Article 7355 of the Statutes for $2.50 for every performance, regardless of the number of performances, or whether or not he is liable for $2.50 for every performance until he shall have paid the sum of $25 in county taxes."

The tax levied by the above article on what is known as medicine shows is an annual occupation tax of fifty dollars for the State and a county occupation tax of $2.50 for each and every performance or exhibition. The statute places no limitation whatever upon the number of exhibits for which this tax of $2.50 is levied, and therefore according to the language of the act the amount of the annual tax collected by the county would be limited only by the number of days in the year in which exhibitions might be given. It is obvious that the county could therefore collect not only more than one-half of the occupation tax collected by the State, but if exhibitions in sufficient numbers were given the aggregate of the tax collected by the county would be many times that collected by the State.

Section 1 of Article 8 of the Constitution cited by you provides that the Legislature may impose an occupation tax both upon natural persons and upon corporations, other than municipal, doing business in this State. It is provided further, however, that the occupation tax levied by any county, city or town for any year on persons or corporations pursuing any profession or business shall not exceed one-half of the tax levied by the State for the same period on such profession or business.

It therefore appears that if the language of Section 38 of Article 7355 R. S., 1911, is construed according to its import and plain and obvious meaning, that is that the county is not limited in the amount of tax to be collected, then such section would be in violation of Section 1, Article 8 of the Constitution, above referred to.

However, we find in Article 7355 R. S., 1911, this provision with reference to the levy of occupation taxes by the county.

"And shall have the right to levy one-half of the occupation tax levied by the State upon all occupations not herein otherwise especially exempted."

These two statutes being in pari materia must be construed together as constituting one and the same act. It is a well known canon of statutory construction that where an act of the Legislature

is capable of two constructions, the one bringing the act within the Constitution, and the effect of the other to place an interpretation thereon that would cause the act to violate the Constitution, it is the duty of the court to give to the act such a construction as will make it a constitutional one. G. C. & S. F. Ry. Co. vs. State, 120 S. W., 1028.

We quote from that case as follows:

"When one of two constructions can be given a statute, one of which would be violative of the Constitution and the other not, it is the duty of a court to give it that construction which is in accordance with the fundamental law of the land. To give the statute in question and the order of the Railroad Commission the construction contended for by the State would be to hold that they are in derogation of the Constitution of the United States as well as of the State of Texas, in that defendant would be deprived of its property without 'due process of law and without adequate compensation. To give the statute and order in question the construction contended for by the defendant, no constitutional principle would be violated, for the statute and order would only apply to shipments in cars owned, hired or under the exclusive control of the shipper during the period of time necessary for their use in carrying and delivering the freight therein at destination."

See also Camp vs. State, 135 S. W., 146.

In the case of State vs. Post, 169 S. W. 401, the Court of Civil Appeals in this State for the Third Supreme Judicial District, said:

"It will not be presumed that the Legislature intended an act to be so construed as to render it unconstitutional."

Again, in the case of Glass vs. Pool, 166 S. W. 375, the Supreme Court of this State used this language:

"In testing the constitutionality of the statute in question the language must receive such construction as will conform it to any constitutional limitation or requirement, if it be susceptible of such intepretation, and the law here brought in question must be sustained unless it be clearly in conflict with some provision of the Constitution."

In our opinion it was the intention of the Legislature in the enactment of Subdivision 38 of Article 7355 to authorize a county to levy and collect an occupation tax of $2.50 upon every performance or exhibition of a medicine show until such tax should aggregate twenty-five dollars, or one-half of the tax levied by the State. Especially is this in our opinion a proper construction when this section is read in connection with that provision of Article 7357 R. S., 1911, above quoted. This construction of the statute would render it constitutional and bring it within the rule laid down in the case of State vs. Post, *supra*, to the effect that it will not be presumed that the Legislature intended an act to be so construed as to render it unconstitutional. To hold otherwise would deprive the county of the right to collect any occupation tax whatever from such performances when it was clearly the intention of the Legislature to levy a tax thereon.

Yours truly,

C. W. TAYLOR,

Assistant Attorney General.

OP. NO. 1920—BK. 51, P. 151.

DELINQUENT TAXES—FORECLOSURE OF TAX LIEN AND PURCHASE BY STATE.

1. Where the county attorney has filed suit to collect taxes delinquent against a tract of land for a particular year or years and has failed to include in said suit taxes for prior years also delinquent against said land and there has been a judgment foreclosing the tax lien and a sale of the land to the State, the right of the State to thereafter sue and foreclose the tax lien against such land for the prior years is not destroyed.

2. In such a case the delinquent owner does not have the right to plead limitation.

April 9, 1918.

Hon. W. C. Jourdan, County Attorney, Marfa, Texas.

DEAR SIR: We have a letter from you, which is, in part, as follows:

"Where taxes are due for say ten years to the State and county on a specific tract of land and the county attorney brings suit to foreclose the lien for the tax due for the last year, does a judgment and sale operate as a waiver of the lien of the State and county for taxes due for the prior years?"

Replying thereto, we beg to state that the county attorney should, of course, have included in the suit all taxes delinquent against the property involved. His failure to do so, however, we think does not destroy the right of the State to foreclose its lien for the delinquent taxes for the years not included in such suit. This is true, because the Constitution, Article 8, Section 15, provides that the annual assessment made upon landed property shall be a special lien thereon. Said section is as follows:

"The annual assessment made upon landed property shall be a special lien thereon; and all property, both real and personal, belonging to any delinquent taxpayer shall be liable to seizure and sale for the payment of *all the taxes* and penalties due by such delinquent, and such property may be sold for the payment of the taxes and penalties due by such delinquent under such regulations as the Legislature may provide."

The lien attaches when the assessment is made.

State vs. Farmer, 94 Texas, 234; 59 S. W., 541.

Your letter also contains the following question:

"In a case as the above, does not the four-year period of limitation run against the county and would not the county's right to recover be barred for four years?"

In reply to this question, it is necessary only to quote the language of Article 7662, R. S., which is as follows:

"No delinquent taxpayer shall have the right to plead in any court or in any manner rely upon any statute of limitation by way of defense

against the payment of any taxes due from him or her, either to the State or any county, city or State (town)."

Yours very truly,
JOHN C. WALL,
Assistant Attorney General.

OP. NO. 1904—BK. 51, P. 78.

DELINQUENT TAXES—FEES OF COUNTY AND DISTRICT ATTORNEYS, COUNTY CLERKS AND TAX ASSESSORS AND COLLECTORS—CONSTRUCTION OF STATUTES.

1. The proviso contained in Article 3893 of the Revised Statutes of 1911, excepting the fees of district and county clerks, county attorneys and tax collectors in suits to collect delinquent taxes, from the provisions of the fee bill, was omitted from said article when the same was amended by Chapter 121 of the printed general laws of the Regular Session of the Thirty-third Legislature, and by omitting the same from such amendment the Legislature intended that thereafterwards the fees of such officers in delinquent tax suits should be included in determining the maximum amount they should retain.

2. The language of the amendatory act shows that it was intended by the Legislature that said article, as amended, should repeal Article 3893, R. S., 1911, and should be substituted therefor.

3. Repeals by implication are not favored, but when the amendatory act creates a new, entire and independent system respecting the subject matter of the old act, the old act is repealed thereby.

March 21, 1918.

Mr. A. S. Noble, County Auditor, Sherman, Texas.

DEAR SIR: We have a letter from you, in part as follows:

"I am writing for an opinion as to whether the fees of district and county clerks, county attorneys and tax collectors in delinquent tax suits can be held by such officers in addition to the maximum fees allowed such officers under the law as specified in the original act, Article 3893 of the Revised Civil Statutes, 1911. * * * I desire to know whether the acts of the Thirty-third Legislature amending said Article 3893 repeal the provision with reference to said officers mentioned and whether said officers should include in their reports of fees collected and retain same in addition to the maximum fees."

Your letter fails to state upon what ground these officers contend that they are entitled to their fees in delinquent tax matters, in addition to the maximum amount they are permitted to retain, but we assume that it is on the ground that the Act amending the fee bill passed by the Thirty-third Legislature, which is Chapter 121 of the printed General Laws of said session, does not expressly repeal Article 3893 of the Revised Statutes of 1911, and must be considered cumulative of that article, and that the last proviso contained in said article is still in effect.

Article 3893 of the Revised Statutes of 1911, contains the following proviso:

"* * * Provided, further, 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."

The balance of said article relates to compensation for ex officio services. This and other articles of the fee bill were amended by an act of the Thirty-third Legislature, which, in so far as it relates to Article 3893, is in the following words:

"An act to amend articles * * * 3893 * * * of the Revised Civil Statutes of the State of Texas of 1911.

"Be it enacted by the Legislature of the State of Texas:

"Section 1. That Article * * * 3893, * * * of the Revised Civil Statutes of the State of Texas be and the same are hereby amended so as to hereafter read as follows: * * *

"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. 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 of the official beyond the maximum amount of compensation and excess fees allowed to be retained by him under this chapter."

It will thus be seen that the proviso in reference to the fees of district and county clerks, county attorneys and tax collectors in suits to collect taxes, contained in said original article, was omitted when the article was amended, and we think it was the intention of the Legislature, by omitting this proviso from the amended article, to require the officers named to account for all fees accruing to their offices in suits to collect delinquent taxes, and that such officers, since the amended act became effective, are not entitled to such fees in addition to the maximum amount provided to them in the act.

The words of the amendatory act are plain and unambiguous. By the words "That Articles * * * 3893 * * * of the Revised Civil Statutes of the State of Texas be and the same are hereby amended *so as to hereafter read as follows,*" it was plainly intended by the Legislature that thereafterwards said article should contain only the provisions included in the amendatory act, and that said article, as so amended, should thereafterwards be substituted for Article 3893 of the Revised Statutes of 1911. A case in point is that of the State versus Andrews, 20 Texas, 230, from which we make the following quotation:

"The act of the 28th of August, 1856, amends the former act by providing that its first section *'shall hereafter read as follows,* etc., proceeding to re-enact some of its provisions, and among them that which makes causes determined in the county in which this cause was determined returnable to the court holding its session at Tyler; but omitting the provision above quoted in respect to land causes in which the State is a party. The latter act must be deemed a complete repeal of the first section of the former, including, of course, the provisions in question, under which causes of this description were formerly returnable to

this branch of the court. * * * The bringing of the case was, therefore, not only plainly without the authority of law, but against law. It is, therefore, improperly upon the docket, and must be stricken therefrom; and it is ordered accordingly."

This opinion has been repeatedly cited with approval by the higher courts of this and many other states. See Volume 1 of Rose's Notes on Texas Reports, page 817.

In the amendatory act reference is made to the particular article of the Revised Statutes of 1911, intended to be amended. As to the effect of this, we call attention to the decision of the Supreme Court in the case of English, etc., Inv. Co. vs. Hardy, 55 S. W., 169, from which we make the following quotation:

"* * * It must be held that such a reference to the number of an article in a code, such as our Revised Statutes, is sufficient in the title of an act amendatory thereof to allow any amendment germane to the subject treated in the article referred to. Gunter vs. Mortgage Co., 82 Texas, 502, 17 S. W., 840; State vs. McCracken, 42 Texas, 383. Many decisions from other States to the same effect might be cited. The reason for the decisions holding this proposition must be that the naming of the article to be amended directs attention to all of the provisions therein as the subject of the amending act and that such provisions can be ascertained by reading the article to be amended * * ;the reference to the number of the article to be amended does include, as the subject of the amendatory act, the whole subject embraced by the provisions of the former. It is that article which the title proposes to amend, and not merely such parts of it as relate to the creation of corporations."

A reading of the entire amendatory act, which is Chapter 121, of the printed General Laws of the Regular Session of the Thirty-third Legislature, shows that the Legislature intended by said act to entirely revise the subject matter of the fees of office, particularly as to the maximum amount the officers named therein should retain of the fees accruing to their offices. The question of whether district and county clerks, county attorneys and tax collectors should or should not be permitted to retain fees accruing to their offices in suits to collect taxes, was a matter of importance to be considered by the Legislature when determining the maximum such officers should receive, which was the very and the only question involved in the amendatory act. The fees of these officers in delinquent tax suits constitute a considerable portion of the total amount of fees collected by them each year. It would be very unreasonable to presume that the Legislature, having under consideration only the question of the amount of fees such officers should be permitted to retain each year as compensation for their services, and having under consideration the very article of the old fee bill which excepted these fees from the provisions thereof, would have omitted the proviso of the old article, unless they intended that, after the amendatory act became effective such fees should be considered in determining the maximum amount such officers might retain. It is unreasonable that when they had under consideration the question of amending this very article by referring to it by number and providing that it should be "amended so as to hereafter read as follows," they would have failed

to re-enact said proviso, unless they intended that thereafterwards these fees should be considered in determining the maximum amount such officers should receive. Considerable time had elapsed since the original fee bill was passed. The population of the State had rapidly increased, and the old fee bill ceased to properly fit the changed conditions.

By this amendatory act the Legislature clearly intended to revise the entire subject of fees in so far as it related to the maximum amount certain officers might receive. A principle well established in this State is thus stated in the opinion of the Supreme Court in the case of Bryan vs. Sunderberg, 5 Texas 423:

"It is undoubtedly true that a construction which repeals former statutes by implication is not to be favored. * * * But when the new statute in itself comprehends the entire subject and creates a new, entire and indepenedent system respecting that subject matter, it is universally held to repeal and supersede all previous systems and laws respecting the same subject matter."

For re-statements of this doctrine, we call attention to the decisions of the Supreme Court in Fayette County vs. Faires, 44 Texas, 514; Tunstall vs. Wormley, 54 Texas, 480; and Stirman vs. State, 21 Texas, 734.

Nor could it be successfully contended that this amendatory act is invalid because of its caption, in that the articles mentioned in the act are amended merely by reference to their numbers in the Revised Statutes of 1911. The courts of this State have frequently held that such a caption is sufficient. See Nichols vs. State, 23 S. W., 680; ex parte Segars, 25 S. W., 26; Taber vs. State, 31 S. W., 662; State vs. McCracken, 42 Texas, 383; Gunter vs. Texas Land & Mortgage Co., 17 S. W., 840.

Certain fees and commissions are provided to county and district attorneys and to tax collectors in Chapter 147 of the printed General Laws of the Regular Session of the Thirty-fourth Legislature, commonly known as House Bill 40, but by no provision of this act did the Legislature evince an intention to except such fees and commissions from the provisions of the fee bill. The rule to be followed in determining what fees should be accounted for by officers under the provisions of the fee bill is that stated by the Supreme Court in Ellis County vs. Thompson, 96 Texas, 22. This rule might be briefly stated as follows: Every fee or compensation provided to the officers mentioned in the fee bill should be considered in determining the maximum amount such officers should receive, unless the same is excepted from the provisions of the fee bill by the act fixing the fee or by the fee bill itself.

The five cents per line allowed to tax collectors by House Bill 40 for the preparation of the delinquent tax record, or supplements thereto, is not a fee or commission accruing to the office of the tax collector from suits for the collection of delinquent taxes, and it is the opinion of this department that the Legislature intended to allow this charge to tax collectors in addition to the maximum amount allowed under the fee bill. Prior to the passage of House Bill 40, the

duty had not been imposed upon tax collectors to make the delinquent tax record. (See Stringer vs. Franklin County, 123 S. W., 1171). And this fact, in connection with a construction of the language used in that act itself in reference to the charge of five cents per line, has convinced us that, so far as this compensation is concerned, it was the intention of the Legislature to except it from the provisions of the fee bill.

You are, therefore, advised that Article 3893, as amended by Chapter 121 of the printed General Laws of the Thirty-third Legislature, has been substituted for and repeals Article 3893 of the Revised Civil Statutes of 1911, and that district and county clerks, county attorneys and tax collectors, since said amendment became effective, are not entitled to receive fees accruing to their offices in delinquent tax suits, in addition to the maximum salaries fixed by the fee bill. These fees should now be considered in determining the maximum amount such officers should receive.

Yours very truly,
JOHN C. WALL,
Assistant Attorney General.

OP. NO. 1906—BK. 51, P. 94.

INHERITANCE TAXES—COUNTY ATTORNEYS—COMMISSIONS.

Chapter 166, Acts Regular Session 1917.
Articles 7487-7502, Revised Civil Statutes.
Maud vs. Terrell, 200 S. W., 375.

The above act of the Thirty-fifth Legislature has been held constitutional in the case above cited, and the person or persons appointed by the Comptroller to collect inheritance taxes may retain the amount allowed him under the contract not exceeding 10 per cent, if as the result of his services the taxes are collected.

In the event it becomes necessary to file suit for the collection of inheritance taxes, the person appointed by the Comptroller cannot file such suit, but it must be filed by the county or district attorney or by the Attorney General, and it is the duty of the person appointed by the Comptroller to assist the county attorney or the district attorney or the Attorney General in such suit, and if inheritance taxes are collected as the result of such suit, the county attorney is entitled to the commissions allowed him by Article 373, Revised Civil Statutes.

No authority is especially conferred on the county attorney to collect inheritance taxes without suit and he is not entitled to commissions on inheritance taxes collected without suit.

The person appointed by the Comptroller is not entitled to commissions, unless he performs all the duties required of him under the contract and by Chapter 166 and unless the taxes are in fact collected as the result of his efforts.

March 26, 1918.

Hon. Samuel C. Harris, County Attorney, Ballinger, Texas.

DEAR SIR: In your letter of March 21st you refer to the recent opinion of the Supreme Court in the case of Maud vs. Terrell, 200 S. W. 375, construing Chapter 166, Acts of the Regular Session of the Thirty-fifth Legislature, and you desire to be advised with refer-

ence to the commissions that the county attorney is entitled to retain when inheritance taxes are collected as the result of his efforts.

The Supreme Court, in the case cited, held that the Act of the Thirty-fifth Legislature, authorising the Comptroller to appoint a person or persons to look after and collect inheritance taxes, was constitutional. It is settled, therefore, by that decision, that if a person under contract with the Comptroller, as provided in the Act, performs the services contemplated by his contract and services required of him by Chapter 166, and as the result of his services inheritance taxes are collected, he is entitled to retain the commissions allowed him by the contract not exceeding 10 per cent of the taxes collected. This is true whether the taxes are collected with or without suit.

It is also settled by the decision above referred to that the person or persons appointed by the Comptroller cannot institute or control suits filed for the collection of inheritance taxes, but that such suits must be instituted and can be controlled only by the county or district attorney or the Attorney General, and that in the event it is necessary to file suit for the collection of any inheritance taxes, the person appointed by the Comptroller will be obliged to aid and assist the county or district attorney or the Attorney General in such suit. In the event inheritance taxees are collected as the result of a suit filed by the county or district attorney and prosecuted by him, the county or district attorney is entitled, under Article 363, to commissions on the amount collected of 10 per cent on the first one thousand dollars and 5 per cent on all sums over one thousand dollars. We believe that the county or district attorney is entitled to such commissions whether the taxes are collected after judgment or before judgment, provided they are collected as the result of the suit. In other words, if the county or district attorney files a suit for the taxes and the person owing the taxes pays them because of such suit but before the judgment is entered, the county attorney would be entitled to his commissions. By reason of the decision of the Supreme Court in the case above referred to, when inheritance taxes are collected as the result of a suit filed by the county or district attorney and when the person appointed by the Comptroller has aided the county or district attorney in the prosecution of such suit and has performed the other duties required of him by Chapter 166, such person is entitled out of the taxes collected to the commissions stipulated in his contract not exceeding 10 per cent and the county attorney is also entitled to his commissions of 10 per cent and 5 per cent out of the taxes collected.

It remains to be determined whether the county attorney is entitled to commissions on inheritance taxes that may be collected without suit as the result of his efforts. Before the enactment of Chapter 166 of the Acts of the Thirty-fifth Legislature it was made the duty of the county attorney by Article 7491 of the Revised Civil Statutes to report to the county judge all estates subject to taxation and for making such report the county attorney was allowed a compensation of 10 per cent of the tax not exceeding twenty dollars in any one estate. The statutes as to inheritance taxes, which are Articles 7487 to 7502,

impose no duty on the county attorney, except that of reporting the estates to the county judge and except the duty of filing suit for the recovery of the penalty prescribed by Article 7490, in the event the executor, administrator or trustee should fail to make and file an inventory. Since the enactment of Chapter 166 of the Acts of the Thirty-fifth Legislature it is no longer the duty of the county attorney to report to the county judges estates subject to inheritance taxes, for Article 7491 was by that Chapter amended and the duty of reporting the estates to the county judge was placed upon the person or persons appointed by the Comptroller and no mention was made in the article as amended of the county attorney. It appears, therefore, that in the Inheritance Tax Law since the amendment made by the Thirty-fifth Legislature nowhere is it expressly made the duty of the county attorney to collect inheritance taxes. Turning to the articles of the statute relating in general to the duties of the county attorney, which are contained in Chapter 3 of Title 13 of the Revised Civil Statutes, we find that nowhere is it expressly made the duty of the county attorney to collect taxes due the State or county. Articles 360 to 363, inclusive, of that chapter seem to imply that the county attorney is authorized to collect certain money belonging to the State and to the county, since by these articles it is made his duty to report to the county and the State all county and State money which he has collected, and since by Article 363, in addition to the commissions which are allowed him on money collected in any case, he is also allowed to retain the same commissions on all collections made for the State and county, indicating that in certain instances he has authority to collect money for the State and the county. It was held in the case of Russell vs. State, 40 S. W. 69, that the district attorney, by reason of the articles last referred to, had the authority to receive certain money due the county.

If, however, it is granted that before the enactment of Chapter 166, Acts of the Thirty-fifth Legislature, the county attorney had the authority to collect State tax money without filing suit and to retain commissions on it, still we believe that since the enactment of this chapter the county attorney no longer has such authority as far as inheritance taxes are concerned. Chapter 10, of Title 126, including Articles 7487 to 7502, and including, of course, Article 7491, as amended, is a complete law with reference to the collection of inheritance taxes. Nowhere in this law is the county attorney mentioned, except that it is made his duty to file suit for the recovery of the penalty imposed by Article 7490. The duty of collecting inheritance taxes without suit is imposed upon the tax collector and upon the person or persons appointed by the Comptroller. By the language of Article 7491, as amended, it is made the special duty of the person or persons appointed by the Comptroller to look specially after and collect the inheritance taxes and such person is required to aid in every possible way in the collection of such taxes. It is made the duty of such person or persons by this article as it has been construed by the Supreme Court to aid and assist the tax collector, and the county judge and the appraisers, as well as the county or district attorney and the Attorney General Since the particular duty of

reporting, looking after and collecting inheritance taxes is specially placed upon the person or persons appointed by the Comptroller, and he is allowed a substantial compensation for the performance of such service, and since the duty or authority of the county attorney to collect such taxes without suit can be gathered only by implication from general laws, we believe it is a proper construction of all these laws that there is now no duty imposed upon the county attorney to collect inheritance taxes, unless it becomes necessary to file suit for their collection, and that since no such duty is imposed upon him, he is not entitled to any commission in the event such taxes are collected without suit as the result of his efforts.

The placing upon a person other than the county or district attorney of the duty of collecting inheritance taxes without suit would not be in conflict with the section of the Constitution which defines the authority and duties of the county and district attorneys, for the duties and authority of the county and district attorneys as defined in that section are in reference only to representing the State in court.

With reference to the compensation of the person or persons appointed by the Comptroller under Chapter 166 of the Acts of the Thirty-fifth Legislature, we call your attention to the fact that the compensation is allowed him for the performance of all of the duties imposed upon him by the law and that before a tax collector would be justified in paying such a person or persons a commission on inheritance taxes, he must be furnished with satisfactory evidence that such person holds a contract from the Comptroller under the chapter and must be advised of the terms of such contract and must also be furnished with satisfactory evidence that such person has performed the duties imposed upon him by his contract and by Chapter 166, and that the taxes have been collected as the result of the performance of such duties. For example, it would not be sufficient for the person appointed by the Comptroller merely to report the estate to the county judge. The compensation was not given him for the performance of this one service. He must have used diligence in securing the collection of the taxes, must have reported the estate to the county judge and must have assisted, or must have offered to assist the appraisers and the county judge in appraising the estate and in calculating the amount of the tax, and must also have rendered any necessary or proper aid to the collector. In addition to this, of course, the person or persons appointed by the Comptroller, in order to earn his commissions, must in the event of suit aid and assist the county or district attorney or the Attorney General whenever his aid and assistance is needed or desired by such official.

Very truly yours,
G. B. SMEDLEY,
Assistant Attorney General.

OP. NO. 1905—BK. 51, P. 104.

NEWLY ORGANIZED COUNTIES—DELINQUENT TAXES—CONSTRUCTION OF THE ACT CREATING HUDSPETH COUNTY.

1. Suits for the collection of taxes against lands composing a newly organized county which became delinquent prior to the time the county was organized, should, after the organization of such county, be filed in the district court of said county by the county attorney of such county.
2. Such taxes, when collected, whether by suit or otherwise, become the property of the newly organized county.

March 28, 1918.

Hon. H. Wyatt, County Attorney, Sierra Blanca, Texas.

DEAR SIR: We have a letter from you, asking to be advised whether suits to collect taxes which have become delinquent against lands now composing Hudspeth County, but which became delinquent while such lands were still a portion of El Paso County, should be filed in the District Court of Hudspeth County and by the county attorney of said last named county.

Replying thereto, we beg to call attention to Article 7722, R. S., and succeeding articles in Chapter 19 of Title 126 of the Revised Statutes. These articles provide, in substance, that where a new county is created, "it shall be the duty of the person in charge of the assessor's roll in the county or counties from which said new county, or any part of it, has been taken or to which such unorganized county has been attached for judicial purposes, to allow such person as the commissioners court of the newly organized county may appoint for that purpose, access to the rolls for the purpose of making the transcripts hereinafter provided for."

The transcripts provided for by succeeding articles are "transcripts of the unpaid assessments, both on person and property, in that portion of the county included within the limits of the new county."

It is also provided that the commissioners court of the old county shall approve said transcripts, which are required to be made in duplicate, and "shall deliver one of them to the collector of the new county; the other he shall forward to the Comptroller." Then Article 7725 provides:

"The collector of such new county shall receive the same compensation and shall have the same authority to collect and enforce the collection of the taxes found to be due by such transcripts as is employed by the collectors of the other counties of this State."

It will be noted that nothing is said in these articles about the collection of delinquent taxes by suits, but the language of the articles clearly evinces an intention on the part of the Legislature to impose upon the collector of the new county, after the same is organized, the duty of collecting taxes which became delinquent against the lands composing the county prior to the time the same was created or organized.

We are, also, of the opinion that it was the intention of the Legis-

lature, by requiring that the transcripts of the delinquent rolls of the old county, so far as they relate to the lands of the new county, should be prepared and delivered to the collector of the new county—that all of the officers of the old county should be relieved from any further duties in respect to collecting such delinquent taxes. This is made plain by the fact that in Article 7724 it is stated that the object of furnishing one copy of the transcript to the Comptroller is to "authorize him to give the proper credit to the collector of the old county and to charge the same to the collector of the new county." In other words, after the receipt of such transcript it is necessary for the Comptroller, in respect to all taxes then delinquent against the lands of the new county, to keep an account only with the collector of the new county.

Such delinquent taxes, when collected, become the property of the new county (see Hardeman County vs. Foard County, 47 S. W. 30, 536), and, of course, when they must be collected by suit, after the new county is organized, it follows the suits should be brought by the county attorney of the new county in the district court of such county.

Some confusion has been caused by certain provisions of the act creating Hudspeth County, which is Chapter 25 of the printed General Laws of the Regular Session of the Thirty-fifth Legislature. In Section 7 of said Act, among other things, it is provided:

"* * * And said assessor and collector (of Hudspeth County), until said taxes for the year 1916 and previous years are assessed and collected, shall be governed by the laws of the State of Texas as to tax assessors and tax collectors generally for the assessment and collection of State and county taxes for said years, and until said taxes for the year 1916 *and previous years* are assessed and *collected*, and paid over by said tax collector, as hereinafter provided, his power and duty under the law as otherwise prescribed as to the collection of said taxes, shall not in any wise be affected by the provisions of this act."

In said section it is also provided that the collector of El Paso County shall make "triplicate reports of all taxes collected upon the property in El Paso County *for the year* 1916, as it existed prior to the creation of Hudspeth County herein, and file one of said reports with the treasurer of El Paso County, one with the commissioners' court of El Paso County, and forward the other, with all moneys received by him during the previous month, as taxes upon persons and property, within the limits of Hudspeth County * * * less his commission, to the tax collector of the County of Hudspeth, and he shall continue to do so until all of said taxes are collected and remitted."

In said section it is also provided that the tax collector of El Paso County shall report and remit on the first day of each month to the tax collector of Hudspeth County "all moneys received by him during the previous month, as taxes upon persons and property, within the limits of Hudspeth County * * * *for the years previous to the year* 1916, in the same manner in all respects, as herein provided for taxes for the year 1916."

This act was approved February 16, 1917, and became effective June 20, 1917. Hudspeth County had to be organized afterwards. The

1916 taxes had been assessed a year prior to that, and such as had not been paid by January 31, 1917, had become delinquent. Until Hudspeth County was organized, it was the duty of the assessor of El Paso County to assess taxes against the lands composing Hudspeth County, and of the collector to collect the same. In compensation for their services, they were entitled to all fees and commissions provided by law. The object and purpose of the Legislature, by the provisions from Section 7 of said Act, above referred to and quoted, were to emphasize that these duties should be performed by such officers of El Paso County until Hudspeth County was organized.

Nothing is said in said act about suits for the collection of delinquent taxes, or the duties of the county attorney of El Paso County in respect thereto. Hudspeth County now being organized, suits to collect taxes delinquent against the lands of said county should be brought in the district court of said county by its county attorney. What is said in said act relates to the collection of delinquent taxes by the collector of El Paso County. There is nothing said therein about the collection of such taxes by suit. And if the suits are instituted in Hudspeth County, there could possibly be no confusion, unless by reason of certain provisions of the act the tax collector of El Paso County might insist upon receiving commissions upon delinquent taxes so collected by suits instituted in Hudspeth County. This would not affect the validity of the suits brought in Hudspeth County. It would merely be a matter of difference between the collectors of the two counties, to be settled between them by a separate agreement or suit.

You are, therefore, advised that the proper place to institute these suits is the district court of Hudspeth County and that, as county attorney of said county, you are entitled to the fees in such suits.

Yours very truly,
JOHN C. WALL,
Assistant Attorney General.

OP. NO. 1857—BK. 51, P. 130.

STREETS AND ALLEYS—COMMISSIONERS' COURTS—TAXATION.

Commissioners' court has authority to levy a tax under the twenty-five cent permanent improvement provision for the purpose of paying the counties pro rata part of street paving, such tax to be in addition to the fifteen cent general and special for roads and bridges.

April 6, 1918.

Honorable A. P. McKinney, Jr., County Attorney, Huntsville, Texas.

DEAR SIR: From your letter of April 3rd, addressed to the Attorney General it appears that the commissioners court of Walker County desire to assist the incorporated town of Huntsville in paving around the court house square. The city is to pay two-thirds of the cost and the county one-third. It appears that the county has already levied twenty-five cents for county purposes and fifteen

cents for roads and bridges. They now desire to levy an additional tax sufficient to provide a fund to defray the cost of this paving, such levy to be made under the authority to levy not exceeding twenty-five cents on the one hundred dollars for erecting public buildings, streets, sewers, water works and other permanent improvements. You desire an opinion from this department on the right of the county commissioners to levy this additional tax.

Under Section 9, Article 8 of the Constitution, a county may levy the following taxes:

1. Twenty-five cents for general county purposes.
2. Fifteen cents to pay jurors.
3. Twenty-five cents for the erection of public buildings, streets, sewers, water works and other permanent improvements.
4. Fifteen cents for roads and bridges.
5. Fifteen cents special road tax upon a vote of the people.

The above constitutional provisions are in substance carried into the Revised Statutes of this State appearing in Article 2242, R. S. 1911. Article 999 R. S. 1911, authorizes the improvement of streets, the cost thereof being borne in part by the city and in part by the property owners. The county being the owner to the court house property would, under this article of the statute, have authority to defray its proportionate part of cost of street improvements.

In the case of William vs. Carroll, 182 S. W. 29, the Court of Civil Appeals held in effect that where the constitutonal limit of fifteen cents had been levied for roads and bridges, no additional levy may be made for general purposes for the purpose of increasing the expenditure for roads and bridges above the aggregate of the tax raised by the fifteen cent limit, or, thirty cents if the fifteen cent special had been levied. In that case the contention was made that in addition to the thirty cents for roads and bridges a tax could be levied for that purpose under the twenty-five cents authorized for public buildings, streets, sewers, etc. The court denied this contention upon the ground that streets are those public highways within cities and towns and that a tax could not be levied for use upon the county roads under this provision. The Court said:

"Considering these premises, we are of the opinion that the words 'streets' and 'roads,' as used in the Constitution, are not synonymous, and therefore that the tax of 25 cents on the $100 valuation as provided for in the Constitution 'for the erection of public buildings, streets, sewers, waterworks and other permanent improvements' must be restricted to the erection of permanent streets within the corporate limits of a city or town, when such street or streets are the continuations of public roads, and when the consent of the board of aldermen or the city council has been first obtained, to authorize the county commissioners' court to make such improvements. In our opinion, it was not the intention of this provision to authorize a levy of 25 cents on the $100 valuation to raise revenue with which to build or construct or maintain public roads or bridges outside of the city limits of a municipal corporation, whether they were permanent in their nature or otherwise, and in determining the maximum rate which can be levied for the road and bridge fund this rate cannot be considered."

The commissioners court having authority with the consent of the

city council to improve the streets of an incorporated town and having the power to levy a tax of not exceeding twenty-five cents for streets, we are of the opinion, and so advise you, that your commissioners court would be acting within its lawful authority to levy not exceeding twenty-five cents on the one hundred dollars valuation for the purpose of raising funds to defray the expense of the paving of the street or square adjoining the court house.

In making this levy however, there must be taken into consideration all other levies made under this subdivision of the statute authorizing the levy of taxes.

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

OPINIONS AS TO WATER RIGHTS.

OP. NO. 1776—BK. 49, P. 335.

IRRIGATION—DETERMINATION OF RIGHTS.—ACT APPROVED MARCH 19, 1917.

The determination of water rights by the Board of Water Engineers under the act approved March 19, 1917, should not be confined to the main stream, but should include the main stream and its tributaries, the whole of the source of water supply.

June 25, 1917.

Hon. W. T. Potter, Secretary Board Water Engineers, Austin, Texas.

DEAR SIR: In your letter to the Attorney General of June 18th, you refer to Sections 105 to 129, inclusive, of the General Irrigation Act approved March 19, 1917, which sections relate to the determination of the relative rights of the various claimants to the waters of the streams and other sources of water supply. You refer to the fact that some of the larger streams of the State have a number of tributaries of more or less importance from an irrigation standpoint, and you desire to know whether the Board of Water Engineers, in the event a petition is filed with it for the determination of the water rights on one of these larger streams, should in such proceeding consider and determine the rights on such tributaries as well as those on the main stream.

If the construction of the law, as far as it relates to this question, well be concluded that the law authorizes the Board to determine the relative rights upon a stream without including in such determination the rights upon the tributaries of the stream.

The language used in Section 105 is, that upon the petition of one or more water users "upon any stream or other source of water supply, requesting the determination of the relative rights of the various claimants to the waters of such streams or other source of supply, it shall be the duty of the Board of Water Engineers, etc."

Other sections of the Act used the word "stream" or words "source of water supply." It is our opinion, however, that the proper construction is to be arrived at by reading the whole of this portion of the law together and by reading it in the light of the purpose of its enactment and the ends sought to be accomplished. When this is done, we believe that it is clear that a proceeding for the adjudication of water rights should comprehend and include not only the main stream but the main stream and all of its tributaries, that is; the entire source of water supply.

These sections of the new irrigation Act are the result of a radical change in the law and constitute a new step in the development of the Irrigation Law of Texas. By the Act of 1917 the duties and powers of the Board of Water Engineers are very greatly enlarged to the end that the Board may have more complete control of the public waters of the State and may prevent its waste and secure its economi-

cal application to beneficial use. In addition to conferring upon the Board of Water Engineers these more extensive powers, the Legislature undertook to establish an elaborate method of procedure for the purpose of measuring and determining the relative rights to the use of water from the streams of the State. The purpose of the Legislature was that the water rights might, as far as possible, become definitely and permanently settled and that the bringing of countless suits in court, and delays incident to the trial of such suits, might be avoided. In passing this law, Texas followed the example of a number of other western States. In discussing the purpose of similar acts passed by other western States, Kinney in Section 1568 of his text book on "Irrigation and Water Rights" said:

"In general, these acts furnish an elaborate system of special procedure for the settlement and adjudication of all questions of priority of the appropriation of water *from a common source of supply*, as between the respective claimants thereto and by decree awarding to each claimant the quantity of water to which he is entitled for the beneficial use or purpose to which he applies it. * * * One end that has been attained by these special proceedings is that they have made a permanent public record of all the rights to the use of water which have been so adjudicated *from any common source of water supply* and give the names of the parties who are entitled to the use of the water, together with a definite and certain description of their respective rights."

The Oregon statute for the determination of water rights was before the Supreme Court of the United States in the case of Pacific Livestock Company vs. Lewis, 36 Sup. Ct. Rep., 637. The law was held to be constitutional, and in discussing the difference between the procedure under the Oregon statute and private suits between individual water claiments, the court said:

"They are merely private suits brought to restrain alleged encroachments upon the plaintiff's right, and, while requiring an ascertainment of the rights of the parties in the waters of the river, as between themselves, it is certain that they do not require any other or further determination respecting these waters. Unlike them, the proceeding in question is a quasi public proceeding, set in motion by a public agency of the State. All claimants are required to appear and prove their claims; no one can refuse without forfeiting his claim, and all have the same relation to the proceeding. *It is intended to be universal and to result in a complete ascertainment of all existing rights*, to the end, first that the waters may be distributed under public supervision among the lawful claimants according to their respective rights without needless waste or controversy; second, that the rights of all may be evidenced by appropriate certificates and public records, always readily accessible, and may not be dependent upon the testimony of witnesses, with its recognized infirmities and uncertainties, and third, that the amount of surplus or unclaimed water, if any, may be ascertained and rendered available to intending appropriators."

The Wyoming law for the determination of water rights is also very similar to the Texas law. The Supreme Court of Wyoming, in the case of Farmers' Investment Co. vs. Carpenter, 9 Wyo., 110, 61 Pac. 258, 50 L. R. A., 747, thus states the object of the Wyoming law:

"For the purpose of ascertaining the precise rights and priority of each appropriator to the end that the public records may be furnished an accurate and defined statement thereof and as an aid to adequate and effective State control of the public waters."

Likewise, the recent Act of the Texas Legislature describes in detail an elaborate method for the careful and thorough determination of the water rights of the various claimants. Upon the filing of a petition, the Board is required to prepare notices setting forth the time and the place when it will begin the investigation of the flow of the stream and of the ditches and pumps taking water therefrom, and of the time and place when the Board, or one of its members, will begin to take testimony as to the rights of the parties. This notice is required to be published. The Board is required to hold a hearing in each county through which the stream may flow. Each person claiming a right to use the water, as shown by the records of the Board, must be notified of the time and place of the hearing. Each claimant is required to file, in writing, a complete statement of the extent and nature of his claim. After the testimony is taken it shall be kept open to inspection of various claimants and owners who shall be notified of the time and place where it may be inspected. The Act provides for the contesting before the Board of any claim, and provides for the subpoenaing of witnesses, etc.

It is made the duty of the Board to make an examination of the stream or other source of water supply, the examination including the measurements of the discharge of the stream, of the carrying capacity of the various ditches and canals, an examination of the lands to be irrigated, etc.

After all the evidence has been compiled and the contestants have been heard, the Board shall make and enter of record its findings of fact and order determining and establishing the several rights to the waters of the stream. After the final determination, the Board shall issue to each person or corporation represented in such determination a certificate setting forth in detail the extent of the right of such person. The law provides for an appeal to the district court from the order of the Board.

The plan is not one intended to affect a few persons, or a small territory, and it is not intended merely for temporary relief. It is a comprehensive plan intended to be thorough, complete and final and that all the rights of the various claimants may be carefully measured and finally adjudicated. It would be impossible to accomplish these general purposes of the Act if the proceeding were confined to the main stream and excluded the tributaries. But more than this, the extent, and oftentimes the existence, of the rights of water users on the main stream can not be determined unless, at the same time, the extent of the rights of the water users on the tributaries is determined. The appropriation of the waters of a stream is an appropriation of the waters of the tributaries and other sources. This rule is thus stated by Long in his text book on "Irrigation":

"Where an irrigator, by prior appropriation, has acquired the right to the flow of a stream or to a certain quantity of the water, it follows

necessarily that his appropriation is, in effect, an appropriation also of all the tributaries and other sources of supply of the stream, so far as this may be necessary to insure to him the quantity of water covered by his appropriation. Hence other appropriators or persons will not be permitted to so divert or control the water of tributary streams as to cut off the sources of supply and prevent the prior appropriator from receiving the full amount of water to which he is entitled." (Sec. 134).

The appropriator is even interested in the waters of the tributaries which flow into the stream below his point of diversion to this extent:

"Where there are appropriators prior to him below his point of diversion on the stream, and there are also appropriators subsequent to him of the waters of the tributaries, which naturally flow in the stream below his point of diversion and above those of his prior appropriators, and he is called upon to supply the water to which those below him are entitled. In cases of this kind he is entitled to the flow of the lower tributaries, as against his junior appropriators thereof, when it is necessary to protect the rights of the lower appropriators prior in time to him from the main stream." (Sec. 649, p. 1139).

For purposes of irrigation a stream includes not only the main stream, but a stream and all of its tributaries and branches.

"All the streams of water within a single watershed, under the doctrine of appropriation, are considered as a composite body and include not only the main water course, but also all the branches and tributaries to the same. Hence it follows that prior appropriations of the water of the main stream include the right to the waters of the tributaries above the point of diversion to the full extent of those prior appropriations." (Sec. 649).

The subject matter of the Board's investigation and thing to be distributed by the Board is all the water in the entire source of supply. No one of the claimants has title or a right to any certain water, but each claimant has only a right to a certain portion of the entire available quantity of water. The vital question is one of supply. See

Stricker vs. Colorado Springs, 16 Col., 61, 25 Am. St. Reps., 245.
Kinney on "Irrigation and Water Rights," Secs. 288-9.

Each water user is directly interested in the whole of the source of the water supply. As said by the Supreme Court of Utah, the rights of an appropriator "carry with them an interest in the stream from the points where the waters are diverted from the natural channel to the source from which the supply is obtained." Cole vs. Richards Irrigation Co., 27 Utah 205, 75 Pac. 376, 101 Am. St. Reps. 692. See also 40 Cyc. 717. Such appropriator can prevent the unauthorized taking of water at any point in his source of supply whether it be from the main stream, from a remote tributary or from a spring rising upon another's land, when such taking decreases the supply of water to which he is entitled. See Kinney on "Irrigation and Water Rights," Section 311.

The waters of the tributaries are inseparably connected with the waters of the main stream. An appropriation of water from the main

stream decreases the amount of water subject to appropriation in the tributary and the appropriation of water from a tributary decreases the amount of water subject to appropriation in the main stream.

Without further elaboration, it is sufficient to state that if the proceeding under the statute were limited to less than the main stream and all its tributaries within the watershed, the results would be incomplete and unsatisfactory, the findings of the Board would be inaccurate and indefinite, confusion and litigation would arise, and the purpose of the law would not be accomplished.

The language used in certain sections of the Act indicates a purpose to include the tributaries as well as the main stream. For example, Section 129 provides that whenever the Board has determined the rights of the various claimants to the use of water upon any stream or other source of water supply, "it shall be the duty of all claimants interested in such streams or other source of water supply to appear and submit their respective claims," and the section further provides that if any such claimant fails to appear and submit proof of his claim, he shall, after three years from the date of the entering of the order, be barred and estopped from subsequently asserting any rights theretofore acquired upon the stream. The use of the words "all claimants interested in such streams or other source of water supply" indicates a purpose to include in the adjudication the rights of all persons having any character of interest in the waters of the stream. As hereinbefore explained, it is clear that all persons claiming the right to take water from the tributaries of a stream are directly interested in the waters of the stream.

The Oregon statute for the determination of water rights is very similar to the Texas statute. Indeed, the Texas statute is modelled largely after the Oregon statute. The forms prepared by the State Board of Control of Oregon for use in the determination of water rights show that it is the practice, under the Oregon statute, to adjudicate at the same time the water rights on the tributaries as well as on the main stream.

The Wyoming statute is also similar to the Texas statute. The facts in the case of Nichols vs. Hufford, 133 Pac. 1084, indicate that it is the practice in Wyoming to include the tributaries in the adjudication. The case arose out of the adjudication of the water rights in Bear River and its tributaries. The matter directly involved in the suit was a contest over a claim to the water in Pine Creek, a tributary of Smith's Fork, which was a tributary of Bear River.

Even if it were conceded that the Board under the Texas statute has the authority to adjudicate the water rights in a stream without at the same time determining the rights in the tributaries, the Board would undoubtedly have the authority, under Section 40 of the Act, which authorizes it to adopt and enforce rules, regulations and modes of procedure, to adopt and enforce a rule to the effect that the rights on tributaries should be adjudicated at the same time as the rights on the main stream, and to so prepare its forms for use in the determination of water rights as to include the tributaries, and we respectfully suggest this course to the Board.

We realize that the conclusion which we have reached, in response

to your question, will require considerable additional labor, time and expense, but the benefits to be derived from a thorough and complete adjudication of the whole source of water supply will more than compensate.

Yours very truly,
G. B. SMEDLEY,
Assistant Attorney General.

OP. NO. 1812—BK. 50, P. 72.

PUBLIC WATERS—IRRIGATION—ACT APPROVED MARCH THE 19TH, 1917.

The provision of Section 16 of the above act, to the effect that nothing in the act shall affect or restrict the right of any person owning land to construct on his own property any dam or reservoir which would impound less than 500 acre-feet of water, does not give such person the right to use, without permit, the water impounded by such dam or reservoir or to impound and hold in such reservoir water needed by water-users having a prior right. The provision merely gives such person the right to construct such dam or reservoir without submitting his plans to the Board of Water Engineers for approval.

August 25, 1917.

Hon. W. T. Potter, Secretary Board of Water Engineers, Capitol.

DEAR SIR: In a recent letter, you have requested the Attorney General for a construction of the latter portion of Section 16 of the General Irrigation Law passed by the Twenty-fifth Legislature. The portion of the section in question is as follows:

"* * * provided, however, that nothing in this section or in this act shall affect or restrict the right of any person or persons owning lands in this State to construct on his own property any dam or reservoir which would impound or contain less than five hundred acre-feet of water."

The provision quoted is a portion of Section 16, which section together with Sections 17, 18 and 19, have for their purpose to give, for a limited time, a priority to any person or corporation undertaking to investigate the feasibility of a project for the creation of a reservoir for impounding flood waters in large quantities. The provision in question is not germane to these sections and is improperly placed and became a portion of the law as an amendment to the bill as originally introduced. By its language, it undertakes only to give to a person owning land in the State the right to construct on his own property a dam or reservoir which would impound less than 500 acre-feet of water, without the construction of such reservoir being subject to the general restrictions and limitations in the irrigation law. But for this provision of Section 16 such person, if the dam or reservoir were constructed on or across any stream of the State or so constructed as to impound water from a stream of the State, would be obliged to submit the plans for the dam or reservoir to the Board of Water Engineers for its approval. See Section 15 of the Act.

By Section 20 of the Act the Board in certain cases is given the

right to require additional detailed plans and specifications, and by Section 22 of the Act the Board is given the right to determine whether the plans, plats, etc., are in compliance with the law and with the regulations of the Board and is given the right to require the amendment of the same. By Section 31 the Board is given the authority to inspect impounding works during their construction and to determine whether or not they are being constructed in a proper manner and in accordance with the order of the Board.

We believe that a proper construction of the proviso in Section 16 is that it was intended to exempt the owner of the land desiring to construct a dam or reservoir on his own property to impound less than 500 acre-feet of water from securing the approval of the plans of such dam or reservoir by the Board of Water Engineers before construction, and to exempt such dam or reservoir during the construction from the supervision of the Board under Sections 15, 20, 22 and 31, above referred to.

The provision in Section 16 says nothing whatever about the taking or using of water, and it would not be a reasonable construction of it to conclude that it was intended to give to such person the right, without permit, to use or divert the water impounded by the dam or reservoir.

It is the taking and using of the waters of the streams of the State that the irrigation law is intended to regulate. The important things are, that no person not entitled to the water shall divert it from the stream, and that persons entitled to the water shall take no more than they need. These matters are regulated by those portions of the law which require permits to be obtained for the taking of water, by those portions of the law which limit the quantity of water which one person takes to the amount beneficially used, and by those portions of the law which give to the Board the right to prevent waste, etc. For example: Section 6 defines an appropriator as one who has made, or who may hereafter make, *beneficial use* of water within the limitations of a lawful permit. Section 9 of the law defines beneficial use as *the application of water* for a lawful purpose. Sections 34 and 35 prescribe penalties for *the wilful taking or diverting of the water* without first complying with the law. Section 96 gives the Board authority to prevent waste of the water, and Section 98 gives to any person injured by waste the right to maintain an action for damages.

That the vital thing in the law is the taking, using or diverting of water is shown by the last paragraph of Section 15, which permits the enlargement or extension of any existing canal or other work which does not contemplate or which will not result in the use of a larger volume of water.

It would be unreasonable to conclude that the Legislature, by the provision of Section 16, which has been quoted, intended to allow any person who happened to own the bed of a stream to construct a dam or reservoir, and to take and use such a large quantity of water impounded by the same and to deprive other persons having prior rights of their rights to use the water. The provision does not relate at all to the taking or use of the water, and it ought not to be

given a construction which would largely defeat the principal purpose of the law and which would interfere with existing rights.

We do not believe that the owner of such dam or reservoir could even hold the water of the stream behind the dam or in the reservoir to the injury of those having prior rights to the water. The holding of the water under such circumstances and when needed by persons entitled to use the same would amount to waste of the water which could be prevented by the Board. See Section 96.

The Board is also given the right, by Section 39, to condemn existing works, which may become a public menace or dangerous to life and property, and we do not believe that dam or reservoir constructed under the provisions of Section 16 is exempted from this authority given the Board by Section 39.

The Board would also have authority, under Section 96, to declare such dam or reservoir, constructed under the provision of Section 16, which has been quoted, to be a public nuisance, in the event the holding of water in the same amounted to waste. We reach these conclusions because of the fundamental rule that though a person may have the right to construct or maintain property he may not so maintain or use his property as to injure another.

We therefore advise you that a person owning land in this State may, under the portion of Section 16 which has been quoted, construct on his own property any dam or reservoir which would impound less than 500 acre-feet of water without submitting his plans to the Board of Water Engineers and obtaining approval of the same and without making any application to the Board for a permit to construct such dam or reservoir, but that the right given him by this section to construct such dam or reservoir does not give him, without obtaining a permit therefor, the right to take or use the water impounded by the dam or reservoir (when, of course, such water is public water of the State). If the water to be impounded by the dam or reservoir is public water of the State, as defined in the first three sections of the law, the person constructing such dam or reservoir can not take or divert the same without obtaining a permit from the Board for that purpose.

We have discussed this question without reference to the right which the owner of the dam or reservoir may have to take a certain quantity of the water from the stream, under certain circumstances, by reason of riparian ownership.

Yours very truly,
G. B. SMEDLEY,
Assistant Attorney General.

OP. NO. 1873—BK. 50, P. 405.

IRRIGATION—ADJUDICATION OF WATER RIGHTS—COSTS—ACT OF MARCH 19, 1917.

Contests provided for by Sections 114 and 115 of the Irrigation Act of 1917 should not be heard at the time of the taking of testimony, un-

der Sections 106 to 110, but should be filed after the completion of the taking of the testimony and after all the evidence has been placed on inspection under Section 111 and should be heard after notice of the contest as provided by Section 114. All contests should be heard before the making of the final order of adjudication under Section 118.

While Section 112 and other sections authorize the board to make various expenditures in the course of the adjudication of water rights, such expenditures to be paid out of an appropriation for that purpose, and Section 113 directs that money so expended shall be charged as costs and paid into the State treasury when collected, no method is provided in the act for the collection of such costs.

January 29, 1918.

Hon. W. T. Potter, Chairman Board of Water Engineers, Capitol.

DEAR SIR: In your letter of January 24th to the Attorney General you refer to Sections 105 to 129 of the Irrigation Act of 1917, which relate to the adjudication by the Board of Water Engineers of the relative rights of the various claimants to the waters of the streams of the State, and you desire to be advised whether the contests, which may be filed under Section 114, should be filed and considered at the time of the taking of testimony by the Board under Section 106, or should be considered by the Board at the time of the final adjudication under Section 118.

The sections of the Irrigation Act above referred to outline an elaborate and expensive, but at the same time an orderly plan for the adjudication of all the water rights on the streams of the State. It evidently is the purpose of the Act that the Board of Water Engineers shall finally, after full hearings and investigations, determine and adjudicate the relative water rights of all claimants on all the public streams of the State. Any one or more water users may file a petition requesting the determination of the relative rights of the various claimants to the waters of any public stream of the State. (See Section 105.) When this has been done, the Board is required to prepare and publish a notice, giving the place and time when the taking of the testimony as to the rights of the parties claiming water shall begin. Testimony must be taken in each county through which the stream flows. (See Section 106.) In addition to the published notice, the Board is required to send a notice by registered mail to every person or corporation shown by the records of the Board to be a user or claimant to the use of the water upon the stream, which notice shall state the date when the Board will take the testimony in the county of the claimant's residence. (See Section 107.)

Section 110 directs that the Board shall take the testimony in the different counties on the dates named in the notices. By Section 111 it is provided that "upon the completion of the taking of testimony" the Board shall give notice, by registered mail, to the various claimants that at the time and place named in the notice "all of said evidence shall be open to inspection to the various claimants." This section directs that the Board shall keep such evidence open for inspection for such lengths of time as, in the opinion of the Board, shall be necessary to permit anyone interested to examine the same. By Section 114 any person or corporation claiming any interest in the stream is given the right to contest "any of the rights of the persons who have

submitted evidence as aforesaid." The person desiring to make such contest shall file written notice with the Board of Water Engineers stating the grounds of his contest, etc., which written notice shall be filed "within thirty days after the expiration of the period as fixed in the notice for public inspection." When any such contest has been filed, the Board is required to notify the person or persons whose rights are contested and to hear the contest by taking the evidence, etc. (See Section 115.)

Section 116 directs that upon the expiration of the period for which the evidence is kept for inspection "the evidence in the original hearing before the Board of Water Engineers, or any member or members thereof, together with the evidence taken in all contests, if any, shall be transmitted to the office of the Board of Water Engineers." By Section 118 it is provided that as soon as practicable after the compilation of the data and the filing of the evidence in the office of the Board it shall make and enter of record its "findings of fact and its order of determination, determining and establishing the several rights to the waters of said stream." This is the final judgment of the Board, and by later sections of the Act it is made conclusive on all persons, unless an appeal is taken from the findings to the district court, as provided in Sections 120 and following.

It is believed that the foregoing outline of a portion of the Act indicates the order of the procedure intended to be followed. In our opinion, it was not intended that the Board should hear any contests during the time of the taking of testimony, under Sections 106 and following. All the evidence in the different counties should first be taken, and after this has been done, all the evidence should be placed on inspection at such place, or places, and for such time as shall be necessary to permit anyone interested to examine the same. The language of Section 111 indicates that the evidence to be placed on inspection is all of the evidence taken in all of the counties. One purpose of this provision of the law, and perhaps the primary purpose, is that the water claimants may have full opportunity to examine all of the evidence as to all of the claims on the stream in order to determine whether they desire to contest any of such claims. A claimant might after examining all of the evidence taken in the county in which his land is situated determine that he should contest some claim in such county, but after examining the evidence taken in adjoining counties, he might determine that such contest would avail him nothing, or he might determine that he ought to contest not only some claim or claims in his own county, but, also, at the same time some claim or claims in other counties. The stipulation in Section 114, that all contests shall be filed within thirty days after the expiration of the period for public inspection clearly indicates that no contest should be filed and certainly that no contest should be held until the taking of all the testimony has been completed and the evidence placed on public inspection.

It is clear also from Sections 116 and 118 that all contests shall be heard and considered by the Board before the entry of the final order of adjudication under Section 118. This is indicated by the language

of Section 116 to the effect that after the expiration of the period for inspection the evidence taken in the original hearings, as well as the evidence taken in all contests, shall be transmitted to the Board and by the language of Section 118, to the effect that after the compilation of the data and the filing of the evidence, the Board shall make its final adjudication. The making of its findings of fact and entry of its order is the final action by the Board in the adjudication of the water rights, and in such findings and in such order all the rights of the different claimants and all of the contests should be included and determined.

We therefore advise you, in response to your first question, that contests should be filed and considered subsequent to the taking of all the testimony relating to all the rights on the stream and after the evidence has been placed on inspection, and that such contests should be filed and heard before the entry of the final order of determination provided for in Section 118.

In your letter of January 24th, and in another letter of January 25th, you desire to be advised as to the method of collecting the expenditures and costs referred to in Sections 112 and 113 and in other sections of the Act.

An examination of the whole of the Act which relates to the adjudication of water rights shows that a great many expenses are necessarily incurred in the course of the procedure outlined for such adjudication. Section 112 directs that most, if not all, of such expenses shall be paid out of a fund created for that purpose and for which the Legislature shall make an appropriation. Section 113 directs that any money expended in accordance with Section 112 "shall be charged as costs in the proceedings creating the necessity for its expenditure" and that upon collection thereof such sums shall be deposited with the State Treasurer. No method is provided, however, for the collection of such costs, and after an examination of the whole Act we have concluded that there is no manner in which the Board can enforce the payment of such costs. The machinery for the adjudication of all the water rights on any stream and its tributaries may be put in motion on the petition of anyone or more claimants, but such person is not required to give security for costs.

It can not reasonably be concluded that it was the intention of the Legislature that the person filing such petition should be legally liable for all the expenses and costs incident to the adjudication, for the rights of very many persons are determined and the adjudication benefits them as much as it benefits the petitioner and is also beneficial to the general public. The Board is not given the authority to apportion the expenses and costs among the different persons whose rights are measured and determined, nor is a contestant, under Section 114, required to give any security for the costs growing out of his contest. It is not provided that he shall pay the costs if he loses his contest or that the person, or persons, whose rights are contested shall pay the costs of a successful contest.

The cost bond required to be given under Section 121 by any person appealing from the final adjudictaion of the Board is not given

to secure the payment of the costs and expenses theretofore incurred in the hearings and adjudication by the Board, but apparently is intended only to secure the costs incident to the appeal and the proceedings following the appeal. It would not be reasonable to assume that the Legislature intended to make a person appealing from the Board's order liable, if unsuccessful, for all the costs incident to the hearing and determination by the Board. The law is very clearly defective. It was evidently intended that expenditures made under Section 112 should be charged as costs in the proceedings creating the necessity for the expenditure, and that such costs should be collected and paid into the Treasury, but because no method was provided for the collection it is our opinion that the greater part, if not all, of the expenses incurred in the hearings and determination by the Board must be paid out of the appropriation made by the Legislature and that such burden must be borne by the State until some adequate method is provided for the apportioning and collection of costs.

We believe that, because of the language of Section 113 and because of the broad power given the Board by Section 40 to make, promulgate and enforce rules, regulations and methods of procedure in certain instances where the costs are clearly traceable to the person responsible for the proceeding, creating the necessity for their expenditure and for whose peculiar benefit the proceedings were had, the Board would be justified in charging such costs to the person responsible for the proceeding. An unsuccessful contest would probably be an example of such case. However, there is no method by which the Board could compel the payment of such costs so charged.

We believe that the foregoing answers the several questions in your two letters.

Yours very truly,
G. B. SMEDLEY,
Assistant Attorney General.

OPINIONS ON MISCELLANEOUS SUBJECTS.

OP. NO. 1911—BK. 51, P. 142.

NEPOTISM—COMMISSIONERS COURT.

It would be a violation of the anti-nepotism law on the part of each member of the commissioners' court to appoint a county engineer who is a brother-in-law of one of the commissioners, and the fact that a commissioner related to the prospective engineer did not vote would not relieve the transaction of its vice.

April 9, 1918.

Hon. Mike T. Lively, District Attorney, Dallas Texas.

DEAR SIR: The Attorney General has your letter of April 8th, as follows:

"This office would greatly appreciate an immediate ruling from your department on the following question, to wit: Would it be a violation of the anti-nepotism statute of this State for the commissioners' court of the county to collect and pay out of county funds a county engineer who is a brother-in-law of one of the commissioners, and would the fact that the commissioner related to such county engineer failed to vote for his appointment make any difference where the compensation came from general county funds."

Replying thereto, you are advised that it would be a violation of the anti-nepotism statute for your commissioners court to select a county engineer who is a brother-in-law of one member of the court.

Article 381 of the Penal Code of this State is as follows:

"Subject to the exception 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, district, 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, or member of the Legislature, to appoint, or 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, the Legislature, 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 whatsoever."

Article 382 enumerates the officers to which this law applies, among which is the county commissioner. Article 381 prohibits the officers enumerated from appointing, voting for or voting 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 such board. The last expression makes the law applicable to all members of the commissioners court and prohibits their voting for the appointment of any person related

to any member of the court. Therefore, the fact that the brother-in-law who is a commissioner does not vote would not make such appointment legal.

Brothers-in-law are related in the first degree by affinity, being one degree removed from the common ancestry.

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

OP. NO. 1658—BK. 48, P. 189.

PUBLIC WAREHOUSEMEN—PERMANENT WAREHOUSE AND MARKETING ACT.

Acts Thirty-third Legislature, First Called Session, Chapter 37.
Permanent Warehouse and Marketing Act, Section 10.

1. Public warehousemen operating under Chapter 37, Acts First Called Session Thirty-third Legislature are required to give but one bond in any one county regardless of the number of warehouses they may operate in such county.

2. But they are required to give a bond and obtain a certificate in each county in which they operate.

3. Corporations chartered under the permanent warehouse and marketing act are only required to give one bond regardless of the number of warehouses they may operate.

September 6, 1916.

Messrs. F. C. Weinert and Peter Radford, Managers, Warehouse and Marketing Department, Capitol.

GENTLEMEN: You desire the opinion of the Attorney General as to whether a public warehouseman having more than one warehouse is required to give a separate bond for each warehouse, or whether one bond can be given covering all.

I assume that your inquiry relates to the provisions of Chapter 37, Acts of the First Called Session of the Thirty-third Legislature. We beg to advise you, that it is the opinion of this office, that one bond is sufficient. You will note that Section 3 of Chapter 37, aforesaid, reads as follows:

"The owner, proprietor, lessee or manager of any public warehouse, whether an individual, firm or corporation, before transacting any business in such public warehouse shall procure from the county clerk of the county in which the warehouse or warehouses are situated a certificate that he is transacting business as a public warehouseman under the laws of the State of Texas, which certificate shall be issued by said clerk upon a written application, setting forth the location and name of such warehouse or warehouses, and the name of each person, individual or a member of the firm interested as owner or principal in the management of the same, or, if the warehouse is owned or managed by a corporation, the names of the president, secretary and treasurer of such corporation shall be stated, which application shall be received and filed by such clerk and preserved in his office, and the said certificate shall give authority to carry on and conduct the business of a public warehouse, within the meaning of this act, and shall be revokable only by

the district court of the county in which the warehouse or warehouses are situated, upon a proceeding before the court, on complaint by written petition of any person, setting forth the particular violation of the law, and upon process, procedure and proof, as in other civil cases. The person receiving a certificate, as herein provided for, shall file with the county clerk granting same a bond payable to the State of Texas, with good and sufficient surety, to be approved by said clerk, in the penal sum of five thousand dollars, conditioned for the faithful performance of his duty as a public warehouseman,—which said bond shall be filed and preserved in the office of such clerk."

You will observe that the proprietor, owner, lessee or manager, whether an individual or corporation before transacting business, must procure from the county clerk of the county in which the "warehouse or warehouses are situated a certificate, etc." This clearly indicated that a warehouseman might have more than one warehouse in the same county. The concluding sentence of this section of the law is the one which provides for the bond and declares "the person receiving a certificate as herein provided for, shall file with the county clerk granting same, a bond payable to the State of Texas with good and sufficient surety to be approved by said clerk in the penal sum of $5000.00, etc." Stated in another form the law requires that a public warehouseman shall receive a certificate as such, from the clerk of the county in which is located his warehouse or warehouses; in order to obtain this certificate, he must file a $5000.00 bond; having filed the bond and obtained the certificate, he is at liberty to conduct as many warehouses as he desires in that particular county. Of course if a warehouseman transacts business in more than one county, he will be compelled to file a bond and obtain a certificate from the county clerk of each county in which he transacts business.

This seems to me is the plain reading of the law. If your inquiry relates also to warehouse chartered under the Permanent Warehouse and Marketing Act, we beg also to advise you, that one bond is sufficient. Section 10 of this Act provides that before the charter is delivered to a corporation and the certificate of authority issued "the corporation shall execute by its proper officers a bond payable to the State of Texas, the amount of such bond to be determined by the Commissioner of Insurance and Banking, taking into consideration the capacity of the warehouse and the amount of business proposed and likely to be conducted, and such bond may be changed from time to time in accordance with the volume of business done or to be done."

This section of the law immediately follows Section 9, which states the requisites of the charter of the corporation. Subdivision 2 of Section 9 declares that the place or places where the business of the corporation is to be transacted should be stated in the application for a charter, thus clearly showing that the law contemplates that a corporation chartered under the Permanent Warehouse Act may operate more than one warehouse; and that, therefore, our view of the matter that one bond is sufficient follows the rules of construction because that requirement is a part and a parcel of that portion of this Act prescribing the method of authorizing a bonded warehouse under the Permanent Warehouse and Marketing Act.

You are advised, first, that public warehousemen operating under Chapter 37, Acts of the First Called Session of the Thirty-third Legislature, are required to give but one bond in any one county regardless of the number of warehouses that they may operate in such county; but that they are required to give a bond and obtain a certificate in each county in which they operate.

Second, That a corporation chartered under the Permanent Warehouse and Marketing Act is only required to give one bond regardless of the number of warehouses they may operate.

Yours very truly,

C. M. CURETON,

First Asistant Attorney General.

OP. NO. 1664—BK. 48. P. 202.

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 theren 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 made 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 associations 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, transportation, 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 mar-

ket 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 special number of coats of plaster be used, can not be construed to be any restriction in trade or com-

merce 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.
Ft. 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 Ft. 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 Ft. 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 Ft. 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 & 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 stated, was decided by the Court of Civil Appeals at Ft. 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 overrruled. 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 decided 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 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 cannot be denied that the architect has the right to engage in his business or profession, 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 busineess.

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 combinations 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.

Very truly yours,
C. A. SWEETON,
Assistant Attorney General.

OP. NO. 1663—BK. 48, P. 217.

ANTI-TRUST LAWS—LAUNDRIES.

1. A laundry is not engaged in trade or commerce, nor does it sell or exchange articles of merchandise and commodities, nor is it a manufacturer. Its business is that of performing a service for hire. It is a laborer.
2. Our anti-trust laws do not prohibit combinations affecting personal service or personal labor unless such combinations restrict the pursuit of a business authorized by law.
3. Certain resolutions of Laundrymen's Association dealing with the question of compensation for personal service or personal labor and not being restrictions in the pursuit of a business authorized by law held not prohibited by anti-trust statutes.

September 30, 1916.

Mr. Eugene Cherry, care Sherman Steam Laundry, Sherman, Texas.

DEAR SIR: You have requested the opinion of this Department as to whether or not the resolutions passed by the Laundrymen's Association of Texas at its recent meeting are in conflict with the Anti-Trust Statutes of this State. The resolutions adopted are as follows:

Whereas, the cost of handling laundry work has increased during the past year to such an alarming degree, especially that class of work known as ship work, and

Whereas, it is so apparent that a radical change must necessarily be made in the methods of handling this class of work, in order to meet the enormous increase in the cost of every commodity used in the preparation of laundry work, and realizing that the transportation charge on laundry should be taxed against the customer, where it justly belongs,

Resolved, That the laundrymen of Texas, in convention assembled, adopt in a modified way what is known as the North Dakota plan of pro rating express, and in order to successfully place this plan in operation a code of rules are hereby adopted as follows:

1. That after December 1st, 1916, we will not allow commission in excess of 25 per cent. and will not allow free or deadhead work.
2. That we will not solicit new agencies for a period of six months after August 31st, 1916.
3. That for all work offered and accepted during the six months intervening between August 31st, 1916, and March 1st, 1917, a commission of 25 per cent. will be allowed and all such work returned to the agent c. o. d. for all charges.
4. That no laundry doing a shipping business shall at any time take work from any town where a laundry is in operation, operated by a member of this association, on a price basis less than is charged by said local laundry.
5. That in taking on new agency work the practice of furnishing wagons, paying for telephone or for the gathering of work, etc., be absolutely discontinued.
6. That this association shall work in harmony with other State associations who have adopted or may adopt this or similar plans.
7. The intent of these resolutions is that they shall not in any way conflict or violate the statutes of the Commonwealth of Texas.

In order that the plan of pro rating express may be placed in successful operation at the earliest possible moment, and in order further that the interests of all may be best conserved and that a hardship may not fall on any laundry owned in the State on account of unfair or unjust competition, the following resolution was offered and unanimously adopted:

Whereas, the pro rating express plan is one of great moment to the launderers of this State, and

Whereas, in the judgment of this committee the plan can be best applied through the dividing of the State into sections or districts, be it

Resolved, That a committee be appointed for the purpose of dividing the State into districts to be headed by captains, governors or such other officials as may be determined by the committee, it being understood that these district governors shall work in harmony with the plans or policies of this association.

The first inquiry naturally arising in the investigation of this question is—what is the business of a laundryman? This question must first be determined before we can decide whether or not our anti-trust code has any application to the resolutions above set out.

Briefly stated, the business of a laundryman is to wash and iron linens and other wearing apparel. It is washing, ironing and starching. The laundryman does not sell or exchange articles of merchandise, produce or commodities. He is not a manufacturer nor is he engaged in trade or commerce. His business is simply rendering a service for others, and reduced to its last analysis it may be called labor. True his work is performed largely by the aid of machinery, but this is true in almost every field in which labor is employed. Our anti-trust code prohibits combinations having for their purpose restrictions in trade or commerce or aids to commerce; restrictions in the free pursuit of the business authorized or permitted by law; the fixing, maintaining, increasing or reducing the price of merchandise, produce or commodities; the lessening of competition in the manufacture, transportation, sale or purchase of merchandise, produce or commodities; the fixing or maintaining of any standard or figure whereby the price of any article or commodity of merchandise, produce or commerce shall be in any manner affected, controlled or established; the regulation, fixing or limiting of the out-put of any article or commodity which may be manufactured, mined, produced or sold, 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; the abstaining from engaging in or continuing business or from the purchase or sale of merchandise, produce or commodities; the consolidating of two or more corporations for the purpose of preventing or lessening competition; the agreeing to refuse to buy from or sell to any other person, firm, corporation or association of persons any article of merchandise, produce or commodity. The term "trade" as used in our anti-trust statutes means the buying and selling of commodities. "It embraces the buying and selling of any article of commerce, the barter of such articles and their transportation by common carriers." Queen Insurance Company vs. State, 34 S. W., 397.

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.

The term "commodity" was defined by our Supreme Court in the Queen Insurance Company case, *supra,* as follows:

"The word is ordinarily used in the commercial sense of any mov-

able 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."

Labor is not an article of trade or commerce, nor is it produce, merchandise or a commodity.

Our anti-trust statutes do not comprehend combinations affecting the terms and conditions of personal labor or personal service unless such combinations should in any case fall within the condemnation of that portion of the statute denouncing combinations for the purpose of restricting the free pursuit of a business authorized or permitted by the law.

The courts of our State in a number of cases have construed said clause of the statute to mean that the restriction must be upon the pursuit of the business of others than those embraced in the combination or agreement and that the business restricted must be one authorized by law. A business authorized or permitted by law is one which the law gives the right to engage in independent of contract and irrespective of the consent of any person whomsoever. State vs. M. K. & T. Ry. Co., of Texas, 91 S. W., 214; Ft. Worth & D. C. 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.

The agreements of the laundrymen as evidenced by the resolutions under consideration have the effect of increasing prices for work done by them, of lessening competition in such work and of fixing the compensation of agents who represent them; but as each and all of the resolutions deal with the subject of labor or service and as no business of any other person which the law authorizes him to engage in is restricted, they are not prohibited by our statute.

Let us examine each resolution and see if we are correct in the conclusion above stated. It will no doubt be conceded that if the resolutions deal only with personal work and personal service, and if they do not restrict the pursuit of a business authorized by law, then the statute does not condemn them. We will therefore analyze each resolution for the purpose of determining its meaning and its scope.

The First Resolution deals with the commission to be allowed agents for their services and the giving of free work. This is an agreement to fix the compensation of agents. It is an agreement to pay the agents a certain compensation for *work*. It in no way affects trade, commerce, the price of merchandise, produce or commodities, and as the law does not confer upon the agent or any other person the right to represent the laundries without their consent, no business authorized by law is restricted.

Resolution Second provides that the laundries will not solicit new agencies for a period of six months after a given time. This is simply an agreement among the laundrymen not to employ new men to *work* for them for the period designated. It does not affect in any manner trade or commerce, the price of merchandise, produce or commodities, and as no one has the right under the law to demand or compel employment by the laundries, no business authorized by law is restricted.

Resolution Third provides that for all work offered and accepted by the laundries during a certain period of time a commission of twenty-five per cent only will be allowed and all such work returned to the agent c. o. d. for all charges. This resolution, like the first one, comprehends the fixing of compensation for the agents, and the remarks made regarding resolution First are applicable here.

Resolution Fourth provides that no laundry doing a shipping business shall take work from any town where a laundry is in operation operated by a member of the Laundrymen's Association on a price basis less than is charged by said local laundry. This resolution is an agreement among the laundrymen to fix the price of *labor* in the towns where association laundries are in operation. It does not affect trade or commerce, the price of merchandise, produce or commodities, and as no one has the lawful right to demand that the laundries render service at any price, no business authorized by law is restricted.

Resolution Fifth provides for a reduction in the expenses of the work pertaining to the establishment and maintenance of new agencies. It means that the laundrymen will require their new agents to furnish wagons, pay telephone bills and bear the expense of gathering the work, and the effect of it is to fix or lessen the compensation of their new agents for *work* performed, and no business authorized by law is restricted because no new agent, nor any other person has any lawful right to perform any service for the laundrymen without the consent of the parties involved.

There is nothing contained in resolution Sixth requiring comment.

Resolution Seventh is an agreement to divide the State into districts and thereby lessen competition in *labor,* no business authorized by law being involved.

It is therefore manifest that these resolutions deal only with the question of personal labor and personal service and that no business of any character authorized or permitted by the laws of this State is or can be in any manner restricted by the observance thereof.

Questions similar to these have been decided by courts of other states, but the courts of our State so far as we are aware have never been called upon to determine whether or not our statute embraces laundries within its scope.

In the case of Downing vs. Lewis et al, 76 N. W. 900, it was held by the Supreme Court of Nebraska that a combination between persons engaged in the laundry business was not inhibited by the anti-trust statutes of that state. The case arose out of a sale made by one laundryman to another, by the terms of which it was agreed that the seller should not engage in the laundry business in the city where the sale occurred for a period of five years. It was alleged that the seller breached the agreement and the purchaser brought suit for damages and for an injunction. The lower court gave judgment for defendant and plaintiff appealed. The Supreme Court reversed the judgment of the lower court on the ground that the agreement in question was lawful under the common law and that the anti-trust statute of the State of Nebraska did not condemn said agreement. The statute of

Nebraska, which was construed by the court in said case denounced combinations between persons, firms or corporations engaged in the manufacture or sale of any article of commerce or consumption for the purpose of fixing a common price for any such article or product. The court held that a laundry, the business of which is to wash and iron linen and other wearing apparel, is not a manufacturing establishment and therefore the terms of the statute could not apply.

In the case of State ex rel. Moose, the Attorney General vs. Frank et al., 169 S. W. 333, the Supreme Court of the State of Arkansas held that an agreement to fix the price of laundering not being an agreement to fix the price of a commodity, convenience or repair as these words are used in the anti-trust statutes of Arkansas, prohibiting combinations to fix the price of any commodity, convenience or repair, did not offend against the anti-trust statutes of that State. In this case the Attorney General of Arkansas brought suit against certain parties in said State to recover penalties for alleged illegal combinations in violation of the anti-trust laws of said State. It appears from the facts stated in the opinion that certain persons engaged in the laundry business entered into a combination and agreement for the purpose of fixing the prices of laundering and for the further purpose of suppressing and eliminating competition in said business. The suit was brought in the Circuit Court of Pulaski County. The defendants demurred to the plaintiff's petition on the ground that same showed no cause of action under the laws of said state. The trial court sustained the demurrer from which judgment the State appealed. The Supreme Court affirmed the judgment holding that the combination declared upon in said cause between persons engaged in the business of laundering did not come within the terms of the anti-trust code of said state.

The Arkansas statute prohibits combinations to regulate or fix the price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining or any article or thing whatsoever,' or to maintain said price when so regulated or fixed or to fix or limit the amount or quantity of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining or any article or thing whatsoever. It was contended by the State in the case above cited that the allegations of the petition showed an agreement to fix the price of a commodity, convenience or repair. In disposing of this question, the court said:

"In construing this act we must bear in mind that it is highly penal, and as such must receive a strict construction. * * * Nor are we concerned with any consideration of the economic questions involved in this act. A study of its terms makes the fact plain that the Legislature has not included within the inhibition of this act agreements relating to the price of labor. * * *

"If the business of laundering is not a commodity, then an agreement fixing prices for the performance of that service is not within the inhibition of the anti-trust act. No other word or term in that act could include that business. The act does use the word 'repair,' but it cannot be seriously contended that this word is sufficient to embrace the business of laundering. It may be true that to some extent laundries do repair the clothes which they wash, but it does this as a mere incident to that business, and by such service they merely repair the damage which

they have done in performing their service of making the clothes clean. The business of laundering is a mere service done, whether performed by hand or machinery, and an agreement to regulate the price to be charged therefor is in its last analysis merely an agreement to fix the price of labor or services, and the Legislature of this State has not made such an agreeemnt unlawful. Lohse Patent Door Co. vs. Fuelle, 215 Mo.; 421, 114 S. W., 997; Cleland vs. Anderson, 66 Neb. 252, 92 N. W., 306; State vs. Duluth Board of Trade, 121 N. W., 395."

The following cases hold that a laundry is not engaged in a manufacturing business. Commonwealth vs. Keystone Laundry Co., 203 Pa. 285; Muir vs. Samuels, 62 S. W. 481; In re White Star Laundry Co., 117 Fed. 570.

In the case of Rohlf vs. Kasemeir et al., 118 N. W., 276, the Supreme Court of Iowa held that an agreement of physicians to fix, regulate and establish the price of medical service and medical skill was not prohibited by the anti-trust statute of that State, because such services and such skill of a physician or surgeon are not an article of merchandise or commodities. On the question the court said:

"Used in connection with the term 'merchandise' and qualified as it is in the latter part of the section by the words 'manufactured, mined, produced or sold,' it is manifest that the statute was not intended to, and did not, include labor, either skilled or unskilled. It must be remembered that the statute is a criminal one and that such statutes must be strictly construed, and, in case of doubt, the construction must be adopted most favorable to the party charged. The only ground upon which appellant can stand with any show of plausibility is that labor is a commodity to be bought, sold or produced as merchandise. This is a strained and unnatural construction and gives to the word 'commodity' a meaning which is perhaps permissible, but is not the commonly accepted one. Under our statutes, words and phrases are to be construed according to the context and the approved usage of the language. With this in mind, we are constrained to hold that labor is not a commodity within the meaning of the act now in question. As supporting this conclusion, see Hunt vs. Riverside Club, 140 Mich., 538; 104 N. W., 40, 12 Detroit Leg. N. 264; Queen vs. State, 36 Fed., 250, 24 S. W., 397, 22 L. R. A., 483 It seems to be the almost universal holding that it is no crime for any number of persons without an unlawful object in view to associate themselves together and agree that they will not work for or deal with certain classes of men, or work under a certain price or without certain conditions. Carew vs. Rutherford, 106 Mass., 14 Am. Rep., 287; Commonwealth vs. Hunt, 4 Metc. (Mass.), 134, 38 Am. Dec., 346; Rogers vs. Evarts (Sup.), 17 N. Y. Supp., 268; United States vs. Moore, (C. C.) 129 Fed., 630.

"The statute in question was aimed at unlawful conspiracies or combinations in restraint of trade, and was manifestly not intended to cover labor unions. It is the right of miners, artisans, laborers or professional men to unite for their own improvement or advancement or for any other lawful purpose, and it has never been held, so far as we are able to discover, that a union for the purpose of advancing wages is unlawful under any statutes which have been called to our attention."

For other cases bearing on this question see American League Baseball Club of Chicago vs. Chase, 149 N. Y. S., 6; Metropolitan Opera Company vs. Hammerstein, 147 N. Y. S., 53; People vs. Klaw et al, 106 N. Y. S., 341.

Believing as we do that these resolutions involved in this opinion do not affect trade or commerce or the price of merchandise, produce

or commodities and that they in no way interfere with or restrict the pursuit of a business authorized by law, we therefore advise you that they are not prohibited by the anti-trust statutes of this State.

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

OP. NO. 1669—BK. 48, P. 250.

COUNTY AUDITOR—CLAIMS AGAINST THE COUNTY—MANDAMUS.

Upon the disapproval by the county auditor of a claim against the county the remedy of the holder of the claim is two-fold:
1. By suit against the county to establish the claim.
2. Mandamus to compel the approval by the county auditor.
Articles 1366, 1481, 1482 R. S. 1911.

October 24, 1916.

Hon. Marvin Scurlock, County Attorney, Beaumont, Texas.

DEAR SIR: The Attorney General is in receipt of your letter stating in substance that the county auditor of your county has refused to approve a claim against the county for the agreed portion payable by the county for the improvement of certain streets in the city of Beaumont.

You desire to know if mandamus against the county auditor to approve the claim is the proper remedy of the holder thereof to enforce collection.

Replying thereto, we beg to say that as we understand this controversy the commissioners court of your county acting upon opinions Nos. 1027 and 1359 of this department made an agreement with the city officials of the city of Beaumont to the effect that the county would to the extent of $1500.00 bear the expense of improving certain streets in that city, which streets were the continuation of county roads into and through the city; that upon presentation of the claim by the parties doing the work the county auditor refused his approval thereof.

In our opinion the holders of this claim have two remedies, either of which may properly be pursued to collect the amount owing by the county, such remedies being as follows:

1. Mandamus will lie to compel the county auditor to approve the claim, and,
2. The holders of this claim may bring suit against the county to establish the same.

Article 1366 of the Revised Statutes, provides as follows:

"No county shall be sued unless the claim upon which such suit is founded shall have first been presented to the county commissioners' court for allowance, and such court shall have neglected or refused to audit and allow the same or any part thereof."

Subsequent to the enactment of the article above quoted the Legis-

lature passed what is known as the County Auditor Law, a portion of Section 15 of which now constitutes Articles 1481, and 1482 of the Revised Statutes of 1911, which are as follows:

"All claims, bills and accounts against the county must be filed in ample time for the auditor to examine and approve same before the meetings of the commissioners' court, and no claim, bill or account shall be alllowed or paid until same shall have been examined and approved by the county auditor.

"It shall be the duty of the auditor to examine such claims, bills and accounts and stamp his approval thereon. If deemed necessary by the auditor all such accounts, bills or claims must be verified by affidavit touching the correctness of the same before some person authorized to administer oaths."

The case of Anderson vs. Ashe, county auditor, 90 S. W. 872, was instituted by Anderson, who was the sheriff of the county to compel the county auditor to countersign a warrant upon the county treasurer issued in his favor. The suit was instituted in the district court and the warrant being for only $225.00, there arose the question of jurisdiction. Upon the certified question from the Court of Civil Appeals from the First Supreme Judicial District the Supreme Court of the State answered the question as to the jurisdiction of the district court in the following term:

"We answer the first question in the affirmative. The amount of the claim was not in controversy in this case. The relator did not seek any judgment of the court as to the amount or the validity of his claim, but simply to enforce the performance of a ministerial act enjoined by law upon the auditor." Luckey vs. Short (Tex. Civ. App.), 20 S. W., 723.

It will be seen from the above quotation that the court approves the remedy by mandamus to compel the county auditor to countersign the warrant, being a suit simply to enforce the performance of a ministerial act, and we therefore advise that such a procedure would be proper in the case presented by you.

Upon the authority of the case of Anderson vs. Ashe, *supra*, we also advise that the county auditor of your county having disapproved this claim, the holders thereof have another and different remedy by way of suit against the county to establish such claim. The case above cited holds in effect that the disapproval of the county auditor places it beyond the power of the commissioners court to act upon the claim and amounts to a rejection by the court bringing it within the terms of Article 1366, denying the right to sue a county until the commissioners court shall have neglected or refused to audit and allow the account. In this case the court said:

"We conclude that the rejection by the auditor put it out of the power of the commissioners' court to act upon the claim and amounted to a rejection by that court, bringing it within the terms of article 790 of the Revised Statutes of 1895. Under this view of the statutes the plaintiff in this case had the right to sue the County of Harris to establish his claim against it. This construction preserves the rights of persons having claims against such counties and enforces the legislative intent."

We therefore advise that the remedy of the holder of the claim

may be either by mandamus to compel the county auditor to approve it or by suit against the county to establish the same.

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

OP. NO. 1670—BK. 48, P. 254.

PENSIONS.

A pensioner of the Federal Government under the Mexican Pension Act is not entitled to receive a pension from the State of Texas. The fact that a pensioner may have been placed upon the rolls of this State prior to the enactment of the present law creating the office of Pension Commissioner does not deprive the commissioner of the right to strike a pensioner from the rolls upon ascertaining that such pensioner was also drawing a pension from the Federal Government.

A pension is a bounty and the Legislature may prescribe the terms upon which such pension may be granted as it may see fit, not in conflict with the constitutional provision. The Constitution, Section 51, Article 3, Chapter 107, Acts Twenty-sixth Legislature. Chapter 141, Acts Thirty-third Legislature, Article 6284, R. S., 1911.

October 25, 1916.

Hon. J. C. Jones, Commissioner of Pensions, Capitol.

DEAR SIR: The department is in receipt of your letter, reading as follows:

"I have discovered that a pensioner of the State of Texas was granted a Confederate pension as the widow of a Confederate soldier in 1900 and that at the time this application was approved the widow was drawing a pension from the United States Government for services rendered by her deceased husband in the Mexican war, but no mention was made of this pension in applying for the Texas pension. It has now come to my attention and it is my desire to remove her name from our pension roll; have I the authority by law to do so, or will the fact that her application was approved prior to the date this office was created keep me from removing the name?"

Replying thereto, we beg to advise that on the 15th day of September, 1913, Hon. George W. Kyser, then the Commissioner of Pensions, submitted to this Department the question of whether or not a widow of a Confederate soldier then drawing a pension from the United States Government as the widow of a Mexican war soldier, was entitled to a pension on the record of her deceased husband as a Confederate soldier. In response to this inquiry, this department in an opinion rendered September 16, 1913, held that a widow of a Confederate soldier was not entitled to a pension from this State who at the same time was drawing a pension from the Federal Government as a widow of a Mexican war soldier. The opinion of this department so holding will be found on page 719 of the Report and Opinions of the Attorney General for 1912, 1914. The similarity of the questions presented by Mr. Kyser and yourself leads us to believe that the case you present was the one presented by Mr. Kyser.

You present, however, the further question as to your authority to remove this applicant from the roll, the pension having been granted prior to the time your office was created, and replying to this question we beg to say that in our opinion you have the author- known to you that the facts of the case do not bring the pensioner within the law authorizing the granting of the pension.

It is provided by Article 6284 of the Revised Statutes of this State, as follows:

"It shall be the duty of the Commissioner of Pensions, when it shall come to his knowledge that any person has been granted a pension through fraud or perjury, or that any one on the pension roll has, by reason of acquiring property or annuity, emolument or other income that would have prevented the granting of a pension had such conditions existed at the date of said application, to strike the name of such persons from the pension roll."

It appears from the correspondence submitted with your inquiry that the Pensioner in question was granted a pension by the Federal Government in 1888, as the survivor of a deceased husband who served in the Mexican war, and that in 1899 such pensioner was granted a pension by the State of Texas as the widow of a Confederate veteran. The Confederate pension law in effect at the time of the granting of this pension by the State was the Act of the Twenty-sixth Legislature passed at the Regular session thereof in the spring of 1899, and being Chapter 107, of the printed Acts of the Legislature. It is provided in this act that the word "indigent" within its meaning, shall be construed to mean one who is in actual want and destitute of property and means of subsistence. It is not necessary for us to determine whether or not a person drawing a pension of eight dollars a month from the Federal Government would be in indigent circumstances within the meaning of the act of 1899. By the act of 1909 indigency within the meaning of this Act is defined by Section 6 thereof, which is now Article 6272 of the Revised Statutes, to be those who are not, among other things, receiving aid or a pension from any State or of the United States or from any other source. While a Federal pensioner under the act of 1899 may not have been debarred from receiving a pension under the State law prior to the act of 1909, we think there can be no question but that with the amended definition of indigency as contained in the latter law, as well as the subsequent amendments thereto, a person is not in indigent circumstances within the meaning of the law who draws a pension from the Federal Government. By Section 51 of Article 3 of the Constitution, as amended in 1912, it is provided in substance that the Legislature may grant aid to indigent and disabled Confederate soldiers and their widows who came to Texas prior to January 1, 1900. It is also provided in this section that the Legislature shall have the power to levy and collect a tax upon property in this State not to exceed five cents on the one hundred dollars valuation for the purpose of paying such pensions. The Legislature in putting into effect this provision of the Constitution enacted Chapter 141 of the Acts of the Thirty-third Legislature and by such act defined indigency as hereinabove indicated. Any provision of this act of the

Legislature not in conflict with the constitutional provision above cited would be valid. The constitutional provision in effect at the date of the enactment by the Thirty-first Legislature of the Act of 1909 was in so far as this discussion is concerned in identical language as that of the present Section 51 of Article 3, providing that the Legislature should have the power to grant pensions to Confederate soldiers and their widows in indigent circumstances.

It is held in U. S. vs. Teller, 107 U. S., 68, that "No pensioner has a vested legal right to his pension. Pensions are the bounties of the government which Congress has the right to give, distribute or recall at its discretion."

Admitting therefore, that drawing a pension from the Federal Government would not deprive the applicant of a pension from the State Government prior to the Act of 1909, yet when this latter act went into effect it cannot be denied that from and after the taking effect thereof a pensioner drawing a pension from the Federal Government could not thereafter legally draw a pension from the State as it is expressly provided in the latter act, as well as the amendments thereto by the Thirty-third Legislature, that a person drawing a pension from the State or Federal Government or any other source is not in indigent circumstances within the meaning of the pension laws of this State, and it would be the duty of the Commissioner of Pensions any time he may ascertain that a pensioner of this State is drawing a pension from the Federal Government or any other State of the Union, to at once strike that pensioner from the rolls of this State.

We therefore advise that you would be authorized under the authorities above cited to strike from the rolls the name of the pensioner in question.

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

OP. NO. 1671—BK. 48, P. 259.

ANTI-TRUST STATUTES CONSTRUED.

1. The anti-trust statutes denounce combinations having for their purpose the fixing of prices at which commodities may be sold.
2. Said statutes denounce combinations having for their purpose the making of agreements to pool, unite or combine interests in the purchase of commodities whereby the price of said commodities might be in any manner affected.
3. A proposed plan of San Antonio merchants to purchase their supplies and to advertise through a common agency held illegal.

October 26, 1916.

Hon. J. B. Lewright, 434 Moore Building, San Antonio, Texas.

DEAR SIR: After careful consideration of the questions involved in your inquiry, we have reached the following conclusions with reference thereto:

1. The contract, upon its face, is legal and contains no provisions in conflict with the anti-trust laws of this State. It appears to be simply an agency contract whereby Mr. Guilbeau, for a stipulated consideration, is constituted the agent of the merchants, with certain specified duties to perform. Our anti-trust statutes have no application to contracts between principal and agent because such contracts are not the result or outgrowth of a combination. One of the necessary and essential elements constituting the offense of trust, monopoly or conspiracy against trade is a combination. Such combination must be between two or more entities for one or more of the purposes defined. The principal and his agent represent but one entity, therefore there can be no combination in contracts or agreements made between them.

2. However, looking beyond the form to the substance of the proposed plan, the conclusion must be reached that the persons interested therein contemplate the creation and formation of a combination and union of their capital, skill and acts for certain declared purposes.

Our Supreme Court in the case of Gates vs. Hooper, 39 S. W., 1079, defined the word "combination," as used in our anti-trust statutes, as follows:

> "In order to constitute a trust, within the meaning of the statute, there must be a combination of capital, skill or acts by two or more. *Combination*, as here used, means union or association. If there be no union or association by two or more of their capital, skill or acts, there can be no combination, and hence no trust. When we consider the purposes for which the combination must be formed, to come within the statute, the essential meaning of the word combination and the fact that a punishment is prescribed for each day that the trust continues in existence, we are led to the conclusion that the union or association of capital, skill or acts denounced is where the parties in the particular case designed the united co-operation of such agencies, which might have been otherwise independent and competing, for the accomplishment of one or more of such purposes."

If the plan submitted by you should be consummated, it is perfectly clear to us that all the retail grocery merchants of San Antonio, parties thereto, would be united and associated for the purpose of combining their purchasing ability in one common agency thereby reducing the cost of the commodities bought and sold by them, and for the further purpose of combining the advertising features of their businesses to the end that the cost of same might be reduced and that the maximum resale price of their commodities might be fixed. In other words, the retail grocery merchants, parties to the plan, would not be independent agencies in the purchase of their commodities or in the making or placing of advertising contracts, but they would all act as one concern in such matters. This, of course, would constitute a combination and the only question remaining to be considered is whether such combination is one condemned by the statutes.

Article 7796 Revised Statutes of 1911 prohibits combinations for the following purposes, among others:

(a) To fix the price of merchandise, produce or commodities;

(b) To fix any standard or figure whereby the price of any article

or commodity of merchandise, produce or commerce shall be in any manner affected, controlled or established;

(c) To make, enter into, maintain, execute, or carry out any contract, obligation or agreement by which the parties thereto shall agree to pool, combine or unite any interest they may have in connection with the sale or purchase of any article or commodity whereby its price might be in any manner affected.

In the operation of the plan under consideration the parties to the combination are under agreement to observe a maximum price in the resale of their merchandise, said resale price to be fixed from time to time by their common agent. This unquestionably comes within the purpose designated in subdivisions (a) and (b) above for which the statute prohibits combinations to be formed. We are also of the opinion that the agreements of the merchants, which amount to a pooling, combining and uniting of their interests in the purchase of merchandise, for the purpose of affecting its price, would come within the purpose defined in subdivision (c) above, for which purpose a combination may not lawfully be formed or created.

We are aware of the reasons advanced by the merchants of your city as to why they consider it necessary to combine their interests for the purposes above indicated, but these matters can not be given controlling weight in determining the intent of the Legislature in the construction of a legislative enactment. If it were lawful for the merchants of San Antonio to create, form and carry out the plan hereinabove discussed, then all the merchants of the State could become parties to the same plan. This would bring the grocery business of the entire State under one common head or management, and, of course, it would be possible for such a monopoly to operate with distressing effect upon the public.

The paramount purpose of our anti-trust statutes is to prohibit all combinations which tend to stifle, suppress or limit competition. The statutes were enacted for the purpose of promoting competition. But, regardless of the good or evil effects of such a plan upon the public, we are of the opinion that the law denounces it.

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

OP. NO. 1686—BK. 48, P. 375.

CONTRACTS WITH COUNTIES.

(A) Contracts made directly with commissioners' courts.
(B) Contracts made with duly authorized agent of such courts.
(C) Contracts made with one member of the court or with a person holding himself out as agent of the court.
(D) Ratification by commissioners' court of unauthorized contracts.
(E) Implied contracts.
(F) Constitutional restrictions in the expenditure of public funds.

December 18, 1916.

Hon. Marshall Spoonts, County Attorney, Ft. Worth, Texas.

DEAR SIR: We have a letter from you, in substance, stating that the county auditor of Tarrant County wishes to know whether or not he should allow a claim of Charles Kassell, an attorney-at-law, which has been presented by said Kassell to said Court and has been allowed in the sum of $250, the claim being for attorney's fees for alleged services rendered the commissioners court, "the facts concerning which will sufficiently appear from a copy of an order spread upon the minutes of the commissioners court and herewith enclosed." Then your letter proceeds:

"The contention of the auditor appears to be that since the contract, if any, with Mr. Kassell was not a matter of record and not made in writing or adopted or in any manner approved by the commissioners' court and no orders affecting same having been made or entered, that the claim is not valid and should not be paid, and for that reason refuses to pay same."

Ths copy of the order of the commissioners court referred to, among other things, recites:

"Whereas, on or about the 1st day of July, 1915, the board of commissioners of Tarrant County, in regular session, directed the county judge to employ an attorney for the purpose of investigating and reporting upon the rights and powers of said commissioners with reference to the taxation of the assets of the banks of said county at one hundred cents on the dollar, the question being then pressing because of a permanent injunction which has been issued out of the district court restraining the commissioners from taxing the assets of banks at any greater rate than that applying to other property in said county, and further because the taxes for 1915 had been assessed against said assets notwithstanding said injunction at one hundred cents on the dollar and said commissioners had been applied to, sitting as a board of equalization, to reduce said assessment to seventy cents on the dollar, with a threat of new litigation if such reduction was refused; and whereas, in pursuance of said directions the county judge employed Charles Kassell of Ft. Worth, Texas, as the attorney of this board in connection with said matter and reported to the board that said attorney had been retained with the understanding that if no litigation took place the fee for the services rendered should be satisfactory to the commissioners as a fair compensation for such services, and in the event litigation resulted a fee should be agreed upon; and whereas, said services were rendered and accepted by the commissioners' court, resulting on July 31, 1915, in a settlement with said banks by which the assessment against their assets was reduced to eighty per cent. of the capital, surplus and undivided profits; and whereas, thereafter said Kassell presented his account against the board of commissioners for five hundred dollars for services so rendered and said board declined to pay said sum and fixed the fee at two hundred and fifty dollars to be immediately paid, and said Kassell agreed to accept said award in full of all claim against said board; and whereas, through inadvertence, the said various acts and resolutions of the commissioners were not entered upon the minutes of the court.

"Now, therefore, be it resolved by the board of commissioners of Tarrant County that this resolution, with the foregoing embodied therein, be spread upon the minutes of the court as a true statement of the transactions therein referred to, and that this resolution have the same effect as though the acts of said board had been duly recorded as the same took place in the minutes of this court."

In reply to your letter we will state somewhat at length the principles which should govern in ascertaining the validity of claims against counties based upon contracts made with commisisoners courts. Some of these principles will not be necessary in passing upon this particular claim, but we wish to collect the authorities on the subject into one opinion.

At the outset it may be stated that the following general rules are essential to the validity of all contracts with counties:

Contracts Made Directly With Commissioners Courts.

1. General Rules.

"The powers of county boards must be exercised by them as boards and not as individuals. An individual member, unless expressly authorized, cannot bind the county by his acts, and notice to or knowledge by an individual member not shown to have been imparted to the board is not binding upon the latter. (Citing City of Clayton vs. Galveston County, 20 Tex. Civ. App., 91, 50 S. W., 737 and Hoshorn vs. Kenawah County (W. Va.), 26 S. E., 452) * * *

"It follows as a natural consequence of the rule that a county board can act only as a body; that such boards must, in order to perform any official act, be regularly convened either in a regular meeting, in a regular meeting adjourned or in a special meeting properly called."

These rules have been adhered to by the higher courts of Texas in all their decisions involving the validity of contracts with counties.

Jackson-Foxworth Lumber Co. vs. Hutchinson Co., 88 S. W., 412. Ferrier et al. vs. Knox Co., 33 S. W., 896; and cases cited.

Contracts Made With Duly Authorized Agents.

Article 3873, R. S., provides that the commissioners court may appoint an agent to make any contract authorized by law, and the contract or acts of such agent, duly executed and done, for and on behalf of the county, and within his power, shall be valid and effectual to bind such county to all intents and purposes.

Construing this Article of the statute, the Court of Civil Appeals in Jackson-Foxworth Lumber Company vs. Hutchinson County, 88 S. W., 412, said:

"Article 797, Sayles Revised Statutes 1897, authorizes the appointment by the county commissioners' court of an agent to make and contract on behalf of a county for the erection or repairing of county buildings and to superintend their erection or repairing, and such contract, duly executed and done on behalf of the county and within such agent's powers, shall be binding on the county. This contemplates an *express* authority to make the *particular contract*, or one which arises by necessary implication from the power actually granted."

See also Allen vs. Abernathy, 151 S. W., 349.

In other words, to be binding on the county, a contract made with an agent must be the particular contract, all the terms of which have been authorized by the commissioners court acting as a body and must be made by and with an agent duly appointed for that purpose by the commissioners court acting as a body.

Contract Made With One Member of the Court, or With a Person Holding Himself Out as Agent of the Court.

The Supreme Court of this State has decided that a county may become liable on any authorized contract made by one who purports to act in its behalf, if thereafter with full knowledge of all the terms of the contract the commissioners court as a body assent to and ratify it.

Thus in the case of Boydstun vs. Rockwall County, 86 Texas, 239; 24 S. W. 272, the Supreme Court said:

"Where the governing body of a municipal corporation is empowered to do an act purely administrative in its character, such as to make a contract, and to appoint an agent for that purpose, it may ratify such act, when done by one without authority, who purports to act in its behalf. 1 Dill. Mun. Corp., Sec. 463 and note; 19 Amer. & Eng. Enc. Law, 471; Mechem Pub. Off., Sec. 534; 1 Beach Pub. Corp., Sec. 696. Our Constitution and statutory laws empower the commissioners' court to invest the money belonging to the permanent school fund of the county in bonds of other counties in this State, and we think, where the power to make a contract is given to such a body, it carries with it authority to appoint an agent, with power at least to enter into an agreement *subject to ratification of the courts.*"

Ratification.

The general rule in respect to ratification of voidable acts is thus stated in 10 Cyc. at page 1079:

"The general rule in respect to the ratification or confirmation of voidable acts is that the ratification or confirmation by the party having the power to disaffirm, in order to bind him, must take place *with full knowledge of the circumstances.* If therefore he assent while in ignorance of the attending facts, he may disaffirm when informed of such facts."

That there can be no ratification by a county of an unauthorized contract without full knowledge by the commissioners court of all the terms and the circumstances of the contract, has been specifically held by the higher courts of this State.

See Boydstun vs. Rockwall County, 86 Tex., 234; 24 S. W., 273.
Clayton vs. Galveston County, 50 S. W., 739.

Ratification Must Be by the Court Acting as a Body.

Another rule established by the higher courts of this State is, that the ratification must be by the commissioners court itself as a body. It is not sufficient that some member or members of the court ratify it.

Thus in the case of Nichols vs. The State, 32 S. W., 455, the Supreme Court held:

"The authority to ratify can only be by the power that created the contract and acts of ratification by an officer or agent of the government are not binding upon the principal. The authority to contract in this

instance was the express act of the Legislature, which accurately defined the powers of its agents and prescribed the manner of contracting, and upon principle it would seem that acts, to constitute ratification, must come from the source that authorized the contract and not from its agents. 19 Am. & Eng. Enc. Law, 437-477 and notes; 1 Dill. Mun. Corp. (4th Ed.), 465; Marsh vs. Fulton Co., 10 Wall, 683; Horton vs. Town of Thompson, 71 N. Y., 524. In this case it is seen to be the Legislature of the State which is the principal; only it had the power to authorize the contract, and we do not see how any principle of the law of ratification will authorize some other agent of the State or department of the government by its acts to bind the State to a ratification of the contract. State vs. Bank of Missouri, 45 Mo., 541. Such a rule would subvert the principle that ratification must flow from the source that authorizes the contract."

Implied Contracts.

While the higher courts of this State hold that it is very questionable whether liability on the part of a county can arise from an implied contract, still there is a line of decisions which, on principles of equity, hold that when a municipal corporation has received the benefit of a contract it had power to make, but which was not legally entered into, it may be compelled to do justice and pay a reasonable price for what it has received.

City of San Antonio vs. French, 80 Tex., 575; 16 S. W., 441.

The opinion in the case of City of San Antonio vs. French has been cited by the Courts of Civil Appeals in the following cases:

City of Denison vs. Foster, 28 S. W., 1052.
Nichols vs. State, 32 S. W., 45-6.
City of Dallas vs. Martin, 68 S. W., 710.
Brand vs. San Antonio, 50 S. W., 411.

Constitutional Restrictions in the Expenditure of Public Funds.

Close restrictions were placed by the framers of the Constitution upon the Legislature, commissioners courts, and other bodies having the handling of the affairs of the public.

Article 3, Section 53, of the Constitution, provides:

"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 claim created against any county or municipality of the State, under any agreement or contract made without authority of law."

See also Article 3, Section 44 of the Constitution. These sections have been construed in the following cases:

Shelby Co. vs. Gibson, 44 S. W., 303.
Storey vs. Houston Street Railway, 46 S. W., 796; 92 Tex., 139.
State vs. Haldeman, 163 S. W., 1020.
Nichols vs. State, 32 S. W., 455.

We will now apply some of the principles stated above, in the decision of the question at issue.

The facts are undisputed and show that the commissioners court of Tarrant County, acting as a body, authorized the county judge, as their agent, to employ an attorney to represent them in a particular matter; that said agent, acting within the scope of his authority, made the particular contract he had been authorized by the court to make; that the contract was made with Mr. Kassell and all the terms of the same were reported back by the county judge to the commissioners court and said court, acting as a body, ratified it; that Mr. Kassell rendered the services required of him by the terms of the contract and these services were accepted by the court, acting as a body, and the county enjoys the benefits of same; that the compensation Mr. Kassell was to receive was not definitely fixed in advance of services rendered (perhaps because of a desire on the part of the county judge and of the commissioners court to secure such services at as little expense as possible and to pay only in proportion to the services rendered), the terms made known to the court being "that if no litigation took place the fee for the services rendered should be satisfactory to the commissioners as a fair compensation for such services, and in the event litigation resulted a fee should be agreed upon." No litigation resulted and the commissioners court, acting as a body, determined that a fair compensation for the services rendered by Mr. Kassell would be $250 and by its order quoted in this opinion directed that that amount be paid to him.

We think the contract was valid, legal and binding and that the county owes Mr. Kassell the sum of $250.

The contention of the auditor is that the claim should not be paid because the contract was not made of record and was not in writing and because no orders affecting same were made and entered upon the minutes.

There is no statute requiring that contracts of this nature shall be in writing.

Article 2276 requires that the court shall cause the proceedings of each term to be recorded in a book kept for that purpose and that the minutes of the record "shall be read over and signed by the county judge, or the member of the court presiding, at the end of each term and attested by the clerk."

Our courts, however, have held that the failure of the clerk to attest the minutes does not invalidate them.

Watson vs. DeWitt Co., 46 S. W., 1061.

In the case of Jackson-Foxworth Lumber Co. vs. Hutchinson County, 88 S. W. 412, in discussing the authority of the county judge, who had been authorized by the commissioners court to oversee and look after the construction of a court house, to bind the county for the purchase of certain material, the Court of Civil Appeals held:

"It would not be necessary, however, for such authority to be shown by an order actually entered on the minutes. The fact that such order or action was had could be shown by parole. Ewing vs. Duncan, 81 Tex., 235; 16 S. W., 1000."

See also Waggoner vs. Wise County, 43 S. W. 836.

An order passed by the Court, acting as a body, has now been entered of record. This order recites the entire history of the transaction had with Mr. Kassell. It is somewhat of the nature of a *nunc pro tunc* order. We think the court had or now has the right to enter a *nunc pro tunc* order. Burnett vs. State, 14 Texas 455; State vs. Larkin, 90 S. W. 912.

It is the opinion of this Department that the county auditor should approve the claim of Mr. Kassell and direct that a warrant be issued to him in payment of the same.

Yours very truly,
JOHN C. WALL,
Assistant Attorney General.

OP. NO. 1698—BK. 48, P. 426.

HOUSE BILL NO. 232, THIRTY-FIFTH LEGISLATURE, REGULAR SESSION —CONSTITUTIONAL LAW—INTERFERENCE WITH INTERSTATE COMMERCE—POLICE AND RESERVED POWERS OF THE STATE.

The power of the State to enact legislation of the general character of House Bill 232 has not been superseded by the enactment of the Federal hours of service law.

January 24, 1917.

Hon. W. T. Williams, Chairman of Committee on Common Carriers, House of Representatives, Capitol.

DEAR SIR: We have your communication of even date submitting House Bill 232, with the request for an opinion from this Department—

"as to the authority of the Legislature to enact the accompanying House Bill No. 232."

The exact question involved has not, so far as we have been able to determine, been decided by the courts. As a matter of patent fact, therefore, no man unsmitten with the Spirit of Prophecy can foretell what the courts of last resort would hold touching the matter if the bill should be passed and should become involved in litigation. Obviously the proposition lies within the field of the waging conflict between supposed State and Federal authority; manifestly, also, whenever this is true, a situation fraught with perplexing difficulty is presented not only for the court, the final arbiter, but, to a more surpassing degree, to a lawyer called upon for advance advice. In a government of dual authority, each sovereign must be supreme with respect to certain matters, while with respect to other matters one must possess supreme *potential* power to take exclusive jurisdiction whenever it cares to do so, leaving the other free reasonably to regulate the subject matter in the interest of the public welfare, pending the exertion of the paramount authority.

The subject matter of House Bill 232 belongs in the last named

class of regulation. That the matters with which the bill deals is legitimately subject to legislative government, that it has a justifiable basis in promoting the public safety is beyond question; that wherever the duties of railway employes with respect to State and inter-state commerce are inseparably intermingled to such an extent as to render control of one class of commerce necessary to the adequate protection of the other it is the nation and not the State that has the right to prescribe the dominant and exclusive rule, is settled.

Southern Ry. vs. U. S., 220 U. S., 20.
Northern Pacific Ry. vs. Washington, 222 U. S., 370.
Erie Ry. vs. New York, 233 U. S., 671.
H. E. & W. T. Ry. Co. vs. U. S., 234 U. S., 342.
State of Texas vs. O. & N. W. Ry. Co.
State vs. T. & N. O. Ry. Co., 124 S. W.

It may, also, be regarded as settled law that the duties of railway telegraphers, on any railroad engaged in inter-state commerce, with respect to the two classes of commerce are so unified and indivisible as to justify the Congress, whenever it cares to do so, in taking over the entire field of regulation. See cases cited above.

The proposition, therefore, narrows to the single question: Has Congress actually exerted its potential authority to the extent and with the certainty necessary for the exclusion of State authority?

The National legislation which may be supposed thus to occupy the field is contained in the "Hours of Service Act." This statute, with respect to operators of railways, telegraphs and telephones, provides, in substance: That no such employe

"shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four hour period, in * * * all places * * * continuously night and day, nor for a longer period than thirteen hours * * * in all places operated only during the daytime."

except in cases of emergency. For a violation of the Act the carrier incurs liability for not exceeding $500.00, to be recovered by the United States.

So far, therefore, as the express language of the Federal Act is concerned a carrier, engaged in inter-state commerce, is simply prohibited from requiring or permitting such an employe to be on duty longer than the prescribed hours. Obviously, the carrier could *permit* the employe to work, in any one day, less than nine hours, or could *permit* him to work nine hours or less during any number of days of the month. To be specific, the carrier could, if it cared to do so, permit the employe to have "four days rest" per month. In view of the well settled fact that, in the absence of the actual exercise of superseding Federal jurisdiction, the State would possess full authority to enact and enforce a law requiring the proposed rest periods, and in view of the fact that there is no provision of the Federal Act expressly requiring anything to be done which could not be done if House Bill 232 were in effect, or expressly requiring anything not to be done which would have to be done if House Bill 232 were law, there can be found in the National legislation no *ex-*

pressed intention to override State authority.

Unless, therefore, such an intention upon the part of Congress is to be *implied* from the language used in the Federal Act, there would appear to be no obstacle to the lawful enactment of the Bill.

In approaching the question of the implied intention of Congress, and in view of the conclusions reached by us, it is well to say that there are general expressions in some of the decisions of the Supreme Court of the United States in cases arising under the "Hours of Service Act," which, when considered alone and of themselves, would indicate such an intention upon the part of Congress. For instance, in Erie R. R. Co. vs. New York, 233 U. S., 671, 683, it is said of the Act that—

> "It admits of no supplement; it is the prescribed measure of what is necessary and sufficient for the public safety and of the cost and burden which the railroad must endure to secure it."

But this, and like expressions in other cases, cannot be considered alone; they must be taken with the entire decision and regard must be had for the exact facts before the Court.

In the Erie Case, *supra,* the Court had before it the "Eight Hour Law" of New York: the title of that law at once suggests a positive conflict with the Federal Act. The unit in both laws was the "*day,*" not the "*month*"; the Federal Act made it *legal* to require or permit the employe to work as much as nine hours, while the New York law made it *illegal* to require or permit him to work more than eight hours. If the carrier kept within the rights given it by the Federal Act and permitted its employe to be on duty nine hours, it violated the State law. Again, in the Erie Case the prosecution was based upon the working over-time of an employe actually engaged in inter-state commerce (see 233 U. S., 684). Each of the specific conditions existed, also, in the case of the State vs. T. & N. O. Ry. Co., 124 S. W.

The case of Washington vs. Northern Pacific Ry. Co., 222 U. S., 370, involved a prosecution arising out of the working of an employe beyond the hours prescribed by the State statute; the employe, admittedly, was engaged in inter-state commerce and at work upon an inter-state train, and the opinion is made to rest entirely upon these facts.

In view of the peculiar conditions out of which the case arose, it does not appear to us that any decision so far rendered upon the subject of hours-of-service is, necessarily, an authority against the power of the State to enact this bill.

If there should be a conflict between the Federal Hours of Service Act and H. B. 232, it would necessarily grow out of the infringement by the State statute of some *right* given the carrier by the Federal Act. The only such supposed right to be thus infringed would be the right to work employes at least nine hours on each and every day of the month. It does not seem to us that the Federal Act, even by implication, undertakes to vest such a right in the carrier. The Act deals with *prohibitions* and not *grants* of power; if a *right* to require employes to work as much as nine hours in any day may be

deduced from the law, it must be predicated upon the proposition that a prohibition against working them more than nine hours per day carries with it the positive right to work them at least this much in any one day—implication number one. If the right to require this period of service during *every day* exists, then it rests not only upon "implication number one" but, by further inference, it involves the extension of the first implication to mean that a simple inhibition against working a man more than nine hours in any one day means that the carrier has the right—by virtue alone of the prohibition—to require him to work on each and every day of the month or the year. We do not believe that *rights,* in defiance of otherwise valid authority, can be founded upon such shifting sands. The logic of the pyramided implications appear to be non-sequential. The National Statute deals with the *day* as the unit: the evil to which its prohibitions are aimed is too-constant service continued through two or more consecutive days resulting in exhaustion or temporary impairment of the faculties to such an extent as to render the service unsafe. The proposition in H. B. 232 is not to interfere with the daily hours but is designed to reach another independent evil. The requirement of certain minimum rest periods between any two days work does not appear to be a regulation of the minimum rest period of the whole month's or year's work.

The conception of the need of weekly rest periods for the worker is not merely human; of concurrent origin with the Race was the Supreme command: "Six days shalt thou labor and do all thy work," etc. The universal experience of mankind is in harmony with the wisdom of the Divine Command. Constant labor through excessive periods has its Nemesis in impaired health, shortened lives, inadequate and unsymmetrical development of intellect and character, and a long train of other individual ills which frame themselves into menaces to the public safety and general welfare in a thousand different forms. This sentiment is reflected in the laws of practically all civilized countries to such an extent, and in so many varied ways, that there remains no longer any doubt its subject matter is a proper topic of governmental regulation. We mention it here, not because of any idea that it is our province to deal with the merits of the measure, but because it illustrates and emphasizes the far-reaching effect of saying that the exertion of the otherwise undoubted power of the State over the matter has been suspended and spoken out of existence by mere inferences to be drawn from expressions of Congress. We do not believe that this power can be held, or should be held, to be withdrawn from the State in the absence of a clear and unequivocal declaration to that effect by the Nation.

In our view that the field of regulation sought to be occupied by House Bill 232 has not been pre-empted by the Federal Hours of Service Act, we are supported by a great crowd of witnesses. The people of Maryland and of Massachusetts, and perhaps of other States, have expressed their views by the enactment of statutes, in a general way, similar to this since the enactment of the Federal Law. This, we think, would indicate their judgment that Congress has not occupied the field. Again the Democratic party, in the last Presidential cam-

paign, appealed to the public conscience upon the proposition of the need for the enactment by the states of laws providing for "one day of rest in seven"; to this appeal more than eight million voting citizens of the United States responded. If it had been thought that Congress had already passed a statute, superseding State authority, on the subject, is it probable that the appeal would have been made, or that, if made, it would have found lodgment in so many willing ears? Still again: The Industrial Relations Committee, an agency of the Nation, whose especial function it was to inquire into working conditions throughout the United Sates, in its report, recommended "one day of rest in seven" legislation; if it had thought that Congress had prohibited such regulation by the State, it seems natural that a specific recommendation of the repeal or amendment of the forbidding law would have been made so as to enable the more complete annihilation of the evils in mind by the concurrent action of the State and the Nation.

Another illustration of the wide-spread understanding that the Federal Act hath not the effect of preventing the enforcement by the states of "one day of rest in seven laws" is to be found in the existence of laws in many of the states prohibiting working on Sunday, including work by employes of carriers engaged in interstate commerce.

Of course, if by the passage of the Hours of Service Act, Congress has taken exclusive possession of the field all State Sunday laws applying to railway employes, are void. But so far as we are advised, no such statute has been stricken down upon the ground that it interfered with interstate commerce. The fact that they have been left in existence not only by the Legislatures of those states but by the failure to attack and have them set aside by the courts argues, it seems to us, the general understanding of the validity of State legislation of this character. Our Sunday Statute exempts common carrier employes from its penalties, but this exemption was not made because of the idea of lack of power to include them; manifestly they were excluded upon the grounds of expediency. That the State would have the power to include them will appear from the case presently to be cited.

Of course it is true that the State may use the police power to preserve the sanctity of the Sabbath, and, lest it might be suggested that Sunday laws involve an exercise of a different power than that proposed in House Bill 232, attention is called to the fact that the courts recognize no difference between the use of the police power to protect the Sabbath and its use to promote the safety or general welfare. To emphasize the applicability, on principle, of the cases upholding Sunday laws, let us suppose that House Bill 232, instead of providing for four days rest per. month, should simply provide for rest on Sunday, or should simply prohibit this character of labor on Sunday.

A leading case involving Sunday rest legislation is that of Hennington vs. Georgia, 163 U. S. 299. The State of Georgia had a statute prohibiting the running of freight trains on Sunday, irrespective of whether they were inter-state trains or not, except under

certain conditions; this statute necessarily had the effect of prohibiting the working of train employes on Sunday. It also had a general statute prohibiting work on Sunday. The prosecution involved in the case grew out of the operation of an inter-state train in the State. The defense was made that the statute as thus applied was void as interfering with interstate commerce; this defense was not sustained. And, since the Court clearly states the reasoning underlying the vality of the law, we deem it appropriate to quote at some length therefrom. Says the Court:

"In our opinion there is nothing in the legislation in question which suggests that it was enacted with the purpose to regulate interstate commerce, or with any other purpose than to prescribe a rule of civil duty for all who, on the Sabbath day, are within the territorial jurisdiction of the State. It is none the less a civil regulation because the day on which the running of freight trains is prohibited is kept by many under a sense of religious duty. The Legislature having, as will not be disputed, power to enact laws to promote the order and to secure the comfort, happiness and health of the people, it was within its discretion to fix the day when all labor, within the limits of the State, works of necessity and charity excepted, should cease. It is not for the judiciary to say that the wrong day was fixed, much less that the Legislature erred when it assumed that the best interests of all required that one day in seven should be kept for the purposes of rest from ordinary labor. The fundamental law of the State committed these matters to the determination of the Legislature. If the law-making power errs in such matters, its responsibility is to the electors, and not to the judicial branch of the government. The whole theory of our government, Federal and State, is hostile to the idea that questions of legislative authority may depend upon expediency or upon opinions of judges as to the wisdom or want of wisdom in the enactment of laws under powers clearly conferred upon the Legislature. The Legislature of Georgia no doubt acted upon the view that the keeping of one day in seven for rest and relaxation was 'of admirable service to a State considered merely as a civil institution.' 4 Bl. Com., 63. The same view was expressed by Mr. Justice Field in Ex parte Newman, 9 California, 502, 519, 528, when, referring to a statute of California relating to the Sabbath day, he said: 'Its requirement is a cessation from labor. In its enactment the Legislature has given the sanction of law to a rule of conduct which the entire civilized world recognies as essential to the physical and moral wellbeing of society. Upon no subject is there such concurrence of opinion, among philosophers, moralists and statesmen of all nations as on the necessity of periodical cessation from labor. One day in seven is the rule, founded in experience and sustained by science. * * * The prohibition of secular business on Sunday is advocated on the ground that by it the general welfare is advanced, labor protected and the moral and physical wellbeing of society promoted.'

"So, in Bloom vs. Richards, 2 Ohio St., 387, 391, Judge Thurman, delivering the unanimous judgment of the Supreme Court of Ohio, said: "We are then to regard the statute under consideration as a mere municipal or police regulation, whose validity is neither strengthened nor weakened by the fact that the day of rest it enjoins is the Sabbath day. Wisdom requires that men should refrain from labor at least one day in seven, and the advantages of having the day of rest fixed, and so fixed as to happen at regularly recurring intervals, are too obvious to be overlooked. It was within the constitutional competency of the General Assembly to require the cessation of labor and to name the day of rest.'

"The same general effect are many cases: Specht vs. Commonwealth, 8 Penn. St., 312, 322; Commonwealth vs. Has, 122 Mass., 40, 42; Frolickstein vs. Mobile, 40 Alabama, 725; Ex parte Andrews, 18 California, 678, in which the dissenting opinion of Mr. Justice Field in Ex parte New-

man, 9 California, 502, was approved; State vs. Railroad, 24 W. Va., 783; Scales vs. State, 47 Arkansas, 476, 482; State vs. Ambs, 20 Missouri, 214; Mayor, etc., vs. Linck, 12 Lea. 499, 515. * * *

"Assuming then that both upon principle and authority the statute of Georgia is, in every substantial sense, a police regulation established under the general authority possesseed by the Legislature to provide, by laws, for the well being of the people, we proceed to consider whether it is in conflict with the Constitution of the United States. * * *

"The statute of Georgia is not directed against interstate commerce. It establishes a rule of civil conduct applicable alike to all freight trains, domestic as well as interstate. It applies to the transportation of interstate freight the same rule precisely that it applies to the transportation of domestic freight. And it places the business of transporting freight in the same category as all other secular business. It simply declares that on and during the day fixed by law as a day of rest for all the people within the limits of the State from toil and labor incident to their callings, the transportation of freight shall be suspended.

"We are of the opinion that such a law, although in a limited degree affecting interstate commerce, is not for that reason a needless intrusion upon the domain of Federal jurisdiction, nor strictly a regulation of interstate commerce, but, considered in its own nature, is an ordinary police regulation designed to secure the wellbeing and to promote the general welfare of the people within the State by which it was established, and, therefore, not invalid by force alone of the Constitution of the United States." (163 U. S., 304-5, 307, 318.)

Of course we do not contend that the Hennington case, *supra*, decides the question of conflict here. But it does illustrate the proposition that there must be an unmistakable intent upon the part of Congress to supersede State legislation, for the simple reason that, at the time the case arose, there were numerous Federal Statutes in a general way requiring carriers to perform their public duties of transportation at times, and the Georgia law certainly interfered therewith on Sundays.

As stated in the outset, and as restated with some iteration, the question submitted by you is not free from doubt. We do not pretend to know what the courts will hold, if the bill should be passed. Our idea, however, is that there is at least substantial ground upon which to base the opinion that Congressional action, so far taken, has not destroyed the police power of the State over the subject. In reaching this conclusion we recognize the full strength of the reasoning contra, but, so long as there is ground for debate upon the enforced surrender of the State's power to regulate its internal affairs so as to secure to its citizens the conditions of convenience, safety, health and happiness to which they are justly entitled in material matters, we shall resolve all doubt in favor of the power

What we have said above has regard to the validity of the bill if the same should be passed as a *police measure.*

But there is another power inhering in the State which may be validly exercised, either separately or concurrently with the police power, in the passage of a bill upon the subject in mind, and that is:

The Reserved Power to Alter or Repeal Charters.

Section 5 of Article 12 of the Constitution of Texas declares that "all laws granting the right to demand and collect freights, fares,

tolls or wharfage shall at all times be subject to amendment, modification or repeal by the Legislature"; Section 3 of the same Article subjects the franchise of collecting freights, etc., to Legislative control; Section 17 of the Bill of Rights provides that "no irrevocable or uncontrollable grant of special privileges or immunities shall be made; but all privileges and franchises granted by the Legislature, or created under its authority shall be subject to the control thereof." These, and other laws, fully reserve to the State the power to alter, amend or repeal charters and franchises, and the liability to the exercise of such power became a part of the charter contract of all corporations.

In the exertion of this power the Legislature may impose any condition upon the further retention of the franchises which it might have originally written into the charter. "It would seem necessarily to be the very essence of the right of amendment reserved that what could have been put in the charter originally, whatever its consequence, can be added to the charter, whatever the consequence of the addition." Erie R. R. Co. vs. Williams, 233 U. S., 700-1.

It might be said here, as with respect to the police power, that the State could not, through the exercise of this power, require the corporation to do something that would interfere with interstate commerce or the doing of which would contravene Congressional regulation thereof. But if this criticism were just in any case, it does not appear to be well grounded here for the simple reason that the enforcement of House Bill 232 would not require the carrier to do anything in contravention of the Federal legislation. As pointed out already, the Federal Act, if given the widest latitude imagined for it, does not undertake to require the carrier to work its men for the full nine hours on any day, and much less does it require it to work men every day in the month. The most that could be said for the Act along this line is that it *recognizes the* right of the carrier to permit work of nine hours duration on each day, leaving it entirely optional with it as to whether or not the full period of service will be required. In this view, therefore, the Federal Act simply grants a privilege, so far as the National Government is concerned, and in no sense imposes a duty.

This optional right, as all other rights, must, where possible, be used in harmony with its charter contract provisions. That the State might originally have written into every charter the provisions of H. B. 232 is obvious; if that had been done, can there be any question but that it would have been the duty of the carriers, so long as they retained the benefits of the charter, to observe the requirements and burdens thereof? In that case the rights and privileges supposedly given by the Federal Act could have, and should have, been exercised in harmony with their duties to the State. If this would be true of original charter provisions, it seems clear that it would also be true of such provisions added to the charter through the exercise of the reserved power. Erie R. R. vs. Williams, *supra,* and cases cited therein.

The Erie Case, we think, furnishes a fair example of the valid use of this power in matters of the kind under consideration. The only

way in which it can possibly be said that House Bill 232 could impose any burden upon interstate commerce would be by adding a financial burden—of some extent—to the carrier, and this exact question was presented in that case. There the Supreme Court had before it the semi-monthly pay law of New York, with a defense from the carriers to the effect that the law imposed a financial burden which burden ultimately, of course, had to be borne by commerce, State and interstate, and also thereby took property without due process and also denied the equal protection of the law. In resolving the questions against the corporation the Court said:

"In considering the compentency of the legislative judgment and the power the courts have to review it, we may inquire, what is here complained of? What does the labor law of New York do that seriously affects the liberty of plaintiff? It requires cash payments. That requirement is not now resisted. It requires semi-monthly payments. Plaintiff now pays monthly. The extent of its grievance, therefore, is two payments a month instead of one, with the consequence of expense and inconvenience. It is hardly necessary to say that cost and inconvenience (different words, probably, for the same thing) would have to be very great before they could become an element in the consideration of the right of a State to exert its reserved power or its police power, New York & N. E. R. R. Co. vs. Bristol, 151 U. S., 556; United States vs. Un. Pac. Ry. Co., 160 U. S., 1; St. Louis, I. M. & C. Ry Co. vs. Paul, 173 U. S., 404; Wisconsin, etc., R. R. Co. vs. Jacobson, 179 U. S., 287. See also Balt. & Ohio R. R. Co. vs. Interstate Commerce Commission, 221 U. S., 612.

"Putting cost and inconvenience to one side, there would remain only an abstract right. Taking them into consideration they constitute the detriment to which plaintiff is subjected by not being able to make the forbidden contracts. It may be admitted an advantage is taken away from plaintiff, or, to put it another way, a burden is imposed upon it. Is it within the power of the State to impose the burden by virtue of its reserved control over plaintiff? The question must be answered as if the requirement of the law was part of the charter of plaintiff, and in such case it would seem certainly that a liberty of contract could not be asserted against it, for it would be a part of the contract accepted and binding on plaintiff—a liberty exercised precluding a liberty to be exercised,—and it would seem necessarily to be the very essence of the right of amendment reserved that what could have been put in the charter originally, whatever its consequence, can be added to the charter, whatever the consequence of the addition. Of course, we mean what was and is competent for the State to impose, and we are brought to the narrow question whether a regulation of the time and manner of payment by a railroad of its employes is within the competency of the State to require. A negative answer is contended for, the argument urged to support the contention being that a contract right of dealing with its employes is conferred by plaintiff's charter, which right the labor law takes away and plaintiff is deprived of property because of the expense to which it is subjected, which, it is contended, is not justified by a corresponding public benefit. It would seem, therefore, to be the contention of plaintiff that it acquired by its charter a vested right to deal with its employes according to its own judgment and, as alleged in its answer, that it was vested with its powers as a railroad and to contract and be contracted with, for the employment of persons to conduct its operations and enterprises at and for such wages and upon such terms of payment as might or should be agreed on. In other words, it is the contention that the rights asserted are of the very essence of its grant, giving it the rights of a natural person and investing it with the same immunity from control whether exercised under the police power or the reserved power of amendment. We may, in answering the contention, put

aside the rights of natural persons and the rights which might exist under a constitution which did not reserve control in the State. The effect of the control reserved was to make plaintiff, from the moment of creation, subject to the legislative power of alteration and, if deemed expedient, of absolute extinguishment as a corporate body. Spring Valley Water Works vs. Schottler, 110 U. S., 347, 352."

While this case, and the cases cited therein, did not arise alone under the Commerce Clause, we can perceive no substantial difference in principle as applied to cases of that class. Whether we are right or wrong in this immediate view, we do know that the Supreme Court has not yet held that the reserved power may not be exerted with respect to regulations such as House Bill 232. We say this because in the case of Erie R. R. Co. vs. New York, 233 U. S. 671, 684 —decided on the same day that Erie R. R. Co. vs. Williams, *supra,* was decided—the Supreme Court clearly intimated as much. The statute involved there, as already shown, was the New York Eight Hour Law applying to railway employes engaged in interstate commerce. The law was stricken down because of conflict with the Federal statute and because it was held not to be a valid exercise *of the police power.* Counsel for the State attempted to justify the law as a use of the *reserved power*; the Supreme Court held that the statute was not intended as an exercise of the reserved power, clearly indicating that a much different question would have been presented if such intention had appeared. Upon this point it was said:

"Defendant in error attempts to distinguish Northern Pacific Railroad Co. vs. Washington, supra, on the ground that the State was dealing with a corporation organized under the laws of another State, and the State of Washington had no power to alter or repeal its charter. This power, it is contended, the State of New York has over the Erie Railroad and exercised the power in the law under review, and that the Court of Appeals has so decided. It is asserted besides that Henion was not engaged in interstate commerce. These assertions are not justified. The Court of Appeals did not decide that the labor law constituted an alteration or repeal of the charter of the company. The learned judge who delivered the opinion of the court expressed such to be his view, saying (p. 376) that 'If a statute failed as a valid exercise of the police power, personally' he was 'not doubtful that under its reserved control over corporations the Legislature might pass such an act in regulation of the performance of the business for which a railroad was organized.'

"It is clear that the learned judge did not express the view of the court. We have no doubt that if the court entertained such view it would have been declared. It would have been a direct and, from the standpoint of the State, an adequate solution of the questions involved and would have made unnecessary the elaborate consideration of the extent of the police power of the State and its coincident exercise and adjustment with congressional power of regulation. The contention of defendant in error, therefore, has not the foundation asserted for it, and we may pass it without further comment."

And then to make it clear that the validity of the exercise of the *reserved power,* in legislation of this class, had not been passed upon, the Court said that it would not consider *"whether* it is competent for a State, through its power to alter or *repeal the charter of railroads incorporated under its laws, to displace or share the jurisdic-*

tion of Congress over interstate commerce." (Page 684.) Mind you, the conflict between State and Federal regulation in that case was clear and undoubted; such is by no means the case here; but even in such a case, the Court of last resort has specifically declared the question to be undecided. So far as we are advised or have been able to discover with the time at our command, this is the last expression of the Court upon the question.

In the absence of a specific holding to the contrary, therefore, by the Supreme Court we shall adhere to the view that legislation of the character proposed may be enacted pursuant to the power the State has reserved with respect to charters and franchises.

As indicated in Erie vs. New York, *supra,* the question of what power the Legislature intends to use is important. We suggest, therefore, that the bill, if enacted, should carry a declaration of the use of both the police power and the reserved power, there being no constitutional objection to the concurrent use of both.

We trust that the difficulty of the questions presented by you, together with the brevity of time at our disposal, will justify, in your mind the lack of conciseness and sequential arrangement in this statement of our views.

Respectfully submitted,
LUTHER NICKELS,
Assistant Attorney General.

OP. NO. 1699—BK. 48, P. 448.

STOCK LAW—TICK ERADICATION—STATUTORY CONSTRUCTION.

In an election held for the purpose of determining whether a county shall take up the work of tick eradication a voter, in addition to the qualifications prescribed for a voter under the general law, shall possess the additional qualification of being a freeholder in the county.

Chapter 169, Acts of the Thirty-third Legislature.
Section 23, Article 16, Constitution.

January 29, 1917.

Hon. Horace V. Davis, County Attorney, Tyler, Texas.
For Attention Hon. Clifford C. Hall, Assistant.

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

"An election has been ordered in Smith County by the commissioners' court under Article 7314e of Vernon's Sayles' Texas Civil Statutes of 1914 for the purpose of determining whether the county shall take up the work of 'tick eradication.' Will your department please advise who will be a qualified voter, under the law, in this election, as prescribed by said article of the Statute (No. 7314e)."

"Does the law contemplate that a voter, to participate in this election, shall be a resident land owner or property taxpayer?"

All legislation in this State for the regulation and protection of stock raisers and embodying the local option feature is based upon Section 23 of Article 16 of the Constitution, which is in the following language:

"Sec. 23. Stock Laws.—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."

Upon the above quoted provision of the Constitution is based Section 8 of Chapter 169 of the Acts of the Thirty-third Legislature, which forms the basis of your inquiry.

This section is in the following language:

"Sec. 8. It shall be the duty of the commissioners court of any county lying and being situated south or east of the Federal quarantine line to order an election in said county when petitioned to do so by seventy-five resident land owners of the county for the purpose of determining whether the county shall take up the work of tick eradication in said county. Said election to be ordered not less than thirty days nor more than sixty days after the filing of said petition. At said election the ballots shall have printed upon them, 'For tick eradication in ————county,' and 'Against tick eradication in ————county.' The officers of said election shall hold said election and make returns thereof as provided by law in case of other elections as nearly as may be. Said returns shall be made returnable to the county judge of the county. The commissioners' court shall meet and canvass said returns as soon as practicable after such election and if they shall find that a majority of all the votes were in favor of tick eradication under the direction of the Live Stock Sanitary Commission, they shall so certify and cause publication of same to be made in a newspaper published in said county. The county judge shall so notify the Live Stock Sanitary Commission and upon receipt of such notice from the county judge of the county so holding such election, the Live Stock Sanitary Commission shall cause to be issued a supplemental proclamation signed by the Governor proclaiming a quarantine around said county and the citizens of said county, in cooperation with and under the direction of the Live Stock Sanitary Commission, shall begin the work of tick eradication within thirty days of the issuance of the said supplemental proclamation. Should the commissioners' court find that a majority of the votes cast were against tick eradication, then the county judge shall so notify the Live Stock Sanitary Commission and on and after such notice by the county judge of the county holding such election the Live Stock Sanitary Commission shall be denied the right to take up the work of tick eradication in said county, and the provisions of this act with reference to tick eradication and the establishment of special quarantines in reference thereto shall not be in effect in said county."

It will be noted from a reading of the above section that it is the duty of the commissioners court of any county in a certain defined portion of this State, when petitioned so to do by seventy-five resident land owners of the county to order an election to determine whether or not the work of tick eradication shall be taken up in the county.

This Act does not attempt to define the qualifications of voters at such elections, but the Legislature contents itself with the statement that the officers of said election shall hold said election and make returns thereof, as provided by law in case of other elections, as near as may be. The Act further provides that if upon a canvass of the returns the commissioners court shall find that a majority of all the

votes were in favor of or against tick eradication certain procedure and rights shall follow.

It is a general rule of statutory construction that statutes will be construed, if possible, to avoid an infringement upon some constitutional provision. In Lewis' Sutherland on Statutory Construction, Section 83, we find the following language:

"Another universal principle applied in considering constitutional questions is that an act will be so construed, if possible, as to avoid conflict with the Constitution, although such a construction may not be the most obvious or natural one. 'The courts may resort to an implication to sustain a statute, but not to destroy it.' But the courts cannot go beyond the province of legitimate construction in order to save a statute, and where the meaning is plain, words cannot be read into it or out of it for that purpose."

In Glass vs. Poole, 166 S. W. 375, the Supreme Court of this State, in passing upon the constitutionality of the statutory provision, used this language:

"In testing the constitutionality of the statute in question the language must receive such construction as will conform it to any constitutional limitation or requirement if it be susceptible of such interpretation and the law here brought into question must be sustained. unless it be clearly in conflict with some provision of the Constitution."

If the construction should be placed upon the above act of the Legislature that any qualified voter not a freeholder should be permitted to vote at such an election then the same would plainly conflict with Section 23 of Article 16 of the Constitution, wherein it is provided in substance that any such law shall be submitted to the freeholders of the section to be approved by them before it shall go into effect. While the Act itself, as above seen, does not provide that the voter shall be a freeholder, yet under the holdings of the courts in the authorities above cited we are warranted in placing such a construction upon the Act that it would comply with the provisions of the Constitution and thereby be valid. In our opinion it is the duty of the court to read into this Act the constitutional provision that a voter at such election should, in addition to the qualifications prescribed for voters under the general law, have the qualification of being freeholders in the county.

Under this constitutional provision it is not necessary that the person offering to vote shall have paid taxes, but if he can establish to the satisfaction of the judges of the election that he is a freeholder in the county he should be permitted to vote.

Clark vs. Willrich, 146 S. W., 947.
Hillsman vs. Falson, 57 S. W., 921.

You are therefore advised in accordance with the above opinion.

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

OP. NO. 1705—BK. 48, P. 480.

Article 17 of the Constitution, which authorizes the Legislature to propose amendments to the Constitution to be voted on by the people, is not related to or limited by any other provision of the Constitution in regard to legislative procedure.

A resolution proposing an amendment to the Constitution is not a bill or a resolution within the contemplation of Section 34 of Article 3 and is not to be controlled by the ordinary legislative procedure.

An amendment to the Constitution may be proposed by either branch of the Legislature at any biennial session; there is no provision that it shall be read on three several days; it may be voted on successively day after day and when it receives a vote of two-thirds of all the members elected to each House by a yea and nay vote it may be considered as having passed that House.

Section 34 of Article 3 is applicable to bills and resolutions pertaining to legislative procedure, but has no relation whatever to Article 17 and is not a limitation thereon. If, however, it should be held that the procedure under Article 17 is to be controlled by the provisions of Article 3, Section 34, still the same has no application to amendments offered to bills or resolutions, but has application only to the bills and resolutions themselves.

February 13, 1917.

Hon. F. O. Fuller, Speaker of the House of Representatives, Capitol.

DEAR SIR: The question you propound under date of the 10th inst., reduced to its simplest form, is whether or not Article 17 of the Constitution, which authorizes the Legislature to propose amendments to the Constitution to be voted on by the people, is related to or is limited by any other provision of the Constitution in regard to legislative procedure.

It may be safely assumed at the outset that no other provision of the Constitution authorizes the Legislature to propose amendments to the Constitution, and if Article 17 were eliminated from the Constitution the Legislature would be without authority to submit amendments for adoption by the people.

We have not been able to find any case where the identical provision of the Constitution referred to in your communication has been construed with reference to the matter under consideration, but we do find both State and Federal Court constructions of similar provisions of constitutions relating to the ordinary legislative procedure from which we believe the principle may be deduced that answers your inquiry.

Section 15 of Article 4 of the Constitution is as follows:

"Every order, resolution or vote to which the concurrence of both Houses of the Legislature may be necessary, except on questions of adjournment, shall be presented to the Governor, and before it shall take effect shall be approved by him; or, being disapproved, shall be repassed by both Houses, and all the rules, provisions and limitations shall apply thereto as prescribed in the last preceding section in the case of a bill."

It will be observed that this section of the Constitution provides that orders, resolutions and votes requiring the concurrence of both Houses of the Legislature shall be subject to the veto power of the Governor.

Section 34 of Article 3 of the Constitution under consideration in regard to resolutions, reads as follows:

"* * * After a resolution has been acted on and defeated, no resolution containing the same substance shall be considered at the same session."

The resolutions contemplated in each of these provisions of the Constitution are evidently of the same kind, and therefore if we should find that the provision first referred to in regard to the veto power of the Governor over resolutions has no relation to and is not a limitation on Article 17 of the Constitution, we would readily conclude for the same reason that the latter provision of the Constitution which provides that "after a resolution has been acted upon and defeated no resolution containing the same substance shall be considered at the same session" also has no relation to and is not a limitation on the procedure outlined for proposing amendments to the Constitution as contained in Article 17.

It will be observed that Article 17 of the Constitution is separate and apart from any other article; it does not refer to nor is it dependent upon any other part of the Constitution, and provides a complete procedure. It does not deal with matters of general legislation, but is confined exclusively to the subject of proposing amendments to the Constitution.

In the case of Commonwealth ex rel. Elkins vs. Griest, 196 Pa. 396; 50 L. R. A. 570, the question arose as to the right of the Governor of the State to veto a proposed amendment to the Constitution of the State of Pennsylvania. The Constitution of that State was divided into eighteen articles as ours is divided into seventeen articles, the eighteenth being confined as our seventeenth is confined, to the method and procedure of proposing amendments, and in all material respects the provisions of the two constitutions are very similar.

It was contended in that case that the Governor could exercise the power of veto under the following provision of their Constitution, which as you read you will observe is almost word for word identical with the similar provision of our Constitution quoted above. It reads:

"Every order, resolution or vote to which the concurrence of both Houses may be necessary, except on the question of adjournment, shall be presented to the Governor and before it shall take effect be approved by him, or being disapproved, shall be re-passed by two-thirds of both Houses, according to the rules and limitations prescribed in case of a bill."

In denying the right of the Governor to veto an amendment proposed by resolution of the Legislature of the State of Pennsylvania, their Supreme Court used in part the following language:

"The question is, must a proposed amendment to the Constitution be submitted to the Governor and be subjected to the requirement of his approval? The first and most obvious answer to this question is that the article which provides for the adoption of an amendment is a complete system in itself, from which the submission to the Governor is carefully excluded, and therefore such submission is not only not required,

but cannot be permitted. It can only be done by reading into the 18th Article words which are not there and which are altogether inconsistent with and contrary to the words which are there. Under the article the amendment becomes a part of the Constitution without any action of the Governor. Under the opposing contention it cannot become a part of the Constitution without the positive approval of the Governor, when no such approval is either expressed in or implied from the explicit words of the article. They cannot be implied because there is no necessity for such implication, and without such necessity there can be no implication. This is a most familiar principle in the construction of mere ordinary statutes and also in the construction of written contracts. And more than this, if the proposed amendment is to be submitted for the approval of the Governor, it follows that if he disapproves it it may fail altogether and thus an element of defeat be introduced into the 18th Article, when that article manifestly does not permit the existence of such an element. The only authorities which have any right to assent to or to dissent to the adoption of the amendment are the two Houses of the General Assembly and the people. If these latter vote adversely it fails. If the two Houses do not agree it never has any existence even as a proposition. But nowhere in the article is any other assent or any other dissent permitted to affect the quesion of adoption, nor is there any place in the article into which the necessity or the propriety of any other assent or dissent can be imported by implication. Therefore, it follows upon the most obvious and ordinary principles of statutory interpretation that there being no warrant for executive intervention contained in the 18th Article, it cannot be placed there by any kind of implication from the 26th Section of the 3rd Article (being the one last quoted). * * * *"

Referring to the article of the Constitution last quoted, the Court says:

"Nowhere in the article is there the slightest reference to or provision for the subject of amendments to the Constitution. It is not even alluded to in the remotest degree. On the contrary, the entire article is confined exclusively to the subject of legislation, that is, the actual exercise of the law-making power of the Commonwealth in its usual and ordinary acceptation. It is too plain for argument that unless there was somewhere else in the Constitution a provision for creating amendments thereto, that that power could not be exercised under any provision of the 3rd Article. It follows that a direction to submit 'every order, resolution or vote' of the two Houses to the Governor for his approval does not carry with it any other matter than such as is authorized by the article. As constitutional amendments are not authorized by the 3rd Article (being the one last quoted), they cannot be within the purview of these orders, resolutions or votes which must be submitted for the action of the Governor.. But independently of this consideration, which seems conclusive, it is perfectly manifest that the orders, resolutions and votes which must be so submitted are and can only be such as relate to and are a part of the business of legislation as provided for and regulated by the terms of Article 3. These are the affairs that are the exclusive subjects of the article. They constitute the matters which are fully and carefully committed to that department of the government which is clothed with its whole legislative power. The things that are to be done by the two Houses are legislative only, and hence when orders, resolutions and votes are directed to be submitted to the Governor, it is orders, resolutions and votes referring to matters of legislation only that are to be submitted. * * *"

The Court further in its opinion, in commenting upon the article with reference to the amendments to the Constitution and the article

with reference to submitting every order, resolution or vote to the Governor the same as a bill, says:

"These two articles of the Constitution are not inconsistent with each other, and both may stand and be fully executed without any conflict. One relates to legislation only and the other relates to the establishment of constitutional amendments. Each one contains all the essentials for its complete enforcement without infringing at all upon any other function of the other. And it follows further that because each of these articles is of equal dignity and obligatory force with the other, neither can be used to change, alter or overturn the other."

The same question arose under a similar provision of the Federal Constitution in the case of Hollingsworth vs. Virginia, 3 Dall. 378; 1 L. Ed. 644, where it was held by the Supreme Court of the United States that amendments to the Federal Constitution proposed by Congress were not required to be presented to the President for his action thereon, although the Federal Constitution, Subdivision 3, Section 7 of Article 1, contains the following provision:

"Every order, resolution or vote to which the concurrence of the Senate and House of Representatives may be necessary except on the question of adjournment shall be presented to the President of the United States, and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be re-passed by two-thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in case of a bill."

It will be observed that the language of the Federal Constitution just quoted is strikingly similar to the language employed in the corresponding provisions of the Constitution of the State of Pennsylvania, and also of this State.

The question in the Hollingsworth case was whether the eleventh amendment to the Federal Constitution should have been presented to the President for his approval.

It was there contended in view of the provision of the Constitution just quoted, that every order, resolution or vote to which the concurrence of the Senate and House of Representatives may be necessary except on the question of adjournment, shall be presented to the President, and before the same shall take effect shall be approved by him, or being disapproved, shall be passed by two thirds vote, etc. In other words, that he was given the power to veto a resolution of this nature proposing an amendment to the Federal Constitution.

Replying to this contention, Mr. Justice Chase for the Supreme Court, said:

"There can surely be no necessity to answer that argument. The negative of the President applies only to the ordinary cases of legislation. He has nothing to do with the proposition or the adoption of amendments to the Constitution."

We think, therefore, in view of the above adjudicated cases and in the absence of any conflicting authority, that the provision of the Constitution under consideration and also that with reference to the right of veto by the Governor, relate to matters of ordinary legisla-

tion, and therefore have no relation to, nor are they limitations upon the provisions of Article 17, which within itself provides a complete procedure for proposing amendments, submitting them to the people and for declaring the final result of the election. This view leads to the further conclusion that a resolution proposing an amendment to the Constitution is not a bill or a resolution within the contemplation of Section 34 of Article 3 and is not to be controlled by the ordinary legislative procedure.

This does not mean, of course, that the House is without power to promulgate rules for its own procedure, but no rule could be promulgated with reference to the submission of a constitutional amendment as provided in Article 17 that would conflict therewith. In other words, an amendment to the Constitution may be proposed by either branch of the Legislature at any biennial session; there is no provision that it shall be read on three several days; it may be voted on successively day after day and when it receives a vote of two-thirds of all the members elected to each House by a yea and nay vote it may be considered as having passed that House.

In the second paragraph of your letter you ask the following:

"Where a substitute or an amendment has been offered to a House Joint Resolution amending the Constitution, and such amendment or substitute has failed to pass, same having been re-considered and tabled, would it then be in order to offer the same amendment or substitute at the same stage of the resolution or at a subsequent stage?"

While your communication does not state the facts, yet I have learned that the pending joint resolution has been recommitted and your question is predicated on the procedure that will likely transpire when it makes its re-appearance in the House from the committee.

Under general rules of parliamentary law the effect of a recommitment for any cause is to undo all that has previously been done in the House with reference to the bill and to throw the subject back into the hands of the committee for their revision or completion or for whatever purpose the recommitment may have been ordered.

The question arises whether or not the provisions of Section 34 of Article 3 would prevent the offering of the same amendments to or substitute for the resolution when it makes its re-appearance that were voted down when the resolution was last before the House for consideration.

It will be noted from a reading of Section 34 of Article 3, that the constitutional limitation as to the consideration of the substance of any item of legislation applies only to *bills* and *resolutions*, and not to amendments proposing to amend such bills or resolutions.

It will be recalled that this constitutional provision is entirely in accord in this respect with the general rules governing legislative bodies in the enactment of laws; that is, amendments to bills and resolutions are not subject to the same rules as governing the bills and resolutions themselves.

The following paragraph in Mr. Sutherland's work states the rule with reference to matters therein mentioned:

"The readings required of bills are intended to afford opprortunities for deliberate consideration of them in detail, and for amendment. Hence, amendments are admissible during the progress of a bill through the process of enactment; they are not subject to the same rules as bills in regard to the number of readings. They must be germane to the subject of the bill and are not required to be read three times. And this rule is held to apply though the amendment consists in the substitution of a new bill on the same subject. Nor does concurrence by one House in amendments made by the other require the yeas and nays, and their entry on the journal under the provision for these things on the final passage of bills."

From the foregoing, it will be seen that the Constitutional rule, that a bill shall be read on three several days, is not applicable to amendments in such cases, and this rule obtains even though the proposed amendment should be the substitution of a new bill on the subject. Likewise, concurrence by one house in amendments made by the other does not require the yeas and nays, and their entry in the journal.

Construing our constitutional provision above quoted in the light of the construction given of other constitutional provisions relating to the manner of enacting laws, it is our opinion that Section 34, Article 3 of the Constitution, has no application to amendments offered to bills or resolutions.

We therefore conclude, and so advise you, that Section 34 of Article 3 of the Constitution is applicable to bills and resolutions pertaining to legislative procedure, but has no relation whatever to Article 17 and is not a limitation thereon. If, however, it should be held that the procedure under Article 17 is to be controlled by the provisions of Article 3, Section 34, still the same has no application to amendments offered to bills or resolutions, but has application only to the bills and resolutions themselves.

Yours very truly,

B. F. LOONEY,

Attorney General.

OP. NO. 1714—BK. 49, P. 28.

1. Commissioners' court has no authority to contract for the services of an attorney as special adviser for a fixed period at a given salary.
2. Commissioners' court may contract for the services of an attorney in a special matter where the interests of the county require such services.
3. It is the duty of the commissioners' court to have publication of the delinquent tax record made in accordance with the provisions of Articles 7687 and 7692, unless as provided in House Bill 40, the delinquent list for each year has been advertised as required by said articles.
4. The fact that a person has failed to pay his poll tax will not make him ineligible as a candidate for or an incumbent of any State or county office in the State of Texas, except the offices of State Senator and member of the House of Representatives.

March 7, 1917.

Hon. H. H. Flowers, Hebronville, Texas.

DEAR SIR: We have a letter from you in which you ask the following question:

"Has the county commissioners' court full authority to employ counsel for the county and compensate his services as such by monthly salary?"

It is the opinion of this department that the commissioners court does not possess such authority.

In the case of Groomes vs. Atascosa County, 32 S. W. 188, it was held that the commissioners court had no power to contract for the services of an attorney as special adviser 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. 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.

In your letter you also state:

"We have no records in the county showing that the delinquent tax rolls prior to the year 1914 were published; the commissioners' court of this county have refused to have same published. Would you advise me as county attorney to file suits on these notices, knowing that parts of the delinquent taxes have never been published? The fact that the Legislature in 1915 made it mandatory on the part of the county attorney to file these suits and being of the opinion that the delinquent notices must be published at some time before suits are filed, we are at loss to know just how to proceed."

Replying to this inquiry, we beg to state that Article 7687 R. S. 1911, among other things, provides:

"Upon the completion of said delinquent tax record by any county in this State, it shall be 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 contract duly entered into and publisher's fee of twenty-five cents shall be taxed against such tract or parcel of land so advertised."

House Bill No. 40, which is Chapter 147 of the printed General Laws of the Regular Session of the Thirty-fourth Legislature, went into effect June 19, 1915. In Section 3 of this Act, among other things, it is provided:

"It shall not be necessary to publish said delinquent tax records and supplement thereto if the delinquent list for each year has been advertised as required by Article 7692 of the Revised Statutes of 1911."

In other words, Articles 7687 and 7692 of the Revised Statutes of 1911 were not repealed by the passage of House Bill No. 40. On the contrary the language of House Bill No. 40 above quoted plainly shows that the Legislature intended that the publications of the delinquent tax record required by Articles 7687 and 7692 are necessary prerequisites to the maintenance of suits for the collection of delinquent taxes. House Bill No. 40 merely provides that it is not necessary to make such publications of the delinquent tax records and supplements thereto if the delinquent lists for each year have been advertised.

The duty of making this publication by the provisions of Articles 7687 and 7692, as well as by the provision of House Bill No. 40 above quoted is imposed upon the commissioners court. It is the plain duty of the commissioners court to make such publications, if the same have not theretofore been made, in such a time as will enable the county or district attorney to properly institute suits for the collection of delinquent taxes in accordance with the provisions of House Bill No. 40.

In your letter you also ask the following question:

"Is it mandatory under the Terrell Election law that incumbents in public offices, holding their offices by virtue of public vote, pay their poll tax every year, or is it enough that they pay the same for the year on which they are candidates?"

Replying to this question, we call your attention to Article 3082, R. S., 1911, which 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."

We also call your attention to Article 3083 R. S. 1911, stating to whom certificates of election may be issued.

It will thus be seen that under the provisions of the Terrell Election Law, any person is eligible to a county or State office in this State who has resided in the State for a 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. The fact that he has not paid his poll tax for the year in which he seeks to be elected to the office does not under the Terrell Election Law render him ineligible. Nor would the fact that he thereafter failed to pay his poll tax render his office vacant or be a ground upon which he might be ousted from office.

Nor does the Constitution contain any provision rendering a person ineligible as a candidate for or occupant of any State or county office, because of failure to pay his poll tax, except in respect to the office of State Senator and member of House of Representatives.

The qualifications which a State Senator must possess are that he shall be a citizen of the United States and at the time of his election a *qualified elector of the State,* and shall have been a resident of the State five years next preceding his election, and the last year thereof a resident of the district for which he shall be chosen, and shall have attained the age of twenty-six years. See Article 3, Section 6, of the Constitution. The qualifications for a member of the House of Representatives are the same except that it is required that he should be a resident of the State two years next preceding his election and have attained the age of twenty-one years. See Article 3, Section 7, of the Constitution. For one to be a qualified elector within the meaning of Article 3, Sections 6 and 7, above referred to,

it is provided in Article 6, Section 2, of the Constitution that, among other things, "he shall have paid his poll tax under the laws of the State of Texas." Said last named section after stating certain qualifications necessary to be "a qualified elector," provides:

"And all electors shall vote in the election precinct of their residence; * * * provided further, that any voter who is subject to pay a poll tax under the laws of the State of Texas shall have paid said tax before he offers to vote at any election in this State and hold a receipt showing his poll tax paid before the first day of February next preceding such election."

The provisions of the Terrell Election Law in reference to poll tax receipts affect only the right to vote. See Article 2939 and 2997 R. S. 1911.

The foregoing has to do only with State and county offices. Of course in cities having charters containing a provision to the effect that no one should be eligible as a candidate for city office who had failed to pay his poll tax the matter would be different. The provision of the city charter would have to be complied with before the candidate would be eligible.

Yours truly,
JOHN C. WALL,
Assistant Attorney General.

OP. NO. 1719—BK. 49, P. 56.

MEDICAL PRACTICE ACT.

Under the medical practice act of this State an unlicensed person cannot be permitted to practice medicine or surgery under the direction and guidance of a licensed physician and surgeon, and such unlicensed person would be guilty of a violation of the act.
Chapter 1, Title 90, Revised Civil Statutes.
Chapter 123, General Laws of the Thirtieth Legislature.

March 23, 1917.

Texas State Board of Medical Examiners, M. F. Bettencourt, M. D., Secretary, Mart, Texas.

GENTLEMEN: The Attorney General is in receipt of your letter of March 20th, as follows:

"The question has been asked me for answer as to whether an undergraduate (and consequently a non-possessor of license to practice medicine in this State) can be allowed, legally, to practice medicine under the guidance of a licensed physician. The argument is presented that internes in hospitals and assistants in sanitaria practice upon those under their care without being the possessors of a license to practice medicine in Texas, and therefore (it is assumed) that one would be equally entitled to practice medicine under the guidance of a physician in private practice as long as he worked for a salary for the physician licensed and allowed him to make the charges for services rendered. This, as we view it, would serve as a protecting shield to many educationally unfit to practice the healing art. We would appreciate a ruling from your de-

partment that we may be able to answer the question definitely."

In Section 14 of the Medical Practice Act of this State penalties are provided for the violation thereof in the following language:

"Any person practicing medicine in this State in violation of the provisions of this act shall, upon conviction thereof, be fined in any sum not less than $50 nor more than $500, and by imprisonment in the county jail for a term not exceeding six months, and each day of such violation shall constitute a separate offense, and in no such case shall the violator be entitled to recover anything for the services rendered."

It will be noted from the language of the above copied section that the penalty is laid against a person "practicing medicine" in violation of the Act. The term "practicing medicine" is defined by Section 13 of the Act, as follows:

"Any person shall be regarded as practicing medicine within the meaning of this act (1) who shall publicly profess to be a physician or surgeon and shall treat, or offer to treat any disease or disorder, mental or physical, or any physical deformity or injury, by any system or method, or to effect cures thereof. (2) Or who shall treat or offer to treat any disease or disorder, mental or physical, or any physical deformity or injury by any system or method or to effect cures thereof and charge therefor, directly or indirectly, money or other compensation."

Under Subdivision 1 of Section 13 it would be necessary to allege and prove that the person charged not only publicly professed to be a physician and surgeon, but in addition thereto that he treated or offered to treat diseases, disorders, etc.

Under the statements contained in your letter, upon which you desire an opinion from this office, it appears to us that a person practicing medicine, even though he does so under the guidance and direction of a licensed physician, would come within the definition contained in Subdivision 1 of Section 13. The fact that he actively engaged in the practice of the profession would be a public profession that he was a physician or surgeon. It would not be necessary that he proclaim to the world through the medium of advertising in the newspapers that he practiced medicine or that he post his sign "Dr. ———— of————, M. D.", or otherwise advertise himself as doctor, and we therefore advise that such a person would come within the definition contained in Subdivision 1, above quoted

The second subdivision of Section 13, covers a different class. in that it provides that one who shall treat or offer to treat any disease, disorder, etc., and charge therefor, either directly or indirectly, money or other compensation. The distinguishing feature of the two subdivisions is that in the latter it is not necessary that the person in question profess to be a physician or surgeon, and that he charge, either directly or indirectly, for the services.

In the case presented by you an unlicensed person practicing under a licensed physician or an interne in a sanitarium or hospital, actually engaged in the practice of the profession, under the physicians in charge of such institution, by such acts brings himself within the meaning of "practicing medicine," as set forth in Subdivision 1 of

Section 13, and in addition to bringing himself within the meaning of Subdivision 1, in our opinion he would also come within the definition set out in Subdivision 2 of such section, for the reason that he would be treating or offering to treat diseases and disorders, physical deformities, etc., and would be indirectly charging for the service, the charge being made by the institutions, in the case of an interne in a hospital, or the preceptor in the case of a young man studying medicine under the guidance and direction of a licensed physician. This identical question is discussed in 22nd American & English. page 87, as follows:

"The fact that an unlicensed person in practicing medicine and surgery administered the medicine and permitted the operation under the direction and charge of a licensed physician and surgeon does not relieve him from the operation of the statute."

To like effect is the text in 30th Cyc, 1564, as follows:

"Liability under a statute prohibiting the practice of medicine without a license is not affected by the fact that the operations were performed and the medicines were administered under the direction and charge of a licensed physician and surgeon."

In the State of New Jersey the statute regulating the practice of dentistry made an exception in favor of a registered assistant of a licensed dentist.

In the case of the State Board of Dentistry, etc. vs. Terry, 62 Atl. 193, the Supreme Court of that State held that even this exception to the general statute is narrowed to a registered student, while assisting his preceptor in the preceptor's presence and under his direct and immediate personal supervision.

In the case of State vs. Paul. 76 N. W. 861, the Supreme Court of the State of Nebraska had under consideration a case wherein an unlicensed person was practicing, together with a licensed physician. The Nebraska statute made certain exceptions permitting unlicensed persons to perform certain services. In holding the defendant had violated the Act this Court said:

"It will be observed that the Legislature, by the foregoing provisions, has excepted from the operation of the law persons belonging to any one of the classes designated in the act, and the only proper inference to be drawn is that any person other than a registered physician or surgeon, not embraced in one of such classes, who shall 'operate on, profess to heal, or prescribe for, or otherwise treat any physical or mental ailment of another,' is, on conviction, subject to the penalties prescribed by said Section 16, already quoted. State vs. Buswell, 40 Neb., 158; 58 N. W., 728. We think the court, in its instructions, excepted from the force and effect of the statute persons not within the meaning of the law. Under the instructions the jury were fully warranted to acquit the defendant if he applied the remedies under the directions of a licensed physician in charge of a patient, or if the defendant merely assisted a licensed surgeon in performing an operation, and did that which such surgeon directed him to do, notwithstanding the defendant received one-third of the remuneration paid for such treatment or operation. The statute will not bear the interpretation the trial court has placed upon it. A person not being a registered physician, nor acting gratuitously under an

emergency, nor being a commissioned surgeon in the army or navy of the United States, nor being in the occupation of a nurse, nor administering usual or ordinary household remedies, who, for a remuneration, treats any physical or mental ailment of another, is within the condemnation of the statute, even though he acted under the direction of a registered physician: Any other interpretation would do violence to the language employed by the Legislature. The construction adopted by the trial court would protect one not a registered surgeon in the amputation of the limb of another, in case the operation was guided by the instructions of a registered surgeon. Such interpretation would nullify and defeat the beneficent object of the law." (76 N. W. Rep., 862).

It is true that in the case presented by you the unlicensed person receives a stipulated salary, in lieu of a percentage of the receipts of the firm, as was the case in the Nebraska case just referred to. However, there is no distinction, in our minds, between performing the services for a salary and for a certain percentage of the income. It is at least the making of an indirect charge, such as is contemplated by Section 13 of the Act.

Section 10 of the Texas Act contains all of the exceptions of the Act, and sets out those persons and practices not contemplated thereby. A student or assistant is not mentioned in this section, as being one of those exempt from the operation of the law.

We therefore advise you that in our opinion a student of medicine could not practice the profession, even though he did so under the direction and guidance of a licensed physician. The benefit he can derive from his association with such licensed physicians must be limited to the teachings, precepts, and example by such physician and he should not be permitted to engage in the practice, and if he should do so it would be a violation of the provisions of the Medical Practice Act, subjecting him to the penalties therein prescribed.

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

OP. NO. 1720—BK. 49, P. 61.

GAME, FISH AND OYSTER LAWS—JURISDICTION—COUNTY BOUNDARIES.

An offense against the game, fish and oyster law, committed within four hundred yards of the boundary of any two counties may be prosecuted in either county. Articles 238-244, C. C. P.

March 27, 1917.

Hon. Will W. Wood, Game, Fish and Oyster Commissioner, Capitol.
For Attention Hon. Sam C. Johnston, Chief Deputy.

DEAR SIR: Your chief deputy, Mr. Johnston, has orally presented to this Department for an opinion thereon a question of jurisdiction over an offense against the laws of this State regulating the taking of fish committed in what is now called Caddo or Soda Lake, lying upon the boundary between Harrison and Marion counties. As we

understand Mr. Johnston, this offense was committed in Marion County at a point 205 yards from the center line of Cypress Bayou running through said lake, which center line he understands to be the boundary line between the two counties. The question propounded is: Has the court of Harrison County jurisdiction to try the offense?

Replying thereto, we beg to advise that in our opinion the court of either county has jurisdiction to try the case. Article 238 C. C. P., is in the following language:

"An offense committed on the boundary of any two counties, or within four hundred yards thereof, may be prosecuted and punished in either county; and the indictment or information may allege the offense to have been committed in the county where it is prosecuted."

There is another article of the statute fixing jurisdiction over offenses committed upon streams that are the boundary between two counties. This is Article 244 C. C. P., and is as follows:

"Where a river or other stream or highway is the boundary between two counties, any offense committed on such river, stream or highway at a place where it is such boundary, is punishable in either county, and it may be alleged in the indictment or information that the offense was committed in the county where it is prosecuted."

If this offense was committed within four hundred yards of the actual boundary between the two counties, then we are of the opinion that same could be prosecuted in either of said counties.

Willis vs. State, 10 App., 493.
Cox vs. State, 41 Texas, 1.
Chivarrio vs. State, 15 App., 330.
Mendiola vs. State, 18 App., 462.
Abrigo vs. State 29 App., 143.
Hackney vs. State, 74 S. W., 555.
McElroy vs. State, 111 S. W., 948.
Madrid vs. State, 71 App., 420.

In the case of Hackney vs. State, above cited, defendant was charged with an offense committed on the Brazos River. The case was tried in Bosque County, the defendant contending that the offense, if any, was committed on the other side of Brazos River in either Johnson or Somervell County, such river forming the boundary between Bosque and the two last named counties. The defendant insisted that Article 228 C. C. P., now 238 C. C. P., did not apply when a river constitutes the county line. The Court in discussing the question said:

"We are not aware that the question of venue has ever been decided with reference to a construction of Article 228, Code Cr. Proc. 1895, where a river constitutes the dividing line between two counties. Evidently said article is comprehensive enough to authorize jurisdiction where the locus of an offense is within four hundred yards of the line of the county where the prosecution is begun, although a river may be the dividing line between the two counties. Nor do we find anything in Article 234, Code Cr. Proc., 1895, which militates against this construction.

That article merely regulates the venue, as we understand it, where an offense is committed in the river itself. Accordingly we hold that the court did not err in holding that the prosecution could be maintained in Bosque County."

If therefore this offense was committed within 400 yards of the actual boundary line between the counties of Marion and Harrison the court of either county had jurisdiction of the case.

For your information concerning the exact location of the boundary line between these two counties, we submit the following boundaries fixed by the Legislature in the creation of such counties.

Marion County was created from a portion of Cass County, which latter was created by the Act approved April 25, 1846, Gammed's Laws, book 2, page 1441. The boundary of Cass County by this Act was fixed as follows:

"Beginning in the middle of Big Cypress Bayou, five miles and a half east of where the old line run by Sedacum, dividing the counties of Bowie and Red River, strikes said Cypress Bayou; thence due north to the Sulphur fork of Red River; thence down the middle of Sulphur fork to the old United States line; thence due south with said line to the middle of Lake Soda; thence up the middle of said lake to its head, where the main Cypress falls into said lake, the same being one and a half miles west of the town of Jefferson; thence up said Cypress Bayou to the mouth of Boggy River and place of beginning."

It appears from the last call in the above that the south line of Cass County followed up the middle of Soda lake to where the Cypress falls into such lake.

Harrison County was created by the Act approved January 28, 1839, Gammel's Laws, Book 2, page 159, its boundaries being as follows:

"Beginning at the mouth of Murval's Bayou; thence in a direct line to Norris' crossing of the Atoyac River; thence up the same to its source, or to the crossing of Trammel's trace; thence with said trace to the Sabine River; thence up the same to the Cherokee crossing; thence along the road leading to Jonesborough to the Big Cypress Bayou; thence down the road to Lake Soda; thence east to the boundary line between this Republic and the United States; thence due south to the Sabine River; thence up or down said river, as the case may be, to the place of beginning."

By an Act approved January 8, 1844, being an Act to define the northern boundary of Harrison County, it was provided as follows:

"That from the place or point where Big Cypress enters into the Lake Soda the line shall continue through and with the course of said lake centering its waters to the United States line."

It was further enacted "that that portion of territory lying north of the line prescribed in the preceding section, which was heretofore included within the county of Harrison, be, and the same is hereby added to the county of Bowie.

Marion County was created by the Act approved February 8, 1860, with boundaries as follows:

"Beginning at the southeast corner of Cass County and running thence north with the east boundary line of said County of Cass thirteen miles; thence due west to Big Cypress Bayou in the County of Titus, and thence with the meanderings of said bayou in a southeasterly direction to the northwest corner of Harrison County and thence down said bayou with the north line of Harrison County to the place of beginning."

From the above boundaries as fixed by the Acts of the Legislature referred to it appears to us that the boundary line between the counties of Marion and Harrison in this particular locality is the center of Soda lake, as defined by the Act of January 8, 1844, above referred to.

Very truly yours,
C. W. TAYLOR,
Assistant Attorney General.

OP. NO. 1730—BK. 49, P. 83.

LIVE STOCK SANITARY COMMISSION—QUARANTINE—NOTICES.

Upon the designation of the Live Stock Sanitary Commission of a district, county, part of a county or premises to be quarantined notice of such quarantine shall be issued and publication made thereof in a newspaper in the area so designated, or, if no newspaper is published within such area, then in the nearest newspaper thereto.

When no newspaper is published within twenty-five miles of the quarantined area, notice of such quarantine is had by sending to the person, firm or corporation owning or caring for the quarantinable animals a written notice thereof, a duplicate of which shall be filed with the county clerk.

C. S. S. B. 108, enacted by the Thirty-fifth Legislature.

April 3, 1917.

Hon. D. H. Cunningham, Chairman Live Stock Sanitary Commission, Fort Worth, Texas.

DEAR SIR: The Attorney General is in receipt of your favor transmitting a copy of the Senate Journal containing Committee Substitute Senate Bill No. 108, relating to quarantine by the Live Stock Sanitary Commission. You call attention to certain sections of this bill and desire to be advised whether or not it is necessary that you publish in newspapers the notices of quarantines served by you.

You call attention to a portion of Section 1, all of Section 4 and Sections 17 and 18, which, in order that this opinion may clearly set forth the law under consideration, as well as our advice thereon, we copy, as follows:

"It shall be the duty of said Live Stock Sanitary Commission to quarantine any district, county or part of county, or premises within this State when it shall determine upon proper inspection the fact that cattle, sheep or other live stock in such district, county, part of county or premises are affected with any malignant, contagious, infectious or communicable disease, or with the agency or transportation of such diseases, and to give written or printed notice of such quarantine to the proper

officers of railroad and express companies doing business in or through such quarantine district, county or part of a county within this State, and to publish notice of the establishment of such quarantine in such newspaper in the quarantine district, county or part of county as the Live Stock Sanitary Commission may select, or give notice in such other way as it deems necessary and adequate for the purpose of establishing and maintaining a quarantine service."

"Sec. 4. It shall be the duty of the Live Stock Sanitary Commission, whenever they have reason to believe or shall receive notice that any malignant, contagious, infectious or communicable disease or the infection thereof exists among any domestic animals in this State, to immediately investigate, and if such disease is found to exist or if they have reason to believe such disease exists, to immediately quarantine such animals and the premises upon which they are located; provided further, that if glanders or anthrax is found, the State Veterinarian or Assistant State Veterinarian shall make a thorough investigation and shall notify the county judge of the county wherein such animals are located, of the number and description of the animals so affected."

"Sec. 17. Whenever the Live Stock Sanitary Commission shall have determined the fact that cattle, sheep or other live stock are infected with malignant, contagious or infectious disease, they shall designate the district, county, part of county or premises necessary to be quarantined, and notice of such quarantine shall be issued by the said commission or chairman thereof, as herein provided. Publication of such quarantine notice shall be made in any newspaper within such area, or if no newspaper is published within such area, then the nearest newspaper thereto, and if there is no newspaper published within twenty-five miles of the quarantine area, a written notice sent to the persons, firm or corporation owning or caring for such quarantined domestic animal or animals shall be deemed sufficient notice of such quarantine."

"Sec. 18. Whenever any quarantine is declared by the Live Stock Sanitary Commission and printed or written notice thereof is given to the persons, firm or corporation owning, caring for or in charge of such quarantined domestic animal or animals or premises, the person serving such written notice shall file a duplicate copy of such notice with the county clerk of the county wherein said quarantine is declared, which duplicate copy shall be admissible as evidence in lieu of the original quarantine notice in any of the courts of this State."

It is a well established rule of construction that when possible to do so effect must be given to every portion of a statute, to the end that no part thereof may be held inoperative.

Moore vs. Commissioners Court, 175 S. W., 849.
Spence vs. Fenchler, 180 S. W., 597.

In the latter case the Court said:

"It is an elementary rule of construction that, when possible to do so, effect must be given to every sentence, clause and word of a statute so that no part thereof be rendered superfluous or inoperative. Crary vs. Dock Co., 92 Tex., 275, 47 S. W., 967; Railway vs. Railway, 86 Tex., 545, 26 S. W., 54; Michie's Ency. Dig. Tex. Rep., Vol. 15, p. 965; 1 Kent, Section 462. Every portion of a statute should be construed in connection with every other portion to produce a harmonious whole. Lewis' Suth. Stat. Const., Vol. 2, Section 368 and cases cited."
(180 S. W., 600-1).

Mr. Sutherland, in his work on Statutory Construction, in laying down the rule to the effect that an Act of the Legislature must be construed in its entirety, says:

"The practical inquiry is usually what a particular provision, clause or work means. To answer it one must proceed as he would with any other composition—construe it with reference to the leading idea or purpose of the whole instrument. A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently each part or section should be construed in connection with every other part or section and so as to produce a harmonious whole. It is not proper to confine the attention to the one section to be construed." (Sutherland on Statutory Construction, pages 706-707.)

The above author also lays down the following rule of construction:

"Therefore, it is an elementary rule of construction that all the parts of an act relating to the same subject should be considered together and not each by itself. By such a reading and consideration of a statute its object or general intent is sought for and the consistent auxiliary effect of each individual part." (Sutherland on Statutory Construction, pages 660-661).

Observing the above rules let us consider together these sections of Senate Bill 108, and determine whether or not the entire Act taken together, or at least those portions thereof relating to this subject, contemplates that the Live Stock Sanitary Commission shall give notices by publication in newspapers, wherever possible, of all quarantines established by it.

Section 17 of the Act, as is perfectly apparent, from a reading thereof, requires the publication of the notices of quarantine in a newspaper published within the area so defined, or, in the event no newspaper is published within such area, then in a newspaper published within twenty-five miles of such area. This section and the next succeeding one, if there be no newspaper published within such area or within twenty-five miles thereof, provide that the notices of such quarantine may be given by written notice sent to the person, firm or corporation owning or caring for such quarantined animals, and such written notice shall be deemed sufficient notice thereof. It is provided, however, by Section 18 that a duplicate copy of the notices served upon the owners shall be filed with the county clerk of the county, which copy shall be admissible as evidence, in lieu of the original quarantine notice, in any of the courts of the State. From these two sections it appears, therefore, that it is mandatory upon the Commission to publish notices of the quarantine in a newspaper, unless the conditions therein enumerated prevail. So, if the Commission has authority to establish quarantine without newspaper publication we must look elsewhere in the Act for such authority. This power is not given by Section 4 above copied. Such section makes it the duty of the Live Stock Sanitary Commission, when certain conditions exist, or they have reason to believe that diseases exist among the live stock, to immediately quarantine such animals and premises upon which they are located. This article makes no refence to the notice to be given.

Coming, then, to Section 1 of the Act we find that where quarantine has been established it is made the duty of the Commission to publish notice of the establishment of such quarantine in such newspaper in the quarantined district, county or part of county as the

Live Stock Sanitary Commission may select, "or give notice in such other ways as it deems necessary and adequate for the purpose of establishing and maintaining a quarantine service." The question presented by the above quotation from Section 1 is—does it confer upon the Commission the authority to give notice other than by publication in a newspaper? The language of this Article would, in its ordinary meaning and acceptation, leave it optionary with the Commission to make publication in the newspaper or in such other manner as it saw fit and deemed best; and standing alone such a construction would be reasonable, but when construed together with the other sections of the act specifically demanding newspaper publication we are of the opinion that the Commission would not have authority to exercise a discretion and give notice in another manner than by publication in a newspaper.

In our opinion, the word "or," used in the above quotation should be read "and" and give a meaning to this section demanding the publication in a newspaper of the notice of the Commission and that the Commission may give such other notice as it may deem meet and proper.

Quoting again from Sutherland on Statutory Construction we find in Section 397 the following language:

> "The popular use of 'or' and 'and' is so loose and so frequently inaccurate that it has infected statutory enactments. While they are not treated as interchangeable, and should be followed when their accurate reading does not render the sense dubious, their strict meaning is more readily departed from than that of other words, and one read in place of the other in deference to the meaning of the context. In People vs. Rice it is said that the words 'and' and 'or' when used in a statute are convertible as the sense may require. The word 'or' in a statute may have the meaning of 'that is to say,' 'to wit,' etc." (Sutherland on Statutory Construction, 397).

The word "or," as used in the quoted portion of Section 1, gives that section a meaning in absolute conflict with Sections 17 and 18, and in order to harmonize the two sections, under the rule that acts or parts of acts in pari materia must be construed together and that all portions of an act must be construed together to arrive at the intention of the Legislature, as well as the rule laid down in Sutherland that "or" and "and" are interchangeable, it is our duty to read Section 1 with the word "and" used in the place of the word "or," and when so used gives a meaning to this section that the Live Stock Sanitary Commission must give notice by publication in a newspaper and also may give such other notice as is deemed necessary and adequate for the purpose of establishing and maintaining the quarantine service.

We therefore advise that it is only in those cases where no newspaper is published within the quarantined area, or within twenty-five miles thereof, that you would be authorized to dispense with newspaper publication of the notices of the establishment of quarantine.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

OP. NO. 1729—BK. 49, P. 94.

HEALTH REGULATIONS—SANITARY CODE—CONTAGIOUS DISEASES—MEASLES.

Under the statutes of this State relating to the public health measles is not a quarantinable disease, except that persons suffering therefrom shall be barred from school for twenty-one days and shall not be permitted to enter or ride in any day coach, sleeping car, interurban or street car.

Article 4528, Revised Statutes.
Sanitary Code, Rules 1, 3, 5, 12 to 16, 32, 51, 71 and 72.

April 3, 1917.

W. A. Davis, M. D., Secretary State Board of Health, Capitol.

DEAR SIR: The Attorney General is in receipt of your letter as follows:

"I am in receipt of a number of letters asking for an interpretation of the Sanitary Code relative to measles. As you, doubtless, know there exists at present a terrific epidemic of this disease in the State. If, under the Sanitary Code, measles can be quarantined, and if so under what class of quarantine should such cases be placed?"

In order to arrive at a clear understanding of the various articles of the statute, as well as the rules of the Sanitary Code of this State, dealing with the subject of measles, it will be necessary to review somewhat at length such articles and rules.

The disease of measles is treated in the Sanitary Code as a contagious disease and it becomes the duty of the physicians in this State to report the same, in the manner and form prescribed by Rule 1 of the Sanitary Code, which Rule is in the following language:

"Rule 1. Physicians shall report contagious and pestilential diseases and deaths from same.—Every physician in the State of Texas shall report in writing or by an acknowledged telephone communication to the local health authority immediately after his or her first professional visit each patient he or she shall have or suspect of suffering with any contagious disease, and if such disease is of a pestilential nature, he shall notify the President of the State Board of Health at Austin by telegraph or telephone at State expense, and he or she shall report to the said health authority every death from such disease immediately after it shall have occurred. The attending physician is authorized and it is made his duty to place the patient under restrictions of character described herein below in the case of each and every respective disease."

Certain contagious diseases are enumerated in Rule 3, which is as follows:

Rule 3. " 'Contagious diseases' shall include Asiatic cholera, etc., and be reported to the President of the State Board of Health. The phrase 'contagious disease' as used in these regulations shall be held to include the following diseases, whether contagious or infectious, and as such shall be reported to all local health authorities and by said authorities reported in turn to the President of the State Board of Health: Asiatic cholera, bubonic plague, typhus fever, yellow fever, leprosy, smallpox, scarlet fever (scarlatina), diphtheria (mebraneous croup), epidemic cerebro-spinal meningitis, dengue, typhoid fever, epidemic dysentery, trachoma, tuberculosis and anthrax."

It will be noted that the disease of measles is not contained in the above rule.

Under Rule 5 certain rules and regulations of quarantine, isolation and disinfection are prescribed for the several contagious diseases before mentioned. The language hereinbefore mentioned, used in this rule, relates to the diseases enumerated in Rule 3. This becomes perfectly apparent when all of the rules and regulations dealing with the disease of measles are taken into consideration. The restrictions and regulations governing the various contagious diseases are set out in various rules, all of which must be construed together, in order that the legislative intent may be arrived at.

Rule 5 contains regulations defining quarantine, which may be absolute or modified. Also the rules for isolation, which may be either absolute, modified or special, and also defines disinfection, which may be complete or partial. This rule, therefore, constitutes the authority of the Health Officer in restrictions and procedure in certain cases.

Rules 12 to 16, inclusive, deal with certain contagious diseases under specific heads and prescribe the character of quarantine that may be established in the control of the respective diseases. These rules are in the following language:

"Rule 12. Quarantinable pestilential diseases; absolutely quarantined.—In the management and control of the following pestilential diseases: Cholera, plague, typhus fever and yellow fever, the house must be placarded, premises placed in absolute quarantine, patient in absolute isolation and a complete disinfection done upon death or recovery taking place.

"Rule 13. Quarantinable dangerous contagious diseases; modified quarantine.—In the management and control of leprosy, smallpox, scarlet fever (scarlatina), diptheria (membranous 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.

"Rule 14. Non-quarantinable contagious diseases.—The management and control of typhoid fever, cerebro-spinal meningitis (epidemic), epidemic dysentery, trachoma (acute catarrhal conjunctivitis), tuberculosis and anthrax require special isolation and partial disinfection.

"Rule 15. Quarantinable for school purposes; barred from school twenty-one days.—Persons suffering from measles, whooping cough, mumps, German measles (rotheln) and chickenpox shall be required to be barred from school for twenty-one days (at the discretion of the local health officer) from date of onset of the disease, with such additional time as may be deemed necessary, and may be readmitted on a certificated (certificate) by him attesting to their recovery and non-infectiousness.

"Rule 16. Minor diseases to be excluded during illness.—Those actually suffering from tonsilitis, scabies (itch), impetigo contagiosa, favus, shall be excluded from school during such illness and be readmitted on the certificate of the attending physician attesting to their recovery and non-infectiousness."

It will be noted from a reading of the above quoted rules that Number 12 deals with quarantinable pestilential disease and prescribes the form of quarantine therefor.

Rule 13 enumerates quarantinable, dangerous, contagious diseases, and prescribes the form of quarantine.

Rule 14 enumerates non-quarantinable contagious diseases.

Rule 15 enumerates certain diseases quarantinable for school purposes and directs that the person suffering therefrom shall be barred from school for twenty-one days, at the discretion of the Health Officer, and such additional time as may be deemed necessary.

While Rule 16 enumerates certain minor diseases, persons suffering from which shall be excluded from school during such illness.

It therefore appears that the Legislature has fixed the status of the disease of measles and other diseases mentioned in Rule 15 with reference to quarantine regulations.

Rules 12 and 13 enumerate those diseases that may be quarantined, either under absolute or modified quarantine, while Rule 14 enumerates the non-quarantinable diseases and Rule 15 those diseases persons suffering from which shall be excluded from the schools for twenty-one days or more.

We refer also to Rule 9 of the Sanitary Code, which is as follows:

"Rule 9. Person affected or exposed to contagious diseases shall obey health authority. It shall be the duty of all persons infected with any contagious disease, or who, from exposure to contagion from such disease, may be liable to endanger others who may come in contact with them to strictly observe such instructions as may be given them by any health authority of the State, in order to prevent the spread of such contagious disease, and it shall be lawful for such health authorities to command any person thus infected or exposed to infection to remain within designated premises for such length of time as such authority may deem necessary."

Also to Rule 51 of the Sanitary Code, which is as follows:

"Rule 51. Contagious diseases barred from public vehicles.—No person known to be suffering from any contagious disease, such as smallpox, scarlet fever, diptheria, measles or whooping cough, shall be allowed to enter or ride in any day coach, sleeping car, interurban car or street car, and when any such person is discovered to be in any car as mentioned above, it shall be the duty of the conductor or other individual in charge of said car to notify the nearest or most accessible county or city health officer and the latter shall remove and isolate said patient as is proper in such case or circumstance."

It thus appears that the authority of the Health Officers over persons suffering from the diseases mentioned in Rule 15 is to exclude them from the schools for twenty-one days or more and to give instructions, as provided in Rule 9, and also that insofar as measles and whooping cough are concerned such persons shall not be allowed to ride upon the trains, interurbans or street cars. By Rule 72 certain regulations are prescribed for the transportation of bodies dead of non-quarantinable contagious diseases. It will be noticeable that measles is mentioned among those diseases enumerated in this rule, and we cite this rule for the reason that the heading thereof clearly indicates that the Legislature intended that the diseases therein mentioned should be classed as non-quarantinable.

Article 4528, Revised Statutes, is in the following language:

"Article 4528. General powers and duties of the State Board of

Health.—The State Board of Health shall have general supervision and control of all matters pertaining to the health of citizens of this State, as provided herein. It shall make a study of the causes and prevention of infection of contagious diseases affecting the lives of citizens within this State and except as otherwise provided in this act, shall have direction and control of all matters of quarantine regulations and enforcement and shall have full power and authority to prevent the entrance of such diseases from points without the State and shall have direction and control over all sanitary and quarantine measures for dealing with all diseases within the State and to suppress same and prevent their spread."

While Rule 32 of the Sanitary Code is as follows:

"Rule 32. These rules not to prevent local rules of quarantine if no conflict.—Nothing contained in these regulations shall be construed to prevent any city, county or town from establishing any quarantine which they may think necessary for the preservation of the health of the same; provided that the rules and regulations of such quarantine be not inconsistent with the provisions of these regulations and be consistent with and subordinate to said provisions, and the rules and regulations prescribed by the Governor and State Board of Health. It shall be the duty of the local health authority to at once furnish the President of the State Board of Health with a true copy of any quarantine orders and regulations adopted by said local authorities."

The above two provisions of the laws relating to the public health are the only ones which contain language of a general nature, giving to the health authorities the authority to prescribe rules and regulations in cases of contagion.

Article 4528 confers upon the State Board of Health general supervision and control of all matters pertaining to the health of citizens of this State. It also makes it the duty of the State Board to study the causes and prevention of infection of contagious diseases. It also places in the Board the direction and control over all matters of quarantine regulations and enforcement, with the power and authority to prevent the entrance of diseases from points without the State. But nowhere in the Article does it authorize the institution of quarantine over the diseases expressly enumerated in the Sanitary Code.

Rule 32, above quoted, merely provides that the regulations contained in the rules shall not prevent any city, county or town from establishing any quarantine which they may think necessary, provided, however, that the rules and regulations of such quarantine be not inconsistent with the provisions of the regulations contained in the Sanitary Code, and provided further that such rules shall be subordinate to the provisions therein contained. While it is a sound rule of construction that laws relating to the public health must be liberally construed, yet we find no authority in our statutes that would authorize the State Board of Health, or the various health officers of the State to inaugurate a quarantine in case of a disease that is specifically mentioned in the rules and for which regulations have been prescribed by the Legislature. As has been seen, Rules 30 and 51 deal expressly with the disease of measles and the Legislature having enacted these provisions dealing with the regulations that may be enforced with reference to such disease, in our opinion it is conclusive that such rules are a limitation upon the right of the

officials to deal with persons suffering from such disease, with the addition that persons suffering therefrom must obey the instructions of the health authorities, as is provided in Rule 9, herein quoted.

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

OP. NO. 1731—BK. 49, P. 108.

PENSIONS—STATUTORY CONSTRUCTION.

Two acts of the Legislature dealing with the same subject matter will be construed together so as to harmonize the two and give effect to their various provisions.

Senate Bill No. 464 of the Thirty-fifth Legislature, amended Chapter 141, Acts of the Thirty-third Legislature, only in the matter of taking testimony for the procuring of a pension, but re-enacted the entire act amended.

House Bill No. 246 of the same session amended only Section 5 of Chapter 141 of the Thirty-third Legislature, placing all pensioners upon the same rule.

Held.—That the two acts dealing with the same subject will be construed together and that although Senate Bill No. 464 left Section 5 intact and in the exact language of the original act House Bill 246 will control and become effective.

April 5, 1917.

Hon. J. C. Jones, Commissioner of Pensions, Capitol.

DEAR SIR: The Attorney General has your letter of April 4th, as follows:

"Senate Bill No. 464 was passed by the Legislature and signed by the President of the Senate and the Speaker of the House on March 14, 1917, and was signed by the Governor on April 3, 1917.

"House Bill No. 246 was passed by the Legislature and signed by the President of the Senate and Speaker of the House on March 16, 1917, and was signed by the Governor on April 2, 1917.

"It appears that Senate Bill No. 464 conflicts with House Bill No. 246, but I desire to know if the fact that the House Bill was passed last, by the Legislature, would amend the Senate Bill, or would the fact that the Governor signed the Senate Bill last, make the House Bill void?"

Under our view of the two acts in question it is immaterial as to which of the two was last enacted by the Legislature or which of the two was signed last by the Governor. These two acts dealing with the same subject matter will be construed as being in *pari materia* and treated as though they constituted one and the same Act.

Before discussing further the legal consequences of the two acts of the Legislature we will briefly review them, in order to determine exactly what was done.

Senate Bill No. 464 by Suiter, reenacted in its entirety, Chapter 141 of the General Laws of the Thirty-third Legislature, and aside from the renumbering of the sections, which came about by numbering as Section 1 the usual verbiage that the amended law shall here-

after read as follows, the only change was in Section 5 of the bill, which was Section 4 of Chapter 141, whereby there was stricken from the section the following language:

"* * * and in case the applicant or the witnesses from disability or other circumstances beyond his control cannot appear before the county judge at the court house of the county or office of the judge, such judge may, and it shall be his duty, to go before such applicant, and such witnesses for the purpose of hearing such proofs. The county judge shall certify to the trustworthy character of the witnesses and to the citizenship of the applicant, who must have been a bona fide resident of the county in which he makes his or her application for a period of six months next before the date of said application. He shall in every case administer an oath to each applicant and witness before they sign the affidavit,"

and inserted in lieu thereof was the following:

"* * * unless such applicant or the witnesses are not physically able to appear before the county judge, or from other circumstances beyond the control of the applicant, cannot appear before the county judge, then such evidence may be made before any officer authorized to administer oaths; provided that when the proof is made before any other officer than the county judge, the county judge shall certify that the applicant and witnesses are of trustworthy character and entitled to credit and that the officer before whom the proof is made is duly qualified and authorized by law to administer oaths and take affidavits. The county judge shall also certify to the citizenship of the applicant, who must have been a bona fide resident of the county in which he or she makes his or her application for a period of six months next before the date of said application and which fact shall be stated in the certificate of the county judge. In every case the officer taking the proof shall administer the oath to each applicant and witness before they sign the affidavit."

That the above change was the sole and only purpose of the Act is readily ascertainable from an inspection of the caption, which states the same to be an Act to amend Chapter 141 of the General Laws of the Thirty-third Legislature, setting out the caption of the latter Act and stating as follows:

"By providing a method for taking evidence in such cases as come under the provisions of this Act and providing that this shall be cumulative of all other laws pertaining to Confederate pensions when not in conflict herewith."

The same also appears from the emergency clause, which is in the following language:

"The fact that the present law requires all applicants for a Confederate Pension to make their application and proof before the county judge and that many of such applicants and witnesses are old and feeble and live a long distance from the county judge and are not able to appear before the county judge thereby causing long delay in getting their applications acted upon, creates an emergency," etc.

This clearly indicates that the Legislature in passing this Act had no intention whatever of disturbing Section 5 of the original Act, dealing with the classification of pensioners, which was the only subject of House Bill 246 by Nichols, here under consideration.

Section 5 of the original Chapter 141, Acts of the Thirty-third Legislature, provided in substance that on the first days of September and March of each year the Commissioner of Pensions should first 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 for each year, and the remainder of the funds to be equally pro rated among the pensioners who are in indigent circumstances only. Whereas the only purpose of House Bill 246 was to so amend this section as to place all pensioners upon the same rule and to pro rate all of the funds equally between the pensioners who are in indigent circumstances.

Thus we have two acts of the Thirty-fifth Legislature, dealing with one and the same act of a preceding Legislature, but with different portions thereof, but each of said acts dealing with the general subject matter of Confederate pensions. We quote from Lewis' Sutherland on Statutory Construction, Section 443, as follows:

"Section 442. Interpretation as affected by other statutes—Acts in pari materia.—All consistent statutes which can stand together, though enacted at different dates, relating to the same subject, and hence briefly called statutes in pari materia, are treated prospectively and construed together as though they constituted one act. This is true whether the acts relating to the same subject were passed at different dates, separated by long or short intervals, at the same session or on the same day. They are all to be compared, harmonized if possible, and, if not susceptible of a construction which will make all of their provisions harmonize, they are made to operate together so far as possible consistently with the evident intent of the latest enactment."

"Statutes which are not inconsistent with one another, and which relate to the same subject-matter, are in pari materia, and should be construed together; and effect should be given to them all, although they contain no reference to one another, and were passed at different times. Acts in pari materia should be construed together and so as to harmonize and give effect to their various provisions. This is especially the case when the acts are passed at the same session."

We also quote Section 448 from the same author:

"Section 448. Same.—Where enactments separately made are read in pari materia, they are treated as having formed in the minds of the enacting body parts of a connected whole, though considered by such body at different dates, and under distinct and varied aspects of the common subject. Such a principle is in harmony with the actual practice of legislative bodies, and is essential to give unity to the laws, and connect them in a symmetrical system. Such statutes are taken together and construed as one system, and the object is to carry into effect the intention. It is to be inferred that a code of statutes relating to one subject was governed by one spirit and policy, and was intended to be consistent and harmonious in its several parts and provisions. For the purpose of learning the intention, all statutes relating to the same subject are to be compared, and so far as still in force brought into harmony, if possible, by interpretation, though they may not refer to each other, even after some of them have expired or been repealed. An amendatory act and the act amended are to be construed as one statute, and no portion of either is to be held inoperative if it can be sustained without wresting words from their appropriate meaning. Where a statute is made in addition to another statute on the same subject, without repealing any part of it, the provisions of both must be construed together."

In the case of H. & T. C. Ry. Co. vs. The State of Texas. 95 Texas 507, the Supreme Court of this State in discussing a similar question used this language:

"But it is to be presumed that different acts passed at the same session of the Legislature are imbued by the same spirit and actuated by the same policy and they should be construed each in the light of the other."

We therefore advise you that in our opinion the two acts of the Thirty-fifth Legislature under discussion should be construed together and that effect be given to each that will accord with the manifest intention of the Legislature, as expressed in the Acts and that Senate Bill 446 is effective only in that it amends Chapter 141 of the Acts of the Thirty-third Legislature, with reference to the taking of testimony on applications for pensions, and that House Bill 246 is effective in placing all pensioners upon the same rule, without distinction growing out of their physical condition.

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

OP. NO. 1733—BK. 49, P. 113.

COUNTY HOSPITALS—COUNTY AUDITORS—COMMISSIONERS COURT.

The Board of Managers of a County Hospital has the power to make purchases of supplies and materials for such institution, without the necessity of securing a requisition signed by the County Judge.

Bills incurred by the Managers of the county hospital should be filed with the commissioners court and examined and approved by the county Auditor, and all warrants for expenses of such hospital must be countersigned by the County Auditor.

Chapter 2, Title 29, and Title 29a, Vernon's Sayles' Civil Statutes of 1911.

April 5, 1917.

Hon. T. J. Newton, County Attorney, San Antonio, Texas.

DEAR SIR: In your favor, addressed to the Attorney General, you enclose a communication to you by your county auditor, wherein he construed the law authorizing the erection and maintenance of county hospitals to be cumulative of the County Auditors' Law and consequently the purchase of all supplies and materials for the county hospital must be made through the county auditor, under the provisions of Title 2 of Chapter 29, Revised Statutes.

In our opinion your county auditor is in error in holding that accounts must be contracted and materials and supplies bought for the county hospital under the provisions of the County Auditors' Law, but that it would be the duty of the Board of Managers to file accounts with the commissioners' court for examination and approval of the county auditor and the county auditor should also countersign all warrants in payment of such accounts.

In order that we may distinguish between these two acts of the Legislature it will be necessary to refer briefly to the various provisions of the two acts, the one providing for the appointment and qualification and prescribing the duties of the county auditor and the other authorizing the construction and maintenance of county hospitals.

Referring first to that authorizing the appointment and prescribing the duties of the county auditor we find that in Article 1480, R. S., that supplies of every kind, road and bridge material or any other material for the use of said county or any of its officers, departments or institutions must be purchased upon competitive bids, which which bids shall be advertised for by the county auditor. It is provided by Article 1481 that "all claims, bills and accounts against the county must be filed in ample time for the auditor to examine and approve same before the meetings of the commissioners court, and no claim, bill or account shall be allowed or paid until same shall have been examined and approved by the county auditor."

Article 1482 makes it the duty of the auditor to examine the claims, bills and accounts against the county and to stamp his approval thereon.

Under these articles the courts of this State have held that the provisions thereof are mandatory and make the approval of the auditor a condition precedent to the exercise of jurisdiction over the claim by the commissioners court.

Anderson vs. Ashe, 90 S. W., 874.
Yantis vs. Montague County, 110 S. W., 162.

Article 1484, relating to the audit of claims and the manner of making purchases on behalf of the county is in the following language:

"Art. 1484. Restrictions and requirements in audit and approval of claims, requisition, etc., bills for supplies, etc.—He shall not audit or approve any claim against the county, unless the same has been contracted as provided by law, nor any account for the purchase of supplies or material for the use of said county or any of its officers, unless, in addition to other requirements of law, there is attached thereto a requisition signed by the officer ordering same and approved by the county judge; which said requisition must be made out and signed and approved in triplicate by the said officers, the triplicate to remain with the officer desiring the purchase, the duplicate to be filed with the county auditor, and the original to be delivered to the party from whom said purchase is to be made before any purchase shall be made."

Article 1485 prescribes that all warrants on the county treasury, except warrants for jury service, must be countersigned by the county auditor. The above are all of the articles in the County Auditors Law bearing upon the question under discussion.

Title 29a of Vernon's Sayles' Civil Statutes, being the Act of the Thirty-third Legislature, empowers the commissioners court to establish and maintain county hospitals. It is provided by Section 2 of this Act that when a site has been acquired for such hospital and contracts have been awarded for the necessary buildings and improve-

ments that the commissioners court shall appoint five citizens of the county to constitute a board of managers of the hospital.

Section 3 of this Act prescribes the power and duties of the board of mangers, and among other things provides in substance that the board of managers shall fix the salaries of the superintendent and all other officers and employes within the limits of the appropriation made therefor by the commissioners court.

It is also stipulated that the board of managers shall have the general superintendence, management and control of the said hospital, of the grounds, buildings, officers and employes thereof; of the inmates therein and of all matters relating to the government, discipline, contracts and fiscal concerns thereof, and make such rules and regulations as may seem to them necessary for the carrying out of the purpose of such hospital.

It is provided by Section 5 of this Act that the board of managers may establish at the hospital, or in the city nearest thereto, or in the largest city in the county, a separate school for the education, care and treatment of children suffering from tuberculosis. It is also provided in this section that such school shall be conducted as a branch of the hospital and the pupils and inmates thereof be considered as inmates of the hospital and subject to the provisions of this Act. It is also provided that the board of managers shall appoint a teacher or teachers, especially qualified to instruct and care for the pupil inmates of the school, and to delegate the superintendent of the hospital and a member or members of the staff of visiting physicians, a physician or physicians in attendance upon any county dispensary, or shall employ a physician to attend the inmates of said school and also to delegate one of the hospital nurses, or a visiting nurse, or to employ a nurse, to assist in the care and treatment of said pupils.

In Section 6 of the Act it is provided that the board of managers shall from time to time purchase from the State Board of Health printed copies of certain rules and regulations, circulars, pamphlets, bulletins and other publications, or shall have same printed and deliver copies to practicing physicians in the county and to such public and private schools as may request copies thereof and also to distribute same to such organizations, churches, associations, societies, unions and individuals as may request same in writing.

Section 7 of the Act deals with the duties of the board in reference to records, bills and accounts and provides in substance that the board of managers shall keep a book, wherein shall be recorded a proper record of the proceedings of the board, which book shall at all times be open to inspection by the members of the board, the commissioners court and to any citizen of the county. With reference to the manner of payment of bills against the institution this article provides, as follows:

"The board of managers shall certify all bills and accounts, including salaries and wages, and transmit them to the commissioners court of the county, who shall provide for their payment in the same manner as other charges against the county are paid."

The duties and powers of the superintendent appointed under Section 2 of the Act are prescribed in Section 8 thereof and among other duties imposed upon this official is that he shall, with the consent of the board equip the hospital with all necessary furniture, appliances, fixtures and all other needed facilities for the care and treatment of patients and for the use of officers and employes thereof and shall purchase all necessary supplies not exceeding the amount provided for such purchases by the commissioners court. It is provided, also, that he shall have general supervision and control of the records, accounts and bills of the hospital and all internal affairs and maintain discipline therein, and enforce compliance with and obedience to all rules and by-laws, etc.

The provisions of Section 3 and Section 7 contemplate that the commissioners court shall set apart a certain amount annually for the support of the hospital and Section 3 providing that the salaries of officers and employes shall be fixed within the limits of the appropriation made by the commissioners court, while Section 7 requires the board to make full and detailed estimates of the appropriations required during the ensuing year for all purposes.

It is provided by Section 14 of the Act that it shall be lawful for the commissioners court of any county to cooperate with and to join the proper authorities of any city or town having a population of ten thousand persons or more in the establishment, building, equipment and maintenance of a hospital, and to appropriate such funds as may be determined by such court. It is also provided by Section 16 that under certain conditions counties of a population of less than fifteen thousand may join for the purpose of the Act and erect one or more hospitals for their joint use.

We have gone thus far in a discussion of the various provisions of the County Hospital Act, in order to make plain that the Act is complete within itself, and provides for a perfect system of management and control of its affairs and the contracting of debts for supplies and materials, as well as the employment and fixing the salary of physicians and other employees.

The provisions of Section 7, with reference to the payment of accounts, is worthy of special notice. It is provided that the board shall certify the bill and that same shall be paid by the commissioners court, in the same manner as other charges against the county are paid. No reference whatever is made in this Act to the purchase of materials by the county auditor under competitive bids.

In holding that a county auditor had no supervision over the funds of a common school district the Court of Civil Appeals, in the case of Houston National Exchange Bank vs. School District No. 25, Harris County, reported in 185 S. W. 589, after discussing the various provisions of the school laws the Court said:

"A careful study of these articles leads us to the conclusion that, if the auditor's law was intended to apply to the common school districts, then the whole system of school laws were thereby practically abolished and repealed by implication. The commissioners court, and not the trustees of the district, must be satisfied with and direct the auditor to accept the bid. The auditor accepts the bid and thereby closes the contract, destroying the power conferred upon the board of trustees, 'to

make all contracts,' etc., and the State and county school superintendents lost their power of revision and control.

"Article 1481 provides that all bills and accounts must be filed in ample time for the auditor to examine and approve the same before the meeting of the commissioners court, and that no account shall be paid until the same has been examined and approved by the county auditor, thereby taking from the county superintendent of public instruction the authority to approve vouchers, and by inference, at least, requiring them to go before the commissioners court with the auditor's approval before they can be paid. In fact, Anderson vs. Ashe, 99 Texas, 447, 90 S. W., 874, and Yantis vs. Montague County, 50 Tex. Civ. App., 403, 110 S. W., 162, each hold that the auditor's approval is a condition precedent to the exercise of jurisdiction over the claim by the commissioners court."

(185 S. W., 592.)

In our opinion if the authority granted the county auditor over the expenditure of general county funds is to be invoked with reference to the expenditure of the funds of the board of managers of a county hospital the express power granted to such board will be destroyed and while the provisions of the County Hospital Law may not be so much antagonistic to the County Auditors' Law as the General School Laws of the State are, yet we are of the opinion that there is a complete vesting of authority in the board of managers over the expenditures of the funds appropriated by the commissioners court, except in that the bills therefor must be paid by the commissioners court in the ordinary and usual method.

By stipulating in Section 7 of the County Hospital Act that the commissioners court should provide for the payment of bills against the hospital in the same manner as other charges against the county are paid in our opinion the Legislature intended that such bills should be paid under the procedure prescribed by Articles 1481, 1482 and 1485, Revised Statutes of 1911, which articles are a portion of what is commonly called the County Auditors' Law.

As has been seen above these articles provide in substance that all claims against the county must be filed in ample time for the auditor to examine and approve the same before the meeting of the commissioners court. It is further provided that no claim, bill or account shall be allowed or paid until same shall have been examined and approved by the auditor.

It is made the duty of the auditor to examine such claims, bills and accounts and stamp his approval thereon, and it is also made his duty to countersign all warrants on the county treasurer, except warrants for jury service. In this particular, therefore, we agree with your county auditor that it would be the duty of the board of managers and of the county hospital to file all claims, bills and accounts with the commissioners court and that same should be examined and approved by the county auditor, as shown by stamping his approval thereon, and that all warrants drawn in payment of such bills and accounts should be countersigned by the auditor.

We therefore advise that in the purchase of materials and supplies the board of managers of county hospitals are not controlled by the provisions of the statute relating to the office of county auditor, but that upon a presentation of claims, bills and accounts to the commissioners court for payment, such claims, bills and accounts take the

course prescribed by the County Auditors' Law with reference to the approval thereof by such officer.

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

OP. NO. 1727—BK. 49, P. 121.

STATE PURCHASING AGENT—ESTIMATES—REQUISITIONS.

It is the duty of the Purchasing Agent to purchase the kind, character, grade, quality or brand of articles estimated or requisitioned by the superintendents of the various eleemosynary institutions, except that he has authority to make selection from the grades or brands estimated by the various superintendents, in order that uniformity may prevail in the purchase of the supplies in the aggregate.

Chapter 1, Title 125, Revised Statutes, 1911, as amended by Chapter 126, Acts of the Thirty-fourth Legislature.

April 5, 1917.

Dr. Beverly Young, Superintendent Southwestern Insane Asylum, San Antonio, Texas.

DEAR SIR: The Attorney General is in receipt of your letter of April 1st, wherein you desire to be advised as to whether or not you, as Superintendent of the Asylum, have the right to specify the goods desired for your institution and insist upon the purchase of same, as specified, by the Purchasing Agent, or whether the Purchasing Agent has the authority to substitute other goods in lieu of those specified by you.

Your request is predicated upon a statement contained in your letter that you made request for a Shafer Piano, Style No. 55179, enclosing a bid of $285.00 from a local house, but that the Purchasing Agent had shipped to you a Number 1 Harrington Piano, at the price of $250.00.

As we construe the statutes creating the office of State Purchasing Agent and conferring duties and powers on the incumbent of such office they require the heads of the various institutions of this State to make estimates of the supplies needed by such institutions and it is the duty of the Purchasing Agent to advertise for bids therefor and to purchase the supplies in accordance with the estimates of the heads of the institutions.

Certain Articles of Chapter 1, Title 125, Revised Statutes of 1911, creating the office of State Purchasing Agent and conferring certain powers thereon, were amended by Chapter 126 of the Acts of the Thirty-fourth Legislature, and in referring to articles of the statute in this opinion we will use the articles as amended.

Article 7328 prescribes the method for contracting for supplies. This Article makes it the duty of the Purchasing Agent to contract for supplies for the eleemosynary institutions of this State, basing his contracts upon estimates to be furnished him by Superintendents, approved by the board of said institutions respectively. It is

provided in this Article that the Purchasing Agent shall advertise for bids and that such advertisements shall call for sealed bids, to furnish the aggregate of the desired articles and supplies as estimated for by such institutions, naming the articles, supplies and quantities and character required. The latter part of this Article contains the following language:

"When the same article is estimated for by two or more institutions but of different brands or grades shall be purchased, so as to produce uniformity in use by all institutions."

The patent ambiguity contained in the above quoted phrase is clarified by resort to the original Article 7328, which was amended by the Act of the Thirty-fourth Legislature, wherein we find the sentence above quoted to read as follows:

"When the same article is estimated for by two or more institutions, but of different brands or grades the Purchasing Agent may determine which of the brands or grades shall be purchased, so as to produce uniformity in use by all the institutions."

The above omission may have occurred in the printing of the Act of the Legislature, and the sentence may be complete in the original amendment, but be that as it may we can resort to the original article, in order to determine the purpose of the Legislature, and as we view all of the provisions relating to the Purchasing Agent this is the only case wherein the Purchasing Agent may substitute one grade of an article for the grade estimated by the head of the institution, and this is done only for the purpose of uniformity in the supplies purchased for the various institutions of the State.

We will next consider the provisions of Article 7330, which were not amended, or in any manner affected by the amendatory Act of the Thirty-fourth Legislature. We find in this Article the following provision:

"The estimates furnished said Purchasing Agent, as aforesaid, upon which he makes his advertisements and contracts shall, as near as practicable, state the quantity and quality of the articles and supplies needed and when possible the brand of the same and copies of such estimates shall be filed with the Comptroller and be open to public inspection."

It appears to us that in the use of this language the Legislature has clearly conferred upon the heads of the various institutions the unquestioned authority to stipulate the class, grade, quality and even the brand of the commodities they desire for use in their institutions, and nowhere in the Act do we find that the Purchasing Agent would have authority to substitute his choice of a brand, grade or character of an Article for the choice of the head of the institution making the estimate, except of course the right conferred by Article 7328, to choose between the different choices one brand or grade, in order to make uniform the purchases for the various institutions.

Thus far we have been dealing with the annual contracts for supplies. The particular question you present, however, falls within the classification of emergency purchases, provided for in Article 7333. This Article is in the following language:

"Art. 7333. In case of emergency and where the articles are deemed in need and necessary by any such institution, and are of such character as to be impracticable to be included in the annual contract, the superintendent of any such institution shall make a requisition for same to the Purchasing Agent, who, if in his judgment he considers the articles or supplies to be needed or necesary, shall forthwith purchase same in the open market, but if he does not approve the requisition he shall forthwith forward the same to the board of managers of control of the institution, who shall forthwith investigate the need of the articles or supplies requested, and if satisfied that the requisition is proper, shall thereupon recommend the same to the Purchasing Agent, who shall then forthwith honor the requisition and make the required purchases in the open market; provided, that furniture or equipment for educational institutions shall be of the particular kind and make as requisitioned for by such institutions when approved by the board composed of the Governor, Comptroller and Purchasing Agent. Provided, that in all bids taken by the Purchasing Agent or under his direction preference shall be given to the dealers in the cities or towns in the county in which the said institution is located, conditioned that the articles to be purchased shall be the equal in price and quality to the articles if purchased elsewhere."

We take it that the piano was bought upon a requisition and not under an annual contract. It seems to us that under the plain wording of the above Article of the statute if the Purchasing Agent had not concurred in your requisition for a Shafer Piano it would have been his duty to so advise you and forthwith forward your requisition to the Board of Managers of the Asylum for investigation by them, and if the board should have taken your view of the matter they had the power to recommend to the Purchasing Agent that the piano stipulated for by you should be purchased and it would have then been mandatory upon the Purchasing Agent to have purchased the Shafer Piano, as requested by you and your board.

The office of Purchasing Agent of this State is a creature of the Legislature and the incumbent of that office can exercise only those powers expressly conferred upon him by the Legislature.

In Orange County vs. T. & N. O. R. R. Co., 80 S. W., 670, it is held in effect that public officers cannot bind the government by acts beyond their actual authority, though within the apparent scope of their authority. The powers of public agents and boards created by statute are limited by the statutes creating them and their acts to be binding must in every instance be authorized, either expressly or by implication.

Reliance Mfg. Co. vs. Board of Prison Commissioners, 170 S. W., 941. See also Commonwealth vs. Central Consumers Co., 91 S. W., 711.

We therefore advise that the State Purchasing Agent has no authority to substitute his choice of articles for those stipulated for in the estimates or requisitions of the heads of the various eleemosynary institutions, and that upon requisitions for emergency purchases should the Purchasing Agent disapprove the requisition it would be his duty to transmit the same to the Board of Managers of the institution, who would have the authority in their discretion to recommend the same to the Purchasing Agent, whereupon it would be mandatory upon him to purchase the character of article required.

We are constrained to believe that the apparent differences be-

tween you and the State Purchasing Agent can be largely obviated by a free and open discussion of the various matters as they arise, and we beg to suggest that when differences of opinion occur that you take the matter up with him in person, in order that harmony may prevail in the various institutions of the State government.

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

OP. NO. 1732—BK. 49, P. 126.

Construing Senate Bill No. 159, holding that debts cannot be created under said bill until it goes into effect, that the bill does not authorize the purchase of automobiles, or other material or implements necessary for the carrying out of its provisions.

April 7, 1917.

Dr. W. B. Collins, State Health Officer, Capitol.

DEAR SIR: Your desire to be advised:

First: If you can begin operations under Senate Bill No. 159, passed by the last Legislature, but which bill is not yet in effect, and to know if you would be authorized to contract new debts for necessaries to be used in carrying out the purpose of said bill, to be paid after the bill goes into effect.

Our answer to the above is that the Constitution prohibits the creation of any debts until there is a valid and pre-existing law in existence authorizing such debts to be created. In our opinion, no debts of any character can be created under said bill until same is in full force and effect. We do not believe that the legislative intent with reference to when a bill goes into effect can be changed in this way by those charged with the enforcement of the law created by the bill.

Second. You desire to know if you could directly create debts before the bill goes into effect; if you could make arrangements with the International Health Board to pay for all expenses incident to carrying out the provisions of the bill prior to the bill going into effect, and thereafter for a corresponding period, and for a like amount let the State pay for all of the bills.

We advise you that the same rule would apply to this transaction, for it is only a round-about way of doing the same thing. What the law condemns being done directly will be condemned when the same thing is done indirectly. The net effect of this transaction is that the State, when it does pay for all the expenses, would pay for debts created prior to the bill going into effect. Therefore, we do not think this can be done.

Third. You desire to be advised if you would be authorized under the provisions of this bill to purchase automobiles to be used in carrying on the work provided for in the bill.

The language of the bill, making the appropriation, is as follows, to wit:

Section 1. That for the purpose of enabling the State Health Officer of the State of Texas to *employ such assistance as he deems necessary to assist in intensive rural health work and rural sanitation leading to the prevention and eradication of malaria, hook-worm, typhoid fever, tuberculosis, and other contagious or infectious diseases in the State of Texas,* there is hereby appropriated, out of the State Treasury not otherwise appropriated, the sum of twenty-five thousand ($25,000.00) dollars, or so much thereof as may be necessary for the remainder of the fiscal year, August 31, 1917, and the further sum of forty-five thousand ($45,000.00) dollars, or so much thereof as may be necessary, for the fiscal year ending August 31, 1918, to be expended under the direction of the State Health Officer and to be paid upon warrants drawn by the State Comptroller of Public Accounts on vouchers approved by the State Health Officer."

While this language is very broad and permits you a wide discretion in the employment of means to aid in stamping out malaria, hook worm, etc., we do not think it is broad enough to permit you to buy automobiles, even though it should be conceded that automobiles would result in an economic saving to the State. This was a matter to be considered by the Legislature, and had the Legislature intended to permit the purchase of automobiles, we think it is an item involving such a large outlay of money that the Legislature would have expressly given its authority to purchase them, and failing to provide expressly for the purchase of automobiles, we believe that the Legislature did not intend the use of the money herein appropriated to be used in the purchase of means of conveyance, but could be used only in providing those things actually necessary and proper to carry on the work provided for in the act.

Section 3 of the Act authorizes you to accept donations, which donations become a part of the general fund at your disposal, and shall be deposited by you with the State Treasurer in a special fund to be paid out only as directed in this bill, provided that said moneys shall be used *"for the specific purpose of preventing and eradicating malaria, hook worm, typhoid fever, and other contagious diseases in the State of Texas."*

We believe that the purchase of an automobile as a means of transportation would be too remote to come within the meaning of "specific purpose of preventing," etc. It is necessary that a line be drawn somewhere, because it could be argued that this language is broad enough to permit the purchase of a railroad car, or cars, if this should be deemed advisable by the Department, and in fact the ideas of various persons would vary to such an extent that it is necessary to give to the language some fixed meaning. Therefore, we have decided that the Legislature did not undertake to include the means of transportation, but included only that which is indispensable in carrying on the work of stamping out the diseases mentioned. An automobile can not be used to stamp out a disease. It can only be used as a vehicle to carry the agent about from place to place, but such chemicals, drugs, microscopes, slides, etc., as are necessary, of course would be proper to be purchased under the provisions of this Act.

Yours very truly,

W. A. KEELING,
Assistant Attorney General.

OP. NO. 1748—BK. 49, P. 190.

AGGRAVATED ASSAULT AND BATTERY.

An assault or battery becomes aggravated when committed with premeditated design and by the use of means calculated to inflict great bodily injury.

An assault and battery committed upon another, by the use of the fists of the person making the assault, although there may be present the necessary element of premeditated design, is not per se an aggravated assault, within Subdivision 9 of Article 1022 of the Penal Code, but, if committed in the manner and under the circumstances and conditions calculated to inflict great bodily injury, what would otherwise be a simple assault would be converted into an aggravated assault or battery.

Article 1022, Penal Code.

April 28, 1917.

Hon. F. H. Church, County Attorney, Oakville, Texas.

DEAR SIR: The Attorney General has your letter of April 21, reading as follows:

"I cannot find in the report you sent me of the Attorney General's Office what I want. This is the case: A patron of the Oakville independent high school fell out with the school superintendent because his girl failed to pass in her examination, alleging that the teacher (the superintendent) was prejudiced against her. So he and his son go up to the school house while school is in session, call the teacher out in the hall and assault him with their fists. This is done in the presence of the children. Now the said parties want to plead guilty to a simple assault. As county attorney I am not willing to take the pleas, for the reason the punishment for simple assault and battery is not sufficient to atone for the crime.

"Will you please cite me to the statute wherein I can prosecute them for an aggravated assault."

Replying to your communication, as set out above, we beg to say that what would otherwise be a simple assault may become an aggravated assault or battery under the ten different circumstances and conditions set out in the correspondingly numbered subdivisions of this Article.

The facts stated in your letter, in our opinion, could possibly bring the case you present within only one of these ten subdivisions, that is to say Subdivision No. 9, which reads as follows:

"9. When committed with premeditated design, and by the use of means calculated to inflict great bodily injury."

There is clearly present in the case you present the element of premeditated design. The fact that the defendant and his son together went to the school, called the teacher out in the hall and assaulted him, clearly shows a preconceived and deliberate plan to assault the teacher, and makes out our case on this phase of the complaint.

As to whether or not the other necessary element of the offense is present in your case, that is, the use of means calculated to inflict great bodily injury depends upon the circumstances attendant upon the difficulty. An assault upon a person by means of the fists of the

assaulting party, although the result of a premeditated design, is not per se an aggravated assault. The proof must go further and show that under the conditions and circumstances peculiar to the transaction the manner of the use of the fists or the results growing out of such assault were calculated to inflict great bodily injury. In the case of Peacock vs. State, 52 Texas Criminal Reports, 432, the defendant was convicted of an aggravated assault growing out of the striking upon the head with a pistol. The court charged the jury upon this phase of the case that if they believed from the evidence beyond a reasonable doubt that the defendant with a premeditated design committed an unlawful assault and battery upon the said Bevill by the use of means calculated to inflict great bodily injury then they should find the defendant guilty of an aggravated assault. The court said:

"This in the second clause, clearly authorizes the jury to find the defendant guilty of an aggravated assault, if they believed that the attack on the witness Bevill was made by the use of means calculated to inflict great bodily injury. In view of the utter absence of any description at all of the pistol, or that one might or could inflict serious bodily injury with it, used as a bludgeon, this charge should not have been given."

See Branch vs. State, 35 Texas Crim. Rep., 304; 33 S. W., 356.
Pierce vs. State, 21 Texas Crim. App., 540.
Kelley vs. State, 12 Texas Crim. App., 245.

In Buchanan vs. State, 13 S. W., 1000, the defendant was convicted of an aggravated assault and battery, under an indictment which charged the word "aggravated" to mean that the assault and battery was committed with premeditated design and by the use of means calculated to inflict great bodily injury. The court said:

"We do not think the evidence warrants a conviction. The only means used by defendant in committing the offense were his hands and knees. He struck the injured party several blows with his fist, threw him down and got upon him with his knees, etc. These means were not under the circumstances of this case calculated to inflict great bodily injury. There might be instances where the use of such means would be calculated to inflict such injury; but ordinarily the use merely of the hands and fists will not constitute an aggravated assault and battery."

In the case of Yeary vs. State. 66 S. W., 1106, the court having under consideration a conviction for aggravated assault by the use of the fists used the following language:

"While we are on this branch of the case we might as well allude to the proof, which, in our opinion, maintains this count. The proof on the part of the State tended to show a conspiracy between appellant and five other persons to give the prosecutor, Dial, a severe beating on account of a prohibition speech he had made the night before at Farmersville, in Collin County. In pursuance of this design they boarded the train at Farmersville, and in a short time thereafter, while prosecutor was sitting quietly in his seat, without any altercation or words, they pounced upon him, and, while one of the parties held prosecutor down in the seat of the car, defendant and McKinney (another one of the party) beat him severely with their hands and fists. The six parties apparently acted together while the beating was going on; some of the party crying out, "Give him hell." Another said, "Hold the door," evidently to prevent an in-

trusion. One said, "Pull his whiskers out," while another told the parties beating him to gouge his eyes out. We think there was ample testimony to show a premeditated design to do the beating, and that prosecutor was beaten severely, though not to the extent that would characterize the punishment he received as serious bodily injury. Yet we do not understand that the State had to make proof of serious bodily injury in order to maintain the charge that the means used were calculated to inflict serious bodily injury. In our view, the circumstances of this case show that six stalwart men banded themselves together with the premeditated design to give prosecutor a severe beating with their hands and fists, and, under the circumstances, the means used were such as were calculated to inflict great bodily injury on prosecutor. The fact that the beating fell short of inflicting serious bodily injury does not show that the means they used were not calculated to inflict such injury."

The case of Keley vs. State, 12 Texas Court of Appeals Reports, was a conviction upon a charge of an aggravated assault committed with the fists and premeditated design, by the use of means calculated to inflict great bodily injury. It was contended in this case that the means used being the fists of the attacking party makes the information good only for simple assault and battery. The court held the information good and sufficient. In discussing and affirming this case the court said:

"That an aggravated assault can be committed with the fists and that such means, when used with premeditated design, are and may be calculated to inflict great bodily injury are abundantly attested by the facts in this case. Appellant evidently premeditated his act, for he waited until his victim, who was a prisoner in the custody of the officer, had reached the top and was about descending a flight of stairs when he came up behind him saying "——— you I intend to knock you down these steps," struck him a blow with his fists on the back of the neck. Witness says "I would have fallen down the steps had not Mills, the officer, held me up." "Defendant then struck me two more licks with his fists, as I was going down the steps. I was making no resistance to the officer, Mr. Mills. I was under arrest when the defendant struck me."

To have knocked him down the steps would have been calculated to inflict great bodily injury upon him. That he might have been knocked down the steps by the blow on the back of the neck with his fist, situated as the parties were, is not only reasonable, but highly probable. Under the circumstances developed an aggravated assault, as charged, is fully made out and the judgment is affirmed."

Therefore, we advise you that if you can prove circumstances existing at the time of the assault upon the teacher by these parties by means of their fists, which would probably have resulted in great bodily injury accruing to the teacher in our opinion you can sustain a conviction had for such an offense. You are familiar with all the facts and circumstances of the case and if you can bring it within the rules laid down herein a conviction would be sustained.

Yours very truly,

C. W. TAYLOR,

Assistant Attorney General.

OP. NO. 1746—BK. 49, P. 195.

COMMISSIONERS' COURT—COUNTY FUNDS—REST ROOMS.

The commissioners court is without authority to expend the funds of the county in the maintenance of rest rooms.
Article 2241, Revised Statutes, 1911.

April 28, 1917.

Hon. Mike T. Lively, County Attorney, Dallas, Texas.

DEAR SIR: The Attorney General is in receipt of your letter of April 24th, wherein you propound the following question:

"The Rural Welfare Association, a civic organization, undertaking to look after the temporary needs of the wives of farmers visiting the City of Dallas, has been furnished with a building belonging to Dallas County, and have in this building for some time past been conducting a rest room and nursery for the women folks of the farmers while visiting in Dallas.
This association has now asked the commissioners court of this County to take over the work of conducting this rest room, and the commissioners court desire to know whether they have the authority under the law to use the money of the County for this purpose. I am referring the question to you for an opinion."

Unless there be some statutory provision authorizing the commissioners court of any county to expend the funds of the county in the maintenance of a rest room then no such authority exists. The general powers of the commissioners court are set out in Article 2241.
Section 7 of this Article is as follows:

"To provide and keep in repair court houses, jails and all necessary public buildings."

Upon this subdivision and a construction of the latter portion thereof, to wit, "all necessary public buildings" depends the answer to your question. As we view it, the term "necessary public buildings" used in this Article, means the buildings necessary for the proper conduct of the business for which counties are created, and there being no statutory authority for a county to engage in the business of erecting and maintaining rest rooms for the people, in our opinion the commissioners court is without authority to expend the funds for such purpose.
In the case of Baldwin vs. Travis County, 88 S. W. 480, the Court, in discussing the power of the commissioners court over the funds of the county said:

"We have been unable to find any constitutional or statutory provision conferring general or special authority upon commissioners courts to contract for or provide for the payment by the county of expenses of the character sued for in this case. Bland vs. Orr, 90 Texas, 492, 39 S. W., 558; Mills County vs. Lampasas County, 90 Texas, 606, 40 S. W., 403; Bryan vs. Page, 51 Texas, 532, 32 Am. Rep., 637; Nichols vs. The State, 11 Texas Civ. App., 327, 32 S. W., 452; Payne vs. Washington County, 25 Fla., 798, 6 South., 881; Heney vs. Pima County (Ariz.), 14 Pac., 299.
"Appellant's contention that appellee is liable on the ground that the commissioners court ratified the contract made by the county attorney and his assistant is not sound for the reason that the said court could not bind appellee by the ratification of a contract it was not authorized to

make because not within any power conferred on it by the Constitution or laws of the State. Boydston vs. Rockwall County, 86 Texas, 234, 24 S. W., 272; Nichols vs. The State, *supra;* 1 Dillon on Municipal Corportations, Section 463, and note; 19 Am. & Eng. Ency. Law, 471; 1 Beach on Pub. Cor. Section 696. And a county cannot be held liable in an action upon an implied contract or quantum meruit, unless the commissioners court was authorized to make the contract sought to be implied, or on which the quantum meruit is based. City of San Antonio vs. French, 80 Texas, 578, 16 S. W., 440, 26 Am. St. Rep., 763; Penn vs. City of Laredo (Tex. Civ. App.) 26 S. W., 636; Peck vs. City of Hempstead (Tex. Civ. App.) 65 S. W., 653; I Dillon on Municipal Corporations, Sections 459, 460. There being no liability upon a contract not within the scope of the authority of the commissioners court, the county cannot be estopped from setting up the question of authority to make such contract as a defense to an action upon same. 2 Dillon on Municipal Corporations, 935, 936." (88 S. W., 484).

The question for determination in the above case was whether or not the commissioners court was liable for newspaper fees for publication of citations in tax suits, the court holding that there was no such authority. Upon the doctrine announced in this case we advise you that your commissioners court is without authority to expend the funds of the county in the maintenance of rest rooms, although such undertakings are very laudable and the conveniences furnished therein have become almost essential in the larger towns of the State, and we think the Legislature, if it were brought to its attention, would readily pass an Act authorizing the expenditure of county funds for such purposes.

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

OP. NO. 1752—BK. 49, P. 225.

CONSTITUTIONAL LAW—RESTRICTIONS ON RIGHT OF CONTRACT.

Opinion that the courts would hold valid a section of a proposed act prohibiting the waiver of a right of redemption given by the act to owners of real estate sold under execution, etc.

May 7, 1917.

Hon. J. W. Swope, Member of the Legislature, Capitol.

DEAR SIR: The Attorney General has received a letter from you, enclosing a copy of House Bill No. 42, and requesting the opinion of the Department as to the legality of the section of the bill which prohibits the waiver of the right of redemption given by the bill to the owners of real estate sold under execution. It appears that the question is whether this section of the bill is in violation of the constitutional right of freedom of contract.

It is settled that the right to make contracts is a property right which is protected both by the Federal Constitution and by the State Constitution. It is equally well settled that under the police power a state may pass a law limiting or restricting the right of contract,

provided the limitations or restrictions are not unreasonable or arbitrary and provided they are imposed for the protection of the safety, health, morals, or for the general welfare of the public.

It is difficult to draw the line between reasonable and unreasonable limitations, and the question in your letter opens an almost inexhaustible field of research. After giving the question careful consideration and after such investigation of the authorities as the short time in which you desire a reply will permit, we advise you that, in our opinion, if the bill is enacted into law, the courts will not hold invalid that portion of the bill prohibiting the waiver of the right of redemption.

A section of the Terrell Election Law provided that any person who loans money to another to be used for paying the poll tax of such other person shall be guilty of a misdemeanor. Among other grounds, this law was attacked as being an unreasonable limitation on the right of contract. The law was sustained by the Court of Criminal Appeals in the case of Solon vs. State (114 S. W., 350), Judge Ramsey saying in the opinion:

"The right to contract is subject to the limitations which the State may lawfully impose in the exercise of the police power. Holden vs. Hardy, 169 U. S., 366, 18 Sup. Ct. 383, 42 L. Ed., 780. * * * The right to borrow money is subordinate to the more valuable right of the people to have their elections protected against fraud and corrupt influence. What regulations are necessary to effect this protection is for the Legislature to determine, and their determination and provisions, within reasonable limitations, must be sustained."

The Supreme Court of Missouri, in the case of Karnes vs. American Fire Insurance Company, (46 S. W., 166), against an attack on the same ground, sustained a law prohibiting the parties to any contract from making a contract limiting the time in which suit might be brought, saying:

"Defendant assails the act as an unconstitutional attempt to take away the right of private contract, which it is said, is guaranteed to the citizen. It is argued that 'the right to acquire, possess, and protect property includes the right to make reasonable contracts, which shall be under the protection of the law.' *The State may, nevertheless, prohibit such contracts as contravene the policy of its laws, and the right exists to prevent the enforcement of agreements that are against the public policy of that State, or that will result in fraud, imposition or oppression.* It can not be claimed that parties have the right to make any and all such contracts as they deem proper. The State has made, and may make many, regulations that will restrict this right. For instance, we have usury laws, and their validity is unquestioned. Parties are not permitted to insert certain specified conditions in insurance contracts which would be perfectly legitimate and entirely proper but for the statutory prohibition; yet the courts sustain these provisions, and declare ineffectual any attempt, by contract, to evade or nullify the statute."

In the case of Hooper vs. California, (155 U. S., 652). the Supreme Court of the United States had under consideration a law of California making it a misdemeanor for a citizen of the state to procure insurance from a company not incorporated under the law of California, or which had not filed a bond in compliance with the state

law. In response to the contention that the right of a citizen to contract insurance for himself is guaranteed by the fourteenth amendment, the court said:

"The fourteenth amendment, however, does not guarantee the citizen the right to make within his State, either directly or indirectly, a contract, the making whereof is constitutionally forbidden by the State."

The Supreme Court of the United States, in the case of Knoxville Iron Company vs. Harbison, (183 U. S., 13), sustained a statute requiring all persons or corporations issuing scrip or store orders for the payment of laborers and employes to redeem such scrip or orders in money on demand. The opinion of the Supreme Court of Tennessee sustaining the law was approved under the rule that a state may enact such laws *"when necessary or expedient for the safety, health, morals, comfort and welfare of its people."*

Judge Denman, in the case of Burgess vs. W. U. Tel. Co., (92 Texas, 125), in discussing the extent of the power of the Legislature to regulate and limit the making of contracts, said:

"We see no reason why the legislature of a state may not prohibit its courts from giving effect to *unreasonable* stipulations in contracts, nor why it may not go one step further, and, within just and reasonable bounds, declare certain stipulations unreasonable. It is to be presumed that the Legislature in enacting this statute investigated and in good faith determined that by requiring the notice to be given within less than 90 days many just claims would be defeated, and that no legitimate rights of the parties liable for the damages would probably be imperiled if he were required to so frame his contract as to allow at least 90 days for giving the notice. We can not say that in so doing they have exceeded their power."

The rule as to liberty of contract is thus stated in 8th Cyc:

"The right to acquire, hold, and dispose of property includes the right to make reasonable and proper contracts; but does not enable a citizen to contract either by himself or his agent in violation of the laws of the State. It does not on the other hand prevent the Legislature placing restrictions on the right to contract, when demanded by a sound public policy. It does not interfere with the right of the Legislature to pass laws for the protection of individuals or classes of individuals against fraud or unfair dealing. * * *"

The validity of usury laws is no longer questioned, (see 39 Cyc., 910), and yet a usury law very plainly limits the right of contract in that it makes void all agreements to pay more than a certain rate of interest. Such laws are sustained as expedient and necessary to protect the borrowers of money, who constitute a very large class of our citizens, from oppression at the hands of those who lend.

Other examples of similar laws, which have been held valid, could be cited, but the foregoing are sufficient to illustrate the rule, and we believe that the section of the act in question comes well within the authorities above cited and the rules which have been quoted from them.

The purpose of House Bill No. 42 is to give to persons who have been so unfortunate as to be unable to meet debts against their real

estate an additional period of grace after the real estate has been sold under foreclosure. One reason, doubtless, for the insertion of the section prohibiting the waiver of this right of redemption or additional period of grace, is that in many instances persons lending money would doubtlessly insist upon inserting such waiver in the instruments securing the loans and that the borrowers, being to a certain extent at the mercy of the lenders, could not object to the insertion of such waiver and would thus be deprived of the right of redemption given them by the act.

It can not be said as a matter of law that such restriction on the liberty of the parties to the contract is unreasonable or arbitrary, and if it is written into the law, the courts would doubtless hold that the members of the Legislature must have believed such provision necessary or expedient for the welfare and the protection of a class of the citizens of the State and that it is therefore valid.

We, therefore, advise you that, in our opinion, the section of the law in question would not be held unconstitutional.

Yours very truly,

G. B. SMEDLEY,

Assistant Attorney General.

OP. NO. 1756—BK. 49, P. 230.

OFFICIAL COURT REPORTERS.

The official court reporter is under no obligation to furnish to the district attorney free of cost a transcript of the testimony of any witness adduced upon the trial of a felony case.

The fees of a reporter in such case should be paid by the district attorney in his individual capacity if he desires such a transcript.

Articles 1920 to 1933, Vernon's Sayles' Civil Statutes.

May 8, 1917.

Hon. J. J. Bishop, District Attorney, Crockett, Texas.

DEAR SIR: The Attorney General is just in receipt of your letter of May 7, wherein you desire to be advised whether or not under the law it is the duty of the regularly appointed court stenographer to make out a transcript from her notes of the testimony of any certain witness desired by the district attorney, and to furnish such transcript, free of cost, to the attorney.

Replying thereto, we beg to say, that we find nothing in the statutes of this State relating to official court stengraphers that would compel such official to furnish, free of cost to the district attorney, a transcript of any portion of the testimony.

The duties of a court reporter are set out in Article 1923, Revised Civil Statutes, which is as follows:

"It shall be the duty of the official shorthand reporter to attend all sessions of the court; to take full shorthand notes of all the oral testimony offered in every case tried in said court, together with all objections to the admissibility of testimony, the rulings and remarks of the

court thereon, and all exceptions to such rulings; to preserve all shorthand notes taken in said court for future use or reference for four years, and to furnish to any person a transcript in question and answer form of all such evidence or other proceedings or any portion thereof, upon the payment to him of the compensation hereinafter provided."

It will be noted from the above Article it is made the duty of the reporter to furnish to any person a transcript in question and answer form of all the evidence or other proceedings or *any portion thereof upon the payment to the reporter of the compensation hereinafter provided.*

Other portions of the act relating to the compensation of court reporters are as follows:

By Article 1924 the reporter upon furnishing the transcript shall be paid the sum of 15c per folio of one hundred words for the original copy.

By Article 1925 it is provided, that when any criminal case is appealed and the defendant is not able to pay for a transcript as is provided for in Section 5 of the Act, same being Article 1924, or to give security therefor, he may make an affidavit of such fact and the Court shall order the stenographer to make such transcript in duplicate and deliver them as provided in civil cases, but the stenographer *shall receive no pay for the same.*

It is provided in Article 1926 that at the request of any party to a suit it shall be the duty of the reporter to make a transcript in typewriting of all the evidence and other proceedings, or any portion thereof, in question and answer form as provided in Section 5 of the Act (Art. 1924), which transcript shall be paid for at the rate of 15c per folio of one hundred words by the person ordering the same.

The article of the statute particularly applicable in your case, same being a trial on a felony charge in the district court, is Article 1933 wherein it is provided in substance, that the official reporter shall keep an accurate stenographic record of all the proceedings of such trial as is provided in civil cases. This Article contains provisions with reference to the making up of the statement of facts and bills of exceptions from the report of the stenographer, and it is expressly provided that in cases where the judge is required to and does appoint an attorney to represent the defendant in criminal action, that the official reporter shall be required to furnish the attorney for the defendant, if convicted and where appeal is prosecuted, with a transcript of his notes as provided in Section 5 of the Act, for which services he shall be paid by the State one half of the rate provided for herein in civil cases.

It will thus be seen that under no provision of the law is the stenographer or court reporter required to furnish to the prosecuting attorney, all or any portion of the testimony, free of cost to such officer, or to be paid for in any manner by the State. It is true the court stengrapher is an official of the court, and there is some intimation in the case of Middlehurst vs. Collin-Gunther Co., 99 S. W., 1027, that the judge could require the court stenographer to furnish him, free of cost, a transcript of a portion of the testimony in order that

the judge might refresh his memory in passing upon the statement of facts.

We do not find any authority, however, in the Act providing for the appointment of court stenographers describing their duties and fixing their compensation for placing upon such official of the court the ex officio duty of furnishing to the district attorney, free of cost, all or any portion of the transcript of the evidence adduced upon the trial. There are many officers of whom are required ex officio services, some to be performed without compensation and others to be provided for by the commissioners court by way of ex officio allowances, but as said hereinabove no such ex officio duties are imposed upon the official court reporter, and unless imposed upon him by the statute, then all services performed by him are covered by the express provisions of the Act authorizing him to charge at the rate prescribed therein for all services performed by him for any party having the legal right to demand such services, and we, therefore, advise that in the opinion of this Department, if you as district attorney desire the official court reporter to transcribe any portion of the testimony, it would be his duty to do so but that he would be entitled to receive the compensation fixed by the Act and as there is no provision that the State shall pay such compensation, then manifestly the obligation would rest upon you to pay the same.

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

OP. NO. 1758—BK. 49, P. 261.

COUNTY AUDITORS' LAW.

On and after June 20, 1917, under the provsions of Chapter 134 of the printed general laws of the Thirty-fifth Legislature only the judge or judges of the district court or courts having jurisdiction in a county have power to appont a county auditor. The county judge will no longer have the authority to participate in the appointment.

May 14, 1917.

Hon. Ben S. McMillin, House of Representatives, Capitol.

DEAR SIR: We have a letter from you asking whether the amendment to the County Auditors' Law, which is Chapter 134 of the printed General Laws of the Regular Session of the Thirty-fifth Legislature, eliminates the county judge as one of the persons to select an auditor for Grayson County.

Replying thereto, we call attention to Section 3 of said Act, which is as follows:

"Sec. 3. That Article 1461, Chapter 2, Title 29, of the Revised Civil Statutes of 1911 and amended by the Thirty-fourth Legislature, page 182, be so amended as to hereafter read as follows:

"Article 1461. The judge or judges of the district court or courts having jurisdiction in the county shall appoint the auditor provided for in this act, at a special meeting held for that purpose, a majority ruling pro-

vided, that in the event there is more than one district judge, and such judges fail to agree upon the selection of some person as auditor or a majority of said judges fail to agree, then either of said judges shall certify such fact to the Governor of the State, who shall thereupon designate and appoint some other district judge of the State to act and vote with the aforesaid judges in the selection of such auditor. The action shall then be recorded in the minutes of the district court of the county and the clerk thereof shall certify the same to the commissioners' court, which shall cause the same to be recorded in its minutes, together with an order directing the payment of the auditor's salary."

While one of the prime objects of the Act, as indicated by the caption and the emergency clause, was to provide for the appointment of auditors in counties having a population of forty thousand inhabitants or having a tax valuation of fifteen million dollars, and while in the Section quoted it is provided that "the judge or judges of the district court or courts, having jurisdiction in the county, shall appoint the auditor *provided for in this Act,* at a special meeting held for that purpose," still Section 3 amends Article 1461 of the original County Auditors' Law and must be substituted for Article 1461 in said law.

The Act in question goes into effect June 20, 1917. You are therefore advised that on and after said date the power to appoint a county auditor is vested only in "the judge or judges of the district court or courts, having jurisdiction in the county," and the county judge cannot participate in the appointment.

Yours very truly,
JOHN C. WALL,
Assistant Attorney General.

OP. NO. 1759—BK. 49, P. 275.

1. Chapter 179, Acts of 1917, applies to all elections for which notices are required to be posted, except general elections.
2. Where notices are required to be posted for thirty days prior to an election and the notice was first published thirty days before the day of election, it would not be necessary for the notice to be published once each week for five weeks—publication once each week for four consecutive weeks would be a substantial compliance with the statute.
3. If no newspaper is published in the county or district holding such election, it is not necessary to publish the notice.

May 18, 1917.

Hon. J. P. Coon, County Judge, Kaufman, Texas.

DEAR SIR: You request this Department to advise you on the following questions:

Chapter 179, Acts of 1917, is an Act requiring the publication in some newspaper of general circulation of all notices now required by law or contract to be given of any act or proceeding, whether public or private, or relating to a judicial, executive or legislative matter, which notice is now authorized by law or contract to be made by posting notices in one or more public places, but provides that nothing in the Act shall be construed to require the publication of any *gen-*

eral election notice, public road notice nor certain probate notices; and further provides that all notices published under the provisions of the Act shall be "printed at least once each week for the period of time now required for posting such notices," but in the event no paper should be published "in the county where such notice is required to be given, then such notice may be posted as now required by law."

You request this Department to advise:

(1) If this statute applies to bond elections held in school districts, road districts and other political subdivisions in a county.

(2) If we answer the above question in the affirmative, then, where notices are required to be posted for thirty days previous to an election, is it necessary to print the notice once each week for four weeks, or 28 days, or five weeks?

(3) You call especial attention to Section 3 of the Act, which provides that in the event a paper is not published in the county *where such notice* is required to be given, and request us to advise if a newpaper is not published in a school district or other political subdivision but is published in the county, would it be necessary for the notice to be published.

Replying, I beg to say in the opinion of this Department the provisions of this Act apply to all elections, except general elections.

If, however, the newspaper published in the county or district has not been continuously and regularly published for one year, it will not be necessary to publish the notice therein, because Section 1 of the Act recites "that such notices shall hereafter be given by publication thereof in a newspaper of general circulation which has been continuously and regularly published for a period of not less than one year in the county in which said Act or proceeding is to occur."

These notices must be published at least once each week during the period of time now required for posting notices. For instance, notices are required to be posted in common school district elections for a period of twenty-one days and in independent school district elections for a period of twenty days and therefore in such elections, if a newspaper is published in a common school district or an independent school district the notices must be published at least once each week for three weeks. In other instances, however, where election notices are required to be posted for a period of thirty days, such notices may be published at least once each week for four weeks before the date of the election; if the paper is not a weekly paper. then the district would be authorized to have one of the publications run semi-weekly. We do not think that failure to publish such notice for five times would invalidate the election. While it is somewhat difficult to ascertain the intent of the Legislature in making this provision, yet we feel sure that it did not intend to require an impossible task, and when notices of election are required to be posted for thirty days we think one publication thereof each week for four consecutive weeks, or for twenty-eight days, would be a substantial compliance with the statute.

Mr. Dillon, in his celebrated Work on Municipal Corporations, states that "the election will not be affected by technical irregulari-

ties and this rule has been held to apply to the time and manner of the *publication of the notice.* He cites the following cases:

State vs. Smith, 4 Wash., 661.
Seymour vs. Tacoma, 6 Wash., 427.
Williams vs. Shoudy, 12 Wash., 362.
Richards vs. Klickitat, 13 Wash., 509.
State vs. Wilder, 200 Mo., 97.
See Dillon on Municipal Corporations, Sec. 213, p. 431.

The same author stated that "when the *method of publishing* the ordinances is specified in the statute or charter, a substantial compliance with that method is essential.

Prior to the passage of this Act the statutes required that notice of certain coming elections should be published in a newspaper for a certain time before the election day. The *sole purpose* of this is to warn the voters that an election is to be held and on investigation I find that the courts have generally decided that a substantial compliance with the statute is all that is required.

In the case of Moore vs. City of Walla Walla, 60 Federal 961, the Court held that the publication of notice of a city election from June 26th to July 26th, both inclusive, is sufficient compliance with an ordinance directing publication for thirty days, although the official paper in which publication was made was not issued on Sundays or on the 4th day of July. I assume that the paper in which the notice referred to in this case was a daily paper, in that, the notice was published from "June 26th to July 26th, both days included," and although the paper was not published on Sundays and on July 4th, the Court held that the failure to publish notice on those days did not invalidate the bond election held in the City of Walla Walla.

In the case of Scott vs. Paulen, 15 Kan., 162, it was held that where thirty days notice of an election is required, a publication in a weekly newspaper is sufficient, provided that the first publication is at least thirty days prior to an election, and it is continued in each successive issue of the paper up to the time of the election. In this case the Court used the following language:

"The statute requires thirty days' notice of the election. The notice was published in a weekly newspaper, the first publication more than thirty days prior to the election and in each successive issue to the time of the election. This was sufficient."
McCurdy vs. Baker, 11 Kan., 111.
Whitaker vs. Beach, 12 Kan., 492.

In the case of Seymour vs. Tacoma, *supra,* it was held that where there was a substantial compliance with the requirements of the statute governing notices of election in the matter of voting municipal bonds and a fair election had been held, the result could not be defeated by technical irregularities, such as posting the notice for twenty-six days instead of thirty days and a failure to publish the notice in the official paper on the day immediately preceding the election when the ordinance required publication for thirty days next preceding the election.

The Attorney General, in reference to a requirement in Section

2, Chapter 147, Acts of 1913, that ordinances submitting an amendment or amendments to city voters shall not be submitted until twenty days notice has been given by publication for ten days, held that such requirement was complied with by publication once each week for two weeks in a city or town having only a weekly paper. (Volume 32, Opinions Attorney General, page 405).

We think that if no newspaper is published in the district, it will not be necessary to publish the notice. Section 3 of the Act clearly provides that—

"In the event no paper is published in the county *where* such notice is required * * * Then such notice may be posted."

The word "where" in the above section is, we think, used to denote locality. While, as is unfortunately the case with statutory language, it is somewhat indefinite, yet the interpretation of it given by the New York Court of Appeals is "at which or what place." See Cook vs. Kelsey, 19 N. Y., 412, citing Worcester's Dictionary.

It might perhaps have been better for the Legislature to have used the words "county, precinct or district" in the above section; yet, we think it clear that the Legislature intended the word "where" to denote the place *at which* the election notice is required to be posted.

We do not think the Legislature intended to require a school district or other political subdivision in which no newspaper is published to have notices of election published in a newspaper outside of such district. Although a newspaper has been regularly and continuously published for a period of one year in the county, yet if it is not published "in the county *where* such notice is required" to be posted, then the district is not required to have the notice published.

In this connection I call attention to the fact that the statute authorizes the establishment of a county line common school district "to contain territory within two or more counties in the State." If a newspaper is published in a county line common school district and has been published in such district continuously and regularly for not less than one year, then notice of a bond election for such county line district must be published in that newspaper once each week for at least three weeks, but we do not think that the Act is susceptible to the construction that such county line district having no newspaper published therein would be required to go outside the boundary lines thereof and publish notices of the election in a newspaper or newspapers situated in each of the counties lapped by its territorial boundaries.

You are therefore advised that where a school district or other political subdivision holds an election and a newspaper has been "continuously and regularly" published therein for not less than one year, then the notice of election must be published at least once each week for the period of time now required for posting such notices, and if an election is held for the entire county (except general elections), the notice must be published at least once each week during the period of time required for posting notices in a newspaper that has been "continuously and regularly" published in the

county for not less than one year; but, as stated above, if no newspaper is published in that subdivision of the county "where such notice is required to be given," then the notice should not be published, because the authorities would then be required to go beyond the territory affected by the election to have such notice published.

You are therefore advised:

1. Chapter 179, Acts of 1917, applies to all elections for which notices are required to be posted, except general elections.

2. Where notices are required to be posted for thirty days prior to an election and the notice was first published thirty days before the day of election, it would not be necessary for the notice to be published once each week for five weeks—publication once each week for four consecutive weeks would be a substantial compliance with the statute.

3. If no newspaper is published in the county or district holding such election, it is not necessary to publish the notice.

Yours very truly,

W. P. DUMAS,

Assistant Attorney General.

OP. NO. 1761—BK. 49, P. 270.

COMMISSIONERS COURTS—COUNTY SUPPLIES—COUNTY AUDITOR.

Chapter 141, Acts of the Thirty-fifth Legislature, requiring commissioners' courts to let contracts under competitive bids after publication, where the same involve $500.00 or more, construed in connection with Article 1480, R. S. 1911, being a portion of the county auditor's law, and held that the two acts are construed together and when so construed each will stand, as the Acts of the Thirty-fifth Legislature, is cumulative of Article 1480, and therefore that supplies in those counties having a county auditor are purchased under the terms of Article 1480.

May 18, 1917.

Hon. A. L. Liles, County Auditor, Belton, Texas.

MY DEAR SIR: The Attorney General is in receipt of your letter of May 17, reading as follows:

"Referring to House Bill No. 157, page 349, General Laws of the Thirty-fifth Legislature, Section 2, also Section 1, regarding buying of supplies.

"Section 2 of above bill says that no part of House Bill No. 157 is intended to repeal any part of Title 29, Chapter 2, Revised Civil Statutes of 1911. Please advise us which law will take precedence, House Bill No. 157 or Article 1480 of Title 29, Chapter 2, Revised Civil Statutes of 1911, as to the manner of buying supplies."

House Bill No. 157, the same being Chapter 141 of the Printed Acts of the Regular Session of the Thirty-fifth Legislature, does not become effective until ninety days after adjournment of the Regular Session of the Thirty-fifth Legislature, on, to wit, March 21, 1917, and the holding in this opinion is applicable, of course, beginning with the taking effect of this Act.

Article 1480, of the Revised Statutes of 1911, was Section 17 of the Acts of 1905, providing for the appointment, qualification, etc., of county auditors, and had application only in those counties subject to the County Auditors' Act. This article of the statute is as follows:

"Article 1480. Bids for supplies, etc.—Supplies of every kind, road and bridge material, or any other material for the use of said county, or any of its officers, departments or institutions, must be purchased on competitive bids, the contract to be awarded to the party who, in the judgment of the commisssioners' court, has submitted the lowest and best bid. It shall be the duty of the county auditor to advertise for a period of two weeks in at least one daily newspaper published and circulated in the county for such supplies and material according to specifications, giving in detail what is needed. Such advertisement shall state where the specifications are to be found, and shall give time and place for receiving such bids. All such competitive bids shall be kept on file by the county auditor as a part of the records of his office and shall be subject to inspection by any one desiring to see them. Copies of all bids received shall be furnished by the county auditor to the county judge and to the commissioners' court; and when the bids received are not satisfactory to the said judge or county commissioners, it shall be the duty of the county auditor to reject said bids and readvertise for new bids; provided that in cases of emergency purchases not in excess of fifty dollars may be made upon requisition, to be approved by the commissioners' court without advertising for competitive bids."

House Bill No. 157 of the Thirty-fifth Legislature does not limit the operation of such Act to any particular classification of counties, but the same is in general terms and standing alone would have application to all counties in the State.

Section 1 of this Act is as follows:

"Section 1. The commissioners' court of this State shall make no contract calling for or requiring the expenditure or payment of two thousand ($2000) dollars or more out of any fund or funds of any county or subdivision of any county without first submitting such proposed contract to competitive bids; notice of the time and place, when and where such contract will be let, shall be published in some newspaper published in said county or subdivision once a week for two weeks prior to the time set for letting said contract; or if there is no newspaper published either in said county or said subdivision, then notice of the letting of said contract shall be given by causing a notice thereof to be posted at the court house door of such county for fourteen days prior to the time of letting such contract; provided that in case of public calamity, where it becomes necessary to act at once to appropriate money to relieve the necessity of the citizens or to preserve the property of the county, this provision may be waived; provided that all contracts made by or with said court calling for or requiring the expenditure of any amount of money less than two thousand ($2000) dollars and exceeding five hundred ($500) dollars, shall be let by competitive bids at a regular term of court, except in case of urgent necessity or present calamity; provided that the provisions of this act shall not apply to any work done under direct supervision of the county commissioners and paid for by the day."

A comparison of Section 1, just quoted, with Article 1480, R. S., 1911, quoted above, discloses at once that the two statutes are in pari materia and are substantially the same, with the exception that the later act deals with those contracts not in excess, amounting to $2000.00 or more, with the proviso that contracts amounting to less

than $2000.00 and exceeding $500.00 shall be let by competitive bids, at a regular term of the Court, except in case of urgent necessity or present calamity.

Not only are these two statutes in pari materia, but by the express provision contained in Section 2 of the Act of the Thirty-fifth Legislature, it is provided that the Act shall not be construed so as to repeal any part of Title 29, Chapter 2, Revised Statutes of 1911, and shall be cumulative of said title and chapter. Chapter 2 of Title 29 contains the County Auditors Law of this State. In our opinion this Act of the Legislature must be construed, as is expressly stipulated in the Act, as cumulative of Article 1480, and when so construed must be held to operate in all counties of the State, irrespective of whether or not such counties are under the County Auditors Law.

Under Article 1480 it is made the duty of the county auditor to advertise for bids for the supplies of every kind, road and bridge material, or any other material, for the use of said county or any of its officers, departments or institutions, and such supplies must be purchased on competitive bids, the contract to be awarded to the party who, in the judgment of the commissioners court, has submitted the lowest and best bid.

By the terms of Section 1, Chapter 141, Acts of the Thirty-fifth Legislature, it is made the duty of the commissioners court to advertise for and let contracts upon the competitive bids when the amount thereof exceeds $500.00, and this applies to contracts of every kind or character calling for an expenditure of moneys out of any fund or funds of any county or subdivision of the county. It will be noted from a comparison of these two acts that the language of the Act of the Thirty-fifth Legislature is much broader than that used in Article 1480, that of the latter limiting the scope of the Article to supplies furnished, while the former covers every contract calling for the expenditure of the funds of the county or any district thereof.

We therefore advise that in the opinion of this Department the two acts will be construed as though they were one and the same and the effect thereof is that in all counties of the State before the commissioners court or county auditor would have authority to let contracts for expenditure of funds of the county or subdivision thereof, where such contracts call for an expenditure in excess of $500.00 competitive bids must be advertised for and received and the contract made under such notice and bids. That insofar as supplies for counties, its officers and institutions are concerned Article 1480 still controls in those counties where the county auditors law is in operation, and it is only in those matters not controlled by the county auditors law that the Act of the Thirty-fifth Legislature has application.

In other words, these two laws are to be construed as though they were one and the same act. That is, that the Act of the Thirty-fifth Legislature has application throughout the State in all counties, whether under the operation of the auditors law or not, the effect being that all contracts made by the commissioners court of any county calling for the expenditure of money in excess of $500.00 shall be let upon competitive bids after advertisement. This leaves in full force and effect Article 1480, being a part of the county auditors law,

which deals with particular classes of contracts without respect to the amount thereof, and makes it incumbent upon the county auditor to let contracts for supplies for counties, its officers and institutions upon competitive bids. The further effect of this Act is to broaden the scope in those counties operating under the county auditors law and to add this provision in those counties not under such law.

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

OP. NO. 1762—BK. 49, P. 281.

LIVE STOCK SANITARY COMMISSION—TICK ERADICATION—COMMISSIONERS COURTS—INSPECTOR.

Chapter 60 of the Printed Laws of the Thirty-fifth Legislature controls in the matter of counties taking up the subject of tick eradication upon a vote of the people.

The commissioners court has no authority of its own motion to appoint inspectors, this can only be done at the request of the Live Stock Sanitary Commission to aid it in the enforcement of the law.

The commissioners court has authority to appoint a stenographer to perform any service in the enforcement of a law, the enforcement of which is conferred upon the commissioners court.

May 18, 1917.

Hon. Charles E. Gross, County Auditor, Dallas, Texas.

DEAR SIR: The Attorney General is in receipt of your letter of May 17, as follows:

"There was an election held in this County on April 3, 1917, and by a large majority "tick eradication" carried. The Thirty-fifth Legislature, I am informed, passed a new tick eradication law that went into effect in March, 1917, then the First Called Session of the Thirty-fifth Legislature passed a tick law applicable to Dallas County. I want to know what law the County must work under. I also want to know if the county commissioners have the authority under the present tick eradication law to hire twelve inspectors and a stenographer and pay them for their services out of funds of the County."

Replying thereto you are advised that Chapter 60 of the Printed Acts of the Thirty-fifth Legislature repealed Chapter 169 of the General Laws of 1913. The latter act supplants the former, both of which deal with the protection of live stock in this State, and insofar as the subject of these two acts is concerned the Act of the Thirty-fifth Legislature controls. In your county an election was ordered under the former law, but held after the taking effect of the latter. The question arose as to whether or not the repeal of the former law, would vitiate an election held under those circumstances. This Department ruled that an election so held was void, but as we understand it the Special Session of the Thirty-fifth Legislature, just closed, passed an Act validating all elections held under similar circumstances. We have not had an opportunity to investigate this Act

since its passage through the Legislature, but assuming that it is a valid act and that we are correct as to its terms then the election in your county is validated and you are operating, in the matter of tick eradication, under the Act of the Thirty-fifth Legislature, passed at its Regular Session.

You also desire advice upon whether or not the commissioners court of your county has authority under the tick eradication law to employ twelve inspectors and a stengrapher and pay them for their services out of the funds of the county.

In our opinion the commissioners court of your county has no primary authority to appoint inspectors under the Act in question. The rule is well established in this State, by numerous decisions of the courts, that the commissioners courts have only such powers as are vested in them by the Constitution and statutes of the State. This rule is subject to the qualification that such courts have the implied power necessary in the perfection of those powers expressly granted.

See Bland vs. Orr, 90 Texas, 495.
Mills vs. Lampasas County, 90 Texas, 606.
Baldwin vs. Travis County, 88 S. W., 484.
Crooms vs. Atascosa County, 32 S. W., 188.

We find no provision, whatever, in this Act of the Legislature authorizing the commissioners court of any county having adopted tick eradication to appoint inspectors for the carrying out of the provisions of the Act. Unless, therefore, there was contained in this Act some such provision the authority would not exist.

In Section 3 of this Act it is made the duty of the commissioners courts to cooperate with and assist the Live Stock Sanitary Commission in protecting the live stock of their respective counties from all malignant, contagious, infectious or communicable diseases, whether such diseases exist within or outside the county, and otherwise protect the live stock interests of their county. It is further made the duty of such courts to cooperate with the Commission and the officers working under authority or direction of the Commission in the suppression and eradication of fever carrying ticks and all malignant, contagious, infectious or communicable diseases of live stock, and it is provided in this Section that when it becomes necessary to disinfect any premises infected with anthrax, hog cholera, glanders, foot and mouth diseases, bovine tuberculosis, etc., under orders of the Commission, the county judge shall have such disinfection done at the expense of the county, according to the rules and regulations of the Live Stock Sanitary Commission, and such courts are authorized and empowered to appropriate moneys out of the general fund for the purpose of constructing or leasing the necessary public dipping vats, and for the purchase of dipping material therefor. An analysis of the above section would disclose that the commissioners court would have authority to appropriate funds of the county:

First: To do those things necessary in the cooperation with the Live Stock Sanitary Commission in the protection of live stock from diseases existing within or without the county.

Second : For the disinfection of the premises.

Third. For the construction or leasing of dipping vats and the purchase of dipping material therefor.

It will be observed that there is nothing in this Section authorizing the commissioners court to appoint inspectors or to pay their salaries.

Coming now to Section 7 of the Act, which contains the local option feature of taking up tick eradication in any county and under which your county is now operating we find nothing in this Section that would authorize the appointment of inspectors. In fact, this Section provides that where a county shall have adopted such law the county judge shall notify the Live Stock Sanitary Commission and it shall be the duty of such Commission to cause to be issued a supplemental proclamation, signed by the Governor, proclaiming a quarantine around said county and thereupon *the citizens of said county in co-operation with and under the direction of the Live Stock Sanitary Commission, shall begin work of tick eradication.*

From the *italicized* portion of the above paragraph it appears that the duty of cooperation with the Live Stock Sanitary Commission in the work of tick eradication is imposed upon the citizens of the county. Construing this language together with that contained in Section 3 of the Act, which makes it the duty of the commissioners court to cooperate with such commission, we are of the opinion it was the intention of the Legislature that the citizens of the county should cooperate with the Live Stock Sanitary Commission through the agency of the commissioners court, which body under the constitution has charge of all the affairs of the county.

We do not wish to be understood as holding that the commissioners court is charged with the duty of enforcing this law, for it clearly appears from a reading of the entire Act that its enforcement is conferred primarily upon the Live Stock Sanitary Commission, and in the enforcement by said commission it may call upon the commissioners courts of the various counties for their cooperation and assistance.

The last portion of Section 1 of the Act of the Thirty-fifth Legislature reads as follows:

"The said Live Stock Sanitary Commission of Texas is hereby empowered with the authority to employ a State Veterinarian and Assistant State Veterinarians in times of emergency, and inspectors or other persons, as it may deem necessary to the performance of the duties imposed upon said Commission. The Live Stock Sanitary Commission, the State Veterinarian, Assistant State Veterinarians and inspectors acting under authority or direction of the Commission are hereby empowered and it is made their duty at their discretion to enter upon premises of any person or persons, company or corporation within this State, for the purpose of inspecting, quarantining or disinfecting premises or live stock thereon."

In the biennial appropriation bills enacted by the Legislature under the heading "Live Stock Sanitary Commission" there appear items whereby appropriations are made for the payment of salaries of inspectors for the commission. The commission having taken up this matter of tick eradication and directing the citizens of your county in the enforcement of the law it would be the duty of such commission to send its inspectors to your county, which inspectors

are paid, as under the provisions of the appropriation bill above referred to.

Under the duty imposed upon the commissioners court to cooperate with the Live Stock Sanitary Commission this Department has held, and we think properly so, that the commissioners court may appropriate funds necessary to an efficient cooperation with such commission, and while we are of the opinion that the commissioners court could not of its own motion appoint inspectors under this Act and send them into the field with authority to inspect the premises, yet we are of the opinion that the commissioners court has authority to do and perform any act necessary to be done in a complete cooperation with the Live Stock Sanitary Commission, and to expend the funds of the county for any purpose contemplated by the Act when called upon by the commission. This would include the appointment of inspectors in event the inspectors of the commission were not available, and if called upon by the Live Stock Sanitary Commission to appoint inspectors, assistants, guards or other necessary aid, to the proper enforcement of this law, the commissioners court would be authorized so to do and to pay the necessary expenses thereof from the general funds of the county. This rule would obtain, however, only in event the commissioners court was called upon so to do by the Live Stock Sanitary Commission, a body charged with the enforcement of the law. The commissioners court would have no authority of its own motion to appoint inspectors and send them into the field in this work.

As to the appointment of a stenographer by the commissioners court we think the Court would have the right to appoint a stenographer, to be paid out of the general funds of the county, to assist in the enforcement of any law the commissioners court is authorized to enforce, and if in the administration of any law relating to the protection of live stock it becomes necessary for the commissioners court to employ a stenographer we think that authority would exist.

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

OP. NO. 1763—BK. 49, P. 287.

SANITARY CODE—BIRTHS AND DEATHS—REGISTRATION—LOOSE LEAF RECORD.

A statute requiring the record of births and deaths to be made in a permanently bound book the Registrar of Vital Statistics would have no authority to prescribe and the city registrar and county clerk would have no authority to use a loose leaf record, as same is not a permanently bound book, within the meaning of this Act.

Rules 37 and 46 of Article 4553a, Vernon's Sayles' Civil Statutes.

May 22, 1917.

Dr. W. A. Davis, Secretary of State Board of Health and State Registrar of Vital Statistics, Capitol.

DEAR SIR: In your letter of May 21st, addressed to the Attorney General, you desire to be advised if a loose leaf binder from which the leaves may be removed is a permanently bound book, within the meaning of Rules 37 and 46 of the Sanitary Code of this State, requiring the record by city and county registrars of all births and deaths in such cities or counties.

That portion of Rule 37 and all of Rule 46 bearing upon this subject are as follows:

"Rule 37. * * * It shall be the duty of the aforementioned city registrar to record in a permanently bound book, which shall be secured from the city for that purpose, all births and deaths which shall occur within their respective cities and towns, together with such statistics and data as shall be furnished him by the birth certificates and death certificates herein elsewhere provided for, and it shall be the duty of said city registrar to transmit all such original birth and death certificates received during the preceding month to the State Registrar of Vital Statistics at Austin on or before the tenth day of the following month."

"Rule 46. Clerks shall record all statistical data.—The clerk of the county court in every county in the State of Texas shall record all statistical data relating to such births and deaths as are reported to him from his County outside incorporated cities and towns in a permanently bound book which he shall secure and keep for that purpose, in form as supplied by the State Registrar, and shall transmit the original certificates to the State Registrar by the tenth of each month following the month in which they are received."

It will be observed that the language used in each of the two rules above quoted is that the record of births and deaths shall be made "in a permanently bound book."

The question presented by you is whether or not a loose leaf system is a permanently bound book, within the meaning of these two articles.

In our opinion your question should be answered in the negative, that is that the loose leaf systems now in vogue, while they are convenient and useful for some purposes, do not meet the requirements of the statute that certain records shall be made in permanently bound books.

The Sanitary Code of this State was enacted in 1911, at which time loose leaf systems were in general use, which fact must have been known to the Legislature and in prescribing that the records in question should be made in permanently bound books we are of the opinion that it discloses the intention of the Legislature to prohibit the use of such systems in the making of the record of births and deaths in this State.

It is made your duty under these rules to prescribe the form of the books used for this purpose, and in our opinion you would be powerless to prescribe a form at variance with the plain language of the statute. It was held in People vs. Nash, 62 N. Y. 484, that where the statute prescribes the method of indexing the records in the office of the county clerk that the board of supervisors was without authority and had no power to change the method of indexing prescribed by the statute.

The Legislature of this State having said that the records of births and deaths shall be kept in permanently bound books then you, upon

whom devolves the duty of prescribing the form, would be without authority to prescribe any other than a permanently bound book and if the loose leaf system does not meet this requirement then you would have no authority to prescribe such and direct its use by the registrars of cities and clerks of the county court in the various counties of the State.

After quite an extended search through the authorities the writer has been unable to find any case bearing directly upon this subject. It appears to us, however, from a consideration of the statutes bearing upon the registration that it was clearly in the contemplation of the Legislature in the enactment thereof that the record of births and deaths required to be recorded by the registrars of cities and the county clerks of counties should be made in permanently bound books of the usual make, securely fastened together and not susceptible of having the leaves thereof interchanged, as is the case in loose leaf systems of books that can be taken apart by designing persons and leaves taken therefrom and others placed in their stead. It may be that by the use of the loose leaf system the records would have a neater appearance and work could be expedited.

We therefore advise you that in the opinion of this Department you would have no authority to prescribe and the city and county officials would have no authority to use the loose leaf system in keeping a record of the births and deaths, as such system does not meet the requirement of the statute that the record be kept in a permanently bound book.

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

OP. NO. 1786—BK. 49, P. 302.

PHARMACY ACT—COMPOUNDING PRESCRIPTIONS.

Where a physician keeps on hand a small supply of drugs and medicines and compounds his own prescriptions and also permits his son, who is not a licensed physician nor a licensed pharmacist to also compound his prescriptions, neither of such persons violate the provisions of the Pharmacy Act.

The Pharmacy Act is intended to protect the public against the compounding of prescriptions and the sale of poisons by licensed pharmacists only where they are employed in a pharmacy or drug store where the public generally may buy drugs and medicine, and has no application to the carrying of a small stock of drugs and medicines and compounding of prescriptions therefor by a physician engaged in the practice of medicine, where such prescriptions are intended for the use of his patients only.

Articles 771 and 881, Penal Code.

May 26, 1917.

Hon. W. H. Graham, County Attorney, Abilene, Texas.

DEAR SIR: In your letter addressed to the Attorney General, under date of May 23rd, you submit for an opinion thereon the following state of facts:

"A physician and surgeon here in Abilene occupies offices in second story of a business building. In one room he keeps a small stock of general drugs. He is not a registered pharmacist. In the office with him is his son who is neither a doctor of any kind nor a registered pharmacist. The son fills the prescriptions of the father in the majority of instances, but in some instances the father fills his own prescriptions. This prescription filling is limited to the doctor's own patients and he does not fill or permit to be filled, prescriptions to the public indiscriminately, except to his own patients, but does do practically all of the filling of prescriptions for his own patients. The public generally does not resort to his office and buy drugs; it is only his own patients."

Article 771 of the Penal Code of this State in substance makes it unlawful for any person not a licensed pharmacist to conduct or manage any pharmacy, drug or chemical store, apothecary shop or other place of business for the retailing, compounding or dispensing of any drug, chemical or poison, or for the compounding of physician's prescriptions, or for any person not licensed as a pharmacist or assistant pharmacist to compound, dispense or sell at retail any drug, chemical, poison or pharmaceutical preparation upon the prescription of a physician or otherwise, or to compounding physicians' prescriptions, except as an aid to or under the supervision of a person licensed as a pharmacist.

By this Article it is also made unlawful for any owner or manager of a pharmacy or drug store or other place of business to cause or permit any other than a person licensed as a pharmacist or assistant pharmacist to compound, dispense or sell at retail any medicine or poison, except as an aid to or under the supervision of the person licensed as a pharmacist. Then follow certain exceptions to the law by way of provisos, one of which is that the Section shall not be construed to interfere with any legally registered physician or practitioner of medicine in the compounding of his prescriptions, or to prevent him from supplying his patients with such medicines as he may deem proper.

The penalties prescribed by this Act are set out in Article 781, of the Penal Code, which is in verbiage substantially the same as Article 771, insofar as the definition of the offenses is concerned. From an analysis of the above Article it appears:

1. That a licensed practitioner of medicine may lawfully compound prescriptions for his patients without the necessity of becoming a licensed pharmacist.
2. It is unlawful for a person who is neither a licensed pharmacist nor a licensed physician to compound prescriptions.
3. It is unlawful for any owner or manager of a pharmacy, drug store or other place of business to cause or permit any other than a licensed pharmacist or assistant pharmacist to compound, dispense or sell at retail any medicine or poison, except as an aid to or under the supervision of a licensed pharmacist.

In our opinion the Act of 1907, establishing the Texas State Board of Pharmacy and regulating the practice of pharmacy and the licensing of pharmacists in this State has no application to the facts presented by you, except that the doctor in question clearly comes within the exemption contained in Article 771.

It is clear from the language of Article 771, as well as that of 781,

that the protection afforded by this Act is directed against pharmacists, drug stores or other places of business. The terms "druggist," "proprietor of a drug store," "pharmacist" are synonymous, for the business of pharmacist or apothecary or druggist is one.

State vs. Clinkenbeard, 125 S. W., 827.

The commonly accepted definition of a pharmacy or drug store is that it is a place where the general public are invited to purchase drugs and medicines and where they may have prescriptions of physicians filled. In order that the supply of drugs carried by the physician in question may come within the contemplation of this Act and the sale thereof in a manner not permitted by the Act made penal, the same must come within that clause of the Act, to wit, "other place of business."

This clause follows the words "pharmacy" or "drug store." This language of the statute comes clearly within the rule of *ejusdem generis*, that is when general words follow an enumeration of particular things such words must be held to include only such things or objects as are of the same kind as those specifically enumerated.

Sutherland on Statutory Construction, Section 422.

It follows, therefore, that the term "other place of business" must be a place of business of like character as a pharmacy or a drug store, that is, a place where the public may purchase drugs and medicines and have their prescriptions compounded.

The physician in question makes no pretense of running a pharmacy or drug store. He is a practicing physician and merely keeps on hand a sufficient supply of drugs and medicines with which to supply his patients. Neither he nor his son are engaged in running a pharmacy or drug store and neither of them are engaged in compounding prescriptions as pharmacists, within the meaning of this Act.

We therefore advise you that in our opinion you could not successfully maintain prosecutions against either of them.

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

OP. NO. 1779—BK. 49, P. 373.

CHAPTER 108 OF THE REGULAR SESSION OF THE THIRTY-FOURTH LEGISLATURE, REGULATING PRIVATE EMPLOYMENT AGENCIES, HAS NO APPLICATION TO AGENCIES ENGAGED EXCLUSIVELY IN SECURING POSITIONS FOR TEACHERS IN THE PUBLIC SCHOOLS OF THIS STATE.

June 28, 1917.

Hon. John W. Hornsby, County Attorney, Austin, Texas,

DEAR SIR: In your favor of the 23rd instant, you request the opin-

ion of this Department as to the meaning of Chapter 108, Acts of the Regular Session of the Thirty-fourth Legislature, regulating private employment agencies, your specific inquiry being whether or not it applies to private agencies established to assist teachers in securing positions in the public schools of the State. I assume, from your inquiry, that the only function of such an agency is to bring teachers desiring positions in touch with school trustees desiring teachers, for which service the agency charges the applicant a compensation.

The statute in question (Section 1) provides:

"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 $25.00."

There are other provisions in Section 1, but the above quotation is believed to be sufficient for this inquiry.

In Section 2 of the Act it is made the duty of the licensed agency to keep a book, in the form to be prescribed by the Commissioner of Labor Statistics, in which shall be entered the "date, sex, nativity, trade or occupation, name and address of every applicant," and he shall also enter in said register the name and address of every person who shall "make application for help or for servants," and the name and nature of the employment for which such help shall be wanted, etc.

There are various other regulatory provisions, and in Section 4 are found the penal provisions of the Act.

Section 5 of the Act defines *a private agency* as follows:

"A private agency for hire is defined and interpreted to mean any person, firm or corporation engaging in the occupation of furnishing employment or help, or giving information as to where employment or help may be secured, or displaying any employment sign, or bulletin, or, through the medium of any card, circular or phamphlet, offering to secure employment or help; provided, that charitable organizations not charging a fee shall not be included in said term."

Your question reduced to its simplest form, is whether or not this law applies at all to agencies engaged exclusively in assisting school teachers to positions as teachers in the public schools of the State.

As this law is penal in its nature, we are to be guided in our investigation by the well settled rule of construction, that if it is doubtful whether the thing complained of falls within or without the penal provisions of the law, the doubt will be resolved in favor of the innocence of the one charged, or who may be charged, with its violation.

112 Pacific 931.
143 Pacific 436.
144 Pacific 907.

If therefore the terms used in describing the business regulated by this law have two significations; that is, a broad application and

yet a narrower one—one that brings the act that may be complained of within the terms of the law, and another that leaves it without—we are, in the absence of any other controlling factor, to accept the latter as being the legislative intent.

Some of the terms used in this statute such as "employment," "where a fee is charged to either applicant for employment or for help" (Section 1), "occupation," where the agency is required to keep a record of each application "in which shall be entered the age, sex, nativity, trade or occupation, name and address of every applicant" (Section 2), also in Section 5 where the employment agency regulated by the Act is defined "to mean any person, firm or corporation engaging in the occupation of furnishing employment or help, or giving information as to where employment or help may be secured, etc." are comprehensive enough to include school teachers and members of all trades, professions and occupations.

But were these terms used in their comprehensive sense?

It will be observed that the agency regulated by this Act is intended not only to secure employment for applicants, but serves the employer as well. The employer class are referred to as those seeking "help" (Section 1), those "who make application for help or servants" (Section 2) also in Section 5 the term "Help" is used.

The only terms used as designating the class of employes sought by the employer class served by these agencies are "help" and "servants."

We conclude therefore, that the only class of agencies comprehended by this Act are those who secure "help" and "servants" for the employer-applicant. The meaning therefore of these terms will enable us to determine the sense in which the more comprehensive terms "employment," "occupation," were used in connection with the employee-applicant, and thus arrive at a correct conclusion as to the character of agencies regulated by this law.

"The word 'help,' as a part of speech used in this connection, means 'an assistant'; a hired laborer or servant; especially a domestic or household servant or assistant" (Century Dictionary).

The term "servant" is defined in the Century Dictionary as follows:

"One who serves or attends, whether voluntarily or involuntarily; a person employed by another and subject to his orders; one who exerts himself or herself or labors for the benefit of a master or an employer; an attendant; a subordinate attendant; an agent. The earlier uses of this word seem to imply protection on the part of the sovereign lord or master and the notion of clientage, the relation involved being one in no sense degrading to the inferior. In modern use, it denotes specifically a domestic or menial helper. In law, a servant is a person who for a consideration is bound to render service under the legal authority of another, such other being called the master. Agents of various kinds are sometimes included in the general designation of servants; but the term 'agent' implies discretionary powers and responsibilities in the mode of performing duty, such as is not usually implied in the term 'servant.'"

At law, a servant is described as one employed to render personal

services to his employer, otherwise than in the pursuit of an independent cause, and who remains under the control of the master.

109 S. W., 240.
6 L. R. A. (N. S.), 544.

We have found no instance where the terms "help" or "servant" have been construed to comprehend school teachers, or members of the professional classes. They seem to refer exclusively to the non-professionals. We are thus led to conclude that the private agencies regulated by this Act are those who seek to secure employment or occupations for the non-professional members of society, designated by the terms "help" and "servant," and therefore would not include private agencies engaged only in assisting teachers to fill positions in our public schools.

There is another view that leads to the same conclusion; that is, where there is an ambiguity in the language of an act, where the meaning is not altogether plain, we are authorized to examine the contemporaneous facts and to look to the mischief sought to be remedied.

In Lewis' Sutherland, second volume, Section 456, the rule of construction here referred to is stated as follows:

"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 the statute. To ascertain it fully, the court will be greatly assisted by knowing, and it is permitted to consider, the mischief intended to be remedied or suppressed, or the necessity of any kind which induced the enactment."

From the same authority, in Section 585, we read:

"The courts construe remedial statutes more liberally to suppress the mischief and advance the remedy. This principle operates to exclude as well as to include cases in furtherance of the law-makers' intention. That which is not in the purpose or meaning, nor within the mischief to be remedied, is not included in the statute, even though it be within the letter. The courts follow the reason and spirit of such statutes till they overtake and destroy the mischief which the Legislature intended to suppress. In doing so, they often go quite beyond the letter of the statute. What is within the intention is within the statute, though not within the letter, and what is within the letter, but not within the intention, is not within the statute."

What were the contemporaneous facts and the mischief sought to be abolished by this remedial statute? The facts were that in the larger cities, not only in this State but through the country, laboring men and women were, in a large measure, forced to resort or were induced to resort, to employment agencies to secure work. A large number of these were foreigners and most of them were strangers; fees were collected from these eager and needy applicants by agencies on specious promises; extortion was often practiced as the price for a job prospect; women and girls, under the belief that they were about to secure honorable employment, were steered to questionable places and ensnared often into immoral practices.

The Legislature had the right to know and evidently did know

that these agencies were places where foreigners, strangers, women and girls, under stress of circumstances, would resort to procure employment, and that such a situation afforded opportunities and temptations for the practice of fraud and oppression. Thus we partially see, the mischief sought to be remedied.

This Act has no reasonable relation to any subject other than to protect in the large cities these classes of our citizens. We find no contention anywhere that employment agencies have been regulated in order to protect school teachers or those following scientific pursuits, or the professionals generally from impositions of the kind mentioned above. The nature of their employment, the educational preparation necessary for its pursuit, the manner in which the members of the professional classes, such as teachers, enter their employment, their ability and equipment to take care of themselves and prevent impositions, and the relatively few in number of our people engaged in this class of employment, forbid the idea that there existed any reason for a law of this nature to protect them from fraud or imposition, or that any mischief with reference thereto really existed.

We therefore conclude that such was not the purpose of the statute, even if it should be found in its letter, although we do not find such to be the case.

This construction is in harmony with the construction given statutes of other states.

A question arose under a statute of the State of Washington, which made it unlawful for any employment agent, or his representative, or any other person, to demand or receive from any person seeking employment any remuneration or fee for furnishing employment or information leading thereto. The violation of said Act was punishable criminally. The Supreme Court of that state held that it had no application to employment agencies for school teachers, stating:

"The purpose of the act was to protect the ignorant class of manual laborers, composed largely of foreigners not familiar with our language and conditions."

In the course of the opinion, among other things, the court said:

"The act has no reasonable relation to any subject other than the protection of those who may be classed as workers or laborers. It has never been contended that business and professional men, teachers and those following scientific pursuits are not amply equipped to protect themselves. A teacher renders the very highest class of professional service, whereas those for whose benefit this law was passed are frequently unskilled in business affairs, and in many instances are men of foreign birth having no competent understanding of our business methods or our language. Furthermore, the act must be determined by a consideration of its natural effect when put in operation. In operation it may tend to protect the day laborer, who, as said by the examiner in the office of the labor commissioner of the city of Seattle, 'is generally poor and without means,' and who, in consideration of a fee, is directed to a job which may not exist, or which may not endure because of collusion between the employment agent and a corrupt foreman. But such considerations do not naturally or reasonably follow the case of a teacher,

when measured by the admitted facts." (See Huntworth vs. Tanner, 152 Pac. 523, 527.)

We therefore conclude, and advise you, that the statute in question has no application to private employment agencies engaged exclusively in securing employment for teachers in the public schools of this State.

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

OP. NO. 1787—BK. 49, P. 385.

GAME, FISH AND OYSTER LAW—DESTRUCTION OF SEINES AND NETS—SEARCH AND SEIZURE.

The authority granted to the Game, Fish and Oyster Commissioner and his deputies to seize and destroy seines and nets used unlawfully is a valid exercise of the police power to protect the property of the State.

The Game, Fish and Oyster Commissioner and his deputies have no authority to enter and search any boat or premises, except when armed with a search warrant, procured under the provisions of the law.

Constitution, Section 9, Article 1.
Penal Code, Article 923g.
Revised Civil Statutes, Article 3985.
Code of Criminal Procedure, Title 6.

July 13, 1917.

Hon. Will W. Wood, Game, Fish and Oyster Commissioner, Care Hotel Hutchins, San Antonio, Texas.

DEAR SIR: The Attorney General is just in receipt of your letter of July 12th, wherein you propound two inquiries, in substance as follows:

1. Have you and your deputies the authority to seize and burn, or otherwise destroy, nets and seines when found in an unlawful use?

2. Have you and your deputies the right to enter and search warehouses, cold storage, etc., or the hold or cabin of boats, without a search warrant?

Replying to your questions, in the order named, we beg to say that the authority of you and your deputies to seize and destroy nets and seines used in the unlawful taking of fish is found in Article 923g, Vernon's Criminal Statutes, which is as follows:

"Article 923g. Having in possession or carrying seine or drag net into prohibited waters.—It shall be unlawful for any person to carry into or have in his possession in any waters where seining is prohibited any seine or drag net, and any such person who shall carry into or have in his possession any such seine or drag net shall be deemed guilty of a misdemeanor, and upon conviction, shall be fined in a sum of not less than ten nor more than one hundred dollars, and any seine or drag net so carried into or found in such waters shall be deemed a nuisance and the Game, Fish and Oyster Commissioner or his deputy are required to abate such nuisance by the destruction of such nets, as provided in this act. Pro-

vided that this act shall not apply to the closed waters within one mile of any town."

This identical question was before the courts of this State in the case of Sterrett vs. Gibson, 168 S. W., 16, and in sustaining this Act, as a valid exercise of the police power, for the protection of the property of the State, the Court cited and discussed numerous authorities, saying:

"This is merely a declaration of the sovereignty that abides in every State, so far as the fish and game within its borders are concerned, and in the consideration of the rights of individuals in connection with fish and game it must always be kept in mind that the State has the undoubted right, power and authority to regulate and control the taking of fish or killing of game, or absolutely prohibit the doing of either. The citizen has no vested right in game and fish, but the State owns the game and the tide waters and the fish therein, as well as the beds of all tide waters. McCready vs. Virginia, 94 U. S., 391, 21 L. Ed, 248; Geer vs. Connecticut, 161 U. S. 519, 16 Sup. Ct., 600, 40 L. Ed., 793; Silz vs. Hesterberg, 211 U. S., 31, 29 Sup. Ct., 10, 53 L. Ed., 75; Ex parte Blardone, 55 Tex., Cr. R., 189, 115 S. W., 838, 116 S. W., 1199, 21 L. R. A. (N. S.) 607. The State has the power and authority to make laws deemed necessary and proper for the preservation of its game and fish, and such power has been exercised so long and so beneficially that any attempt to call it in question will meet with scant consideration by any Appellate Court. Not only has the State the power to preserve its game and fish, but it is its duty to do so by enacting laws prohibiting destructive and exhaustive methods of taking the same by the use of instruments that will destroy them at improper times and places. In the exercise of this wise and beneficent police power the State has authority to not only declare that seines and nets shall not be used in its waters, but to make such use a crime, and to take all measures necessary to prevent a repetition of such offenses. Such instruments of destruction of fish may be declared nuisances by the Legislature and its officers authorized to destroy them.

"In the case of Lawton vs. Steele, 153 U. S., 133, 14 Sup. Ct., 499, 38 L. Ed., 385, it was held, in sustaining a statute of New York, which declared nets nuisances and provided for their destruction:

" 'An act of the Legislature which has for its object the preservation of the public interests against illegal depredations of private individuals ought to be sustained, unless it is plainly violative of the Constitution, or subversive of private rights. In this case there can be no doubt of the right of the Legislature to authorize judicial proceedings to be taken for the condemnation of the nets in question, and their sale or destruction by process of law. * * * But where the property is of little value and its use for the illegal purpose is clear, the Legislature may declare it to be a nuisance and subject to summary abatement. Instances of this are the power to kill diseased cattle, to pull down houses in the path of conflagrations, the destruction of decayed fruit or fish or unwholesome meats, or infected clothing, obscene books or pictures, or instruments which can only be used for illegal purposes. While the Legislature has no right arbitrarily to declare that to be a nuisance which is clearly not so, a good deal must be left to its discretion in that regard, and if the object to be accomplished is conducive to the public interests, it may exercise a large liberty * * * in the means employed * * * The object of the law is undoubtedly a beneficent one, and the State ought not to be hampered in its enforcement by the application of constitutional provisions which are intended for the protection of substantial rights of property. It is evident that the efficacy of this statute would be very seriously impaired by requiring every net illegally used to be carefully taken from the water, carried before a court or magistrate, notice of the seizure to be given by publication and regular judicial proceedings to be instituted for its condemnation.'

"The law of New York authorized the destruction of the fish nets in much the same terms that the Texas statute does.

"The Supreme Court of the United States also held in the case cited that the contention that nets are not in themselves a nuisance, but are lawful acts of manufacture and ordinarily used for a lawful purpose is not a conclusive argument against the law, for the Legislature has the power to declare that which is perfectly innocent in itself to be unlawful. And in the case of People vs. West, 106 N. Y., 293, 12 N. E., 610, 60 Am. Rep., 452, which is cited by the Supreme Court in Lawton-Steele case, it is held:

" 'It is not a good objection to a statute prohibiting a particular act and making its commission a public offense that the prohibited act was before the statute lawful or even innocent, and without any element of moral turpitude.'

"The Supreme Court also approved the case of State vs. Snover, 42 N. J. Law, 341, in which it was held that:

" 'After a statute has declared an invasion of a public right to be a nuisance, which may be abated by the destruction of the object used to effect it, the person who, with actual or constructive notice * * * sets up such nuisance can not sue the officer whose duty it has been made, by the statute, to execute its provisions.'

"There are cases that hold to the contrary of the propositions herein enunciated, but we prefer the line of decisions, sustaining the authority of the State, in the protection of a great industry, to declare instruments of destruction nuisances and to abate them by destrowing them, to that line which would erect barriers of technicalities in the pathway of the State and permit the destruction of fish and game in the interests of men who have no end in view except the upbuilding of their personal fortunes at the expense of the public. No right of theirs is invaded by providing for the destruction of seines and nets found in prohibited places, for it is only by permission of the State that they can fish in its waters, and they must conform to its restrictions and regulations or incur the penatly of being stripped of the right to fish at all. As said by Judge Ramsey in Ex Parte Blardone:

" 'The Legislature has not only the authority to regulate the slaughter of such game, but to make such laws * * * as may and will defeat evasions and prevent violations of this law.' "

From the above case it appears that this is not an open question in this State. The Court holds the statute as a valid exercise of the police power and we can but advise you to follow the holding of the Court, and that you and your deputies have the right to seize and destroy nets and seines, when they are found in an unlawful use.

Replying to your second question, it seems that whatever authority you and your deputies have to search premises to discover fish, turtle, terrapin, or oysters unlawfully taken out, upon which the tax has not been paid, is found in Article 3985, Revised Statutes, 1911, which is as follows:

"Article 3985. Permit to sell, with receipts of seizure and sale; proceeds, how disposed of.—When the special tax provided for in Article 3983 of the chapter has been paid, it shall be the duty of the Game, Fish and Oyster Commissioner, or his deputy, receiving the tax, to give a receipt for same, together with a permit authorizing the holder thereof to dispose of the products on which the special tax has been paid. A duplicate of which receipt and permit shall be retained in the office of said commissioner issuing same. This permit shall be given by the person delivering said products to the person, firm or corporation to whom the products mentioned therein shall be sold or delivered for sale, shipment or storage. Any fish, turtle, terrapin, shrimp or oysters found in the

possession of any packer, buyer or commission man for the disposition of which he can not show the State's permit, shall continue the property of the State, and may be seized by the Game, Fish and Oyster Commissioner or any of his deputies, and sold, the proceeds thereof to go to the fish and oyster fund of the State."

In our opinion this statute is not sufficient to authorize you or your deputies to enter any boat or premises without the consent of the owner or person in charge, unless armed with a search warrant, or even if the statute undertook to give you such authority then it would be in violation of Section 9, Article 1 of the Constitution, as follows:

"Section 9. Guaranty against unreasonable seizures and searches.—The people shall be secure in their persons, houses, papers and possessions from all unreasonable seizures and searches, and no warrant to search any place or to seize any person or thing shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation."

See Dupree vs. State, 119 S. W., 301.

We therefore advise that before you or your deputies would be authorized to enter any boat or premises without the consent of the owner or person in charge it would be necessary for you to procure a search warrant, in the manner and under the conditions set out by Title 6, of the Penal Code of this State.

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

OP. NO. 1814—BK. 50, P. 87.

CONSTITUTIONAL LAW.

Chapters 29 and 204, Acts of the Thirty-fifth Legislature, 1917, providing for West Texas A. & M. College and Northeast Agricultural College are constitutional.

Legislature has constitutional power to establish and provide for the support of such colleges and universities as in its judgment may be demanded by the public interest.

September 6, 1917.

Hon. F. O. Fuller, Speaker of the House, Capitol.

DEAR SIR: We are in receipt of a copy of House Resolution No. ——, by Tillotson, stating the history of Chapters 29 and 204, Acts of the Thirty-fifth Legislature, Regular Session, providing for the establishment, etc., of the "West Texas Agricultural and Mechanical College" and the "Northeast Texas Agricultural College," respectively, and requesting the opinion of this Department upon the question of the constitutional authority of the Legislature thus to make provision for such colleges.

Section 48 of Article 3 of the Constitution empowers the Legislature "to levy taxes or impose burdens upon the people," to raise re-

venue for the economical administration of the government in which may be included the following purposes:

"* * * The support of public schools, in which shall be included colleges and universities established by the State; and the maintenance and support of the Agricultural and Mechanical College of Texas."

The "Agricultural and Mechanical College" referred to in this section is the one established by the Act of April 17, 1871, and referred to in Section 13 of Article 7 of the Constitution. By Section 10, et seq., of Article 7 provision is also made for the establishment, etc., of the "University of Texas." Section 48, of Article 3, and Sections 10 and 13 of Article 7, being parts of the same instrument, and being somewhat in pari materia, must be read together; when this is done it will be seen that the granting power of Section 48 is much broader in its scope than mere provision for the "University of Texas" and the "Agricultural and Mechanical College." The language is that the Legislature may provide for "colleges and universities,"—both terms being in the plural. This general language, undoubtedly, includes the "University of Texas" and the "Agricultural and Mechanical College" established by the Act of April 17, 1871, but it also includes such other "colleges and universities as may be established by the State." The term "established by the State" is both prospective and retrospective in meaning; this must be true, because it modifies the term "colleges and universities."—plural terms,—while at the time the provision was adopted, there was but *one* university and *one* college for whose establishment provision had been made by the Legislature. The people certainly intended that support should be given the one university and the one college already established; they as clearly intended that others might be established, else they would have limited the provision to the one university and the one college instead of using the general plural terms "colleges and universities."

Section 48 clearly contemplates the proposition that additional colleges and universities may be demanded by the public interest, and makes provision for such contingencies, as may from time to time arise, by authorizing the Legislature to impose "burdens upon the people" for the establishment and support thereof.

We have here, therefore, a specific grant of power to accomplish a general object, to wit: the support of such "colleges and universities" as may be "established by the State." The terms "college" and "university" are left undefined,—they are, more or less, incapable of accurate definition, their significance adjusting themselves to the changing needs of time and development. The number of "colleges" and the number of "universities," likewise, is left indefinite. The time and place, and the circumstance, of their establishment "by the State,"—except with respect to the "University of Texas" and the "Agricultural and Mechanical College" provided for by the Act of April 17, 1871,—are all left uncertain. Who, then, shall determine what shall constitute a "college" or a "university," how many and what kinds of "colleges and universities" we shall have, and when and where they shall be located? The answer is obvious. The body—

the Legislature—in whom is vested the general power, has also the power to do all things needful for the full accomplishment of the general purpose. Section 1 of Article 3, itself, vests in the Legislature plenary authority to provide for the public education, by the establishment of essential schools, and Section 48 thereof is tantamount to a command that in the school system shall be included such "colleges and universities" as may be required by the public interest. And that the "colleges and universities" which may be established under the authority of Section 48 are not limited in number or kind by the provisions with respect to the "University of Texas" and the particular "Agricultural and Mechanical College" referred to is a proposition demonstrable by the fact that the general language of Section 48 is much too broad to be limited to these two institutions and their branches.

For the general reasons stated above, we are of the opinion that the Legislature had the power to establish colleges of the kind described in the two statutes referred to. We are, also, of the opinion that there is nothing in the manner in which this power was exercised in the details of the statutes to render them void, and our reasons for this opinion will now be, briefly stated.

Your resolution suggests the idea that these Acts may be unconstitutional, because they undertake to make the new colleges "branches" of the "Agricultural and Mechanical College" at Bryan, Texas, or "branches" of the "University of Texas." The uniform legislative and executive construction of the relevant provisions of the Constitution is that branches of these institutions may, validly, be created by statute, and that such "branches" may be located at places other than Austin and Bryan. Familiar instances of such construction are the statutes, enacted by the Legislature and approved by the Governor, creating the Medical Branch of the University located at Galveston and creating the School of Mines located at El Paso, and creating the West Texas A. & M. College to be located as provided in Chapter 29, Acts of 1917. Of course, the legislative and executive construction of constitutional provisions are not binding and are worthless if clearly wrong, but in doubtful cases they are entitled to great weight (Lewis' Sutherland Statutory Construction, Sec. 476). The fact that the Legislature is expressly given the general power to create and support "colleges and universities" by Section 48 of Article 3, together with the undoubted fact that it has wide discretion as to the choice of means and manner in which this general power may be exercised, afford substantial grounds for saying that it may establish "colleges and universities" as independent units or as parts or branches of those already established as it may choose; this being true, and the legislative and executive departments of the government for a long time having used the power to establish and maintain branches of the two institutions expressly provided for in the Constitution, we think this assumption of the existence of the power is of such great weight that we would not be justified in saying that the power does not exist, even if we should think its existence to be doubtful.

But if it should be true that the power to create "branches" of the "University of Texas" and of the "Agricultural and Mechanical Col-

lege" at Bryan does not exist, still we think that the legislation providing for the so-called branches of these institutions would be sustained by the courts. It is familiar law that a statute will be given a construction, if possible, which will harmonize it with the Constitution, and at the same time accomplish the material objects sought. In "Sedgwick On Statutory and Constitutional Law," at page 593, the rule is thus stated: "It has been repeatedly held, that to warrant courts in setting aside a law as unconstitutianal, the case must be so clear that no reasonable doubt can be said to exist." A corollary of this rule is that parts of a statute may be stricken out for unconstitutionality, and if enough remains to constitutute a workable statute, the remaining portions will be left in force (Ibid, 595). Assuming, arguendo, that the power to create "branches" does not exist, and assuming further that the legislation providing for the Medical Branch of the University, the School of Mines, the Northeast Texas Agricultural College and the West Texas A. & M. all undertake to make these schools "branches" of the University and the A. & M. College at Bryan, we think it is very clear that the power to establish and support all these schools, under such legislation, still exists. This follows, we think, from the fact that the supposed connection making these institutions "branches" of the others is largely a matter of nomenclature and that they are, in effect, independent colleges such as may be created and supported under the warrant of Section 48, Article 3. In effect the only substantial connection between the so-called "branches," on the one hand, and the University or the A. & M. College at Bryan, on the other, is that the general management of the University and the Medical Branch and the School of Mines is placed in one Board of Regents, and the general management of the other schools is placed in the Board of Directors of the A. & M. College at Bryan. But there is nothing in the Constitution to forbid the common management of any or all of the State's educational institutions. The Legislature, having decided to establish new colleges, has the undoubted right to provide for the management thereof as it may see fit; it may provide for an independent board (Sec. 30a, Article 16), or it may devolve the additional duties of the management of the new schools upon existing officers. The management of the new schools, being executive, could have been placed in a board composed of the Comptroller, State Treasurer and Attorney General, or other executive officers (Arnold vs. State, 71 Texas, 239; M. K. & T. vs. Shannon, 100 Texas, 388), but if this had been done it is obvious that the schools would not have become parts or branches of the departments presided over by these officers. So, with respect to the Medical Branch of the University and the School of Mines, if it should be held that they cannot be "branches of the University," it would be held, we think, that they are separate colleges, validly created, whose management is placed in the persons who happn to be members of the Board of Regents of the University; in such case, and under such a construction, the Medical Branch and the School of Mines would be completely organized and provided for as seperate colleges. And so with respect to the West Texas A. & M.; the only apparent connection between this school and the Agricultural and Me-

chanical College at Bryan consists in the facts that the one is, by the statute creating it, called a "branch" of the other and the management of both is placed in the persons who compose the same Board. While the statute creating the West Texas A. & M. denominates it as a branch of the A. & M. College at Bryan, it is so in name only, because, in effect, it is by the substantive terms of the statute, made a new and separate college whose management is vested in the persons constituting the Board of Directors of the A. & M. College at Bryan. As already stated, the Legislature, having the choice of management, had the right to devolve this new duty upon the officers who are charged with the management of the other institution, and these officers will, in the management of the new school, act, not as managers of the A. & M. College at Bryan, but as managers of the new school deriving their authority from the terms of Chapter 29.

With respect to the Northeast Texas Agricultural College, the statute does not term it a "branch" of the A. & M. College at Bryan. We are unable to find any such purpose declared in the statute, nor, by the application of the well established rules of construction, can we deduce such a purpose by implication. The caption of the Act accurately states the main purpose to be "to establish a Junior Agricultural College east of the ninety-sixth meridian and north of the thirty-first parallel," and the subsidiary purpose to be the provision for the management thereof when established; Section 1 declares that "There shall be established in this State a Junior Agricultural College to be known as the 'Northeast Texas Agricultural College,'" and Section 5 defines what character of school it shall be; this is the substantive law. Section 4 provides that "the government and direction of policies of said junior college shall be vested in the Board of Directors of the Agricultural and Mechanical College of Texas." Section 4 does not make the new school a branch of the A. & M. College at Bryan; it simply devolves upon the officers heretofore selected to manage the A. & M. College at Bryan the new and additional duties of managing the new school.

Yours truly,
LUTHER NICKELS,
Assistant Attorney General.

OP. NO. 1816—BK. 50, P. 100.

State Railroad. Powers of Prison Commission. Management and control placed in Prison Commission by Chapter 74, Acts of 1907, Chapter 24, Acts of 1909, and Chapter 180, Acts of 1917.

September 12, 1917.

Honorable W. P. Hobby, Acting Governor, Capitol.

DEAR SIR: We have your favor of the 11th instant, submitting a letter from the Board of Prison Commissioners to you of date September 10th, with respect to the management etc., of the State Railroad.

This railroad was built as a part of, and for the primary use of,

the State Penitentiaries and the Prison System; its construction being authorized by Chapter 74, Acts of 1907, and Chapter 24, Acts of 1909. These Acts provide for the construction of the road as a part of the property of the system and, in its construction, funds of the system were to be used. In addition to these funds, these Acts authorized the execution and sale of certain bonds, which bonds were authorized to be bought by the State Board of Education out of school funds, and payment thereof were secured by property of the railroad and its revenues. After the construction of the road as a part of the property of the Penitentiary System the people of the State adopted an amendment to the Constitution, vesting the control of the prison property in the Board of Prison Commissioners. Because of these matters this department on August 16, 1913, in its Opinion No. 930, held that so much of Chapter 139, Acts of the Thirty-third Legislature as attempted to take from the Board of Prison Commissioners the management of this road, was unconstitutional—a copy of which opinion is enclosed herewith.

The decision in this opinion was recognized by the Thirty-fifth Legislature, in Chapter 180, page 392, General Laws of Texas, 1917 (Regular Session), and Chapter 139, General Laws of 1913, was repealed by said Chapter 180. Section 1 of Chapter 180 provides "that the Prison Commission be and they are hereby authorized together with the consent and approval of the Governor to exercise full and plenary control of said State Railroad," etc. This Act makes it the duty of the Prison Commission, "with the consent and approval of the Governor," to exercise full control over the railroad in the same general manner that it exercises control over all other parts of the prison property.

Amongst other things, this means that agents and employes engaged in the actual operation of said railroad shall be selected by the Prison Commission, with the consent of the Governor, and that appropriations made for the support of the railroad shall be handled in the same general manner as other appropriations made for the support of the Prison System, and that the revenue derived from the operation of the railroad shall be handled in the same general manner as revenue derived from other industries maintained by the Prison Commission. To be more specific: All moneys received by or from the State Railroad should be handled in the manner prescribed in Article 6158, R. S., 1911, as amended by Chapter 32, page 49, Acts of the Thirty-fifth Legislature, First Called Session; and the revenues derived from the operation of the State Railroad may be used to pay the operating expenses thereof, together with the necessary expenses of additions and betterments made in the road as it now exists, as provided in the general language of the appropriation bill under the head of State Penitentiaries on page 209, Acts of the Thirty-fifth Legislature, First Called Session.

Yours very truly,
LUTHER NICKELS,
Assistant Attorney General.

OP. NO. 1820, BK. 50, P. 121.

MOTHER'S PENSION ACT—STEPMOTHER.

The stepmother of a child or children is not a mother of such child or children within the meaning of the act of the Legislature authorizing the payment of mother's pensions.
Chapter 120, Acts Thirty-fifth Legislature.

September 18, 1917.

Hon. Samuel C. Harris, County Attorney, Ballinger, Texas.

DEAR SIR: The Attorney General is in receipt of your letter propounding the following question for an opinion from this department:

"Can the commissioners' court lawfully pay for the partial support of a child or children under authority of Chapter 120 of the Acts of the Regular Session of the Thirty-fifth Legislature under the following conditions—where the child or children are only stepchildren of the widow?"

The Mother's Pension Law of this State was enacted by the Thirty-fifth Legislature and is contained in the printed acts of that session as Chapter 120. Section 1 of this Act is as follows:

"Any widow who is the mother of a child or children under the age of sixteen years and who is unable to support them and to maintain her home, may present a petition for assistance to the board of county commissioners of the county wherein she resides."

It will be noted from a reading of the above quoted section that the commissioners court may, under certain conditions, allow a pension to a widow who is the mother of a child or children.

The answer to your inquiry involves the construction of the language used in the first section of the Act.

The right here given is purely a statutory right, and consequently must be strictly construed. In order to be entitled to the relief here granted the person making application therefor must bring herself strictly within the terms of the Act.

Pensions are bounties of the State and the State can give or withhold the same upon such terms and upon such conditions, as the lawmakers may deem wise and expedient. Therefore, in order for the applicant in the instant case to be entitled to consideration of the commissioners court she must bring herself squarely within the terms of the Act. As said in the case of Thornberg vs. American Strawboard Company, 50 Amer. St. Reps., 334, in discussing the right of action upon the death of a child, "such a right of action exists only for the benefit of the person or persons specified in the statute, and when the statute specifies who may bring such action, only those named can maintain it. If no such person exists then no recovery can be had."

In our opinion the Legislature in this case intended to confer this benefit upon widows who are the blood mothers of children as distinguished from stepmothers.

It has been held that the word "child" does not mean "stepchild," even when the same is used in wills, where the rules of con-

struction are not so strict as those governing statutes. Thornberg vs. American Strawboard Co., 50 Amer. St. Reps., 334.

The word children in common parlance does not include step-children or grand-children or any other than the immediate descendents in the first degree of the person named as ancestor, but will be held to include step-children where it is clear from the whole will that such was the testator's intention. Cutter vs. Doughty, 7 Hill, 310.

From the case of Thornberg vs. American Strawboard Co., *supra,* we quote, as follows:

"Applying the principles stated to this case, it is clear that appellant can not maintain this action. If it were conceded that he was the stepfather of the child named in the complaint he would not come within the terms of the statute. Indeed, the definition given by Wharton of the word 'stepfather' would be decisive of the question: 'Stepfather'—The husband of one's mother who is not one's father'; Wharton's Law Dictionary.

"The word 'father,' therefore, does not mean stepfather, nor does the word 'child' mean stepchild, even when the same is used in wills, where the rules of construction are not so strict as those governing the section of the statute in controversy. 11 Am. & Eng. Ency. of Law, 870; 3 Am. & Eng. Ency. of Law, 230; 8 Am. & Eng. Ency. of Law, 1412, note 2; Shearman vs. Angel, 1 Bail. Eq., 357; 23 Am. Dec., 166; Porter vs. Porter, 7 How. (Miss.), 106; 40 Am. Dec., 55."

In our opinion the Legislature by the use of the words "child" or "children" did not intend to include step-child, and therefore in order for a widow to be entitled to a pension she must be the actual mother of such child or children.

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

OP. NO. 1822—BK. 50, P. 128.

POLL TAX—ROAD DUTY—AGE LIMIT.

A man over forty-five years of age and subject to a poll tax can not be compelled to work upon the roads as a penalty for the failure to pay such poll tax.

San Augustine County Special Road Law. Section 11, Chapter 26, Special laws Thirty-fourth Legislature. Article 832 P. C. Articles 6920, 6973 R. S. 1911.

September 20, 1917.

Hon. John F. McLaurin, County Attorney, San Augustine, Texas.

DEAR SIR: The Attorney General has your letter as follows:

"Will you please advise me under Section 11, of the San Augustine County Road Law; is the delinquent poll taxpayer over the age of 45 years liable or subject to indictment for failure to work on the public roads after being duly summoned to work?"

The San Augustine County special road law is contained in the printed local and special laws of the Regular Session of the Thirty-

fourth Legislature as Chapter 26, and Section 11 thereof referred to by you is as follows:

"The county road commissioners shall obtain from the tax collector of the county as soon after the first day of February of each year as practicable and before the first day of May thereafter, a full list of the delinquent poll taxpayers of the county for the previous year, and the persons so appearing on said list and who are delinquent poll taxpayers, shall be subject to road duty for the period of three days each year and they shall be summoned, as in other cases, to work the roads in the road district in which they may reside, and the performance of the road service provided for in this section shall be subject to the same conditions and regulations as other road service, but this act shall be taken as cumulative. The persons required to do road duty under the provisions of this section shall be subject to prosecution as provided in this act or other law of this State and subject to the same liabilities and punishments provided for in other cases for failing to appear or do good work when summoned to do so, as provided by this act or other law of this State, and all such laws shall apply to parties required to work under the provisions of this section. And when they are convicted for so failing to work the roads shall satisfy the fine and costs as in other misdemeanor convictions. But any person summoned to work on the road under the provisions of this act may satisfy such summons and be relieved from such duty by paying to the county superintendent for public roads and bridges two dollars and fifty cents, which sum shall go to the road and bridge fund."

This section of the special road law is substantially a copy of Article 6973 R. S., 1911.

Article 6973 R. S., 1911, was enacted in 1891. In 1895 the Legislature enacted what is now Article 6920 R. S., as follows:

"No person in this State under the age of twenty-one years or over the age of forty-five years shall be required to work upon the public roads of this State or upon the streets and alleys of any city or town of this State."

It will be noted from the above article that the Legislature has declared that no person over the age of forty-five years shall be required to work upon the public roads of this State. This article is broad enough in its terms to prevent requiring persons over the age of forty-five years to work upon the roads either under the general statutes requiring such duty or as a penalty for failure to pay a poll tax, as is provided by Article 6973.

The Thirty-fourth Legislature in re-enacting Article 6973 as a part of your county road law was charged with the knowledge of this limitation having been placed upon the age beyond which persons could not be compelled to work upon the roads, and having made by express provision such act cumulative of all other acts on the subject, we are of the opinion that the legislative intent was to compel only those delinquent poll tax payers to work upon the roads who could be compelled to perform such duty under the general laws of the State relating thereto.

We therefore advise you that under your special road law a delinquent poll tax payer who is over the age of forty-five years could not be compelled to work upon the roads as a penalty for the failure

to pay such tax, and be subject to the penalty as provided in Article 832, Penal Code.

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

OP. NO. 1826, BK. 50, P. 135.
STOCK—HOG, SHEEP AND GOAT LAW.

The act of the Thirty-fifth Legislature authorizing the submission of the question of whether or not hogs, sheep and goats may be permitted to run at large only during certain months of the year is constitutional.

This question must be submitted only in the districts theretofore adopting the law as it existed prior to the enactment of this provision or in districts where the law is not in force. The commissioners' court could not carve a district from portions of subdivisions theretofore adopting the hog law. Chapter 60, Acts Local and Special Laws, Regular Session Thirty-fifth Legislature.

October 5, 1917.

Hon. Sam Holland, County Attorney, Athens, Texas.

DEAR SIR: Your letter addressed to the Attorney General under date of September 12th was placed upon the desk of one of the assistants who has been engaged in other matters, and consequently you have received no reply. This letter has been handed to me for answer, and replying thereto, you are advised:

Chapter 80 of the local and special laws passed at the Regular Session of the Thirty-fifth Legislature authorizes an election to be held in Henderson or Anderson counties or in a subdivision of either county, to determine whether hogs, sheep or goats shall be permitted to run at large during certain months of each year. This Act of the Legislature is merely a re-enactmeat of the general law upon the subject, with the proviso added to the above effect. In your communication you raise the question of the constitutionality of this law as applied to those counties or subdivisions wherein the hog law had been adopted.

We see no constitutional objection to this Act upon this ground. Section 23, Article 16 of the Constitution authorizes the Legislature to pass laws for the regulation of live stock and protection of stock-raisers in the stock-raising portion of the State, and exempts from the operation of such laws other portions, sections or counties, and further provides that any local laws thus passed shall be submitted to the freeholders of the sections affected thereby. It will be observed that this section does not prescribe and define the limitations upon this character of legislation, but simply provides that the Legislature may pass regulatory measures dealing with live stock and the protection of stock-raisers. We find nothing in this section of the Constitution that would deprive the Legislature of the authority to enact a law such as the one in question, that is, giving the people the privilege of voting upon the laws to determine whether or not hogs, sheep and goats shall run at large during a certain period of the year.

this question to the voters of a county or subdivision thereof wherein the hog law had been theretofore adopted. This authority is expressly given in the Act. Section 23, Article 16 relating to stock laws and

Neither do we find any constitutional objection to the submission of Section 20, Article 16 relating to the sale of intoxicating liquors are not analogous upon the question. The former authorizes the Legislature to pass laws regulating live stock and stock-raisers, while the latter command the Legislature to enact laws whereby counties or subdivisions thereof may determine whether the sale of intoxicating liquors shall be prohibited. This latter section limits the Legislature to the enactment of laws whereby the sale of intoxicating liquors may be prohibited—not the enactment of laws regulating such traffic. Under this section, of course, the Legislature would have no authority to enact a law authorizing counties or subdivisions thereof to vote upon the question of whether or not the sale of intoxicating liquors should be prohibited except upon certain days in the year. This provision of the Constitution is mandatory and the only Act of the Legislature authorized thereunder is an Act providing for elections to determine whether or not the sale of intoxicating liquors shall be absolutely prohibited at all times in a county or subdivision thereof.

From your communication it seems that your commissioners court has undertaken to carve out a district from two subdivisions of the county having theretofore adopted the hog law. If this is correct. then we beg to advise that under the holding of the Court of Appeals in the case of Gilley vs. Haddox, 15 S. W., 714, the commissioners court would not have this authority. In the case referred to the town of Caldwell had adopted the hog law. Thereafter a defined district ten miles square, including the town of Caldwell, was created by the commissioners court and an election ordered therein. The Court held that the commissioners court was without authority to include in a district another subdivision of the county wherein the law had theretofore been adopted. If the entire subdivision cannot be included in a new one, then no portion of the district could be included and an attempt on the part of your commissioners court to carve a new district out of portions of the two districts theretofore adopting the law would be invalid. In addition to this the act of the Legislature in question expressly authorizes this question to be submitted in counties or subdivisions theretofore adopting the law as it existed prior to this act. It does not authorize the commissioners court to carve out new districts from those in which the law is in force, but the question must be submitted in the identical district theretofore adopting the law or in a new district in which the law had not been adopted.

Yours truly,

C. W. TAYLOR,

Assistant Attorney General.

OP. NO. 1830—BK. 50, P. 151

LOTTERIES—INJUNCTIONS—ARTICLE 533 PENAL CODE—ARTICLE 4685 REVISED STATUTES—ACT OF 1905, PAGE 372.

1. Any scheme whereby customers are awarded prizes by chance is a violation of law.
2. A scheme entered into by merchants, proposing that for every dollar's worth of goods purchased, or for every dollar paid on account, a ticket is given that entitles the holder to participate in a drawing in which a number of prizes are distributed to the holders of the tickets whose numbers are drawn, as per the plan adopted, is a lottery and is prohibited by Article 533 of the Penal Code.
3. Unless specially authorized by law or where property rights are involved and irreparable injury to such rights is threatened or is about to be committed, for which no adequate remedy exists at law, courts of equity are not authorized to issue writs of injunction to prevent the commission of a crime.
4. Act of 1905, page 372, preventing the use of premises for the purpose of gaming or exhibiting games prohibited by law, does not apply to violations referred to in paragraph 2, above.

October 12, 1917.

Hon. A. S. Broadfoot, County Attorney, Bonham, Texas.

DEAR SIR: The Attorney General's Department is in receipt of your communication of date October 8, reading as follows:

"Inclosed find an advertisement by Bonham Board of Trade, in which they propose to dispose of an automobile and other property as per rules explained in same, which you will please read.

"1. Where rule says 'Every person eligible shall be entitled to one ticket for each dollar cash purchase, and one ticket for every one dollar paid on account or note, *and no more.*' is that a violation of Penal Code (Branch), Article 534, for 'selling lottery ticket'?

"2. Is Board of Trade guilty of establishing a lottery under Article 533, Penal Code (Branch)?

"3. If it be a lottery, is it subject to injunction under Article 4685, Civil Statutes, where it provides that 'the habitual use, actual, threatened or contemplated use, of any premises, place, building or part thereof, for the purpose of gaming or keeping or exhibiting games prohibited by the laws of this State, shall be enjoined either at the suit of the State or any citizen thereof'?

"4. If you answer No. 3 in the affirmative, will description of place be definite enough if described as 'in city of Bonham'?

"5. Board of Trade is association of persons not incorporated. Will injunction be sufficient as to parties if it includes president, secretary and executive committee? They are the managers."

The advertisement enclosed is a one-page advertisement by the Bonham Board of Trade, composed of a large number of merchants of the city of Bonham, wherein the parties advertise to give a five passenger Maxwell car and $150.00 in gold; the contest running from September 22 to October 24, 1917, at which time the drawing takes place at 3 p. m. "Every person eligible shall be entitled to one ticket for each dollar cash purchase and one ticket for every one dollar paid on account or note, and no more."

The plan is for every dollar spent with the merchant named in the advertisement, or for every dollar paid on account, the party is to receive a ticket in the contest, absolutely free. Twenty-one prizes are

to be distributed on the day of the drawing. The distribution of the prizes is made as follows: A committee will select some little boy or girl to take tickets out of a large box, after the tickets have been thoroughly mixed, and the twenty-one tickets selected and drawn at random by the little boy or girl from the box, entitles the customers holding the similar tickets or numbers to a prize, the first ten numbers, from 1 to 10 inclusive, drawn to receive a prize of $5.00 each in gold; the first numbers drawn from 11 to 20 inclusive to receive $10.00 in gold, and the 21st ticket drawn to receive one Maxwell automobile. No other members receive any prize—only the twenty-one numbers drawn from the box receive the prizes.

In reply to your communication, the Department is of the opinion that any scheme whereby customers are awarded prizes by chance is a violation of law, defining and prohibiting a lottery, as enumerated in Article 533 of the Penal Code.

A lottery has been defined to be any distribution of prizes by chance.

Randle vs. State, 42 Texas, 580.
Holloman vs. State, 2 Cr. App., 610.
Prendergast vs. State, 57 S. W., 850.
Grant vs. State, 54 Cr. App., 406.
Reisen vs. State, 71 S. W., 975.

The definition given of a lottery by Worcester is:

"A distribution of prizes and blanks by chance; a game of hazard in which small sums are ventured for the chance of obtaining a larger value."

A device or scheme whereby tickets are sold and each ticket holder receives something in value, the prizes ranging in value from $5.00 to $50.00, and each ticket entitled the holder to a "postal card" or "card ticket" any how, is held by our Courts to be a lottery.

Randle vs. State, 42 Cr. App., 589.

A scheme by which a merchant sells his goods at usual and ordinary market prices, giving to each customer purchasing goods to the amount of fifty cents, a key, and to the customer thus obtaining the particular key which will unlock a certain box, twenty-five dollars in coin contained therein, is a lottery, and punishable as such.

Davenport vs. City of Ottawa, 54 Kan., 711; 45 Am. State Rep., 303.

In the case of State vs. Munford, 73 Mo., 647; 39 Am. Rep., 532, is also directly in point. Prizes were offered to subscribers to the Kansas City Times, each subscriber receiving a ticket entitling him to participate in a drawing of prizes, and no extra charge above the ordinary subscription price being made. The Supreme Court of Missouri held this a lottery, and that subscribers to the newspapers bought at the same time, and for one and the same consideration, the newspaper and the ticket in the lottery.

A subscription scheme involving club membership and weekly dues of a stipulated sum and final drawing from a bag of tickets for a suit of clothes, is a lottery.

Grant vs. State, 54 Cr. App., 403; 112 S. W., 1068.

The scheme outlined by you is clearly "a scheme for the distribution of prizes by chance," and a lottery, and parties participating therein are subject to a fine of not less than one hundred nor more than one thousand dollars, as provided for by Article 533 of the Penal Code.

Article 4685 of the Revised Statutes, (Vernon's Sayles', 1914), quoted by you, wherein the application for a writ of injunction would lie, as an additional statutory remedy to prevent the use of premises as a gambling house, as provided for by the Acts of the Legislature, 1905, page 372, is not applicable to this offense, a separate and distinct criminal offense.

Unless specially authorized by law, or where property rights are involved, courts of equity are not authorized to issue writs of injunction to prevent the commission of a crime.

It is only when property or civil rights are involved, and an irreparable injury to such rights is threatened, or is about to be committed, for which no adequate remedy exists at law, that courts of equity will interfere by injunction for the purpose of protecting such rights. But courts of equity never interfere for the purpose of preventing acts constituting crime because they are criminal, for they have nothing to do with crime as such. The case presented is a criminal one, pure and simple, in which the criminal law furnishes the only remedy that courts are required to enforce.

It is true that the remedy by injunction has been extended by legislative enactment to certain criminal offenses, viz: against soliciting orders for intoxicating liquors in local option territory; sale of intoxicating liquors without license; use of premises as a gambling house, bawdy house, etc.; but it seems from an investigation of the law applicable thereto, that such remedy has not been extended to the suppression of this offense, a lottery; and since property or civil rights are not involved, and an irreparable injury to such rights is not threatened or about to be committed, for which no adequate remedy exists at law, the remedy by injunction, as suggested by you, would not lie.

State vs. Patterson, 37 S. W., 478.
Ex parte Warfield, 40 Cr. App., 420.
Ex parte Allison, 90 S. W., 495.

Yours truly,
W. J. TOWNSEND,
Assistant Attorney General.

OP. NO. 1836—BK. 50, P. 200.

COUNTY SCRIP OR WARRANTS—INTEREST.

1. In issuing county scrip or warrants in the usual manner and for the current expenses of the county, the commissioners court is not authorized to provide for payment of interest thereon.

2. Ordinary county warrants or scrip are simply directions to the treasurer to pay the amount of money called for, and are to be read as if they expressed upon their face that they are only to be paid in their order and on compliance with the laws.

3. Such warrants of scrip are not contracts to pay on demand or at a date fixed. They are simply evidence of an indebtedness allowed, but are not contracts in writing, bearing interest.

4. The payment of interest on the ordinary county warrants or scrip by the commissioners court is the appropriation of money upon a claim not provided for by a pre-existing law, and is prohibited by Section 44, Article 3, State Constitution.

November 8, 1917.

Hon. P. S. Wiggins, County Auditor, Kountze, Texas.

DEAR SIR: The Attorney General's Department is in receipt of your letter of November 6, in which you advise, in substance, that the various funds of your county have been exhausted for some time and that the several banks of your county are cashing the local scrip warrants issued on these funds, and are holding the same, and the county is paying the banks six per cent. interest on such scrip or warrants. You desire to be advised by this Department if the county commissioners' court of your county has the legal authority to pay the banks this six per cent. interest on these registered warrants or scrip .

Replying to your inquiry, the Department is of the opinion that the commissioners' court of your county has no lawful authority to pay interest on this registered scrip and that its collection by the banks is an unlawful charge.

The commissioners' court of a county has the authority "to audit and settle all accounts against the county and direct their payment." Paragraph 8, Article 2241, Revised Statutes, 1914. This strip is required to be paid in its numerical order as it is registered.

Said commissioners' court has the power to levy and collect each year a tax for county purposes, as enumerated in Article 2242 of the Revised Civil Statutes of 1914 and Section 9, Article 8 of the State Constitution. All claims against the county to be paid by the commissioners' court must be such as come within the constitutional limitations above provided, and in accordance with the statutory provisions of the law of this State. Section 4, Article 3 of the Constitution prohibits appropriations of money upon a claim not provided for by a pre-existing law. Nichols vs. State, 32 S. W., 453.

In the case of the State vs. William Wilson, 71 Texas, 281, appellee, Wilson, as assignee of Kanmacher & Denning, instituted suit against the State to recover an amount claimed to be due his said assigners by the State on a contract for building the East Texas penitentiary at Rusk. According to the terms of the agreement, the work in the construction of the penitentiary was to be paid for in installments as it progressed, and the payments were to be made by the State of Texas upon warrants drawn upon the Comptroller. Under the contract, warrants were issued to the contractors at times when there was no money in the treasury, and were discounted by banks, to whom said warrants were ultimately paid by the State. The depleted condition of the State Treasury at the time of the issuance of the warrants was the cause for the discount of same by the contractors. The discount

on the warrants amounted to $8,765.00. The assignee of the contractor sued the State for this difference, alleging, in substance, that the State was responsible for the discount of the warrants, owing to the fact of its depleted treasury and its being unable to pay off the obligations. Attorney General J. S. Hogg represented the State. The Supreme Court, passing upon the question, Associate Justice Gaines rendering the opinion of the Court, held: (1) That the holder of a warrant drawn by the Comptroller of the State upon its Treasurer, who sells his warrant at a discount because of a want of funds to meet it cannot hold the State liable for the loss he thereby sustains; (2) That the delivery of warrants to a contractor in payment upon his contract is not payment in a depreciated currency when there is no money in the treasury to meet such warrant. The State's contract, then, for money was to cause warrants to be issued by its Comptroller and paid by its Treasurer. The delivery of warrants is not in payment, but as evidence of the indebtedness and authority to the Treasurer to make the payment. (3) That a treasury warrant is but a promise to pay, in legal effect, and a holder of such promise after discounting it would have no further claim upon the maker. (4) The payment of this claim for discount is prohibited by Section 44 of Article 3 of the Constitution, which provides that the Legislature shall not "grant, by appropriation or otherwise, any 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 a pre-existing law."

"The payee who receives and discounts warrants has no claim against the State for the loss any more than the holder of a promissory note who had discounted it after maturity would have against the maker to recover the discount."

"The contractors in this case (above quoted) have suffered a misfortune in common with numerous other contractors of the State who, during the years of a depleted treasury, were forced to place their warrants upon the market and sell them at the best price that could be obtained. Is the State of Texas resting under an obligation to make good to all its officers, agents and contractors who have received and discounted its warrants the losses they have thereby sustained? There may be some moral obligation in the premises, but there is no lawful one. Its warrants having been paid, its legal liability no longer exists." State vs. Wilson, 71 Texas, 201.

In the case of Ashe vs. Harris County, 55 Texas, 49, Associate Justice Gould rendering the opinion for the Court, our Supreme Court held that county warrants issued on claims allowed by the commissioners' court, which, under statute, can be paid only in the order of their registration and according to their class, which are silent as to interest and specify no time of payment, do not bear interest. "In our opinion," says the Court, "ordinary county warrants such as we have described are simply directions to the treasurer to pay the amount of the money called for, and are to be read as if they expressed upon their face that they are only to be paid in their order, and on compliance with the laws." San Patricio vs. McClane, 44 Texas, 397 ;Colorado County vs. Beethe, 44 Texas, 450.

"All claims against the county should be submitted to the county court, or rather, as it is now styled, the county commissioners court; and where allowed by that tribunal, the county warrant issues as evidence of that fact, and authorizes the treasurer to make payment only when they have been registered by him, and then only in the order of their registration according to their class. * * * Such warrants are not contracts to pay on demand or at a day fixed. They are merely evidence of an indebtedness allowed, but are not contracts in writing bearing interest."

Ashe vs. Harris County, 55 Texas, 49.

The ruling of this Department is, in substance and effect, that in issuing scrip in the usual manner and for the current expenses of the county the commissioners' court is not authorized to provide for the payment of interest. This ruling is based upon the wholesome principle that these courts are of limited jurisdiction; that their powers and duties are specially defined by law, and that they may not lawfully exercise such as are not so defined. A strict construction should be given the implied power of counties. Robertson vs. Breedlove, 61 Texas, 324. Our statutes upon this subject nowhere delegate to these courts the authority exercised by the commissioners court of your county in paying interest on its registered scrip or warrants, and the Legislature has repeatedly declined to enact that such warrants shall bear interest by defeating bills offered for this purpose.

Under such circumstances, remembering, also, that such authority would be both dangerous and fruitful of debt and taxation, unless the Supreme Court has expressly and unequivocally so held, the authority should be denied.

In support of the contrary view, the case of Davis vs. Burney, 58 Texas, 364, is cited by your county attorney in his opinion rendered to you. It will be observed, however, that in this case the commissioners' court practically undertook to call in and identify by registration all scrip issued prior to April 18, 1876, when the present Constitution took effect and when a different rule of taxation was authorized, and the court contracted for the "postponement of this indebtedness by agreeing to pay interest as a consideration for the delay." This case, moreover, is a peculiar one. The facts are not fully reported, and it is not clear what was the character of the indebtedness or upon what grounds the decision was put by the court. This being true, it should not be extended beyond the point actually decided, and, especially, to do so would, it is believed, violate the spirit of our laws relating to this subject. In all cases in which county debts are evidenced by scrip or warrants, our statutes governing county finances contemplae either that money is in the treasury to discharge the obligation, or that the holder will await payment through the prescribed methods of taxation. Chapman vs. Douglas County, 107 U. S., 364. The commissioners' court is not authorized to act upon any other premises or basis, and persons dealing with the courts must take notice of the law.

If there is no money in the treasury with which to satisfy the scrip,

the statutes on county finances and taxation clearly show that the holder must abide the collection of taxes and other moneys which are set apart for the payment of such indebtedness. Under the law, these claims become due when there is money in the treasury to pay them, collected in the manner prescribed, and the courts are powerless to contract that they shall fall due at an earlier time and obligate the counties to pay interest "for the use, forbearance or detention thereof"; besides, the payment of interest on such registered scrip or warrants is the appropriation of money upon a claim not provided for by a pre-existing law, and is prohibited by Section 44, Article 3 of our State Constitution.

Yours truly,
W. J. TOWNSEND,
Assistant Attorney General.

OP. NO. 1853—BK. 50, P. 290.

ACCOUNTS AGAINST THE STATE—COMPTROLLER.

All accounts in favor of the Comptroller or his department against the State shall be approved by the Secretary of State before warrants are issued thereon and passed to the treasury for payment.
Article 4336 Revised Civil Statutes 1911.

December 18, 1917.

Hon. W. D. Cope, Care Investigating Committee No. 6, Capitol.

DEAR SIR: The Attorney General has your letter of December 15th, asking for a construction of Article 4336 Revised Civil Statutes of 1911.

Replying thereto, we beg to say that Article 4336 Revised Civil Statutes of 1911, is in the following language:

"Article 4336. Comptroller's account to be approved by Secretary of State.—The account of the Comptroller against the State shall not be passed to the Treasurer until approved by the Secretary of State."

So far as we are able to determine the above article has never been before the courts of the State for a construction, and we are left to the language of the Statute to determine its meaning.

We find that this provision of the Statute first found its place in the laws of this State as Section 15 of the Act approved April 11, A. D. 1846, being an act to define the duties of the Comptroller of Public Accounts of the State of Texas, such section being as follows:

"Section 15. Be it further enacted, the accounts of the Comptroller against the State shall not be passed to the Treasurer until approved by the Secretary of State."

It will be noted that the only variance between the present Statute and that of 1846 is that the word "account" in the present Statute is in the singular, while in the Act of 1846 the same word appears in the plural. This is an immaterial variance between the two articles for the reason that under our rules of construction the singular and

the plural number shall each include the other unless otherwise expressly provided. (See Article 5502 Revised Statutes of 1911).

Section 15 of the Act of 1846 became Article 143 of Hartley's Digest of the Laws of Texas (1850), and it appears in the identical form used in the act of 1846 as Article 5427 of Paschal's Digest. In the Revised Statutes of 1879 it appears as Article 2755 and for the first time in its history as a portion of the Statutes of this State this Article appears with the word "account" in the singular form. Otherwise it is identical with the Act of 1846. This Article was carried into the Statutes of 1895 as Article 2843 and is there in the same form as it now appears.

An Act of the Third Called Session of the Thirty-first Legislature approved August 19, 1910, provided for the election, qualification, bond and duties of the Comptroller and his employes; provided complete system of accounting and bookkeeping and auditing for said department with the other departments and officers of the government. This Act expressly repealed all Articles contained in Chapter 2 of Title 52 of the Statutes of 1895 in which Chapter and Title is to be found Article 2843 above referred to. Section 16, however, of this Act is in the following language:

"The account of the Comptroller against the State shall not be passed to the Treasurer until approved by the Secretary of State."

It is in this form that the provision appears in the Statutes of 1911. The above history of this legislation shows this provision to be continually in force in this State from the date of its original enactment in 1846.

Coming now to the purpose and meaning of this statutory provision, we find that Article 4329 of the Revised Statutes of 1911, being Section 10 of said Act of 1910, provides that the Comptroller shall audit the claims of all persons against the State in cases where provisions for the payment thereof have been made by law, unless the auditing of any such claim shall be otherwise specially provided for.

The Comptroller thus being made the auditor of accounts against the State presented for payment, it appears that unless some other authority is authorized to audit accounts filed by the Comptroller's department no such audit could be made, and it is our opinion that the Legislature by enacting what is now Article 4336 intended that all accounts drawn by the Comptroller or his department against the State should be audited by the Secretary of State before warrants therefor were issued and same presented to the treasury for payment.

We therefore advise you that in our opinion it is the duty of the Comptroller to present to the Secretary of State for his approval all accounts against the State in favor of the Comptroller, or his department, or any member thereof, and that before warrants are drawn by the Comptroller the accounts upon which the same are based should bear the approval of the Secretary of State.

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

OP. NO. 1882—BK. 51, P. 1.

CONSTITUTION OF THE UNITED STATES, ARTICLE 5—CONSTITUTION OF TEXAS, ARTICLE 3, SECTION 40, AND ARTICLE 4, SECTION 15.

1. The question of the ratification of a proposed amendment to the Constitution of the United States by the Legislature is not *"legislation"* within the meaning of Article 3, Section 40 of the Constitution of the State, and it is unnecessary for the Governor to submit such proposal to the Legislature when he calls it in Special Session.

2. The jurisdiction of the Legislature to consider the question of ratifying a proposed amendment to the Constitution of the United States is derived from the Federal Constitution and not from the State Constitution, and a Special Session of the Legislature has equal authority with a Regular session to ratify or reject a proposed amendment to the Constitution of the United States.

3. The veto power of the Governor can not be exercised with reference to a resolution ratifying a proposed amendment to the Constitution of the United States; Section 15 of Article 4 of the State Constitution requiring the presentation of certain matters to the Governor for approval or disapproval refers to ordinary legislation passed by virtue of the authority of the Constitution of the State, and not to proposed amendments to the Federal Constitution, which have been held to be not ordinary legislation and not subject to the Federal veto power.

4. In designating subjects of legislation under Section 40, Article 3 of the Constitution, the Governor is only required to state the subject of legislation in general terms. The better practice from the decisions appears to be to confine the proclamation to a brief specification of the subjects of legislation. An examination of the authorities discloses that the messages of the Governor are always construed quite liberally in favor of the jurisdiction of the Legislature over any subject upon which it is undertaking to pass laws.

February 8, 1918.

To His Excellency, Honorable W. P. Hobby, Governor, Capitol.

DEAR GOVERNOR HOBBY: You have directed our attention to the fact that the Congress of the United States has recently proposed an amendment to the Constitution of the United States providing, in effect, for the prohibition of the manufacture, sale, etc., of intoxicating liquors for beverage purposes. In view of the meeting of a Special Session of the Thirty-fifth Legislature at an early date, you desire to be advised whether or not it is necessary for you to submit the question of the ratification, or rejection, of this amendment to the Legislature, and whether or not it is necessary for you to exercise the veto power with reference to any resolution passed by the Legislature approving or rejecting said proposed amendment to the Constitution of the United States.

These two questions arise out of certain provisions of the Constitution of this State. Section 40 of Article 3 of the Constitution of this State, reads as follows:

"When the Legislature shall be convened in Special Session, there shall be no legislation upon subjects other than those designated in the proclamation of the Governor calling such session or presented to them by the Governor, and no such session shall be of longer duration than thirty days."

Section 15 of Article 4, reads as follows:

"Every order, resolution or vote to which the concurrence of both Houses of the Legislature may be necessary, except on questions of adjournment shall be presented to the Governor, and before it shall take effect, shall be approved by him; or being disapproved, shall be repassed by both Houses, and all the rules, provisions and limitations shall apply thereto as prescribed in the last preceding section in the case of a bill."

It will be observed that a Special Session of the Legislature is without jurisdiction and authority to enact any legislation upon any subject other than those which may be designated by the Governor in a proclamation calling the Legislature in special session or presented to them thereafter. It will also be observed that by the literal wording of Section 15, quoted above, every resolution to which the concurrence of both Houses of the Legislature may be necessary, must be presented to the Governor for his approval or disapproval. The inquiry then is to determine whether or not the ratification of an amendment to the Constitution of the United States proposed by the Congress is "legislation" within the meaning of Section 40, Article 3, above referred to, and, therefore, subject to the necessities and limitations of that section; and also whether or not a resolution of the House and Senate, ratifying such an amendment to the Constitution of the United States, is within the limitations of Section 15 of Article 4, and, therefore, subject to the veto power of the Governor.

We answer both questions in the negative, and say that the ratification of an amendment to the Constitution of the United States proposed by the Congress is not a subject of "legislation" within the terms and meaning of Section 40 of Article 3 of the State Constitution, and that a resolution ratifying such an amendment is not within the terms of Section 15 of Article 4, and is, therefore, not subject to the veto power. The reasons for this conclusion will now be stated:

In the first place, the necessity of ratifying an amendment to the Constitution of the United States does not arise from the Constitution of the State, but finds its origin in Article 5 of the Constitution of the United States, which reads:

"The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the Legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by Congress; provided that no amendment which may be made prior to the year 1808 shall in any manner affect the first and fourth clauses in the ninth section of the first Article, and that no State, without its consent, shall be deprived of its equal suffrage in the Senate."

It will be observed from reading the Article of the Constitution of the United States just quoted, that the amendment proposed by Congress becomes effective "when ratified by the Legislatures of three-fourths of the several states." It will be observed that the

authority to ratify amendments proposed by the Congress, is conferred upon the Legislatures alone. This provision of the Constitution of the United States is necessarily paramount and controlling. The Constitution has not said that the power of ratification should rest with the Legislature and the Governor, but has said that it rests with the Legislature. In our opinion, this provision is exclusive and neither the Constitution nor the laws of the State can add to or detract therefrom.

It will be observed, also, that the power is conferred upon the Legislature, and the jurisdictional question of the right to ratify the amendment is not limited to either a Called Session of the Legislature or a Regular Session of the Legislature. The power to ratify is conferred by the broadest terms and, necessarily, embraces any period of time when the Legislature is regularly organized and acting as a legislative body. It matters not what restrictions there may be in the Constitution of this State as to matters of local legislation, these cannot be made to limit or restrain the authority conferred upon the Legislature by the paramount and prevailing force of the Constitution of the United States.

Article 5 of the Constitution of the United States, quoted above, has not said that the Legislature when in Regular Session, or when in Special Session upon a message from the Governor, may ratify an amendment to the Constitution of the United States, provided the resolution or ratification is approved by the Governor; neither this language, nor this meaning, is to be found in Article 5. On the contrary, Article 5 in the plainest and simplest language confers express authority on the *Legislature* to ratify an amendment to the Constitution of the United States, and no act of the chief executive of this State is necessary to confer jurisdiction on a Special Session of the Legislature to exercise a power which has been conferred by the supreme authoriay of the Constitution of the United States; and no action of the chief executive, in approving, or disapproving, a resolution ratifying an amendment to the Constitution of the United States can affect in the least the action of the Legislature in its ratification of such an amendment, for the reason that such action is taken by virtue of the supreme authority of the Constitution of the United States, which has not confided to the Governors of the various States any right to participate with the Legislature in approving, or rejecting, amendments to the Constitution of the United States. In other words, the ratification of an amendment to the Constitution of the United States, is not ordinary legislation such as is referred to in Section 40 of Article 3, and to which the limitations of Section 15 of Article 4 of our State Constitution relate.

The Supreme Court of the United States has heretofore decided that the submission of an amendment to the Constitution of the United States is not ordinary legislation, and is not subject to the veto power of the President of the United States, as are all resolutions and laws which are in fact *"legislation."*

In the case of Hollingsworth vs. Virginia, 3 Dall, 378, 1 Law. Ed., 654, the Supreme Court of the United States held that amendments to

the Federal Constitution proposed by Congress, were not required to be presented to the President for his action thereon.

In other words, that he did not possess the power to veto proposed amendments to the Federal Constitution. In order that the pertinency of this decision may be appreciated, we here quote the provisions of Article 5 of the Federal Constitution:

"The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution or on the application of the Legislature of two-thirds of the several Statese, shall call a convention for proposing amendments, which in either case shall be valid to all intents and purposes as part of this Constitution when ratified by the Legislatures of three-fourths of the several States or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress. * * *"

Subdivision 3, Section 7, of Article 1, of the Federal Constitution, is as follows:

"Every order, resolution or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment), shall be presented to the President of the United States, and before the same shall take effect shall be approved by him or, being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives according to the rules and limitations prescribed in the case of a bill."

The language of the latter provision of the Federal Constitution is strikingly similar to the language employed in the corresponding provision of the Constitution of this State.

The question in the Hollingsworth case was, whether the Eleventh Amendment to the Constitution of the United States should have been presented to the President for his approval. It appears upon inspection that the amendment was never submitted to the President. It was contended in the argument that the Constitution declares that every order, resolution or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States, and before the same shall take effect shall be approved by him, or, being disapproved by him, shall be passed by two-thirds of the Senate and House of Representatives. Replying to this, Mr. Justice Chase said:

"There can surely be no necessity to answer this argument The negative of the President applies only to the ordinary cases of legislation. He has nothing to do with the proposition or the adoption of amendments to the Constitution."

The holding of the court just referred to is predicated upon the proposition that a resolution proposing any amendment to the Constitution of the United States, is not such legislation as is subject to the veto power of the President.

It will be noted that subdivision 3, Section 7, Article 1, of the Federal Constitution, quoted, is substantially the same as that section and article of our Constitution which requires the resolution shall be

presented to the Governor for his approval, or disapproval; but the court held that an act of Congress, proposing an amendment to the Constitution of the United States to the several States, was not ordinary legislation, and was not within the limitation of this article and section of the Constitution of the United States. For the same reason, and with equal propriety, we have reached the conclusion that inasmuch as when the proposal to amend the Constitution of the United States leaves the Congress, it is not *"legislation,"* that, therefore, its journey from Washington to the seats of government of the several States, does not change its characteristics and that, when it reaches the Legislatures of the States, it is still *not legislation* within the ordinary meaning of those words and, therefore, is not subject to the restrictions contained in Section 40, Article 3, and Section 15 of Article 4, of our State Constitution.

The conclusions reached are very well supported in a collateral way by that line of cases which hold that an amendment to a State Constitution is not subject to the approval, or disapproval, of the chief executive of the State, for the reason that it is not ordinary legislation limited by the constitutional provision authorizing the exercise of the veto power. Among these cases, may be cited the following:

Elkin vs. Griest, 50 L. R. A., 570.
Green vs. Weller, 32 Miss., 650.
Koehler vs. Hill, 60 Iowa, 543.
State vs. State Secretary, 9 So., 776.
In Re Senate File No. 31, 41 S. W., 981.

Your next inquiry relates to the method of presenting subjects to the Legislature for the action of that body. Section 40 of Article 3, as heretofore quoted in this opinion, provides that there shall be no legislation except "upon subjects" designated by the Governor in his call or subsequent messages. The Courts of this State have held that it is not the intention of this section of the Constitution to require the Governor to define with precision the subjects of legislation, but only in a general way by his call to confine the business to particular subjects. Brown vs. State, 32 Crim. App., 133. The better practice seems to be to confine the proclamation to a brief specification of the subjects, which the Governor desires to submit. The courts have construed the proclamation made by the Governor rather liberally toward the right of the Legislature to act. For instance: the courts have held that the proclamation of the Governor "to reduce the taxes, both ad valorem and occupation so far as it may be found consistent with the support of an efficient State Government," embraces the whole subject of taxation. Baldwin vs. State, 3 S. W., 109. The courts have likewise held that a proclamation authorizing the re-apportioning of the judicial districts of the State by implication, authorizes the re-apportionment of any number of such districts. Brown vs. State, 22 S. W., 601.

The courts have held that a proclamation of the Governor "to enact laws, etc., amending and changing the existing laws governing court procedure," authorizes the act changing the terms of the Criminal District Court of Galveston and Harris Counties. Long vs. State, 58 Crim. App., 209; Brown vs. State, supra.

The courts have held that the proclamation of the Governor calling the Legislature "to enact adequate laws simplifying the procedure in both civil and criminal trials," embraced and authorized the act of 1907, relating to local option contests. Stockard vs. Reid, 121 S. W., 1144.

You will observe from the authorities cited that the messages of the Governor are always construed quite liberally in favor of the jurisdiction of the legislature over any subject upon which it has undertaken to pass laws. From these constructions it would reasonably follow that the better course for the chief executive, in submitting subjects for legislation, is to submit briefly and definitely the subjects of legislation, unless the time and opportunity presents itself for submitting the details of a particular and definite subject with a careful exclusion of any other subject which might be ordinarily involved in an attempt to specify the details of legislation.

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

OP. NO. 1893—BK. 51, P. 43.

DROUTH RELIEF ACT—CONSTITUTIONALITY.

An act authorizing counties to loan to farmers money for the purchase of seed and feed and making an appropriation out of State funds to supplement county funds for said purpose is constitutional.

March 4, 1918.

Hon. E. A. Decherd, Jr., Acting Lieutenant Governor, President of the Senate, Capitol.

SIR: We are in receipt on this date of a communication from the Senate, through its proper officers, requesting the advice of the Attorney General as to the constitutionality of Senate Bill Number 14, currently known as the drouth relief bill. We are are not advised in the official communication as to what particular provisions of the Constitution it is suggested this bill is in conflict with, but the Senator presenting the communication to us stated that the suggestion was made that this opinion should particularly relate to Sections 6 and 10, Article 8, and Section 52, Article 3, of the Constitution. Another suggestion has been made, that the bill might be in conflict with Section 51, Article 3, of the Constitution. We will examine these sections and determine the question as best we can in the few minutes available to the writer to prepare this opinion.

Section 10 of Article 8 merely declares that the Legislature shall have no power to release inhabitants of, or property in, any county, city or town from the payment of taxes levied for State and county purposes, except in case of a great public calamity. This section of the Constitution has no application to the bill before you. It refers only to the subject of releasing the taxes, and makes no reference to the subject matter of this bill.

Section 6 of Article 8 relates to appropriations and declares that no money shall be drawn from the Treasury except in pursuance of a specific appropriation made by law. The bill before you makes a specific appropriation, and is not in conflict in any respect with this section of the Constitution.

That portion of Section 52 of Article 3 involved in the inquiry declares, "The Legislature shall have no power to authorize any county, city or town or other political corporation or subdivision of the State to lend its credit or to grant public money or thing of value in aid of or to any individual, association or corporation whatsoever, etc." Our opinion is that this proposed law is not in conflict with this provision of the Constitution.

The care of poor and indigent inhabitants is recognized by the Constitution of this State as a proper subject for the expenditure of public funds.

State Constitution, Article 16, Section 8.
Article 11, Section 2.

Section 3 of Article 8 declares that taxes shall be levied and collected by general laws and for public purposes only. By the express wording of the Constitution, it is entirely clear that the fundamental law regards the relief of the poor as a public purpose, for which public money may be expended.

Without entering on any elaborate discussion of this question, we will direct your attention to the authority upon which the bill before you was based at the time it was drawn, keeping in mind, of course, the fundamental rule that the courts will not declare a law void when once it has been passed by the Legislature unless it is clear and palpable that public interest is entirely absent. Stockton and V. R. Co. vs. Stockton, 41 Calif., 173; Schenley vs. Allegheny, 25 Pa, 128.

The case referred to is State of North Dakota vs. Nelson County, 8 L. R. A., page 283. In 1890 the Legislature of North Dakota passed an act authorizing counties to issue bonds to procure seed grain for needy farmers resident therein. Under that particular law, the funds to be used for the purpose stated were raised by the sale of bonds, and were to be applied to the purchase of seed grain "for residents of the county who are poor and unable to procure the same."

The manner of executing this provision of the law was similar to that in the bill before you. In fact, the measure before you was copied substantially from the North Dakota act in this respect. The objection was raised to the North Dakota act that the tax authorized by the statute was not for the public purpose, and, second, that it conflicted with the Constitution of that State, which provided, as does our own, that "counties are expressly forbidden to make donations or lend their aid to either corporations or individuals." The Supreme Court of North Dakota overruled both these contentions, and held that the act was for a public purpose and that it was not extending aid to private individuals in violation of the Constitution. The court took the common sense view that merely because the impoverished class were not yet in the poorhouse, did not render aid to them a private, as distinguished from a public purpose. The op-

inion, however, sustains the bill before you and is, within itself, a sufficient answer to your inquiry. We will, therefore, quote a large portion of it as the opinion of this Department in answer to your question. After having stated the various provisions of the law, the Court in part said:

"The Legislature by this enactment, so far as it can do so, has clothed the several counties of the State where there has been a preceding crop failure with authority to lend their aid in procuring seed grain to such of their citizens as are engaged in farming pursuits who make it appear, in manner and form as detailed by the law, that they are unable to procure such seed grain by any other means. The law empowers the counties to lend their aid out of money to be obtained by the issue and sale of county bonds, such bonds to be paid, principal and interest, from funds obtained by means of a general tax levy upon all of the taxable property situated within the counties that issue such bonds. Two features of this statute stand out in conspicuous prominence: *First.* All benefits obtainable under the act are confined to persons engaged in the pursuit of farming, and among farmers only those who propose to continue the business of farming after the aid in contemplation has been received by them. *Second.* No part of the fund is intended to be used in support or aiding such indigent persons as have already become a county charge, viz., paupers.

"The objections which may be made to the validity of this statute are twofold: First, it may be claimed that the tax authorized by the statute is not for a public purpose, hence not a valid tax; *second*, it may be contended that, under Section 185 of the State Constitution, counties are expressly forbidden to make donations or lend their aid to either corporations or individuals, hence that the proposed aid is unconstitutional, as repugnant to said section. The courts of this country and of all countries where constitutional liberty exists agree with the elementary writers upon the science of government that it is essential to the validity of a tax that it be laid for a public purpose. Difficulty has frequently arisen in discriminating between public and private objects, but where the object is primarily to foster private enterprises, and the only benefit to be derived by the public is incidental and secondary, the tax will be annulled by the courts as an abuse of the legislative prerogative. In the first instance the duty devolves upon the legislative branch of the government to determine whether a proposed tax is or is not for a public purpose, and courts are loath to interpose and declare any tax unlawful, and will only do so in case of a palable disregard of the wise limitations, express and implied, restricting the power of taxation. But where the Legislature assumes, in the guise of taxation, to compel A to advance his private means to B in the prosecution of a purely private enterprise, the courts will not hesitate to perform the duty of declaring such tax void, as subversive of fundamental and vested individual rights, and will do so even in cases where there is no express constitutional inhibition. The power of confiscation does not exist in the Legislature. The cases cited below are but a few of the numberless cases which have applied these principles to statutes imposing pretended taxes: Citizens' S. & L. Asso. vs. Topeka, 87 U. S. 20 Wall, 655 (22 L. Ed., 455); Commercial Nat. Bank vs. Iola, 2 Dill., 353; Parkersburg vs. Brown, 106 U. S., 487 (27 L. Ed., 283); Cole vs. La Grange, 113 U. S., 1 (28 L. Ed., 896); Allen vs. Jay, 60 Me., 124; Lowell vs. Boston, 111 Mass., 454; State vs. Osawkee Twp., 14 Kan., 422; Coates vs. Campbell, 37 Minn., 498; Cooley Const. Lim. Marg., p. 487; Cooley Taxn., 2d Ed., pp. 55, 126.

"Under these authorities, the test to be applied to the Seed-grain Statute is this: Is the tax provided for in the statute laid for a public purpose? If this question is answered in the negative, the statute must be declared null and void, without reference to Section 185 of the State Constitution, to which the attention of the court has been particularly directed. The statute makes provision for levying a general tax, in coun-

ties issuing bonds, for the benefit of a numerous body of citizens who, without fault of theirs and solely by reason of successive crop failures, are now reduced to extremities and are in fact impoverished to such an extent that they are, for the present time, wholly without the ability to obtain the grain necessary for seeding the lands from which they derive the necessaries of life. It is agreed on all sides that this class of citizens, having aready exhausted their private credit, must have friendly aid from some source in procuring seed-grain if they put in crops this year. The Legislature, by this statute, has devised a measure which seems well adapted to meet the exigency, and promises to give the needed relief with little prospect of ultimate loss to the county treasury. It is reasonable to anticipate that the beneficiaries of the act will be enabled to tide over their present embarrassment and, through the aid granted them by this statute, a widespread calamity, both public and private, will be averted. The crisis in the development of the State which renders some measure of wholesale relief imperatively necessary is fully recognized by all well informed citizens of the State, and this court will be justified in taking judicial notice of the existing status. The stubborn fact exists that a class of citizens, numbered by many thousands, is in such present straits, from poverty, that unless succored by some comprehensive measure of relief they will become a public burden, in other words, paupers, dependent upon counties where they reside for support. It is to avert such a widespread disaster that the seed-grain statute was enacted, and it should be interpreted in the light of the public danger which was the occasion of its passage.

"The support of paupers and the giving of assistance to those who, by reason of age, infirmity or disability are likely to become such, is, by the practice and common consent of civilized countries, a public purpose. Cooley, Taxn., 2d Ed., pp. 124, 125.

" 'The relief of the poor—the care of those who are unable to care for themselves—is among the unquestioned objects of public duty.' Opinion of Brewer, J., in State vs. Osawkee, Twp., 14 Kan., 424.

"If the destitute farmers of the frontier of North Dakota were now actualy in the almshouses of the various counties in which they reside, all the adjudications of the courts, State and Federal, upon this subject could be marshaled as precedents in support of any taxation, however onerous, which might become necessary for their support. But is it not competent for the Legislature, representing the taxpayers, in the exercise of its discretion and within the limits of county indebtedness prescribed by the State Constitution, to clothe county commissioners with authority, to be exercised at their descretion, to make small loans, secured by prospective crops, to those whose condition is so improverished and desperate as to reasonably justify the fear that, unless they receive help, they and their families will become a charge upon the counties in which they live?

"We have carefullly examined the authorities above cited, and many others of similar import, and while fully assenting to the principles enunciated by the cases, viz., that all taxation must be for a public purpose, we do not, with the single exception of the Kansas case, regard them as parallel cases and applicable to the question presented in the case at bar. As we view the matter, the tax in question is for a public purpose, i. e., a tax for the 'necesary support of the poor.'

"The case of State vs. Osawkee Twp., supra, asserts a doctrine which would defeat the tax in question. This court has great respect for the court which promulgated that decision and the sincere admiration for the distinguished jurist now upon the Supreme Bench of the Nation, who wrote the opinion in that case. Nevertheless we cannot yield our assent to the reasoning of the case, leading to the conclusion that a loan of aid to an impoverished class, not yet in the poor house, is necessarily a tax for a private purpose. In our view, it is not certain, or even probable, in the light of subsequent experience in the West, that the court of last resort in the State of Kansas would enunciate the doctrine of that case at the present day. The decision was made fifteen years ago. While the fundamental principles which underlie legislation and taxation have not

changed in the interval, it is also true that the development of the Western States has been attended with difficulties and adverse conditions which have made it necessary to broaden the application of fundamental principles to meet the new necessities of those States. Under the stress of adversity peculiar to the condition of the frontier farmer, there has come to be an expansion of the legal meaning of the term 'poor' sufficient to embrace a class of destitute citizens who have not yet become a public charge. The main features of the seed-grain statute are neither new nor novel. It was borrowed from territorial legislation, and long prior to that the State of Minnesota, in aid of agricultural settlers upon its western frontier enacted a series of statutes which are open to every criticism which can be made upon the statute under consideration. Dak. Laws, 1889, Chap. 43. See also Minn. Gen. Stat. 1878, pp. 1024-1030.

"The Legislature of Minnesota has frequently and by a variety of laws extended aid to the frontier farmers of that State who, far from being paupers, were yet reduced to extremities by reason of continued crop failures resulting from hail storms, successive seasons of drought and from the ravages of grasshoppers. Under one law towns are authorized to vote a tax to defray the expense of destroying grasshoppers; under another statute the Governor, State Auditor and State Treasurer were authorized to borrow $100,000 on State bonds, to be issued by them, and the proceeeds to be expended in the purchase of seed-grain for the neeedy farmers. Again, and at the same session, the same State officials were empowered to issue additional bonds to the same amount to pay a debt contracted for a similar purpose, upon warrants of the State Auditor. Section 6 of the Minnesota Act of 1878, Chap. 93, provides as follows: 'The credit of the State is hereby pledged to the payment of the interest and principal of the bonds mentioned in this act, as the same may become due.' By another section the State auditor is authorized and required to levy an annual tax necessary to meet the interest and principal of the debt created by these bonds. Many of the features of the two seed-grain statutes passed at the First Session of the Legislature of this State are borrowed from Minnesota. In principle, the legislation of the two States is identical. The aid extended is furnished in the form of a loan to individual farmers, secured on their crops, but to be met primarily by taxation. The destitute communities of farmers who were thus assisted in a neighboring State were enabled thereby to tide over their temporary necessities and are now self-supporting.

"This review of legislation in aid of destitute farmers will serve to illustrate the well known fact that legislation under the pressure of a public sentiment, born of stern necessity, will adapt itself to new exigencies, even if in doing so a sanction is given to a broader application of elementary principles of government than have before been recognized and applied by the courts in adjudicated cases. It is the boast of the common law that it is elastic and can be adjusted to the development of new social and business conditions. Can a statute enacted for such broadly humane and charitable purposes be annulled by another branch of the government as an abuse of legislative discretion? We think otherwise. Great deference is due from the courts to the legislative branch of the State government, and it is axiomatic that in cases of doubt the courts never interfere to annul a statute. Cooley, Const. Lim. Marg., p. 487.

"It will be presumed that the Legislature, in passing the seed-grain statute, acted upon the fullest knowledge of the necessities of the situation, and also presumed that they have passed the statute after due deliberation and with the clearest apprehension of the scope and purpose of the language used in Section 185 of the State Constitution. That section is not only restrictive upon counties, but is also permissive. It permits counties to lend aid for 'the necessary support of the poor.' To our mind, the restrictive words of that section were intended to prevent the loan of aid either to individuals or corporations for the purpose of fostering business enterprises, either of a public or private nature, but that the people who adopted the Constitution, as well as those who framed the intrument, expressly intended by the language of that section to grant a

power, affirmatively to the municipal corporations named in Section 185, to lend their aid and make donations for the 'necessary support of the poor.' The attention of the court has been directed to the Constitutions of ninteeen of the States in which the language of Section 185 is used verbatim, except only that in the States of North and South Dakota the words above quoted are interpolated. Why was this peculiar language introduced into the Constitutions of North and South Dakota, when nothing of the kind was found in that of the other seventeen States? Why did not the conventions which formed the organic law for North and South Dakota simply copy the language which, with this exception, is borrowed from the other Constitutions, without inserting the excepting clause under consideration? To our mind, the answer to these questions is found in the peculiar and alarming condition of the people of Dakota Territory in the year 1889, when the two Dakotas assumed the responsibilities of Statehood. Such conditions had not before existed, and hence the Constitutions of other States had made no provisions to meet such necessities. When the two States formed and adopted their Constitutions the fact was well known and recognized by the people of Dakota that the condition of many farming communties was such that some comprehensive measure for their relief was an imperative necessity. In such a conjuncture the words were interpolated into Section 185 of the Constitution, which permit counties to loan their aid for the 'necessary support of the poor.' No constitutional grant of power was necessary to give the new governments authority to provide for the support of paupers in the poor houses. That power is inherent, and exists in all governments as among their implied powers and duties. By universal consent taxes are valid when laid for the support of paupers or those likely to become paupers. There was no necessity and no reason for inserting a provision in the State Constitutions of North and South Dakota authorizing counties to loan their aid to maintain the alms houses. It would be absurd to assume that the framers of the Constitutions and the people who adopted them intended by this provision to enable local municipalities to issue and sell bonds and loan the proceeds to the inmates of the poor houses; yet the power to loan aid in 'support of the poor' is given. In our opinion, this power is conferred in the organic law expressly to meet the exigencies of the situation then existing, and that it is our duty to give it that effect. We believe, and so hold, that the class rererred to in the exception contained in Section 185 of the State Constitution is the poor and destitute farmers of the State, and that the first Legislature which met after the State was admitted has, by the seed-grain statute, put a proper construction upon the language in question. We therefore refuse to grant the writ applied for, and hold that the seed-grain statute is a valid enactment."

In addition to the foregoing, it should be borne in mind that one of the declared purposes of this measure, as shown in Section 17, is for the purpose of raising farm products to feed our armies in Europe during the present war, etc. This purpose is, of course, a military purpose and, therefore, a public purpose, for which public funds may be expended.

The courts have frequently decided that the maintenance of the militia is a public purpose. Hodgdon vs. City of Haverhill, 79 N. E., p. 830.

The State militia, of course, was a branch of the military service and for the common defense, for otherwise it could not be a public affair. If the maintenance of the State militia in time of peace is such a public purpose as that public money may be expended, who is it who will say that the production of food is not now a public and military purpose, when the government of the United States is expending many

thousands of dollars in sending men throughout the Nation to stimulate the production of food? We are told in every publication and by the highest authority that this is an economic warfare as well as a war with destructive weapons. Who can doubt this? We are urged by public authority to limit the kinds of foods which we eat, in order that the army and our Allies may be fed. Can it be said that the production of food and the stimulation of that production is not a public purpose, when the necessity of its preservation and our abstinence is so strongly urged?

We will discuss this feature of the question further. That the aid to be given the destitute producers of essential military supplies is both a public and a military purpose is a question which appears to us to be beyond debate. That such aid extended at this time, under the circumstances which surround us, is not within the inhibition of aid to individuals is equally as clear and is well supported by the authority of the Dakota case. We may mention in this connection that the State of North Dakota just a few days ago passed a bill for this identical purpose and along the same lines of its previous act and along the same lines as the bill before you.

The only true constitutional provision which anyone has suggested to us that this measure violates is Section 51, Article 3, of the State Constitution. This section, in part, declares, "The Legislature shall have no power to make any grant or authorize the making of any grant of public money to any individual, association of individuals, municipal or other corporation whatsoever." The contention insisted upon is that counties are corporations and, therefore, the grant provided for in this bill to counties is inhibited by this provision of the Constitution. In the first place, it may well be doubted if this measure in fact makes a grant of public money to any county within the meaning of the language used in this section, but it is unnecessary to determine that particular question. The constitutional inhibition has no application to counties. A county, of course, is not a municipal corporation and, therefore, the contention must be that a county is a municipal corporation and, therefore, within the constitutional limitation. The theory of this contention is, to begin with, erroneous. Counties, under the Constitution of this State, are not municipal corporations, but are merely legal subdivisions of the State.

Article 11, Section 1, of the Constitution declares:

"The several counties of this State are hereby recognized as legal subdivisions of the State."

This constitutional definition of a county and fixing of its legal status is consistent not only with current American authority, but with the English constitution and law, under which the county system of government originated.

The American and English Encyclopedia of Law, Volume 7, page 900, in defining and giving the general characteristics of a county, says:

"A county is one of the civil divisions of a country for judicial and political purposes, created by the sovereign power of the State of its own will, without the particular solicitation, consent or concurrent action of

the people who inhabit it; a local organization which, for the purpose of civil administration, is invested with certain functions of corporate existence." (American and English Encyclopedia of Law, Vol. 7, p. 900).

It is true that counties have some of the characteristics of municipal corporations, in that they are invested with certain functions of government and have a sufficient entity to sue and be sued. Still, under our Constitution, they are mere legal or convenient divisions of the State for purposes of government. At the most, it may be said that they are only quasi corporations. 7 American and English Ency. of Law, p. 901.

The same authority which we are following holds that counties are not municipal corporations, but, on the contrary, are but a branch of the general administration of the State government. It says:

"Not a Municipal Corporation.—For the purposes of general designation it is not common to use the term 'municipal corporations' in a sense including quasi corporations, such as counties, to distinguish public or political corporations from those which are termed private. But a county is not, in a strict technical sense, a municipal corporation.

"County and Municipal Corporations Distinguished.—Municipal corporations proper are called into existence either at the direct solicitation or by the free consent of the people who compose them. Counties are superimposed upon the inhabitants thereof by the sovereign and paramount authority of the State. Moreover, a municipal corporation proper is created mainly for the interest, advantage and convenience of the locality and its people. A county organization is created almost exclusively with a view to the policy of the State at large, for purposes of political organization and civil administration in matters of finance, of education, of provision for the poor, of military organization, of the means of travel and transport, and especially for the general administration of justice. With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the State, and are, in fact, but a branch of the general administration of that policy." (7th American and English Ency. of Law, pp. 902-903).

It will be noted from the foregoing quotation that a county organization is created almost exclusively with a view to effectuating the policy of the State in the administration of various State affairs, including "provision for the poor" and "military organization."

In the case of Askew vs. Hale Co., 25 Am. Rep., 730, the distinction between county and municipal corporations is clearly stated, and among other things described as characteristics of counties is the statement that counties are one of the means used by the State for the control of roads, bridges and ferries. The court in that case in part said:

"A radical error, fatal to the argument, is in treating the county as a municipal corporation. It has corporate characteristics, but it is not a municipal corporation, though often so termed. It is an involuntary political or civil division of the State, created by statute to aid in the administration of government. It is in its very nature, character and purpose public, and a governmental agency or auxiliary rather than a corporation. Whatever of power it possesses, or whatever of duty it is required to perform, originates in the statute creating it. It is created mainly for the interest, advantage and convenience of the people residing within its territorial boundaries, and the better to enable the government to extend to them the protection to which they are entitled and the more benefi-

cently to exercise over them its powers. All powers with which the county is intrusted are the powers of the State, and all the duties with which they are charged are the duties of the State. If these were not committed to the county, they must be conferred on some other governmental agency. The character of these powers, so far as counties in this State are concerned, are all for the purposes of civil and political organization. The levy and collection of taxes, the care of the poor, the supervision and control of roads, bridges and ferries, the compensation of jurors attending the State courts and the supervision of convicts sentenced to hard labor as a punishment for many violations of the criminal law, it is the general policy of the State to intrust to the several counties, and are all but parts of the power and duty of the State. These powers could be withdrawn by the State, in the exercise of its sovereign will, and other instrumentalities or agencies established and clothed with them." Askew vs. Hale County, 54 Ala., 641; 25 Am. Rep., 730).

The authorities cited and quoted from state the rule which obtains in Texas as announced by the Texas courts, construing our constitutional provisions. For example, in the case of Hamilton vs. Garrett, 62 Texas, 6$5, the Supreme Court of this State held "counties are involuntary political or civil subdivisions of the State, created by general laws to aid in the administration of the government. They are purely auxiliaries of the State; and the statutes confer upon them all the powers they possess, prescribe all the duties they owe and impose all liabilities to which they are subject."

It is true that the statutes of this State have declared that counties shall be bodies corporate and politic but this declaration is not found in the Constitution. It is the Constitution we are now interpreting and construing. However, the language of the Statute declaring counties to be bodies corporate and politic merely confers upon them corporate powers for the more effectual performance of the functions for which they are created, and in the language of the court "was not intended to place them upon the footing of private corporations or of other municipalities." Sherman vs. Schobe, 94 Texas, 130.

Counties are merely legal subdivisions of the State, created for the purpose of bringing government home to the people and supplying the necessary means for executing the wishes of the people and bringing into exercise the machinery necessary to the enforcement of local government. Free vs. Scarbrough, 70 Texas, 674; Edwards County vs. Jennings, 33 S. W., 585.

Counties are created by the Legislature for public purposes, as agencies of the State. Galveston vs. Posnainsky, 62 Texas, 126.

A county is not a corporation proper, but only a quasi corporation. Heigel vs. Wichita County, 84 Texas, 392.

The county's status is that of an instrument of the State government through which it exercises the powers of the State, but for the State itself. Galveston vs. Posnainsky, 62 Texas, 127.

In the last case cited the status of counties in the government of the State is well stated, substantially, as follows:

"Counties are created by the Legislature by general laws without reference to the wish of their inhabitants, and thus for essentially public purposes. Towns and cities are incorporated through special charters which, like most special laws, are enacted at the request of those who are to be most directly benefitted by them and with a view to this end. The

one is created for a public purpose as an agency of the State through which it can most conveniently and effectively discharge the duties which the State as an organized government, assumes to every person, and by which it can best promote the welfare of all. The other, while to a given extent created for a public purpose, is so mainly for the reason that the existence of large towns and cities makes a system or degree of police there necessary which is not so in villages nor with a rural population, but the main and essential purpose for which they are created is the advantage of the inhabitants of the corporation, and in so far as such corporations receive and exercise powers other than such as would be exercised by the State in and through the county organizations, this is essentially true. Galveston vs. Posnainsky, 62 Texas, 118, 126. See Sherman vs. Schobe, 94 Texas, 126, 129; 58 S. W., 949; Coleman vs. Thurmond, 56 Texas, 514, 520."

It may be said that counties are created by the State for the purpose of government. Their functions are political and administrative and their powers are rather duties imposed than privileges granted, and with scarcely an exception all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the State and are in fact but a branch of the general administration of that policy.

Neigel vs. Wichita County, 84 Texas, 329.
Coleman vs. Thurmond, 56 Texas, 520.

It seems from the foregoing authorities that counties are not municipal nor private corporations, within the meaning of those terms, as used in the Constitution, and, therefore, there is no inhibition against the aid by the State to a county in the administration of State laws and the carrying out of State policies.

The writer of this opinion has had but few minutes in which to dictate it, but it appears to us that the authorities cited are sufficient and conclusive on the proposition that the bill before you does not violate any one of the constitutional provisions discussed in this opinion. No other constitutional provision has been urged against the measure so far as we know, and we do not pass upon the measure with reference to any other provision.

You are advised, therefore, that so far as the objections raised have been called to our attention, our opinion is that the bill is constitutional.

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

Since the above opinion was dictated, I have heard that, in addition to other objections, it is now said by some that the bill is prohibited by Section 48 of Article 3 of the Constitution.

This Section of the Constitution reads, in part, as follows:

"The Legislature shall not have the right to levy taxes or impose burdens upon the people except to raise revenue sufficient for the economical administration of the government, in which may be included the following purposes: * * *

Then follows an enumeration of a number of governmental purposes for which taxes may be levied, but, as is observed from the language of the Constitution, the purposes named are not intended to be exclusive, but are such as may be included, and, therefore, any other public or governmental purpose, although not enumerated in the Constitution, could be properly provided for.

Under this provision of the Constitution, objection was made to the Act of April 2, 1887, providing for the payment of a bounty for the destruction of certain wild animals.

It is perfectly apparent taht the destruction of wild animals is not one of the purposes enumerated in the Constitution, hence, if the enumeration of purposes is to be considered exclusive, there could be found no warrant for this bounty law. The court, however, discarded this objection and held that the appropriation to pay bounties for the destruction of wild animals was to protect citizens of this State in the use and enjoyment of their property and was in line with a *due administration of the government.*

In sustaining this Statute, the court, in concluding its opinion, said:

"One of the purposes for which governments are instituted is to protect citizens in the use and enjoyment of their property, and whatever is done in pursuance of this purpose is in 'administration of the government.' That the act was passed by the Legislature for such purpose is apparent from the object expressed in its caption, and is, therefore, in our opinion, not prohibited by our Constitution." (Dimmit County vs. Frasier, 27 S. W., 829-830; Weaver vs. Scurry Co., 28 S. W., 836).

We respectfully submit, therefore, that the bill in question, being devoted to a public or governmental purpose, is not obnoxious to any objection arising under Section 48 of Article 3 of the Constitution.

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

OP. NO. 1895—BK. 51, P. 66.

PUBLIC WEIGHERS—LOCAL AND SPECIAL LAWS.

1. The only subdivisions of a county in which there can be public weighers under the provisions of the general law are: (a) cities which receive annually 100,000 bales of cotton on sale or for shipment; (b) justice precincts of a county; (c) two or more justice precincts of a county which have been united by order of the commissioners court for the purpose of electing public weighers.

2. A law passed by the Legislature, authorizing the commissioners court of Kaufman County to unite two election precincts of one justice precinct to another precinct of said county for the purpose of electing public weighers, would be a local or special law "regulating the affairs of counties" and would violate the provisions of Section 56, Article 3, of the Constitution.

March 7, 1918.

Hon. S. J. Osborne, House of Representatives, Austin, Texas.

DEAR SIR: We have your letter of March 5, which is as follows:

"The commissioners court of Kaufman County, by virtue of the provisions of Article 7828, relating to public weighers, have heretofore consolidated justice precincts Nos. 1 and 5 as one public weigher's district.

"Now, the voters of election precincts Nos. 6 and 33 in justice precinct No. 5, being located near and adjoining justice precinct No. 7, desire to be attached to justice precinct No. 7 as a part of the public weigher's district, the idea being that they are near a town there where they may market their cotton, and are anxious to be placed in a position where they can have a voice in the election of the public weigher for precinct No. 7.

"Will a special act of the Legislature attaching election precincts Nos. 6 and 33 to justice precinct No. 7, in your opinion, be constitutional and safe, from a legal standpoint?"

Replying thereto, we call attention to the following provisions of Article 7828:

"In all of the counties in this State in which there are no city or cities in which the Governor is authorized to appoint public weighers, the commissioners' court of said county, when presented with a petition signed by a majority of the qualified voters of *any justice precinct* in their county praying for the appointment or election of public weighers for *said precinct*, shall appoint or order to be elected at the next general election one or more suitable persons for public weighers for *said justice precinct*, the number of weighers for any one *precinct* to be determined by said court; and, should they appoint a public weigher for said *justice precinct*, he shall hold his office until the next general election, when there shall be elected for said *justice precinct* his successor, a public weigher in the manner and form governing the election of other *precinct* officers; * * * provided further that the commissioners court may unite two *or more justice precincts* for the purpose of electing public weighers."

A consideration of the above quoted provisions, together with other provisions of said Article 7828, discloses that the only subdivisions of counties in which there can be appointed or elected public weighers are (1) a city which receives annually one hundred thousand bales of cotton on sale or for shipment (2) any justice precinct in the county and (3) any subdivision of a county composed of two or more justice precincts united by the commissioners court "for the purpose of electing public weighers."

There is no authority of law for uniting to a justice precinct a portion of another justice precinct "for the purpose of electing public weighers."

Therefore, you are advised that, under the general law, Election Precincts Numbers 6 and 33 of Justice Precinct Number 5, if the same compose only a part of said justice precinct, could not by the commissioners court be united with Justice Precinct Number 7 "for the purpose of electing public weighers."

We are likewise of the opinion that a local or special law uniting said election precincts with Justice Precinct Number 7 in Kaufman County would not be valid. Such a law would violate the following provisions of Section 56, Article 3 of the Constitution:

"The Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law authorizing * * * regulating the affairs of counties, cities, towns, wards, school districts * * *

"And in all other cases where a general law can be made applicable, no local or special law shall be enacted."

A law of this character would affect only a particular portion of a particular county in this State, and, clearly, would be a local or

special law. Clark vs. Finley, 93 Texas, 178; 54 S. W., 343; Hall vs. Bell County, 138 S. W., 180.

Such a law would also be a law regulating affairs of a county. The office of public weigher was created for the benefit of certain subdivisions of the county. The appointment, or the ordering of the election, of public weighers in a class of counties to which Kaufman County belongs is a duty imposed upon the commissioners court of such counties, because they are county affairs. The division of counties into justice precincts and the uniting of two or more justice precincts "for the purpose of electing public weighers" are matters regulating the affairs of counties. The division of counties into justice precincts is a duty imposed by the Constitution, Section 18, Article 5, upon commissioners courts, and the authority to unite two or more justice precincts for the purpose of electing public weighers is also imposed by Article 7828 upon commissioners courts. The commissioners courts have general supervisory powers over county affairs, and the above duties were imposed upon commissioners courts clearly because they relate to county affairs. Such a local or special law would likewise be unconstitutional because a general law could be made applicable. We see no reason why a general law could not be passed, authorizing the commissioners courts of the counties of the State, upon petition, to create a defined district as a public weigher's district and authorize the election of public weighers within the territory of such defined district. Such general laws have been passed in respect to the creation of road districts, irrigation districts and other improvement districts. The general law of which Article 7828 is a portion has been held to be constitutional. Johnson vs. Martin, 75 Texas, 40; 12 S. W., 321.

For the reasons stated, we think the Legislature has not the power or authority to pass a law of the character inquired about in your letter.

Very truly yours,
JNO. C. WALL,
Assistant Attorney General.

OP. NO. 1912—BK. 51, P. 133.

CHILD LABOR LAW—PERMITS.

County judges may issue permits only upon the conditions set out in Section 5 of the act.

It must appear that the earnings of the child are necessary for the support of invalid children, widowed mother or mother whose husband has deserted her, or of the young children, and that such support cannot be sustained in any other manner.

There is no provision of the act authorizing the county judge to issue a permit to a child under the age of twelve years. One of the conditions upon which a permit may be issued is that suitable employment has been obtained for the child. It is necessary that such employment be secured in order that the county judge may determine whether or not it is such employment as is prohibited by the act.

A work-shop within the meaning of the act is a place where dangerous machinery is used, and any such place is within the inhibition of the statute.

As to whether any particular institution is a work-shop within the meaning of this act is a question of fact to be determined in each instance upon the question of whether or not dangerous machinery is used in such places.

Chapter 59, Acts of the Regular Session Thirty-fifth Legislature.

April 8, 1918.

Hon. T. C. Jennings, Labor Commissioner, Capitol.

DEAR SIR: The Attorney General has your letter as follows:

"The investigations of this department show that permits are being issued by county judges in some parts of the State to children under fifteen years of age to work in almost any kind of employment. Section 5, Chapter 59, General Laws of the Thirty-fifth Legislature authorizes county judges to issue permits to children between the ages of twelve and fifteen years under certain conditions and to work in certain employments. In order that this department may be in a position to correct this abuse of authority given county judges under the law, I would respectfully ask your ruling upon the following questions:

"1. Are county judges authorized under the law to issue permits to children under fifteen years of age to work between September 1st and June 1st, which child has able-bodied parents?

"2. Are county judges authorized to issue permits to children to work in any kind of employment who are under twelve years of age?

"3. Are county judges authorized to issue permits to work to children under fifteen years of age, unless it be shown that employment, such as is permitted under the law, has been procured for such child?

"4. Are county judges authorized to issue permits to children under fifteen years of age to work in factories, mills, work-shops, theatres, moving picture shows and other places of amusement, and in places mentioned in Sections 2 and 5 of the act?

"5. Would shoe shining shops, cleaning and dying establishments, manicurist parlors and other places of a similar nature be classed as work-shops under the law?"

We will reply to your inquiries in the order propounded, as follows:

1. Section 1 of Chapter 59, Acts of the Regular Session of the Thirty-fifth Legislature prescribes a punishment by fine of:

"Section 1. Any person, or any agent or employe of any person, firm or corporation, who shall hereafter employ any child under the age of fifteen (15) years, to labor in or about any factory, mill, work-shop, laundry, theatre or other place of amusement or in messenger service in towns and cities of more than fifteen thousand population according to the Federal census, except as hereinafter provided, shall be deemed guilty of a misdemeanor. * * *"

By Section 5 of the Act, the county judge is authorized upon certain conditions to issue permits for children over twelve years of age to enter certain employments. The pertinent portion of Section 5 is as follows:

"Section 5. Upon application being made to the county judge of any county in which any child over the age of twelve (12) years shall reside, the earnings of which child are necessary for the support of itself, its mother when widowed or in needy circumstances, or invalid father, or of other children younger than the child for whom the permit is sought, the said county judge may, upon the sworn statement of such child or its parent

or guardian, that the child for whom the permit is sought is over twelve (12) years of age, that the said child is able to read and write in the English language, that it is able physically to perform the work or labor for which a permit is sought, and that it shall not be employed in or around any mill, factory, work-shop or other place where dangerous machinery is used, nor in any mine, quarry or other place where explosives are used, nor in any distillery, brewery or other place where intoxicating liquors are manufactured, sold or kept, or where the moral or physical condition of the child is liable to be injured, and that the earnings of such child are necessary for the support of such invalid parent, widowed mother or mother whose husband has deserted her, or of younger children, and that such support can not be obtained in any other manner, and that suitable employment has been obtained for such child, issue a permit for such child to enter such employment."

The above quoted provisions of the Employment Act limit the right of county judges to issue permits to those children over twelve years of age and under the age of fifteen years without regard to any period of the year. This Act, however, should be construed in connection with Chapter 49, Acts of the Regular Session of the Thirty-fourth Legislature known as the Compulsory Education Bill and particularly Section 5 of the latter act which is in pari materia with the act of the Thirty-fifth under discussion. Section 5 of the Act of the Thirty-fourth Legislature provides in substance that no child under fourteen years of age not lawfully excused from attendance upon school shall be employed by any one during school in any occupation during the period which the child is required to be in school as provided by this act. The Act of the Thirty-fifth Legislature contains this provision, being part of Section 5:

"There shall be nothing in this act to prevent the working of school children of any age from June 1st to September 1st of each year, except that they shall not be permitted to work in factory, mill, work-shop, theatre, moving picture show or other places of amusement and the places mentioned in Sections 2 and 5 of this act."

The last quoted provision of the Act of the Thirty-fifth Legislature, exempts from the operation of the act school children of any age during the period beginning June 1 and ending September 1 of each year, except they shall not be permitted to work in any factory, mill, workshop, theatre, moving picture show, or other places of amusement as well as the places mentioned in Sections 2 and 5 of the act. The period beginning June 1 and ending September 1 is the vacation period for schools and this provision was inserted in the act to allow children to engage in certain occupations during such vacation.

Coming now to your specific question of whether or not a county judge may issue a permit to children under fifteen years of age to work between September 1 and June 1 when the child has able-bodied parents, we are of the opinion that without regard to the period of the year a county judge may issue the permit only upon the conditions set out in Section 5 of the Act of the Thirty-fifth Legislature, among which conditions are that the earnings of the child are necessary for the support of itself, its mother, when widowed, or in needy circumstances, or invalid father, or of other children younger than

the child for whom the permit is sought. It must appear that the earnings of such child are necessary for the support of such invalid children, widowed mother, or mother whose husband has deserted her, or of the young children, and that such support cannot be obtained in any other manner. From these conditions it appears, therefore, that if a child has able-bodied parents living together that the conditions would not exist warranting the issuance of a permit.

2. Answering your second question we beg to say that there is no provision of this Act authorizing the county judge to issue a permit to a child under the age of twelve years.

3. Answering your third question we refer you again to Section 5 of the Act of the Thirty-fifth Legislature from which you will observe that one of the conditions upon which a permit is issued, is that suitable employment had been obtained for such child. It is necessary that a county judge may be advised of the employment obtained in order that he may determine before granting the permit whether or not such employment is one of those prohibited by statute.

4. Section 5 of the Act makes it one of the conditions of the granting of the permit that such child will not be employed in or around any mill, factory, workshop, or other place where dangerous machinery is used, nor in any mine, quarry or other place where explosives are used, nor in any distillery, brewery or other place where intoxicating liquors are manufactured, sold or kept, or where the moral or physical condition of the child is liable to be injured. These are the employments in which the county judge is not permitted to issue a permit to a child to engage in. All other employments may be permitted.

5. An answer to your fifth question involves a correct definition of the word "workshop." The prohibition against the issuance of a permit for a child to be employed in a workshop, is, that it shall not be employed in or around any mill, factory, workshop, or other place where dangerous machinery is used. The use of the term "dangerous machinery" in connection with the preceding language, indicates that mills, factories and workshops are places where such machinery is used. In order therefore for a workshop to come within the prohibition of the statute, it must be a place where machinery is used.

In the case of In Re Spencer, 117 Am. St. Rep., 137, the California Court says:

> "The word 'work-shop,' as used in a statute prohibiting employment of children under fourteen in any mercantile institution, office, laundry, manufactory, 'work-shop,' restaurant, hotel or apartment house, could not be said not to include a barber shop, it being a place where handicraft is carried on. In re Spencer, 86 Pac., 896, 897; 149 Cal., 396; 117 Am. St. Rep., 137; 9 Am. Cas., 1105."

The Minnesota statute was construed in Sorseleil vs. Red Lake Falls Milling Co., 126 N. W., 903, as follows:

> "Rev. Laws 1905, Sec. 1814, requiring the owner of any factory, mill or work-shop to furnish belt shifters, if practicable, applies to the owners of grain elevators. The term 'work-shop,' as defined by Laws 1907, C. 356, Sec. 2, means any premises, room or place, not a mill or factory, wherein

manual labor is exercised for purposes of cleaning or adapting for sale any article or part thereof, and includes a grain elevator. Sorseleil vs. Red Lake Falls Milling Co., 126 N. W., 903; 111 Minn., 275."

It follows, therefore, that for a workshop to come within this statute it must be one where dangerous machinery is used. Under the definition, shoe shining shops and manicurist parlors, and other places of similar nature, could not be classed as workshops. Whether or not a cleaning and dyeing establishment would come within the definition would depend upon whether or not dangerous machinery was used. This is a question of fact to be determined. In fact, it is a question of "fact" to be determined in all instances. What has been said above with reference to shoe shining shops and manicurist parlors, is based upon general knowledge that in such places no dangerous machinery is used. If the inventive genius should invent dangerous machinery in these places then they would come within the definition and employment therein would not be permitted.

Yours very truly,

C. W. TAYLOR,

Assistant Attorney General.

OP. NO. 1909—BK. 51, P. 147.

STANDARD CONTAINERS FOR FRUITS AND VEGETABLES.

The standard quart defined by the act of the Thirty-fifth Legislature contains 67.2 cubic inches dry measure.

The standard baskets in a four-basket crate shall hold not less than three quarts dry measure and shall contain not less than 201.6 cubic inches.

The specification of width, breadth and depth of such baskets contained in this act, not giving the cubical contents of three quarts dry measure, nor 201.6 cubic inches, will be controlled by the provisions of the act specifying such cubical contents, and a basket not meeting the requirements as to depth, but meeting those as to cubical contents, would be in compliance with the act.

Chapter 181, Acts Regular Session, Thirty-fifth Legislature.

April 9, 1918.

Hon. Fred W. Davis, Commissioner of Agriculture, Austin, Texas.
Attention Hon. E. W. Cole, Director of Markets.

DEAR SIR: The Attorney General has your letter as follows:

"Paragraph (b) of Section 1 of Chapter 181, General Laws passed by the Thirty-fifth Legislature prescribing the dimensions for the baskets in a four-basket crate stipulates that the basket shall measure 5x8 inches at the bottom, 6x10 inches at the top and 4 inches deep, and shall contain not less than 201.6 cubic inches.

"By computing the dimensions we find that the cubical contents of the basket is only 198 2-3 cubic inches instead of 201.6, as the statute demands. We also find that by adding 5-64 of an inch to the depth of the basket the contents will be 201.3 cubic inches, which is 7-10 cubic inches more than the required number of cubic inches, 201.6.

"Since there is a conflict in Paragraph (b), please advise if the Commissioner of Agriculture would be within his legal rights to declare that

the dimensions of a four-basket crate shall be 5x8 inches at the bottom by 6x10 at the top by 4 5-64 inches deep."

That portion of subdivision (b), Section 1, Chapter 181, Acts of the Regular Session of the Thirty-fifth Legislature, involved in your inquiry, is as follows:

"(b). Standard Four-basket Crate.—The basket in said crates shall hold not less than three quarts dry measure, and the dimensions of such baskets shall be 5x8 inches at the bottom, 6x10 inches at the top and 4 inches deep, and shall contain not less than 201.6 cubic inches."

It will be noted from a reading of the above quoted portion of Subdivision (b) that the Legislature has in three ways fixed the contents of such baskets, first, they shall contain not less than 3 quarts dry measure; second, the dimensions in inches of the bottom, top and depth of such baskets is given and third, they shall contain not less than 201.6 cubic inches. While the dimensions in inches of such baskets is important as affecting shipping facilities and packing, yet the fact that the Legislature has seen fit in three different ways to fix the cubical contents of such baskets, leads us to the conclusion that this in the minds of the framers of the act, was the most important matter. It develops that a basket made in accordance with the specifications given will not contain 3 quarts dry measure, or 201.6 cubic inches. Subdivision (f) of this section fixes the contents of a quart box or crate at 67.2 cubic inches, which multiplied by 3 gives the 201.6 cubic inches, required by subdivision (b) for a basket in a standard 4 basket crate.

From the dimensions of the crate as fixed by subdivision (b) it appears there is a space of half an inch between the top of the basket and the top of the crate, the baskets being 4 inches deep and the crates 4½, therefore, the addition of 5-64 of an inch to the depth of the basket will not affect the dimensions of the crate as specified in the act nor the arrangement of the crates in cars.

We are of the opinion, that a basket 4 5-64 inches deep instead of 4 inches deep which would contain 201.3 cubic inches would be in compliance with this act. The wording of the act as to contents is that such baskets will hold not less than 3 quarts dry measure and contain not less than 201.6 cubic inches, therefore, the excess of .7 of a cubic inch in each basket would not violate the law and would also be safely within the "tolerance" allowed by the Federal Act.

You are therefore advised further, that you do not have authority to officially promulgate an order fixing the dimensions of such baskets or crates. In other words, you have no authority to fix standards of weights and measures. By Section 4 of the Act you are authorized and empowered to enforce all of its provisions and to promulgate and publish all necessary rules and regulations for its enforcement. Section 6 authorizes you to promulgate and publish other standards of containers, packs and grades, but this does not give you authority to change the specifications of any container that are given in the act. The Legislature alone has the power to make or suspend a law and it cannot delegate such power to any official.

Constitution, Section 28, Article 1.
Harmon vs. State, 58 L. R. A., 618.
Hewitt vs. Board of Examiners, 3 L. R. A. (N. S.), 896.

It is within the power of the Legislature to fix certain standards and authorize public officials to determine facts from the standards thus fixed, but the Legislature could not authorize you to fix such standards as this would be a delegation of the legislative power.

We, therefore, advise that any order promulgated by you as to the dimensions of such baskets would have the effect only of bringing about a standard contemplated by the act. You could not fix a standard from which a basket could be manufactured containing more or less than the contents fixed for such basket by the Legislature. If by adding 5-64 of an inch to the depth of the basket in question, the cubical contents thereof will be made to conform to the contents required by the act, then such basket would be a legal basket within the meaning of this law.

We believe that upon your advice the manufacturers of these baskest and crates will at once change the depoth of the basket so that its cubical contents may meet the requirements.

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

OP. NO. 1925—BK. 51, P. 207.

CONSTITUTIONAL LAW—PINK BOLL WORM ACT.

Ch. 11, Gen. Laws, Third Called Session Thirty-fifth Legislature.

1. THE ACT IS CONSTITUTIONAL.—(a) The Constitution contains no express grant of authority to the Legislature to pass such law, nor any inhibition against their doing so.

(b) The power to pass such laws is inherent in the people; is absolutely necessary to the protection of the life and property of the community; is a necessary incident to the law of self-defense.

(c) The constitutionality of particular features of the law discussed.

2. THE PURPOSES OF THE ACT.—The purposes of the act are: To prevent the spread of the pink boll worm menace in the State and to eradicate the same where it exists. Three methods are provided:

(a) By the creation by the proclamation of the Governor of a quarantined territory surrounding the known location of the pest, from which it shall be unlawful to ship cotton or cotton products or articles contaminated by the same (Section 5).

(b) By the destruction of cotton and cotton plants in any field or fields where the pest has been discovered and in any fields in the vicinity of the infested fields, whether same are within or without a quarantined zone (Section 6).

(3) By a proclamation declaring it unlawful to grow cotton in a quarantined district known to be infested with the pest or in any part of such quarantined district (Section 7).

3. ENFORCEMENT OF THE ACT.—(a) Violations of the proclamation in respect to the transportation feature are made punishable by fine.

(b) An enforcement can be had by criminal prosecution or by suits in equity.

(c) No penalty is provided for violation of the proclamation in respect to the growing of cotton in a quarantined district or portion thereof, therefore enforcement can be had only by suits in equity to restrain the violation.

(d) If a person should plant or grow cotton in a quarantined district in violation of the provisions of a proclamation, such person would be guilty of maintaining a public nuisance, and the Attorney General of the State or the prosecuting attorney of the county would be the proper person to institute such suit.

Such a suit could be maintained by individuals if they had suffered by the public nuisance private, direct and material damage to themselves beyond that suffered by the public at large.

4. By proceeding in the manner set forth in Section 6 in the act, proper power can be conferred upon the Commissioner of Agriculture to destroy cotton "in any field or fields in which the pink boll worm may have been discovered or any field in the vicinity of such infested fields."

5. The proclamation of the Governor authorizing the destruction of cotton, which is submitted to the department, authorizes the destruction of only "infested cotton or cotton plants" in the field or fields in the area described in the proclamation and not throughout the quarantined zone.

April 27, 1918.

Hon. Fred W. Davis, Commissioner of Agriculture, Capitol.

DEAR SIR: We have a letter from you enclosing proclamations of the Governor dated January 21, 1918, and February 25, 1918, issued under the provisions of Chapter 11 of the Printed General Laws passed at the Third Called Session of the Thirty-fifth Legislature, which is commonly termed the "Pink Boll Worm Act." Then you ask the following questions:

"1. Can the Commissioner of Agriculture obtain a writ of injunction against a farmer restraining him from growing cotton that he has already planted?

"2. Can the Commissioner of Agriculture get a writ of injunction against any farmer in the non-cotton zone to restrain him from planting cotton in such territory?

"3. Do these proclamations give the Commissioner the authority to destroy cotton fields that may be growing any time during the three years covered by the non-cotton zone proclamation, or will it be necessary to cover each season's crop of cotton grown in the non-cotton zone by additional proclamations?

"4. Would it be possible, according to Section 6 of this act, to empower the Commissioner of Agriculture, by proclamation of the Governor, to destroy any cotton fields that may develop the pink boll worm during this season or during the following seasons as long as the non-cotton zone proclamation exists?"

To answer these question it is necessary to review and contrue all the provisions of the Act. We have therefore concluded to write a general opinion on the subject.

By the provisions of Section 1 of the Act a zone is created along the boundary line between the State of Texas and the Republic of Mexico, comprising certain counties and parts of counties specifically mentioned, "for the purpose of aiding in the prevention of the introduction into this State of the cotton pest * * * the pink boll worm."

Sections 2, 3 and 4 of the Act regulate the growing and transportation of cotton from the territory comprised in the zone created by Section 1 of the Act.

In Section 2 of the Act it is provided that "whenever the Secretary of Agriculture of the United States shall certify to the Governor of this State that the pink boll worm in any of its stages * * * has

been discovered in Mexico within fifty miles of the Texas border, it shall be the duty of the Governor to proclaim that part of the zone established by Section 1 adjacent to the location of the pest and for a distance or not less than fifty miles in each zone along the border of the State a closed zone from which it shall be unlawful to transport any cotton or cotton products to any part of the State from such closed zone embraced in the proclamation of the Governor" This section also makes it the duty of the Commissioner of Agriculture of Texas to make a thorough inspection of the cotton fields and cotton and cotton products in such closed zone, and if it is determined that there is no pink boll worm within the zone or pink boll worm in any of its stages within the State of Texas, or without the United States and adjacent to said zone and not less than fifty miles from such closed zone, then he shall certify such finding to the Governor, who shall thereupon issue a proclamation declaring it lawful for cotton grown within such closed zone and its products to be transported therefrom under such conditions as may be deemed essential to the protection of the cotton industry of the State.

In Section 3 of said Act it is provided that if the Secretary of Agriculture of the United States shall report the presence of pink boll worm within twenty-five miles of the Texas border, the Governor shall cause a special examination to be made by the Commissioner of Agriculture of Texas as to the danger of infestation of Texas fields by the pest and if the report of such officer, in the judgment of the Governor, shall justify such action, the Governor shall declare the *growing* of cotton in said zone for such distance adjacent to the known location of the pink boll worm as may be deemed necessary to assure the prevention of the introduction of the pest "a public menace." and thereafter it shall be unlawful for any person or persons to grow cotton in such territory so set apart or to transport any cotton or its products from such zone to any other point in Texas, so long as such condition of menace to the cotton industry shall be deemed to exist.

In Section 4 of the Act it is made the duty of the Commissioner of Agriculture of Texas to maintain a rigid inspection of the cotton fields, etc., in said zone to determine the presence of pink boll worm in any stage of development, and, when the pest is discovered in such zone, to certify the fact to the Governor, who shall immediately proclaim a quarantine of such territory in the zone and adjacent thereto as may be deemed necessary to prevent further advance of the pest into Texas; "and thereafter it shall be unlawful for any person or persons to transport cotton or cotton products of any kind from any territory within the counties in such zone, or the territory adjacent thereto embraced in such quarantine proclamation" etc.

In Section 5 of the Act it is provided that if pink boll worm in any of its stages shall be found in any portion of the State *outside* the above mentioned zone, which is created by the Act, "the Commissioner of Agriculture * * * shall immediately certify that fact to the Governor, who shall proclaim a special zone or quarantine district surrounding the known location of the pest to such extent as may be determined sufficient to prevent the spread of the pink boll worm and it shall be unlawful for any person or persons *to ship* in cotton pro-

ducts of any kind from such quarantine district or transport any car or vehicle, or freight or other article contaminated with cottonseed, etc. * * * from the quarantined area through or to any other point in this State, unless and until it shall have been freed from cottonseed or other cotton product, and shall have been fumigated or disinfected in such manner as the Commissioner of Agriculture of this State shall direct."

Section 6 of the Act is as follows:

"If it shall become necessary, in the judgment of the Commissioner of Agriculture of this State, to the protection of the cotton industry of Texas, that the Commissioner shall destroy cotton and cotton plants in any field or fields in which the pink boll worm may have been discovered, he shall report such condition and certify a recommendation to that effect to the Governor, who shall thereupon declare such cotton or fields of cotton a public menace, and upon the promulgation of such proclamation the Commissioner of Agriculture shall be empowered to exercise all authority requisite to the complete destruction of such cotton or cotton plants in such field or fields, and it shall be his duty to effect such destruction in such manner as may deemed essential to the eradication of the pest and to the adequate protection of the cotton industry of this State. In the event it shall be found necessary in accomplishment of the purposes of this act to destroy any field or fields of cotton, the county judge of the county in which such field or fields may be located shall immediately appoint three disinterested citizens whose duty it shall be to carefully examine such fields or field of cotton and report their conclusions of the value of the cotton in such field or fields to be destroyed to the county judge. Before entering upon the duties required of them, such citizens shall take an oath before some officer legally qualified to administer oaths that they will discharge impartially the duties herein provided for. When the report of the said three citizens shall be filed with the county judge it shall be his duty to transmit the same with the endorsement to the Commisioner of Agriculture of the State, who shall certify to the fact of such field or fields of cotton having been destroyed in pursuance of the provisions of this act and he shall then file such report and certificate with the State Comptroller, who shall issue his warrant upon the State Treasurer for such sum as may be declared just and due in such report, which sum shall be paid from any funds in the State Treasury not otherwise appropriated. Provided if any person whose cotton or field of cotton has been destroyed according to the provisions of this act is dissatisfied with the estimate of damage assessed by the said three citizens he shall have the right of appeal to any court of competent jurisdiction."

Section 7 of said Act is as follows:

"If it shall be deemed necessary by the Commissioner of Agriculture to the protection of the cotton industry of Texas that the growing of cotton in any quarantined district known to be infested with the pink boll worm or in any part of such quarantined district constitutes a certain danger to the cotton industry of the State he shall certify such conclusion to the Governor, who shall thereupon proclaim the growing of cotton in such district a public nuisance, and thereafter it shall be unlawful to grow cotton in such district for such term of years as the proclamation may designate, or so long as such conditions of menace to the cotton industry shall be deemed to exist."

Section 8 of the Act empowers the Commissioner of Agriculture and his authorized agents to enter into any field or fields of cotton or upon any premises in which cotton or its products may be stored or held for the purpose of examination and inspection.

In Section 9 of the Act it is made the duty of the Commissioner of Agriculture to cooperate with the Secretary of Agriculture of the United States in any measure authorized and to be undertaken by the Federal Government in preventing the introduction of the pest into the United States through the State of Texas.

By Section 10 of the Act it is made the duty of any person upon whose premises the pink boll worm shall appear to report the presence of the same to the Commissioner of Agriculture. Failure to do so is made an offense finable not less than one hundred nor more than one thousand dollars. It is also made the duty of any person or persons who may know of the presence of the pink boll worm to report the location of the same to the Commissioner of Agriculture and the failure to do so is made finable within the same limits.

By Section 11 of the Act the transporting of cotton or cotton products from any quarantined territory "placed under restrictions by proclamation of the Governor of the State in accordance with authority conferred by the conditions of this Act, to any part of the State in violation of the Act or of either of the proclamations and restrictions authorized by this Act" is made a misdemeanor punishable by fine of from five hundred to five thousand dollars.

It will be noted that no penalty is provided for a violation of the proclamation of the Governor declaring the growing of cotton to be unlawful in the zone created by the Act or in zones created by the proclamation of the Governor.

The Act Is Constitutional.

It is not necessary that the Constitution should contain an express grant to the Legislature to pass laws of this character. The authority to do so is inherent. As said in the case of Railway Company vs. Smith, 49 S. W., 627:

"The exercise of such a power is absolutely necessary to the protection of life and property. It is a necessary incident of the law of self-defense. They (such laws) are, and are intended to be, but temporary in character."

In the case from which the above quotation is made, the Texas Court of Civil Appeals makes the following clear statement as to the powers of the Legislature to pass laws of this character:

"It is universally conceded that the power to pass proper quarantine laws is among the powers reserved to the several sovereign States of this Union. As was said by Chief Justice Marshall, in speaking of inspection laws, in the case of Gibbons vs. Ogden, 9 Wheat., 203, 'They form a portion of that immense mass of legislation which embraces everything within the territory of a State not surrendered to the general government, all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State and those which respect turnpike roads, ferries, etc., are component parts of this mass.' As was said in that case: 'That such laws (inspection laws in that case) may have a remote and considerable influence on commerce will not be denied; but that the power to regulate commerce is the source from which the right to pass them is derived can not be admitted.' Again, as was

said by the court in Thorpe vs. Railroad Co., 27 Vt., 149: 'It extends to the protection of the lives, limbs, health, comfort and quiet of all persons, and the *protection of all property* within the State. According to the maxim, "Sic utere tuo ut alienum non laedas," which being of universal application, it must, of course, be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others.' This power has been exercised and upheld in a great variety of cases and is so well established that we think it will be unquestioned and extended discussion is therefore unnecessary. Crowley vs. Christensen, 137 U. S., 86, 11 Sup. Ct., 13; Lawton vs. Steele, 152 U. S., 136, 14 Sup. Ct., 490; Slaughterhouse Cases, 16 Wall., 36; Patterson vs. Kentucky, 97 U. S., 501; Morgan's Louisiana & T. R. & S. S. Co. vs. Louisiana Board of Health, 118 U. S., 455, 6 Sup. Ct., 1114; Railway Co. vs. Haber, 169 U. S., 613, 18 Sup. Ct., 488."

Attention is called to the entire opinion. The case was affirmed by the Supreme Court of the United States. Smith vs. Railway, 181 U. S., 248.

The procedure authorized by the Act does not violate the provisions of Section 19, Article 1, of the Constitution of this State, relating to "due process of law," or the provisions of Section 1 of the 14th Amendment to the Constitution of the United States, prohibiting states from depriving "any person of life, liberty or property without due process of law." This feature of a very similar law was very ably discussed by the Court of Civil Appeals in the case of Chambers, County Judge vs. Gilbert, 42 S. W., 630, in which writ of error was denied by the Supreme Court.

Nor does the Act violate the provisions of Section 17, Article 1, of our State Constitution, relating to the taking of private property for public use. On this subject we make the following extended quotation from the case of Chambers, County Judge, vs. Gilbert, supra, which is very helpful as well on other phases of the subject:

"The act here in question does not provide for the taking of private property for public use, contemplated by Section 17, Article 1 of our Constitution (State vs. Schlemmer, 42 La., 1166, 8 South., 307), but it provides for the condemnation and destruction of private property, to the end that the general welfare may be preserved. It is the exercise of the sovereign power of police, intended to protect the public from the spread of a disease among domestic animals, which is usually fatal in its effects, and which may extend to people with fatal results. It is the same power that underlies quarantine laws and regulations and these may go to the extent of authorizing summary destruction of private property when infected with disease germs. Cooley, Const., Lim., 720, citing Harrison vs. City of Baltimore, 1 Gill, 264; Van Wormer vs. Albany, 15 Wend., 262; Coe vs. Schultz, 47 Barb., 64; Raymond vs. Fish, 51 Conn., 80. It is the same power that the government may and does exercise by summary destruction of private property to prevent the spread of fire and a general conflagration. Cooley, Const. Lim., 739, and cases cited in note 1."

Nor is the Act invalid because of the powers therein conferred upon the Commissioner of Agriculture and the Governor to establish zones and to prevent transportation of cotton or infected materials from such zones to other portions of the State and to prevent the growing of cotton within certain zones.

In passing upon similar provisions of the laws of this State for the regulation of livestock and the protection of stock raisers, the

Court of Criminal Appeals of Texas, in the recent case of Mulkey vs. State, 201 S. W., 991, expressly decided that such an Act was not invalid as a delegation of legislative power to an administrative body. On this subject we also call attention to a case decided by the Supreme Court of the State of Washington, Caretense et ux. vs. De Sellom et al., 144 Pac., 934, which is directly in point, from which we make the following quotation:

"In Locke's Appeal, 72 Pa., 498, 13 Am. Rep., 716, it is said: 'The Legislature can not delegate its powers to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend.' See to the same effect: State ex rel. Grogan R., etc., Co. vs. R. R. Com., 52 Wash., 17, 100 Pac. 179; Health Department vs. Rector, 145 N. Y., 32, 39 N. W., 833, 27 L. R. A., 710, 45 Am. St. Rep. 579; Hurst vs. Warner, 102 Mich., 238, 60 N. W., 440; 26 L. R. A., 484, 47 Am. St. Rep. 525; Field vs. Clark, 143 U. S., 649, 12 Sup Ct., 495, 36 L. Ed., 294.

"It is true that the statute does not specifically enumerate the diseases or pests to be eradicated. It simply provides that if the disease or pest exists and can not be cured by disinfection, the owner shall promptly destroy the trees. It authorizes the Commissioner to promulgate rules and regulations for eradicating diseases and pests, to the end that their spread may be prevented. In this respect the State is exercising its sovereign power, commonly called the police power. Broadly stated, the police power of the State is the State's law of self-defense, in respect to both persons and property. State vs. Mountain Timber Co., 75 Wash., 581, 135 Pac., 645."

Another case directly in point is that of Los Angeles Berry Growers Co. Op. Ass'n. vs. Huntley, et al., 146 Pac., 375.

Many laws of similar character have been held to be constitutional by the higher courts of this State.

Article 6601, R. S., making railroads liable to a penalty for permitting Johnson grass to go to seed on the right of way, has been held to be constitutional. Ry. vs. May, 194 U. S., 267; Ry. vs. Shelton, 81 S. W., 794; Ry. vs. Letot, 135 S. W., 656.

Article 7161, R. S., providing for the appraisal and *destruction* of diseased horses, has been held to be constitutional. Chambers vs. Gilbert, 42 S. W., 630; Livingston vs. Elliott, 68 S. W., 724; Maynard vs. Freeman, 60 S. W., 334.

Article 7883, R. S., authorizing an inspector of sheep to arrest, take in charge, and dip sheep afflicted with the scab, under certain circumstances, has been held to be constitutional. Hand vs. State, 37 Tex. Cr. App., 310; 39 S. W., 676; Troy vs. State, 10 Tex. App., 319.

Quarantine laws of this State have been frequently passed upon by the higher courts of the State and sustained. Mobile Fruit and Trading Co. vs. Boere, 55 S. W., 361; Thompson vs. Kimbrough, 57 S. W., 328; King Co. vs. Mitchell, 71 S. W., 611; Ry. vs. Wood, 95 Tex., 223, 66 S. W., 449, 56 L. R. A., 592.

A mass of other laws of similar nature are now in our statutes. See Chapters 1 and 2, Title 66, R. S., relating to public health; Chapter 3, Title 66, R. S., relating to the pollution of water; Chapter 4, Title 66, R. S., relating to charbon or anthrax; Chapter 5, Title 66, R. S., relating to special quarantine regulations; and Chapter 6, Title 66, R. S., prescribing pure food regulations etc.

Similar statutes in perhaps every state of the Union have been held to be valid.

We have so far considered the constitutionality of this character of law rather than the validity of any particular feature of the particular law. The Act may contain some defects. Perhaps it would have been better to have provided some character of notice to the proprietor that his premises were under investigation to determine whether the pink boll worm menace existed thereon, and to have provided a better means of hearing for the proprietor. The trend of authorities, however, is that when the life and welfare of a community is at stake, whether it is the personal or economic life and welfare, whether the health of people, animals or plants is involved, the community has an inherent right to use the weapon at hand. If no effective weapon exists, its authorized agency, the Legislature, may create one. It may be crude and not approved by ethical societies, still its use, under the circumstances, is justified.

True, the Supreme Court of the United States, in the case of Dent vs. West Virginia, 129 U. S., 114, 9 Sup. Ct., 231, in passing upon the method provided in an Act of this character, held it to be process or proceedings adapted to the nature of the case and valid.

Thus, a Court of Civil Appeals of Texas, in passing upon the method provided for the enforcement of the law to protect stock and stock raisers, in the case of Chambers, County Judge, vs. Gilbert, supra, in which writ of error was denied by the Supreme Court, said:

"There is nothing in our Constitution which requires, as preliminary to the exercise of such power, a judicial trial of the issue as to the necessity of such summary action, and the ascertainment and awarding of damage to result therefrom. In the Louisiana case, above cited, an ordinance of the City of New Orleans made it unlawful to excavate or sink a well on premises used as a bakery or baker-shop, and provided for the filling up of wells existing upon such premises. The court treated the ordinance as the exericise of the police power of the State for the protection of public health, the object being to prevent the use of well water by bakers in making bread for the public. It was held that the power there exercised was not within the constitutional restriction prohibiting the taking of property without 'due process of law.' The court, in discussing the question, says: *"It is not perhaps for us to say whether the means adopted to accomplish this purpose are the best and most efficient and least injurious to private interest. These are matters of legislative determination. It is sufficient, for judicial satisfaction, if the means are appropriate to the end, will operate towards its accomplishment, are so intended in good faith, and are not unwarrantably unneccessarily oppressive."*

"In the case before us the proceeding for condemnation of animals afflicted with the dangerous and infectious diseases named, their destruction and the assessment and payment of damages to the owner, does not possess the elements of a judicial trial, but the proceeding is appropriate and effectual in the particular case. It is the exercise of an inherent power in the government, and the manner in which the power is to be executed violates no principle of our State or Federal Constitutions."

Enforcement of the Act.

The Act provides that persons who transport any cotton or cotton products by any means from any territory in the State, which has by proclamation of the Governor been quarantined and placed under

restrictions in that respect, shall be subject to a fine of not less than $500.00, nor more than $5,000.00, and that any person "upon whose premises any pink boll worm shall appear" and who fails, knowingly, "to report the presence of such cotton pest to the Commissioners of Agriculture of this State." shall be subject to a fine of not less than $100.00, nor more than $1,000.00, "for each offense." The Act further provides:

"And any person or persons who may *know of the* presence of the pink boll worm in any locality in this State, and who shall fail to report the *location* of such pest to the Commissioner of Agriculture, shall, upon conviction, be subject to a like conviction."

As heretofore stated, the Act provides no penalty for a violation of the provisions of the Governor's proclamation as to the growing of cotton in the territory described therein.

Of course, the enforcement of the Act as to the transportation of cotton or cotton products from quarantined territory and as to failure to report the presence of the pink boll worm pest to the Commissiner of Agriculture, can be had by criminal prosecution, but such procedure cannot be followed in respect to violations of the proclamation in reference to the growing of cotton in prohibited territory.

The fact, however, that penalties are provided for violations of the proclamation in reference to the transporting of cotton and cotton products and none are provided for violations of the proclamation in reference to the growing of cotton, in our opinion, does not affect the right of the State, or of injured persons, to proceed in equity for abatement of the nuisance.

By the proclamation the transportation of cotton and cotton products from prohibited territory and the growing of cotton in a prohibited territory are declared to be a public menace. One violating the provisions of the proclamation would be guilty of maintaining what by most authorities is termed "a public nuisance" and by Mr. Wood in his Work on Nuisance, "a mixed nuisance."

The method of procedure by equity to abate a nuisance of this kind is well stated in authorities we will hereafter cite. The best considered cases establish the following rules:

The Attorney General of the State or a prosecuting attorney of a county in which a public nuisance exists, may proceed in equity in behalf of the people for its abatement, but such a proceeding cannot be brought where the nuisance is a private one.

State vs. Ohio Oil Co. (Ind.), 47 L. R. A.; 627.
State vs. Vandalia (Mo.), 94 S. W., 1009.
Augusta vs. Reynolds (Ga.), 50 S. E., 998; 69 L. R. A., 564.
People vs. Tucker (Calif.), 48 Pac., 374, 58 Am. St. Rep., 183, 39 L. R. A., 581.

An individual cannot enjoin a public nuisance, unless it works special and peculiar injury to him, and that injury must not be trivial but must be serious, affecting the substance and value of his estate.

Tabbott vs. King, 32 W. V., 69 S. E., 48.

It must be private, direct, and material damage beyond that suffered by the public at large. Mere diminution of the value of property is not sufficient.

Ry. vs. Pruddan, 20 N. J. Eq., 530.
Zalriskie vs. Ry., 13 N. J. Eq., 314.

An injunction may be granted to restrain a public nuisance at the suit of a private person who suffers a special injury thereby.

Ga. Chemical Co. vs. Colquitt, 72 Ga., 172.
Cowle vs. Sprowe (Me.), 56 Am. Dec. 696.
Chapman vs. City of Rochester, 18 N. E., 88.
1 L. R. A., 296; also cases cited in 37 Century Digest, Col. 1691-1692.

A court of equity will not interfere to restrain a public nuisance at the instance of an individual, unless he is in imminent danger of suffering special injury, for which the law does not, under the circumstances, afford him adequate relief.

Georgetown vs. Alexandria Canal Co., 37 U. S., 91; 9 L. Ed., 1012.
Ry. vs. Ward, 67 U. S., 485; 17 L. Ed., 311.

An individual has no right to restrain an interference with a mere public right, if he has not suffered or been threatened with a damage peculiar to himself.

San Antonio vs. Strumberg, 70 Tex., 366; 7 S. W., 754 and cases cited on page 3117 of the Third Volume of Vernon's Sayles' Statutes, under Art. 4643.

To your first question, then, we make reply that, in the opinion of this Department, the Attorney General of the State or the prosecuting attorney of the county in which cotton is being grown in violation of a proclamation of the Governor, properly issued under the terms of this Act, may proceed in equity in behalf of the people to abate the nuisance.

Your second question is answered in the affirmative.

In answer to your third question, we beg to say that the power and authority given to the Commissioner of Agriculture to destroy cotton and cotton plants is in Section 6 of the Act. Attention is called to the fact that before this power arises, the following facts must exist:

(a) The pink boll worm must have first been discovered in a certain locality.

(b) The Commissioner of Agriculture must reach the conclusion that it is "necessary in the judgment of the Commissioner of Agriculture * * * to the protection of the cotton industry of Texas, that the Commissioner shall destroy cotton and cotton plants in the field or fields in which the pink boll worm may have been discovered, or in any fields in the vicinity of such infested fields."

(c) The Commissioner of Agriculture must make report of such condition and of his findings and certify a recommendation to the Governor that, in his judgment it is necessary "to the protection of the cotton industry of Texas" that the cotton and cotton plants in the particular territory where the pink boll worm has been discovered, and "in any fields in the vicinity of such infested fields," describing the territory and fields, shall be destroyed.

(d) The Governor must have, after receiving the report and findings of the Commissioner of Agriculture, issued and promulgated a proclamation declaring "such cotton or fields of cotton a public menace" and giving to such commissioner the power "to exercise all authority requisite to the complete destruction of such cotton or cotton plants in such field or fields."

(e) The county judge of the county in which such field or fields may be located shall, after the issuance and promulgation of such proclamation, "appoint three disinterested citizens * * * to examine such field or fields of cotton, and report their conclusions of the value of the cotton in such field or fields to be destroyed to the county judge."

(f) The report of the committee must be filed with the county judge and transmitted by the county judge "with his endorsements" to the Commissioner of Agriculture.

(g) Said Section also contains this proviso:

"Provided if any person whose cotton or fields of cotton has been destroyed according to the provisions of this act is dissatisfied with the estimate of damage assessed by said three citizens, he shall have the right of *repeal* to any court of competent jurisdiction."

We think the Legislature plainly intended to use the word "appeal" where the word "repeal" appears.

It would seem from the language of the proviso quoted that the owner has the right of appeal to a court of competent jurisdiction even after his cotton has been destroyed.

We also call attention to the fact that by the terms of said Section 6 it is not required that the field or fields or territory in which cotton and cotton plants may be destroyed shall be in a quarantined zone. It may be a field or fields in any portion of the State in which and in the vicinity of which the pink boll worm has been discovered.

Further answering Question 3, we beg to state that, in our opinion, there is authority by the Governor's proclamation dated January 21, 1918, to destroy cotton. This proclamation is susceptible, however, to criticism for uncertainty. For instance, in the preamble it is recited:

"Whereas, * * * the Commissioner of Agriculture of the State, in the manner provided for by law, has caused to be made a thorough investigation of certain territory and premises within the State of Texas hereinafter described to determine whether or not the pink boll worm in any of its stages exists within said area, and * * * it has been made known to him and to the Governor of this State that many *cultivated fields* in said territory are now infected with the pink boll worm, threatening the destruction of the future cotton growing industry in said area and the infection of adjacent territory within said State * * * endangering the whole area of Texas as a cotton growing State, and,

"Whereas, in the judgment of the Commissioner of Agriculture, * * * it is necessary for the preservation of the future cotton growing industry * * * to destroy cotton or cotton plants *in any field or fields* in which the pink boll worm may have been discovered *within said territory or in nay fields in the vicinity of such infested fields,* and to prohibit the shipment of any cotton products * * * from said territory, etc.

"Now, therefore, I, W. P. Hobby * * * do hereby declare and proclaim that such portion of the State of Texas hereinafter described is declared to be a *zone* or *zones* infected at this time by the pink boll worm. (Then follow descriptions of all zones Nos. 1 and 2)."

The proclamation then declares it to be unlawful to transport cotton or cotton products or infected materials or vehicles from the territory of such zones to any other point in Texas, and also provides:

"And I do hereby declare *such infected cotton or infected fields of cotton* a public menace, and the Commissioner of Agriculture be and he is hereby authorized and empowered to exercise all authority requisite and permitted by law, to the complete destruction of *such infected cotton or cotton plants in such field or fields in said area,* and he is authorized to effect the destruction of such *infected cotton or cotton plants in such field or fileds* in such manner as may be deemed essential by him to the eradication of such pest and to the adequate protection of the cotton industry of Texas in the manner provided for by the laws of this State.

"This proclamation is issued on this day and is in full force and effect from and after this day until withdrawn by lawful authority."

In the first place the finding of the Governor that the zone or zones described in the proclamation, which are all of Zones Nos. 1 and 2, including several counties and portions of counties, are "*infected* at this time by the pink poll worm," does not seem to be warranted by the findings of fact by the Commissioner of Agriculture recited in the preamble of the proclamation to the effect merely that "it has been made known to him (the Commissioner) * * * that many *cultivated fields in said territory* are now infected with the pink boll worm."

The authority to destroy cotton, however, does seem to be confined to the findings of fact made by the Commissioner of Agriculture, because this authority extends only to the destruction of "such infected cotton or cotton plants in such field or fields *in said area,* and he (the Commissioner) is authorized to effect the destruction of such infected cotton or cotton plants *in such field or fields*" only.

Our construction, therefore, of this proclamation is, that by it authority is given to the Commissioner of Agriculture to destroy only infected cotton or cotton plants in infected fields "in said area" described in the proclamation.

What has been said about the foregoing proclamation is also true of the proclamation of the Governor dated February 25, 1918.

These proclamations, however, are effective as to the transportation of cotton from any portion of the entire area described in each.

In reply to your fourth question, we beg to state that the existence or non-existence by proclamation of the Governor of a zone in which it is unlawful to grow cotton does not in any manner affect the right to destroy cotton in field or fields where the pink boll worm is discovered. The power to destroy cotton does not arise from any proclamation of the Governor made under Section 7 of the Act, declaring it

unlawful to grow cotton within a certain territory. It arises from the power conferred by proclamation of the Governor issued under Section 6 of the Act.

In the opinion of this Department Section 6 of the Act provides the manner and method in which cotton may be destroyed in infested field or fields and in the neighborhood of infested fields. The procedure therein must be strictly followed and when it is followed, we think the power in the Commissioner of Agriculture to destroy the cotton is complete.

Very truly yours,
JNO. C. WALL,
Assistant Attorney General.

OP. NO. 1930—BK. 51, P. 269.

PINK BOLL WORM ACT—SUPPLEMENTAL OPINION.

1. The act does not provide for the destruction of cotton being grown in a non-cotton zone in violation of the Governor's proclamation, nor for compensation to the owner of cotton so grown and destroyed. After a proclamation had been issued making it unlawful to grow cotton in a certain territory, it is presumed that there will be no cotton grown in such territory. Therefore, the Legislature made no provision for the destruction of cotton therein and for the payment to the owner of the value thereof.

2. The provisions of Section 6, relative to the destruction of cotton, the appraisal of the value thereof and compensation to the owner were intended to apply only to cotton which was being legally grown.

3. The growing of cotton in a territory in violation of a non-cotton zone proclamation would constitute a public nuisance and the same could be abated by the State in a suit brought by the Attorney General. In such a case the State would be entitled to a mandatory injunction, requiring the offending person, at his own expense, to destroy the crops so illegally grown.

May 23, 1918.

Honorable Fred W. Davis, Commissioner of Agriculture, Capitol.

DEAR SIR: We have the letter of Mr. Scholl, Chief Entomologist of your Department, dated May fourteenth, and also the letter of Mr. W. D. Hunter, member of Federal Horticultural Board, addressed to you and dated May 10th, making other inquiries about the pink boll worm matter.

Without quoting the questions they have asked or giving specific answer to each, we think the following remarks in the way of a supplement to the original opinion rendered by this Department on this act, will give them the desired information.

Attention is directed to the fact that sections 6 and 7 of the act are meant to cover entirely different situations.

Section 7 empowers the Governor, after proper findings by the Commissioner of Agriculture, to declare it unlawful to grow cotton in a quarantine zone, or any portion thereof and contains no provision as to the destruction of crops.

Section 6 of the Act empowers the Governor, after proper findings by the Commissioner of Agriculture, to authorize the Commissioner of Agriculture to destroy cotton or cotton plants in field or fields, in which the pink boll worms may have been discovered and in any fields

in the vicinity thereof, whether such fields are situated within or without a quarantine zone.

Section 6 also provides for the appraisal of the crops to be destroyed and for payment of the value thereof. Section 6 was intended to furnish a method for combating the menace as soon as it appeared in cotton fields in any portion of the State of Texas, whether a quarantine zone had been created or not.

On the other hand, after there has been a proclamation of the Governor, properly promulgated under Section 7 of the act, declaring it to be unlawful to grow cotton within a quarantine zone, or any portion thereof, which proclamation has been issued and promulgated before planting time, it is to be presumed that the same will be complied with and that no cotton will be planted and grown within such territory in violation of the proclamation. Therefore, it was not necessary that the act should provide for the destruction of cotton in a territory in which by proper proclamation of the Governor, it had been declared to be unlawful to grow the same. It was not to be presumed that thereafter there would be any cotton within such territory to be destroyed. If thereafter there existed any fields of cotton, the same would be fields grown in violation of the law and the offending person would be guilty of maintaining a public nuisance. The right and power to meet such a condition and to abate such a nuisance exists without any express provision in the statute.

The State, or an individual who has suffered, or may be threatened with irreparable damage peculiar to himself, could maintain a suit in equity to abate the nuisance and secure an injunction restraining the offending person from growing cotton within such territory. To obey such an injunction the destruction of the cotton plant within the prohibited territory would be necessary. If there is any doubt that an injunction would not have this effect, then it is clear to us that the State or the individual, peculiarly injured, would be entitled to a mandatory injunction, requiring the offending person to destroy the cotton being grown by him in violation of the proclamation and restraining him from further growing cotton within such territory. That this right is well established, we think it necessary only to cite the following authorities:

State vs. Goodnight, 70 Tex., 682; 11 S. W., 119.
Townsite Co. vs. McFaddin, 121 S. W., 716.
Railway vs. State, 155 S. W., 561.
Railway vs. Suffern, 129 Ill., 274; 21 N. E., 824.

Section 6 of the Act was not intended to apply to the destruction of cotton being unlawfully grown in a certain territory. It was intended to apply to the destruction of cotton being lawfully grown and therefore a method of appraising and compensation is provided. On the contrary, the person growing cotton in violation of a proclamation of the Governor, clearly would not be entitled to compensation for the destruction of the same. He could not come into the Court with clean hands and ask for compensation.

Respectfully submitted,

JNO. C. WALL,
Assistant Attorney General.

OP. 1922—BK. 51, P. 238.

BOARD OF EDUCATION—INVESTMENT OF PERMANENT UNIVERSITY AND ASYLUM FUNDS.

The Board of Education has authority to invest permanent University and Asylum funds in bonds of the United States.

May 1, 1918.

Hon. W. F. Doughty, State Superintendent, Capitol.

DEAR SIR: In your inquiry addressed to the Attorney General under date of April 27th, which was received by this Department on April 29th, you desire to be advised whether or not the State Board of Education has authority to invest any moneys on hand to the credit of the permanent funds of the Deaf and Dumb Institute, the Blind Institute, the Lunatic Asylum, the State Orphan Home and the University of Texas. You also desire to be advised what securities these moneys may be invested in and the minimum rate of interest such securities must bear in event the Board of Education has the power to make the investments inquired about.

We will discuss these institutions under two headings. Under the first head, the University of Texas, and the other institutions named we will discuss under the second subdivision of this communication.

University of Texas.

The Constitution of this State by Section 11, Article 7, declares that the permanent University funds shall be invested in bonds of the State of Texas, if the same can be obtained. If not, then in United States bonds, and the interest accruing thereon shall be subject to appropriation by the Legislature to accomplish the purpose declared in the foregoing section; that is, for the maintenance, support and direction of a university of the first class for the promotion of literature and the arts and sciences, including an agricultural and mechanical department. It seems that the framers of the Constitution intended to give preference in the making of such investments to bonds of the State of Texas, but realizing that such bonds might not be obtainable it is provided that in such event the permanent funds may be invested in bonds of the United States. These constitute the only constitutional provisions with reference to the investment of the University permanent funds.

The management and control of the University is by statute placed in the Board of Regents, but we find no provision of the statute authorizing the Board of Regents to invest the proceeds of the sale of University land, although by Article 2633 such Board is invested with the sole and exclusive management and control of the lands appropriated to the University and have the right to sell, lease and otherwise manage, control and use the same in any manner as to them may seem best for the interest of the University.

By Article 2652 the Governor is authorized and directed to have issued manuscript bonds of the State of Texas to be sold or exchanged at par for the permanent University fund at any time when there is cash on hand not less than five thousand dollars.

Article 2653 provides that these bonds shall be in such denomination as the Governor may direct and redeemable at the pleasure of the State and shall bear interest at the rate of five per cent per annum.

Article 2654 provides that such bonds shall contain certain recitals as to the title and date of the passage of the Act of 1889, signed by the Governor and Treasurer and countersigned by the Comptroller and registered in the office of the State Treasurer. It is further provided in this article that after said bonds have been registered the Governor shall offer said bonds to the Board of Education as an investment for the permanent University funds then on hand in cash, which are by law authorized to be invested. It seems that this Act of the Legislature recognized the right of the Board of Education to refuse to take the bonds so issued for it is provided that if the Board of Education take said bonds the Treasurer and Comptroller shall make the proper entry showing the facts of the transaction and the necessary transfer of such funds on their books. It is also provided that if the Board of Education shall not take said bonds thus offered same shall be destroyed and canceled and of no effect whatever. This act of the Legislature which was approved April 2, 1889, provided in its caption to the effect that it was an act to provide for the issuance of bonds to supply deficiencies in the revenue, thereby attempting to bring the act within Section 49, Article 3, of the Constitution, which provides:

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

At the present time there is no necessity for the creation of a debt on behalf of the State for any of the purposes authorized by the foregoing section. It is true the nation is at war, but so far as we know the State of Texas has not been called upon to repel invasion or defend itself. Neither, so we are advised, is there a deficiency in the revenue, and therefore the permanent University fund could not be invested in the manner set out in the articles above referred to.

That it was the intention of the framers of the Constitution, as well as the Legislature, that the cash on hand to the credit of the University permanent fund shall be invested is manifest. In our opinion also it is the duty of the State Board of Education to make such investment, and if there are no bonds of the State of Texas obtainable in which the permanent fund may be invested, then the Board of Education should invest same in bonds of the United States.

Deaf and Dumb Institute and Other Asylums.

By the act of August 30, 1856, one hundred thousand acres of the public domain was set apart for each of the following institutions: The Lunatic Asylum, the Deaf and Dumb, the Blind and Orphan Asylums. The Constitution of 1876 in Section 9, Article 7, recog-

nized this grant and provided that the lands heretofore granted for the benefit of such institutions, together with such donations as may have been or may hereafter be made, are hereby set apart to provide a permanent fund for the support, maintenance and improvement of said asylums. It is provided by this section that the Legislature may provide for the sale of the lands and the investment of the proceeds in the manner as provided for the sale and investment of school lands in Section 4 of this article. Section 4 of Article 7, so referred to provides that the Comptroller shall invest the proceeds of the sale of public school lands as may be directed by the Board of Education in the 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 State shall be responsible for all investments. By Chapter 9, Title 79, relating to the public lands of this State the Legislature has provided for the disposition of the lands held by such asylums, but we fail to find in any statute of this State where the Legislature has exercised the authority granted in Section 9, and provided for the manner of investing the proceeds of such lands so sold, that is to say, we fail to find any express authority given by the Legislature.

It is not reasonable to suppose, however, that it was the intention of the Legislature to permit the lands to be converted into cash and the cash to remain idle without producing an income for the support and maintenance of the institution. It may be that we have overlooked in the hurry of this examination made necessary by the short space of time in which this opinion must necessarily be written, some provision of the statute that would authorize this investment, or it may be that the codifiers have omitted this provision from the compilation.

In our opinion it was the purpose in the minds of the framers of the Constitution, as well as the statutes of this State, to authorize the State Board of Education to invest the proceeds of these lands. The Legislature has by Articles 2736 *et seq.*, authorized the Board of Education to invest the permanent public free school funds of the State in bonds of the United States, the State of Texas, counties of the State, independent and common school districts, road precincts, drainage, irrigation, navigation and levee districts, incorporated cities and towns, thereby complying with the provisions of Section 4, Article 7, of the Constitution above referred to. The Legislature having provided for the investment of the public free school fund, we are of the opinion that the method thus prescribed is applicable to the investment of the proceeds of the asylum lands and that therefore the Board of Education has authority to invest the permanent funds now on hand in bonds of the United States.

We also call your attention to Article 2743, Revised Statutes, which is as follows:

"The provisions of this chapter shall extend to any bonds or securities other than the bonds of the State or of the United States, in which the public school funds are, or may hereafter be, invested, as now or hereafter authorized or prescribed by law, and also to any bonds or securities purchased with any of the permanent funds set apart for the support,

maintenance and improvement of any of the asylums or other institutions of this State."

The provisions of the chapter referred to in this article are those provisions relating to the approval of bonds by the Attorney General which necessarily could not apply to United States or State bonds. But we think the language used in the latter part of the above article is susceptible of no other construction than that it was the purpose of the Legislature to authorize the State Board of Education to invest the permanent funds of the asylums and other institutions of the State.

In neither case does the Constitution or the statutes place a limitation upon the amount of interest that such investments must bear.

Very truly yours,
C. W. TAYLOR,
Assistant Attorney General.

OP. NO. 1929—BK. 51, P. 264.

A defendant who is convicted of a criminal offense and whose sentence is suspended under the provisions of the statute may be pardoned by the Governor. In other words, a defendant in such status has been convicted of crime within the meaning of the Constitution so as to authorize the Governor to exercise the pardoning power.

May 17, 1918.

Honorable Fritz R. Smith, Member Board of Pardon Advisers, Capitol.

DEAR SIR: I have yours of the 15th instant as follows:

"We will thank you very kindly if you will advise us as to the following:

"Arnett Cox was tried and convicted in Ellis County for horse theft and given a two-year suspended sentence. He was immediately turned over to the Federal authorities, being a soldier at the time of the trial and conviction and was given a sentence of two and a half years for a violation of the Federal statutes, and is now incarcerated at Leavenworth, Kans. He desires the removal or pardon of the suspended sentence for the theft of a horse in Ellis County, Texas, in order that he may have the benefit of a parole from the Federal penitentiary.

"Question: Has the Governor of the State of Texas the authority to pardon him and thereby remove this suspended sentence, applicant being out of the State of Texas and from under the jurisdiction of the Governor?"

Your question calls for the construction of Section 11, Article 4, of the Constitution, which insofar as is material reads as follows:

"In all criminal cases, except treason and impeachment, he (the Governor) shall have power after conviction to grant reprieves, commutation of punishment and pardons. * * *"

The question presented, therefore, is whether or not a defendant convicted by the verdict of a jury and whose sentence is suspended has been convicted in the sense of the Constitution so as to authorize the Governor to exercise the pardoning power.

The term conviction is differently defined, that is, it may mean simply the finding of the guilt of the defendant, or it may comprehend the entire proceedings including the judgment and sentence. The construction the term receives depends upon the connection in which it is used. In the case of People vs. Fabian (192 N. Y., 443), 18 L. R. A. (N. S.), 687, the New York courts in drawing this distinction said:

"As to the numerous cases cited in the briefs of both parties to the present appeal, in which the words 'conviction' and 'convicted' are differently defined, it may be said generally that, where the context of the statute refers to the successive steps in a criminal case, or any particular stage of such a prosecution, as distinguished from the others, these words apply simply and solely to the verdict of guilty; but, where the reference is to the ascertainment of guilt in another proceeding, in its bearing upon the status or right of the individual in a subsequent case, then a broader meaning attaches to the expressions and a 'conviction' is not established or a person deemed to have been 'convicted' unless it is shown that a jugment has been pronounced upon the verdict."

The ordinary legal meaning of the term "conviction" when used to designate a particular stage of the criminal trial refers to the plea of guilty by the defendant or the verdict of guilty rendered by the jury. The judgment and sentence follows the establishment of guilt and is the action of the court declaring the consequences of guilt.

In the Snodgrass case, 150 S. W., 174, this distinction was drawn by our Court of Criminal Appeals. In this case the first suspended sentence act of our Legislature was declared unconstitutional on the ground that it conflicted with the above quoted provision of the Constitution in that it would deprive the Governor of his constitutional prerogative to grant pardons. The Court in this case used this language:

"Distinguished from 'judgment' or 'sentence.' The ordinary legal meaning of 'conviction' when used to designate a particular stage of a criminal prosecution triable by a jury, is the confession of the accused in open court or 'the verdict returned against him by the jury,' which ascertains and publishes the fact of his guilt; while 'judgment' or 'sentence' is the appropriate word to denote the action of the court before which the trial is had, declaring the consequences to the convict of the fact thus ascertained." Commonwealth vs. Lockwood, 109 Mass., 323, 325, 12 Am. Rep., 699 (cited or quoted in Quintard vs. Knoedler, 53 Conn., 485, 487, 2 Atl., 752, 55 Am. Rep., 149); State vs. Barnes, 24 Fla., 153, 4 South., 560; State vs. Moise, 48 La. Ann., 109, 121, 18 South., 943, 35 L. R. A., 701; Peope vs. Adam, 95 Mich., 541, 543, 55 N. W., 461; People vs. Lyman, 33 Misc. Rep., 243, 248, 68 N. Y. Supp., 331; State vs. Alexander, 75 N. C., 231, 232, 22 Am. Rep., 675; Com. vs. Miller, 6 Pa. Super. Ct., 35, 40; In re Freidrich (C. C.), 51 Fed., 747, 749. See, also, Hackett vs. Freeman, 103 Iowa, 296, 299, 72 N. W., 528 (citing Schiffer vs. Pruden, 64 N. Y., 47, 52; Blair vs. Com., 66 Va., 850; Bishop Cr. L., Sec. 361; McClain Cr. L., Sec. 110).

"Many other authorities might be cited giving the meaning of the word as defined above, and, to give it a larger or more comprehensive meaning, authority must be found in the statutes of the State, and in the statutes of our State, instead of there being authority found to give the words 'after conviction' a more comprehensive meaning than was known at the common law, or their common signification at the time they were placed in the Constitution, we find express statutory authority to the contrary, giving to the words the common law meaning by expressly declaring that at the time of sentence, that in bar of sentence, if he produce a pardon

from the proper authority, no sentence should be prounounced, but he should be discharged. See Artice 688, Code Cr. Proc., 1857, and which provision and construction has been brought forward in every codification since that date, and it is now Article 861 of the Revised Code of Proceeding of 1911. Thus it is seen that the terms 'after conviction' in our Constitution do not embrace the sentence, but simply mean the determination of guilt by the tribunal authorized to try the issue of guilt or innocence of defendant, and the person becomes subject to pardon whenever that issue is finally determined."

We thus see that a defendant is considered as having been convicted of crime although judgment may not have been rendered nor sentence passed. This idea seems to run throughout different provisions of our criminal procedure but is made manifest in Article 861 C. C. P.

After conviction by the verdict of a jury sentence may be prevented on showing by the defendant that he has been pardoned. Insofar as material this article of the statute is as follows:

"The only reasons which can be shown on account of which sentence can not be pronounced are, 1, that the defendant has received a pardon from the proper authority on the presentation of which legally authenticated he shall be discharged. * * *"

It is thus made perfectly plain that a sentence is differentiated from conviction, and is really no part of the final judgment but is a proceeding apart from and follows the verdict and judgment. See C. C. P. Articles 853-855.

A pardon is an act of grace granted by the pardoning power exempting the convicted individual from whatever punishment or penalties inflicted by law as a punishment for crime.

A defendant whose sentence is suspended rests, nevertheless, under certain restraints, and while the extreme punishment provided for the offense may never be visited upon him, yet depending upon his conduct in the future he may be sentenced and made to suffer extreme punishment. In other words, a person over whom hangs a sentence thus suspended has not been acquitted of this crime, is not in fact free, but rests under and must, for a time, rest under a degree of restraint and is hedged about with conditions that are in fact a measure of punishment for the crime of which he was convicted.

We believe, therefore, that your question should be answered in the affirmative; that is to say, in such a case the Governor has the legal right to exercise the pardoning power to exempt a defendant from whatever degree of punishment or restraint that is imposed by a conviction followed by suspension of sentence.

Very truly yours,

B. F. LOONEY,
Attorney General.

OP. NO. 1877—BK. 51, P. 340.

An alien enemy is ineligible to hold the office of notary public or to be licensed as an attorney at law in this State.

February 5, 1918.

Hon. Geo. F. Howard, Secretary of State, Capitol.

DEAR SIR: I have your favor of the 29th ultimo, in which you ask whether or not, under the law of this State, an alien enemy is entitled to hold the office of notary public, and also whether or not he is entitled to be licensed to practice as an attorney at law.

Replying to your inquiries, beg to say that an alien enemy, in fact aliens generally, are entitled only to such political rights as are given by law. The rule is stated by Mr. Wise in his work on citizenship, as follows:

"An alien enemy is one who owes allegiance to an adverse belligerent. He has no political rights. He may remain in the country at war with his own, and when not chargeable with actual hostility or crime has an implied license to remain until ordered out of the country and, on leaving it, he is allowed to remove his goods and effects and is protected in his other rights. During the pendency of war his rights are in abeyance. An alien enemy is not permitted to prosecute suits in courts and any suit pending abates and the right of action is suspended until the cessation of hostilities. But while he may not sue, he may be sued, and his property is subject to legal process, and in such case he may make defense in person or by counsel. (Page 272)."

This principle is announced to the same effect in 2 Cyc. 89.

An alien is not entitled to hold public office unless authorized to do so by Constitution or statute. 2 Am. & Eng. Ency. of Law, page 68.

In this State aliens are permitted to own real and personal property under the terms of, and as regulated by, Title 3, Vol. 1, Vernon's Civil Statutes.

The status of citizens of one country residing in, or traveling through, foreign countries, is generally regulated by treaties and, when thus regulated, the treaty becomes the supreme law controlling the particular subject-matter. Mr. Wise states this rule as follows:

"The status of citizens of one country residing in or traveling through foreign countries is frequently the subject of treaties between their respective nations; such treaties, when made, are the supreme law of the land, and any State law denying to an alien the right secured by such a treaty would be unconstitutional, null and void." (Page 272).

We deduce the rule, therefore, that aliens, whether friendly, or enemy aliens, have no political rights, except as granted by law.

It may be stated, as a general rule, that war abrogates treaties between belligerent nations. Certainly it abrogates all such treaties as are involved in the subject-matter of the war, but this would not extend to the abrogation of treaties pertaining to civilized warfare; that is, as to the methods and weapons of warfare, as war betwen civilized people does not break every bond of humanity, nor is it a complete lapse into barbarism. However, all intercourse between citi-

zens of the two hostile countries, except as permitted by the authorities conducting the war, is prohibited during the war, and this would include all acts or contracts which tend to increase the resources of the enemy.

The right to practice law (or hold office) is not a natural right or immunity even of a citizen, but is a privilege or franchise granted and regulated by law. 4 Texas Crim. App., 312; 2 R. C. L., 940; 16 Wall., 130; 154 U. S., 116.

The position of notary public is an important office, clothed with sovereign functions and, before qualifying, the incumbent is required to take the constitutional oath. Section 1, Article 16, Constitution.

Every person admitted to practice law shall, before receiving license, take "an oath that he will support the Constitution of the United States and of this State." R. S., Art. 322, Acts 1911.

It is expecting too much of human nature to require an enemy alien, who owes allegiance to a government at war with this government especially one attached to his people and his country as we are to ours, to faithfully live up to the obligations of these oaths.

When, therefore, our statutes (Articles 312, 317 and 318), provide that "any person" desiring to obtain license under the several contingencies authorized, it was meant *any person being a citizen* of the United States.

This language was written into a suffrage statute of the State of Masachusetts by the Supreme Court of that State (7 Mass., p. 523). In passing upon the right of aliens to vote the court, among other things, said:

"The elector of a Senator must be an inhabitant of the senatorial district in which he votes, and the elector of a Representative must have resided one year in the town before he can there be a voter. But an alien may be an inhabitant of a district, because he may there dwell, or have his home, and he may have resided in some town more than a year. Can, therefore, an alien be a legal voter for a Senator or Representative?

* * *

"Now, we assume, as an unquestionable principle of sound national policy in this State, that, as the supreme power rests wholly in the citizens, so the exercise of it, or any branch of it, ought not to be delegated by any but citizens and only to citizens. It is, therefore, to be presumed that the people, in making the Constitution, intended that the supreme power of legislation should not be delegated but by citizens. And if the people intended to impart a portion of their political rights to aliens this intention ought not to be collected from the general words, which do not necessarily imply it, but from the clear and manifest expressions, which are not to be misunderstood. * * *

"It may, therefore, seem superfluous to declare our opinion that the authority given to inhabitants and residents to vote is restrained to such inhabitants and residents as are citizens."

If the court was correct in limiting the right of suffrage under the Massachusetts statute to citizens and in writing into the statute by judicial construction the restraining word "citizen," certainly a greater reason exists to give the statutes of this State a similar construction with reference to the character of persons eligible to hold office and to become licensed attorneys, in view of the nature and obligation of the oaths that they are required to take.

We are not entirely without an authority on this subject. The Supreme Court of North Carolina held that an alien was not eligible to be admitted to practice law in that State. The act under consideration did not, in terms, prescribe citizenship as one of the qualifications. The court, however, held that the act was predicated upon the assumption that applicants should be citizens, and among other things, said:

"Whatever discretion resides in the judges relative to the admission of attorneys ought to be exercised with a view to the advantage and security of the suitors in the several courts, for to them the license is a guarantee that in the opinion of the magistrates signing it the licentiate is politically, not less than legally and morally qualified to transact their business. Yet, in the event of a war being declared between the United States and any foreign nation or government, the authority under which he practices would not protect the subject of such government, not actually naturalized, 'from being apprehended, restrained, secured and removed as an alien enemy,' to the great injury, possibly the ruining of numerous clients. (3 Laws U. S., 84). Even the judges of the State themselves might become the instruments of such apprehension and removal out of the State, under the second section of the same law. No one should be presented to the public under the panoply of such a license, against whom an injured suitor would not have the full benefit of such legal remedy as the laws of the State provide, in the event of fraudulent or negligent practice. * * * There is no profession relative to which the public good more imperiously requires that its members should duly appreciate and honestly maintain the freedom, the purity and the genuine spirit of our political institutions. These are so blended and interwoven with the civil rights of the citizen, they present themselves in such an infinity of relations, as additional abutments to the several charters of property and personal security, that it is difficult to conceive how a professional advocate, owing foreign allegiance and cherishing alien prejudices, can usefully vindicate principles in the abhorrence of which he may have been nurtured; how, on many important occasions, the most brilliant forensic talents can be successfully exerted, unless they are sustained and inspired by an ardent partriotism. The excellence of every human system of laws consists as much in their administration and practice as in the theory itself. Viewing the profession of the law as the source from which the superior judicial magistrates must be derived, and from which a large proportion of enlightened and efficient public officers is usually selected, every one must naturally feel solicitous that it should not fall into such hands as would lower it in the national opinion. It would be difficult to avoid this consequence if aliens were entitled to admission, for legal acquirements and private worth may subsist with inveterate prejudices against the principles of our government. In such an arrangement society would cease to derive that benefit from the profession which it now affords, by supplying a continual succession of men qualified and worthy to preside in the courts of justice. No longer a nursery in which merit is trained under the directing hand of experience and qualified to render manly and essential services to the community, the legal profession 'in its nature the noblest and most beneficial to mankind; in its abuse and debasement the most sordid and pernicious,' would sink into a mere mercenary instrument, without sympathy in the public prosperity and without hold on the public confidence." Ex Parte Thompson, 3rd Hawks Law & Ev., 355 N. C.

The Supreme Court of Nebraska also held that a necessary qualification for admission to practice law is that the applicant be a citizen of the United States and a resident of the State. An alien cannot well take the oath required of attorneys and counselors. 61 Neb., 58.

We are, therefore, of the opinion and so advise you, that enemy aliens are not eligible to hold the office of notary public, or to be licensed as practitioners of law in this State.

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

OP. NO. 1942—BK. 51, P. ——.

PINK BOLL WORM LAW.

1. The act does not give to the Commissioner of Agriculture the power to prevent the operation of gins, compresses and oil mills in quarantine or non-cotton zones.
2. The act does give full power and authority to the Commissioner to prescribe the kind, character and method of fumigation and disinfection of cotton products, situated in a quarantine zone, to which they shall be subjected before same can be legally transported therefrom.

August 8, 1918.

Hon. Fred W. Davis, Commissioner of Agriculture, Austin, Texas.

DEAR SIR: We have a letter from you, among other things stating the following facts and asking the following questions:

"The fact has developed that a cotton gin, a cotton compress and a cotton seed oil mill intend to run this season at Hearne, Texas, which lies within a pink boll worm quarantined district and within the non-cotton zone No. 1. There are also a number of cotton gins in non-cotton zones Nos. 2 and 3 which contemplate running this season.

"In non-cotton zone No. 1 the institutions spoken of above will handle cotton only grown without the restricted zone, but some of the gins in non-cotton zones 2 and 3 intend ginning unlawfully grown cotton within the quarantined districts as well as some cotton grown without the prohibited areas.

"Can the Commissioner of Agriculture legally stop any or all of these institutions from running as long as there is danger from the pink boll worm?

"If the Commissioner can not stop these institutions from running, can he control or take charge of the cotton products handled by these institutions where it is deemed necessary to do so in order to eradicate the pink boll worm?"

Replying thereto, we beg to state that the Act does not in terms authorize the Commissioner of Agriculture to prevent the operation of gins, compresses, or cottonseed oil mills, situated within a quarantined district or within a non-cotton zone. The Act, however, does confer certain powers in respect to the transportation of cotton from a quarantine zone.

Thus, in Section 5 of the Act it is provided in substance that if the pink bollworm, in any of its stages, shall be found in any portion of the State, the Commissioner of Agriculture shall certify such facts to the Governor and the Governor shall proclaim a special zone district surrounding the infected point "to such an extent as may be determined sufficient to prevent the spread of the pink bollworms, and, therefore,

"It shall be unlawful for any person or persons to ship any cotton products of any kind from such quarantined district or transport any car or vehicle, or freight or any other article contaminated with cotton seed or other cotton product capable of carrying the pink boll worm in any of its stages from the quarantined area through or to any point in this State, *unless and until it shall have been freed from cotton seed or other cotton product, and shall have been fumigated or disinfected in such manner as the Commissioner of Agriculture of this State shall direct.*"

The portion of the Act quoted above is somewhat ambiguous. Taken alone it might be subject to the construction that it is unlawful to ship any cotton products of any kind from a quarantined district and that it is unlawful to transport any car, vehicle, freight or other article contaminated with cotton seed or other cotton products unless such car, vehicle, freight or other article, so contaminated, has been freed from cotton seed or other cotton product or fumigated or disinfected in such a manner as the Commisisoner of Agriculture might direct. But the above quoted language must be construed in connection with the sentence following it, which is as follows:

"Any and all such fumigation or disinfection and cost of such protective measures against the spread of the pink boll worm *shall be paid by the owners of the cotton or its products or by the owners of the car, vehicle or freight or other article employed in its transportation.*"

It is plain, when the language of this last sentence is considered, that the Legislature intended that cotton or cotton products, as well as freight or other articles, might be shipped from a quarantined zone after the same had been fumigated or disinfected in such manner as the Commissioner of Agriculture might direct.

Of course the main purpose is to prevent the spread of the pest. To this end the Commissioner of Agriculture is empowered to determine the character, kind and method of fumigation or disinfection any cotton or cotton product within the quarantined zone must be subjected to before the same can be transported from the zone.

By Section 8 of the Act the Commissioner of Agriculture and his authorized agents are also given power and authority "to enter into any field or fields of cotton or upon any premises in which cotton or its products may be stored or held, and may examine any products or container of cotton or its products, or thing or substance liable to be infested with the pink boll worm in any of the stages of its development. For the purpose of effecting the provisions of this Act, the Commissioner of Agriculture may employ and prescribe the duties of such inspectors as may be necessary and fix their compensation.

By Section 11 of the Act, it is made a misdemeanor, punishable by fine, for any person to transport cotton or cotton products from any quarantine territory "in violation of this Act or of either of the proclamations, and restrictions authorized by this Act."

Attention is also called to the fact that by Section 9 of the Act it is made the duty of the Commissioner of Agriculture of Texas to co-operate with the Secretary of Agriculture of the United States "in any measures authorized and to be undertaken by the Federal

Government in preventing the introduction of the pink boll worm into the United States, throughout the State of Texas."

You are therefore advised that while the Act does not, in terms, provide that you, as Commissioner of Agriculture, may provide the operation of gins, compresses and cotton seed oil mills situated within quarantine territory, you have full power and authority to prevent the shipment of cotton and cotton products from such plants to or through any other portion of Texas unless the same have been fumigated and disinfected. You have the authority to prescribe any reasonable and necessary methods of fumigation and disinfection. To carry out the purposes of the Act fully you should in subject matters, as far as possible, co-operate with the Secretary of Agriculture of the United States.

Very truly yours,
JNO. C. WALL,
Assistant Attorney General.

OP. NO. 1312—BK. 40, P. 204.

LEGISLATURE—POWER OF TO PASS LOCAL AND SPECIAL LAWS.

1. Has no power to pass local and special laws regulating the affairs of counties.
2. Can pass special road law but cannot in such a law exempt the county from the operation of the Fee Bill.

November 9, 1914.

Hon. Dan Lewis, County Attorney, San Antonio, Texas.

DEAR SIR: In a letter to this Department you call attention to the fact that Bexar County is operating under a special road law which, among other things, provides that "the County Judge shall receive an ex officio compensation of not less than twenty-five hundred dollars, to be fixed, by the (commissioners) court, and shall receive no per diem, but the provisions of this section shall not in any way affect or diminish the fees of office now received and paid the County Judge under the statutes of this State."

You then ask, in substance, whether the amount of fees and compensation to be retained by the county judge should be determined by the provisions of the Bexar County Road Law or alone by Chapter 4, Title 58, of the Revised Statutes—that is, whether the county judge can retain the ex officio fee provided for in the Bexar County Road Law in addition to the maximum amount of fees provided for in Chapter 4, Title 58, R. S. or whether the maximum amount of fees and compensation he can retain is merely that provided for in Chapter 4, Title 58, R. S.

To answer these questions let us first determine the nature and character of these two Acts.

Chapter 4 of Title 58 of the Revised Statutes is an Act which was passed by the Legislature in 1897. That it is a general law regulating county affairs has been frequently decided by our higher courts, when passing upon this Act itself or upon acts of similar nature.

See: Hall vs. Bell County, 138 S. W., 182.
Smith vs. Grayson County, 44 S. W., 921.
Ellis County vs. Thompson, 95 Texas, 31.
Clark vs. Finley, 93 Texas, 171.

The Act creating a road system for Bexar County was passed by the Thirty-third Legislature and became effective March 24, 1913. It places the control of public roads in Bexar County with the commissioners' court, subject to the provisions of the Act; gives to said court power to condemn land and take materials; to appoint a County Highway Engineer at a salary of $250.00 per month. The Act abolishes the office of ex officio road commissioner and relieves the commissioners of their bonds as such. It provides that each precinct county commissioner shall inspect and supervise the roads of his precinct and perform all other acts required by the commissioners' court, and shall receive a salary of $2400.00 per year. The Act further contains the following provisions:

"Sec. 26. It shall be unlawful for any member of said commissioners' court or for any county officer of Bexar County to be or become financially interested, directly or indirectly, in any contract with said county for road work or for the purchase or sale of any material or supplies of any character, or in any transaction whatever in connection with any of the business of said county, excepting only his own salary, fee or per diem. If any such county commissioner or such county officer shall wilfully violate any of the foregoing provisions of this Section, he shall be deemed guilty of malfeasance in office, and upon conviction thereof shall be punished by a fine of not less than five hundred ($500.00) dollars nor more than one thousand ($1,000.00) dollars, or by imprisonment in the county jail of said county, no more than one year, or by both such fines and imprisonment, and, in addition thereto, shall be forthwith removed from office; provided, that the county judge shall receive an ex officio compensation of not less than twenty-five hundred ($2,500.00) dollars, to be fixed by the court, and shall receive no per diem, but the provisions of this Section shall not in any way affect or diminish the fees of office now received and paid the county judge under the statutes of this State."

"Sec. 27. The provisions of this Act are and shall be held and construed to be cumulative of all general and special 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 Bexar County."

"Sec. 28. Any and all laws and parts of laws in conflict with any of the provisions of this Act shall be and the same are hereby repealed."

"Sec. 29. Should it be judicially determined that any portion of this Act is unconstitutional, void or unenforceable, the remainder shall nevertheless be of full force and effect."

It will thus be seen that the Bexar County Road Law relates only to Bexar County and to the affairs of that county. Its contents so clearly show it to be purely local and special that a discussion of that question or citation of authorities would seem unnecessary. We, however, cite, as conclusive of this question, the case of Hall vs. Bell County, 138 S. W. 181.

Since the Bexar County Road Law was passed subsequent to the Act of 1897 and provides that all laws in conflict therewith are repealed, all the provisions of said law should be given full force and effect, unless the Legislature was inhibited by some provision of the Constitution from passing such a law.

Section 56, Article 3, of the Constitution, among other things, provides:

"The Legislature shall not, except as otherwise provided for in this Constitution, pass any local or special law authorizing: * * *

"Regulating the affairs of counties, cities, towns, wards or school districts. * * *

"And in all other cases where a general law can be made applicable, no local or special law shall be enacted."

Let us now determine whether the Special Law creating a road system in Bexar County is a local or special law, regulating the affairs of a county, which is not "otherwise provided for" in the Constitution.

That such law, in so far as it provides for the construction and maintenance of a system of roads in said county, is "otherwise provided for" in the Constitution, is beyond question.

Article 8, Section 9, of the Constitution, among other things, provides:

"And the Legislature may pass local laws for the maintenance of the public roads and highways, without the local notice required for special or local laws."

The higher courts, construing this section of the Constitution, have frequently held that it confers upon the Legislature power to pass local or special laws for the maintenance of public roads and highways.

City of Dallas vs. Western Electric Co., 83 S. W., 243; 18 S. W., 552.
Association vs. Pierr's Heirs, 31 S. W., 426.

They have gone even further.

In the case of Smith vs. Grayson County, 44 S. W., 923, the Court of Civil Appeals held that "by the use of the words 'maintenance of public roads and highways' the framers of the Constitution had reference to maintaining a system of public roads and highways which would include all the necessary powers to provide and keep up a system of highways," citing Brown vs. Graham, 58 **Texas, 254.**

The same construction was given to this phrase by the Supreme Court in the case of Dallas County vs. Plowman, 99 Texas, 513.

But the Special Road Law of Bexar County does more than merely provide for the construction and maintenance of a system of public roads. It also attempts to fix the minimum amount of compensation the county judge of said county shall receive for ex officio services of all kinds. In that respect it is in direct conflict with the Act of 1897, and with said Act as amended by the Thirty-third Legislature.

Stripped of all its verbiage about creating and maintaining a road system, it is plainly seen to be merely a special act exempting Bexar County from the operation of the Act of 1897 in so far as the compensation of the county judge for ex officio services is concerned. It is almost too plain for argument that an act fixing the amount of fees or compensation a county officer may retain is an act regulating the affairs of a county. We call attention, however, to the language used by the Court in Hall vs. Bell County, *supra,* when passing upon this question:

"The word 'regulating,' as used in the Constitution, should not be given a narrow or technical signification. If the result of legislation is to repeal or materially change any law controlling or affecting the collection, safe-

keeping, or disbursement of county funds, such legislation, within the purview of the Constitution, is a law regulating county affairs. If the act exempting Bell county from the statute requiring a county auditor is valid and enforced, then material changes in the county's affairs will necessarily result. In the first place, the county will save the expense of that office; in the second place, the books which the law requires the auditor to keep would be kept, if at all, by some other officer; and in the third place, many of the duties which the auditor is required to perform will not be performed by any one. Hence it is clear that while the exempting statute does not, in terms, declare that the changes referred to shall take place in Bell county, the effect of that law, if upheld, would necessarily produce such changes. So it appears to us as absolutely certain that the latter law is one which regulates the affairs of Bell county." (138 S. W., 183.)

Let us then determine whether the Legislature had the power by special act to exempt Bexar County from the operation of the Fee Bill in respect to the ex officio compensation of the county judge.

It is inhibited from passing a special act for such a purpose by Section 56, Article 3, of the Constitution, unless such power is vested in it by some other part of the Constitution. An examination of that instrument will show that no such power is therein conferred upon the Legislature. The Legislature then did not have the power to do indirectly what it could not do directly. It did not have the power to pass a special act fixing the compensation of the county judge by merely inserting such a provision in a special act creating a road system. If it had the power to exempt Bexar County from the Fee Bill by inserting such a provision in the Road Law, it then had the power at the time the Act of 1897 was passed to insert a provision in the Act itself exempting Bexar County from the operation thereof. Had such a provision been inserted in the Act of 1897, it would have made that Act a special act and would have rendered it unconstitutional and void. This question is directly passed upon in Hall vs. Bell County, *supra*, in the following manner:

"We note the contention of appellee's counsel to the effect that as the Legislature might, at the time of enacting the auditor's statute, have exempted Bell county from its operation, it had the power to do so at any subsequent time. We do not concede that such power of exemption existed at the time the original statute was enacted; and it would seem that as Bell county contains the requisite population, and therefore belongs to the class of counties for which an auditor was provided, if that county had by name been exempted from that law, such exemption would have rendered that statute a local or special law, and therefore unconstitutional."

It was plainly the intention of the framers of the Constitution not to permit the Legislature by special act to tear down a system for the regulation of county affairs which had been provided by general law. If the Legislature had the right, directly or indirectly, to exempt Bexar County from the operation of the Fee Bill, it has the right to exempt any other county, and the State, so far as the regulation of the fees of county officers is concerned, is in the same condition it was in prior to the passage of the Act of 1897.

Prior to the Act of 1897, county officers retained all the fees accruing to their offices. By said Act the Legislature undertook not to enlarge but to diminish the rights of county officers, and undertook to establish a system whereby all the fees of office were to be treated as a

part of the public revenue, so that the offices would be self-sustaining and the officers would receive reasonable compensation for their services. See the opinion of the Supreme Court in the case of Ellis County vs. Thompson, 95 Texas, 31, for a full discussion of this subject.

The particular question involved here is the question of compensation for ex officio services. That our law makers have for many years realized that it was necessary and important to limit the amount of compensation to be allowed county officers for such services, is shown by a review of the legislation upon this question.

In 1881 a general law was passed, now Article 3862, R. S., making it mandatory for commissioners courts to provide certain compensation for ex officio services of county clerks. That article is as follows:

"For all ex officio services in relation to roads, bridges and ferries (and many other matters mentioned in said article) * * * and all other public services not otherwise provided for to be paid upon the order of the commissioners' court out of the Treasury, the clerk *shall* receive the sum of not less than ten dollars nor more than twenty-five dollars per annum for each one thousand inhabitants of his county; provided, that the total amount paid the clerk in any one year *shall* not be less than fifty nor more than five hundred dollars, said amount to be paid quarterly."

Doubtless, finding that this power was abused, the Act of 1897 was passed in which it was provided (Art. 3893) that while the commissioners' court was not debarred from allowing compensation for ex officio services to county officers, in addition to the maximum fees they might retain under the terms of said Act, still, whether it should or should not allow any amount for such services was left discretionary with it. They were permitted to allow such compensation only "when in their judgment, such compensation was necessary." This article is as follows:

"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, that such compensation for ex officio services shall not exceed the amounts now allowed under the law for ex officio services, etc."

Doubtless, finding that the power thus conferred upon commissioners courts was abused, the foregoing article, 3893, was by the Thirty-third Legislature amended so as to absolutely debar commissioners' courts from allowing any "compensation for ex officio services to county officials when the compensation and excess fees which they are allowed to retain (by the terms of said Act) shall reach the maximum provided for in the Act itself.

Said Article as amended is 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 neces-

sary; 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."

For a clear discussion as to the effect of the Act of 1897, construed in connection with the Act of 1881, see the opinion of the Court in the case of Navarro County vs. Howard, 129 S. W. 859.

The purpose and policy of this legislation, it will be clearly seen, have been to place close restrictions upon the powers of commissioners courts in reference to ex officio compensation of officers. This was done by general laws, and all those laws have been passed for naught if the Legislature now has the power by special law to exempt any county it sees fit from the provisions thereof.

Following almost identicaaly the same line of reasoning we have used, the Court of Civil Appeals in the case of Hall vs. Bell County, *supra*, arrived at the following conclusion:

"Therefore, upon the whole case, after due consideration, and with no desire to strike down legislation, we conclude that the statute which undertakes to exempt Bell county from the operation of the auditor statute is in violation of Section 56 of Article 3 of our State Constitution, and is therefore invalid. We have earnestly sought for, but failed to find, a way which would justify a different conclusion." (138 S. W., 183.)

The Department is, therefore, of the opinion that the Bexar County Road Law, in so far as it attempts to fix the compensation of the county judge for ex officio services at $2500.00, exclusive of all fees allowed him under the general law, is a special or local law regulating the affairs of the county, and is unconstitutional and void.

The Department is further of the opinion that the maximum amount of fees that can be retained by him must be determined alone by the provisions of Chapter 4, Title 58 of the Revised Statutes.

Yours truly,
JOHN C. WALL,
Assistant Attorney General.

NOTE: This decision was rendered before the publication of the last Biennial Report, but was not published therein. It is included in this because it has been recently sustained by the Supreme Court. See Altgelt vs. Gutzeit, 201 S. W., 400.